DISPUTE BETWEEN

BARBADOS

AND

THE REPUBLIC OF TRINIDAD AND TOBAGO

REFERRED TO ARBITRATION IN ACCORDANCE WITH ANNEX VII UNCLOS BY NOTIFICATION OF BARBADOS DATED 16 FEBRUARY 2004

REJOINDER

VOLUME

1

ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN ACCORDANCE WITH ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

In the Matter of an Arbitration Between BARBADOS and the REPUBLIC OF TRINIDAD AND TOBAGO

Index to the Rejoinder of the Republic of Trinidad and Tobago

CHAPTER 1

INTRODUCTION

1 The present Rejoinder is submitted in accordance with the Rules of Procedure of the Tribunal and Procedural Order No. 2. Its purpose is not to repeat the arguments already set out in full in the Counter-Memorial but to respond to fresh points made in the Reply of Barbados filed on 9 June 2005.

2 That Reply was considerably longer than the Memorial of Barbados and was couched in the somewhat aggressive terms which have (regrettably) characterised Barbados' pleadings and letters to the Tribunal throughout these proceedings. Both of these features are surprising.

3 It is Barbados that chose to initiate these proceedings on a unilateral basis with no suggestion to Trinidad and Tobago that the two States might agree upon recourse to arbitration. Barbados took this step after several years of negotiations in which Trinidad and Tobago had made quite clear all of the basic features of the case which it now advances.[1] Barbados' claim in the Caribbean sector, by comparison, was not advanced as an official position, or in any detail, or with any serious indication as to its extent prior to the present proceedings; it did indeed come new-minted with the Memorial. However, Barbados must be presumed to have known its own case before it put pen to paper, even if it had not chosen to share that knowledge with Trinidad and

[1] Thus, the Joint Reports of the five rounds of maritime boundary negotiations which are reviewed in Chapter 2 of the Counter-Memorial show that Trinidad and Tobago always made plain (1) that it considered that the two States were partially in a situation of oppositeness and partially one of adjacency, (2) that in the Atlantic sector, where the two coastlines were adjacent rather than opposite, the median line did not produce an equitable result as required by Articles 74 and 83 of UNCLOS, (3) that Trinidad and Tobago was entitled to an extended continental shelf and should not be cut off from the 200 mile line by Barbados, (4) that the boundary line in the Atlantic sector should lie to the north of the median line and (5) that (when this issue was belatedly raised) it did not accept that the record of fishing activities by Barbadians – such as it was – justified an "adjustment" of the boundary so as to bring it south of the median line. These points were all made clear with reference to the legal basis for the positions taken, and the claims of Trinidad and Tobago were illustrated on a detailed map.

Tobago. It is therefore difficult to see why Barbados could not have set out its arguments in the normal detail in its first round pleading.

The Issues between the Parties

4 The length of the Barbadian Reply should not be allowed to conceal the fact that there are only four principal issues in these proceedings:

(1) whether the Tribunal has jurisdiction and, if it has, what are the limits of that jurisdiction;

(2) whether the obvious geographical differences between the western, or Caribbean, sector and the eastern, or Atlantic, sector produce legal consequences in terms of the location of the boundary;

(3) whether Barbados has made out its claim – in fact and in law – to the areas which it claims south of the median line in the western, or Caribbean, sector; and

(4) whether Trinidad and Tobago is entitled to the boundary line which it claims in the eastern, or Atlantic, sector.

5 In Trinidad and Tobago's submission, the Reply – for all its length – contains little which could not – and should not – have been said in Barbados' Memorial. Only in respect of the first issue does the Reply deal with an issue which Barbados could not have been expected to address earlier;[2] even then, only a brief response is now needed. Trinidad and Tobago's response to Barbados' reply on the issue of jurisdiction is set out in *Chapter 2* of this Rejoinder.

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[2] Trinidad and Tobago accepts, of course, that the arguments on jurisdiction were not known to Barbados prior to the receipt of the Counter-Memorial.

6 On the second issue, Barbados has treated the Tribunal to a virtuoso display of the cartographer's art in which islands are rotated on their axes and the boundaries of places as far from the disputed area as West Africa and the North Sea are redrawn in a colourful – and avowedly fictitious – manner. All of this is done in an attempt to discredit a perfectly simple proposition, namely that the maritime areas to the west of Barbados and Trinidad and Tobago are different from the areas to their east and that there is no justification in the eastern sector for treating the two coastlines as opposite and thus producing a manifestly inequitable result. But the artistry cannot mask the geographical reality, still less can it justify the result which it produces. Trinidad and Tobago has already set out its case on the relevant sectors and relevant coasts in Chapter 5 of its Counter-Memorial. *Chapter 3* of the present Rejoinder will add a fairly brief response to the points made in the Reply on this subject.

7 In the final chapter of its Reply, Barbados makes a half-hearted attempt to shore up its claim to the whole of the continental shelf and EEZ around the north and west of the island of Tobago. As *Chapter 4* of this Rejoinder will demonstrate, it is a brave attempt to make bricks without straw and the claim remains untenable both in fact and in law. Trinidad and Tobago's response will be somewhat longer on this issue simply because of a fresh line of argument which Barbados has sought to advance by introducing "transcripts" of some of the negotiations on the maritime boundary and some of the fishing negotiations (on which more is said below).

8 Finally, there is the issue of the location of the boundary in the eastern sector, on which Barbados said almost nothing in its Memorial. Barbados' Reply, while trying to pour scorn on Trinidad and Tobago's case regarding this issue, fails to grapple with the central elements of that case, namely –

(1) that the two States are, in this sector, in a situation of adjacency rather than oppositeness;

(2) that each is entitled to a full 200 mile zone and shelf and to generate an extended continental shelf beyond 200 miles (if the criteria in Article 76 of the 1982 Convention for such an extended shelf are satisfied [3]);

(3) that Trinidad and Tobago is entitled not to be cut off from its natural prolongation in the circumstances of the Atlantic where no such cut off is inevitable; and

(4) that the boundary line proposed by Barbados produces a manifestly inequitable result.

9 Barbados has, however, raised a number of arguments with regard to this sector which call for a response. That response is set out in *Chapter 5* of this Rejoinder.

10 In *Chapter 6*, Trinidad and Tobago briefly sets out its conclusions and formal submissions to the Tribunal.

The Record of Negotiations between the Parties

11 Before turning to the substantive issues summarised above, there is one procedural matter which must be addressed. In its Memorial,[4] Barbados made a number of brief but misleading references to the five rounds of negotiations which had taken place between the two Parties over the maritime boundary and the four rounds of separate negotiations for the conclusion of a fisheries agreement.

12 For several reasons, what actually transpired during those negotiations is of considerable importance in the present proceedings. First, it is central to the jurisdictional issues, since it is impossible for the Tribunal to determine whether the preconditions to seising the Tribunal set out in the 1982

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3 Both Parties accept that those criteria are met.

4 See, e.g., paras. 2-5, 9, 79 and 95-96 of the Barbados Memorial.

Convention, Articles 283 and 286, have been satisfied without knowing what transpired during those negotiations. Secondly, the basis on which the Parties negotiated for years about access for Barbadian fishing vessels to the Trinidad and Tobago EEZ is of obvious relevance to the Barbadian claim in the western sector based upon supposed historic fishing rights. Thirdly, only an examination of the agreed record of the negotiations can enable the Tribunal to see through some of the allegations, made by Barbados in order to boost its case, which involve a distortion or even a complete misrepresentation of what happened.[5]

13 Fortunately, it is relatively easy to discover what actually transpired during the two sets of negotiations, because, at the end of each session, the two delegations approved a Joint Report which summarised what had taken place. Having given notice to Barbados of its intentions more than three months earlier,[6] Trinidad and Tobago attached all of the Joint Reports to its Counter-Memorial and summarised the history of the negotiations there.[7]

14 Barbados objected to the production of these Joint Reports immediately prior to the filing of the Counter-Memorial and the two Parties set out their arguments regarding the admissibility of the Joint Reports in correspondence with the Tribunal.[8] Trinidad and Tobago sees no reason to repeat here what it

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5 These instances are discussed mainly in Chapters 2 and 4 of this rejoinder, although some examples are given at paras. 21- 28, below.

6 Preliminary Objections of Trinidad and Tobago, 23 December 2004. Trinidad and Tobago there referred to the various ways in which Barbados had discussed the contents of the negotiations and stated that:

> "Trinidad and Tobago notes with surprise that the agreed minutes of these meetings were not annexed to the Memorial. Trinidad and Tobago will annex them to its Counter-Memorial for the information of the Tribunal." (at footnote 1)

7 See Chapter 2 of the Counter-Memorial and Annex Volume 2(2).

8 Submissions on Admissibility of Barbados, 25 April 2005, and of Trinidad and Tobago, of the same date. In addition, there were letters to the Tribunal from the Co-Agent of Barbados, dated 28 and 30 March and 5, 14 and 22 April 2005 and from the Co-Agents of Trinidad and Tobago, dated 29 and 31 March and 7 April 2005 and 24 May 2005.

has said in that correspondence.[9] Suffice it to say that Trinidad and Tobago considers that the relevance of the reports is beyond question and that there was no agreement between the Parties (and no rule of general international law) which precluded their production.

15 The Barbadian Reply has, however, added a new and somewhat curious dimension to this matter. While apparently maintaining its argument that the Joint Reports (and, presumably, anything said or done in the course of the negotiations) are inadmissible, Barbados has not only made extensive reference to them [10] (which Trinidad and Tobago regards as perfectly proper),

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9 Trinidad and Tobago's arguments on this issue were fully developed in its submissions to the Tribunal of 25 April 2005.

10 For reasons best known to itself, Barbados has also annexed all but one of the Joint Reports (omitting the Joint Report of the Fourth Round of Fisheries Negotiations) to its Reply, notwithstanding that all the Joint Reports had already been annexed to the Trinidad and Tobago Counter-Memorial. The Joint Reports can therefore be found as follows:

Maritime Boundary Negotiations:

1st Round (19-20 July 2000), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 1, No. 1 and Barbados Reply Annex 16

2nd Round (24-26 October 2000), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 1, No. 2 and Barbados Reply Annex 17

3rd Round (10-12 July 2001), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 1, No. 3 and Barbados Reply Annex 20

4th Round (30 January to 1 February 2002), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 1, No. 4 and Barbados Reply Annex 23

5th Round (19-21 November 2003), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 1, No. 5 and Barbados Reply Annex 35

Fisheries Negotiations

1st Round (20-22 March 2002), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 2, No. 1 and Barbados Reply Annex 25

2nd Round (24-25 March 2003), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 2, No. 3 and Barbados Reply Annex 29

3rd Round (12-13 June 2003), Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 2, No. 5 and Barbados Reply Annex 33

Although Barbados now takes the position that there was one set of negotiations, that was not the way it characterized matters before; see the statement of the Barbados Foreign Ministry of 2 February 2004 (Barbados Reply Annex Vol 3 no 4) referring to 4 rounds of Fisheries negotiations and the Statement of the Prime Minister of Barbados on 16 February 2004 (Exhibit 1) which spoke of 5 rounds of negotiations on the maritime boundary.

4th Round (19-21 November 2003) Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 2, No. 6; not reproduced by Barbados.

it has also submitted "transcripts" apparently made from tape recordings of the negotiating sessions held in Barbados. These "transcripts" were introduced in the following way –

> "At each round of negotiations, the host Party tape recorded – with the knowledge of the visiting Party – the proceedings. Accordingly, Barbados submits the transcripts for the negotiations, which it hosted (24 to 26 October 2000 [i.e. the second round of boundary negotiations], 30 January to 1 February 2002 [i.e. the fourth round of boundary negotiations], 24 to 25 March 2003 [i.e. the second round of fisheries negotiations] and 19 to 21 November 2003 [i.e. the fifth round of boundary negotiations and the fourth round of fisheries negotiations]. It is curious that Trinidad and Tobago chose to submit the Joint Reports but not transcripts of the tape recordings of the rounds which it hosted."[11]

16 There is nothing curious about Trinidad and Tobago's action. Trinidad and Tobago did not make tape recordings of the sessions which it hosted[12] and neither consented to, nor was aware of, the tape recordings which it now learns Barbados made at the sessions which were held in Barbados.

17 It is not normal practice to tape record diplomatic discussions and it is wholly improper for the State hosting such discussions to make such recordings without the agreement of the other Party. Had there been an agreement to record the sessions, that would have been reflected in the agreed Joint Report of (at least) the first session of the boundary talks, but there is no mention anywhere in the Joint Reports of such an agreement. Moreover, one must question the purpose of making such tape recordings, when the Parties had decided on the adoption of an agreed Joint Report,[13] if the tape recording was not to be used as an aid in the production of the Joint Report. That was never

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[11] Barbados Reply, fn. 34.

[12] Exhibit 2, Affidavit of Barry Bidaisee, Deputy General Manager and Marketing Manager of Cascadia Hotel and Conference Centre, Venue of Negotiations in Trinidad, with supporting contracts 401D2001, 281E2002, 611A2003

[13] That decision is recorded in the Joint Report of the First Round of Maritime Boundary Negotiations in the following terms: "both delegations also agreed on the preparation of a joint report at the end of each round of negotiation to record accurately points discussed and agreed upon so as to avoid having to rely upon memory" (Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) Part 1, No. 1, p. 12).

done. On the contrary, until it filed its Reply, Barbados had never mentioned the fact that it was making tape recordings of the sessions it hosted, nor had it requested copies of recordings which it (apparently) believed had been made by Trinidad and Tobago of the sessions held in Port of Spain.

18 The making of these tapes and their use in the present proceedings is thus a breach of trust and of diplomatic propriety. That is, however, a matter which it is for Trinidad and Tobago to take up with Barbados elsewhere; it is not a matter which need detain this Tribunal.

19 So far as the use of the transcripts in the present proceedings is concerned, Trinidad and Tobago makes only the following points. First, Barbados has offered no evidence as to the manner in which these tapes were made or by whom, nor when or how the transcripts were produced from them. Nor is there any indication of what editorial input went into the production of the transcripts.[14] A degree of scepticism regarding their accuracy is therefore called for, especially where there are unexplained gaps in the recordings or differences between the transcript and the tape recording from which it is taken.[15]

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[14] There appears to have been some editorial input designed to lend support to Barbados' case in the present proceedings. For example, Barbados has added titles to each transcript crafted in order to assist its claim that the boundary and fisheries negotiations were one process (as to which, see paras. 100 and 103-104, below). Thus the transcript of the fourth round of boundary negotiations is entitled "Maritime Boundary Delimitation and Fisheries Negotiations" (Barbados Reply, Annex Volume 3, No. 24), whereas the Joint Report bears the agreed title "Joint Report on the Fourth Round of Negotiations for a Maritime Boundary Delimitation Treaty" (Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part I No. 4; also at Barbados Reply, Annex Volume 2, No. 23).

[15] One example of the latter will suffice. In the transcript of the Fifth Round of the Maritime Boundary Negotiations (Barbados Reply, Annex, Volume 3, No. 36, p. 575), which were held immediately prior to the Fourth Round of Fisheries Negotiations, Barbados' adviser (Mr Volterra) is shown in the transcript as having opened his presentation on the boundary with the words:

> "I will open the presentation by a few preliminary remarks, the first of which is to apologise to everybody who is here for the fisheries discussions. I am sorry if this is very boring for you and largely ..."

The word which is not picked up in the transcript, and represented merely by a succession of dots, is "irrelevant". It is clearly audible on the tape. It is, to say the least, difficult to reconcile this sentiment with the current Barbadian view that fisheries and boundary negotiations were inextricable and formed part of a single process.

20 Secondly, these unauthenticated transcripts cannot prevail in the event of any conflict between them and the Joint Reports of each negotiating session. There can be no question about the authenticity or reliability of the latter, which were agreed by both delegations at the end of each negotiating session and which constitute the official record of the negotiations. There can be no question of relying upon transcripts of tape recordings – made secretly and not produced until years after the sessions in question – in preference to the agreed, official and contemporaneous record of those negotiating sessions.[16]

21 Subject to those caveats, and despite its objections to the way in which these transcripts were made, Trinidad and Tobago does not object to the admissibility of the transcripts.

22 It is, however, worth noting that the use made by Barbados of these transcripts – and of the negotiating record generally – in its Reply can be misleading and is sometimes quite simply bizarre. A single example will suffice. Thus, Barbados prays the transcripts in aid of its argument that "the Negotiation records make clear that both Parties made repeated references to arbitration as a viable method of resolving their dispute were the negotiations to fail".[17]

23 In support of that proposition, Barbados first refers (somewhat surprisingly) to the statement made by its delegate at the first round of boundary negotiations that "Barbados did not envisage having to resort to binding arbitration".[18]

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16 See, e.g., Chapter 2, paras. 32-34 of this Rejoinder.

17 Barbados Reply, para. 75.

18 Joint Report of the First Round of Maritime Boundary Negotiations, Barbados Reply Annex Volume 2, No. 16, p. 161; Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) Part I, No. 1, p. 9. It is characteristic of the way in which Barbados sees what it wants to see in the negotiating record that this statement by Sir Harold St. John is cited as the only support for an assertion in the Reply that "Barbados noted that if the negotiations failed, the option of recourse to third party arbitration was available" (Reply, para. 75).

24 It then alleges that Trinidad and Tobago made "veiled threats" about the dispute being referred to arbitration.[19] Those veiled threats were apparently contained in the following passage in the Joint Report –

> "The ICJ and Chambers of the ICJ have cited with approval the equitable principles that Trinidad and Tobago has advanced for consideration by [the Parties]. Trinidad and Tobago pointed out that if the two States needed to refer this matter to a third party, both States would be looking to that corpus of law reflected in those judgments in support of their positions."[20]

If that statement is capable of being interpreted as a threat of any kind, it is not so much "veiled" as shrouded. Moreover, it is surprising that Barbados does not refer to the transcript at this point, since the statement by Ambassador Sealy appears even less threatening there.[21]

25 Having quoted the above statement from the Joint Report of the Second Round of Maritime Boundary Negotiations, Barbados then adds –

> "See also the comments of Trinidad and Tobago during the negotiations of 19-21 November 2003:
>
> > 'The other interesting thing is that today, Trinidad and Tobago's position is that because of the existence of the Venezuela/Trinidad and Tobago Treaty, we have to take that into account as a relevant circumstance in determining a boundary between Barbados and Trinidad and Tobago. That proposition we disagree with. We disagree with that fundamentally because when you were drawing that line, you didn't take our interest into account, but you did recognize that we had interest, because the Treaty specifically says 'it shall not interfere with the rights of third parties'.'
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> > (Reply of Barbados, Appendix 36, vol. 2 [in fact it appears in volume 3], at p. 598) This contradicts the assertion to the contrary

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19 Barbados Reply, para. 75.

20 Joint Report of the Second Round of Maritime Boundary Negotiations, Barbados Reply Annex Volume 2, No. 17, p. 184; Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) Part I, No. 2, p. 9. The negotiations took place in 2000; the reference to 2004 in footnote 134 of the Barbados Reply is clearly a misprint.

21 Barbados Reply, Annex Volume 2, No. 18, p. 216.

CHAPTER 2

JURISDICTION AND ADMISSIBILITY

A. Introduction

29 This Chapter addresses the factual and legal aspects of Barbados' response to Trinidad and Tobago's objections to jurisdiction and admissibility as raised in Chapter 3 of the Counter-Memorial.[24] Barbados' own objections to Trinidad and Tobago's claim line, including as to the Tribunal's jurisdiction in respect of a claim to an extended continental shelf, are considered further in Chapter 5 below.[25]

B. Issues of fact raised by Barbados in respect of the commencement of the arbitration

30 Barbados' legal submissions in response to Trinidad and Tobago's jurisdictional objections are predicated on two allegations of fact,[26] i.e. that:

(1) There was a dispute between the Parties as evidenced by multiple disputes as to methodology, the relationship of the coastlines, etc in the "nine rounds of negotiations",[27] and

(2) The negotiations came to an end when the Prime Minister of Trinidad and Tobago "pronounced the central and critical issue 'intractable' and invited Barbados to proceed with an arbitration if it so wished".

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[24] See, Barbados Reply, Sections 2.1-2.5 (paras. 94-124).

[25] See, Barbados Reply, Sections 2.6-2.9 (paras. 125-173).

[26] Barbados Reply, para. 95.

[27] As already noted in Chapter 1, Barbados continues to allege – notwithstanding the existence of two separate sets of joint reports – that the separate negotiations on maritime delimitation and on a new fishing agreement were in fact one set of negotiations. Trinidad and Tobago also returns to this allegation in Chapter 4, Section C, below.

These two allegations can be dealt with quite briefly.

31 It is of course the case that throughout the five rounds of negotiations on maritime delimitation the Parties stated their respective positions on different issues, and those positions did not coincide. That, of itself, does not mean that the Parties were in a state of dispute. If it did, parties seeking to effect an agreement under Articles 74(1) and 83(1) of the 1982 Convention would always be in a state of dispute – save in the unusual situation where they instantly agree all matters. Further, as Articles 74(2) and 83(2) provide, it is only where no agreement has been reached "within a reasonable period of time" that the States concerned may resort to the procedures of Part XV.

32 Barbados' difficulty in establishing the existence of a dispute and/or the expiry of "a reasonable period of time" is that it never submitted a claim line in the course of the negotiations. In its Reply, Barbados claims that at the fifth round of negotiations it articulated and "presented graphic depictions and verbal descriptions ... on its own positions, including as submitted to this Tribunal in the Memorial".[28] This is not reflected in the Joint Report, and Barbados' own transcript further undermines these assertions. It is true that Barbados presented various slides at the fifth round, but – to use Barbados' words at the fifth round – these slides were "put together for illustrative purposes" – and were expressly stated not to constitute an official position.[29] Barbados' current assertion is that in the negotiations it claimed a boundary line running just outside Trinidad and Tobago's territorial waters. However, what Barbados actually said with respect to the relevant slide was:

> "This is *just a chart for illustrative purposes*, but one of the bases that Barbados has repeatedly mentioned to Trinidad in these discussions is Barbados' historic fishing rights both in and around the arm of Tobago and over towards Grenada and that whole area over here and *if* one takes those historic fishing rights into account, *then it is possible to*

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28 Barbados Reply, paras. 77 and 79.

29 Barbados Reply, Volume 3, App. 36, p. 576.

contemplate for illustration purposes a maritime boundary between the two countries that follows this red line here [i.e. off Tobago]...".[30]

33 It is possible to contemplate any claim on the part of Barbados; but such contemplation hardly amounts to the formulation and articulation of an actual claim. The Trinidad and Tobago delegation expressed its confusion as to Barbados' position at the time, and as appears from Barbados' statements from its transcript, no official position had been taken by Barbados, while there was agreement as to the need to have a new round of negotiations.[31] That agreement was recorded in the Joint Report as was Trinidad and Tobago's concern at the lack of any official position from Barbados.[32]

> "The Trinidad and Tobago delegation noted with deep concern the characterization by Barbados of its visual presentation, which involved a geometric construction of lines and arcs, as being for illustrative purposes only and the associated comments as not being an official position of Barbados to be reflected in the record, although the Trinidad and Tobago delegation had expressed the hope at the end of the fourth round on 1 February 2002, that before the next round of negotiations, Barbados would present a map with detailed information that would allow Trinidad and Tobago to study its submission in the same way that the Trinidad and Tobago submission afforded the Barbados delegation an opportunity to comment critically on it. Barbados still has not presented an official position in the manner anticipated by Trinidad and Tobago. The two delegations agreed to resume negotiations at the sixth round early in 2004 on dates to be agreed through diplomatic channels[33]"

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30 Barbados Reply, Volume 3, App. 36, pp. 580-581, emphasis added; cf. App. 35, p. 566.

31 Barbados Reply, Volume 3, App. 36, pp. 586 and 602.

32 Barbados Reply, Volume 3, App. 35, p. 569.

33 Trinidad and Tobago Counter-Memorial, Volume 2(2), Exhibit 5, p9.

Thus, at the end of the last round of negotiations (i) no claim had been submitted by Barbados, and (ii) it was agreed that further negotiations were needed.

34 By contrast, so far as concerns Trinidad and Tobago, a claim line had been submitted. Barbados seeks now to denigrate the detail of that claim line, describing it as "a small sketch on a chart of the region showing an arbitrary and unexplained line".[34] By contrast, in the agreed minute, i.e. the Joint Report of the fourth negotiations, Trinidad and Tobago's "small sketch" is referred to as "a detailed working map".[35]

35 As to Barbados' second allegation, i.e. that the Prime Minister of Trinidad and Tobago brought negotiations to an end, Barbados seeks to set the scene by a claim that Prime Minister Manning made various "aggressive public statements" in the weeks leading up to the meeting of Prime Ministers of 16 February 2004, and that he stated that Trinidad and Tobago would refer the "dispute" outside the regime of the 1982 Convention and instead to CARICOM.[36] These allegations are supported by various press articles, but these merely report that Trinidad and Tobago was deciding to refer the failure to reach a fishing agreement to CARICOM.[37] This is confirmed by a statement of the Barbadian Ministry of Foreign Affairs on 2 February 2004.[38] In short, there were no aggressive public statements by Prime Minister Manning, and nothing he said concerned the ongoing maritime delimitation negotiations.

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34 Barbados Reply, fn. 118, also para. 78.

35 Barbados Reply, Volume 2, App. 23, p. 270. Furthermore, the principle of Trinidad and Tobago's claim was clearly stated in the negotiations. Barbados' assertion that no claim was made by Trinidad and Tobago in respect of an extended continental shelf is considered further in Chapter 5 below.

36 Barbados Reply, para. 81.

37 Barbados Reply, Volume 3, Apps. 39 and 41-43.

38 Barbados Reply, Volume 3, App. 40. See further under Chapter 4 below.

36 So far as concerns the meeting of Prime Ministers of 16 February 2004, Trinidad and Tobago has already dealt with this matter at paragraphs 92-99 of its Counter-Memorial, and has submitted a contemporaneous account of the meeting,[39] which in no sense supports Barbados' allegation that Prime Minister Manning had stated that the maritime delimitation was intractable, or Barbados' new allegation that Prime Minister Manning said "by all means go ahead" with respect to Barbados commencing an arbitration.[40] In fact, all Prime Minister Manning said was that "the delimitation negotiations were likely to be more protracted than the fisheries negotiations".[41] Barbados' allegations are also inconsistent with contemporaneous documents emitting from Barbados, e.g. its Diplomatic Note of 18 February 2004 suspending negotiations on maritime delimitation and fisheries,[42] and Prime Minister Arthur's statement immediately after Barbados commenced arbitration, when the highest he felt able to put it was:

> "I believe that Prime Minister Manning *shares my assessment* that there is no possibility of a negotiated settlement of the maritime boundary between Barbados and Trinidad and Tobago that does not compromise the interests of Barbados and Guyana."[43]

37 In fact, Prime Minister Manning in no sense shared that assessment. Trinidad and Tobago also submits with this Rejoinder a witness statement from Andre Laveau, Foreign Service Officer at the Ministry of Foreign Affairs, who also attended the meeting of 16 February 2004.[44] Mr Laveau explains the background to the meeting, and notes that it was Prime Minister Arthur who raised the question of maritime delimitation. He confirms that Prime Minister Manning did not state that the maritime delimitation was intractable (or use other words to that effect), or invite Barbados to take Trinidad and Tobago

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39 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 29.

40 Barbados Reply, para. 88.

41 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 29, para. 14.

42 Trinidad and Tobago Counter-Memorial, Volume 3, Exhibit 87.

43 Exhibit 3.

44 Exhibit 4.

before any international tribunal.[45] As Mr Laveau states: "whilst acknowledging that the maritime delimitation negotiations could take longer than the fisheries negotiations, Prime Minister Manning re-stated his commitment to a mutually satisfactory conclusion of both negotiations."[46]

C. Trinidad and Tobago's objections to jurisdiction and admissibility

38 It should be said at the outset that the language used by Barbados to respond to the objections raised by Trinidad and Tobago is nothing if not strident.[47] This is somewhat surprising in the light of the fact that Trinidad and Tobago has done no more than present three quite straightforward objections (that have in part been adopted by Barbados itself in its objections to Trinidad and Tobago's claims[48]), i.e. that:

(1) Necessary pre-conditions to arbitration cannot just be bypassed (see Section 1 below);

(2) Where, by treaty and by its own internal legislation, Barbados has recognised limits on the extent of its exclusive economic zone, it cannot ignore those constraints when it comes to formulating a good faith claim (Section 2 below); and

(3) Barbados' claim is as formulated in its Statement of Claim, and that claim cannot be enlarged, not least because to do so would be to take

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45 Exhibit 3, para. 10.

46 Exhibit 3, para. 10.

47 The argument in Chapter 3 of Trinidad and Tobago Counter-Memorial is variously described as "a perfunctory straw man", "novel", "strained", "factitious", "excessively formalistic", "pleonastic", "manifestly absurd", "specious".

48 See, Barbados Reply, Section 2.6(A) (paras. 127-131), where Barbados claims that the pre-conditions to arbitration established by Article 283(1) were not satisfied so far as concerns Trinidad and Tobago's claim to an extended continental shelf. See further Chapter 5 below.

this Tribunal beyond its permissible jurisdiction under the 1982 Convention (Section 3 below).

(1) Barbados' Failure to Comply with Necessary Pre-Conditions to Arbitration under Part XV

39 It appears to be common ground between the Parties that the requirements of Article 283(1) of the 1982 Convention are correctly characterised as pre-conditions to the right to commence arbitration.[49] Barbados' position so far as concerns its fulfilment of the requirements of Article 283(1) is easy to summarise: the "contours of the dispute and the legal positions of each Party had been clarified by no less than five years of negotiations", there is no requirement to exhaust diplomatic negotiations and, as of the date of the Notification and Statement of Claim of 16 February 2004, there was a dispute, and there had been an undoubted exchange of views.[50]

40 Trinidad and Tobago's objection is not one of a failure to exhaust diplomatic negotiations, whether as a matter of general law, or with specific reference to any exchange of views taking place under Section 1 of Part XV of the 1982 Convention. It follows that Barbados' response in this respect is not germane.[51] Trinidad and Tobago's objections are formulated by reference to the wording of:

(1) Articles 74(1) and 83(1): parties seeking to effect an agreement under these provisions are not in a state of dispute;

(2) Articles 74(2) and 83(2): it is only when negotiations under Articles 74(1) and 83(1) have proceeded for "a reasonable period of time" that the States concerned (plural) "shall resort to the procedures provided for in Part XV".

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49 See, Barbados Reply, para. 128.

50 Barbados Reply, para. 98.

51 Barbados Reply, paras. 98 and 102.

(3) Part XV: this comprises Section 1 (including Article 283(1)) and not just Section 2.

(4) Article 283(1): this makes the exercise of jurisdiction by an Annex VII tribunal contingent upon (i) the existence of a dispute, and (ii) an exchange of views.

(5) Article 283(2): where a procedure for the settlement of a dispute has been terminated without a settlement, the parties shall proceed to an exchange of views.

(6) Article 286: this creates a unilateral right to submit a dispute to (inter alia) arbitration where no settlement has been reached by recourse to Section 1.

41 It is not "manifestly absurd or unreasonable" to take these provisions in order, and to analyse when a State can and cannot act unilaterally. Indeed, to the contrary, it is the ordinary meaning of Articles 74(2) and 83(2) that the States concerned move together to the procedures provided for in Part XV; likewise, it is the ordinary meaning of Article 283(2) that a party cannot move unilaterally from termination of a procedure for the settlement of a dispute to arbitration under Section 2, without first engaging in an exchange of views.[52] Further, it is manifest that Article 283(1) does require the existence of a dispute and an exchange of views, and Trinidad and Tobago has shown that these requirements have not been met in this case.[53]

42 The qualification "manifestly absurd or unreasonable" is of course taken from Article 32(b) of the Vienna Convention on the Law of Treaties, and that qualification is generally deployed by a party wishing to have recourse to

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[52] This is the understanding of the authors of the Virginia Commentary. See Trinidad and Tobago Counter-Memorial, para. 106.

[53] Trinidad and Tobago Counter-Memorial, paras. 115-118.

supplementary means of interpretation, including *travaux préparatoires*. Yet Barbados makes no mention of the relevant *travaux*, and fails to address the relevant passage from the Virginia Commentary, which is wholly supportive of Trinidad and Tobago's contention that the obligation to exchange views arises when a dispute crystallises, and also whenever there is a breakdown in a procedure that the parties have been following to reach settlement.[54] Consistent with the Virginia Commentary, the *travaux* of Section 1 to Part XV reveal, in the words of the President of the Conference:

> "An exchange of views is also *prescribed* whenever any procedure for settlement has failed to bring about a settlement."[55]

43 In the end, Barbados' response comes down to an invocation of Article 298(1) of the 1982 Convention and the assertion that Trinidad and Tobago's interpretation "would frustrate the object and purpose of Part XV as a whole".[56] The argument is that Article 298(1) allows a party to a dispute concerning the interpretation or application of Articles 74 and 83 to make a declaration at any time excluding compulsory jurisdiction under Section 2 of Part XV, and that to require the parties to exchange views would give time to any "recalcitrant" State to make such a declaration. It is recalled that Article 298(1) provides:

> "When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2, with respect to one or more of the following categories of disputes:
>
> (a) (i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations ... ."

44 There are four points to make about this provision:

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54 See Barbados Reply, para. 102, where Barbados sets out but fails to address the passage from the Commentary that is deployed at Trinidad and Tobago Counter-Memorial, para. 106.

55 Exhibit 5, Document A/CONF.62/WP.9/ADD.1, 31 March 1976, at para. 14, emphasis added.

56 Barbados Reply, para. 105.

(1) Article 298(1) creates an important right for States involved in disputes concerning Articles 74 and 83, i.e. they are treated as being in a special category so far as concerns the application of Section 2 of Part XV.

(2) The exercise of that right is subject to Article 300 of the 1982 Convention, i.e. it can only be exercised in good faith.

(3) By contrast with the situation in respect of Section 2 of Part XV, Article 298(1) does not allow States to avoid the obligations under Section 1, and recognises the separate and free-standing nature of such obligations.

(4) It follows that there is nothing in this provision which can be taken as intended to remove the procedural protections already to be found in Articles 74 and 83 and Section 1 of Part XV, i.e. Article 283.

45 Yet this is precisely the thrust of Barbados' argument. It is that Articles 73 and 84 and Article 283 cannot mean what they say, or else a "recalcitrant" State would be entitled to benefit from the restriction on jurisdiction allowed for by Article 298(1). This is a self-serving argument – the whole purpose of Article 298(1) is to convey an exceptional right on parties to a dispute involving boundary delimitations, and it is the State who seeks to defeat the exercise of that right by moving directly from negotiations under Articles 73 and 84 to notification of an arbitral claim under Article 286 that is seeking to defeat the object and purpose of the scheme put in place by Part XV. Moreover, there is no evidence that Trinidad and Tobago had any intention of invoking Article 298(1), and in fact it had no such intention: the argument is purely hypothetical in its implied reference to Trinidad and Tobago[57].

[57] The thrust of Barbados' argument about article 298(1) is that notwithstanding what Articles 74(1), 83(1) and 283(1) says, it was not prepared to exchange any views with Trinidad and Tobago after it had unilaterally decided that a dispute had arisen because it feared that the "recalcitrant" State might invoke Article 298(1). See further chapter 4 below.

(2) Part XV of the 1982 Convention and the Requirement of Good Faith

46 Paragraphs 108-112 of the Reply address an argument that Trinidad and Tobago does not make, i.e. that it was an abuse of rights to initiate arbitration in circumstances where there had been no exchange of views. Trinidad and Tobago's contention is (solely) that in seeking to employ Article 286 to claim a single maritime boundary line that is incompatible with (i) Barbados' previous recognition of the exclusive economic zone of Trinidad and Tobago, and (ii) Barbados' own legislation, i.e. section 3(3) of the Maritime Boundaries and Jurisdiction Act 1978, Barbados is acting in a manner that is arbitrary or capricious, i.e. in abuse of its rights.[58]

47 There appears to be little between the Parties so far as concerns the content of the doctrine of abuse of rights,[59] albeit that it appears to be Barbados' position that the doctrine has never been or never should be applied. The issues between the Parties come down to the question of recognition of the Exclusive Economic Zone of Trinidad and Tobago (Barbados focuses in particular on the 1990 Fishing Agreement, but simply ignores Appendix A to the Counter-Memorial), and the impact of Barbados' domestic legislation.

48 So far as concerns the 1990 Fishing Agreement, Barbados characterises Trinidad and Tobago's arguments as based on the alleged existence of an estoppel (an argument that Trinidad and Tobago does not actually make) and places considerable emphasis on Article XI of the Agreement, dealing with "Preservation of Rights".[60] The reciprocal preservation of rights for which Article XI provides must be interpreted in context, and in the light of the object and purpose of the Agreement which responds (to use the language of the Preamble) to "the desire of Barbados fishermen to engage in harvesting

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58 Trinidad and Tobago Counter-Memorial, paras. 125 and 128.

59 Barbados Reply, para. 108 and fn. 212.

60 Barbados Reply, para. 115.

flying fish and associated pelagic species in the fishing area within the Exclusive Economic Zone of Trinidad and Tobago". The relevant context for Article XI is constituted by the central provisions of the Agreement, i.e. Article II ("Access to the Exclusive Economic Zone of Trinidad and Tobago") and Article III which deals with the terms and conditions of that access. There is nothing in Article XI that either detracts from, or prevents reliance on, the fact that Barbados was being granted access to Trinidad and Tobago's Exclusive Economic Zone – there was no question of Barbados having any rights to preserve in that Zone.[61]

49 By way of a further instance of Barbados' recognition of Trinidad and Tobago's Exclusive Economic Zone to the south of the median line in the western sector, reference may be made to the press release issued by Barbados' Ministry of Agriculture, Food and Fisheries No. 177/92 of March 1992. This is set out in full below:

> "The Ministry of Agriculture, Food and Fisheries today reminded fishing boat owners and fishermen that at present there is no fishing agreement between the governments of Trinidad and Tobago and Barbados.
>
> *Consequently, the Ministry advised boats should remain within the waters of Barbados. The Ministry said that this Zone extends to points midway between Barbados and Trinidad and Tobago.*
>
> Meanwhile, fishing boat captains and crew can receive assistance and training from the Fisheries Division in charting positions and using marine electronic navigation equipment. An official from the Fisheries Division has noted that group or individual training sessions can be arranged on request." [62]

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[61] It has to be added that the contention at Barbados Reply, para. 116 that Barbados had no choice but to enter the 1990 Fishing Agreement – made by reference to Barbados' Memorial (para. 83) but without reference to the Trinidad and Tobago Counter-Memorial (paras. 46-52) – is no doubt made because Barbados does not wish to be seen to abandon an untenable contention made in its Memorial; but it is nonetheless untenable.

[62] Exhibit 6 (emphasis added). The press release is referred to in Trinidad and Tobago's Diplomatic Note No. 266 of 27 March 1992. See Trinidad and Tobago Counter-Memorial, Volume 3, Annex 15.

50 It is abusive for Barbados now to claim that the EEZ of Barbados in fact abuts the territorial waters of Trinidad and Tobago.

51 So far as concerns Barbados' domestic legislation, again the question is not whether there has been an estoppel or not. The sole question is whether for Barbados to assert a claim that is incompatible with section 3(3) of the Maritime Boundaries and Jurisdiction Act 1978 is arbitrary or capricious.[63] In fact, it is both arbitrary and capricious. It is certainly accepted that, in acting in such a way, Barbados is directly ignoring domestic as opposed to international law, but that does not mean that the domestic law is by definition irrelevant when it comes to the good faith exercise of an international right, i.e. under Article 286 of the 1982 Convention. This is all the more so in circumstances where Barbados relies on its 1978 Act to seek to defeat any claim by Trinidad and Tobago to the north of a median line.[64] In other words, Barbados' domestic legislation is to be taken as opposable to other States, but not to itself.

(3) The Scope of Barbados' Application

52 It appears from paragraphs 119, 121 and 122 of the Reply that Barbados is expressly not seeking to claim anything other than "a single unified maritime boundary line, delimiting the exclusive economic zone and the continental shelf between it and the Republic of Trinidad and Tobago",[65] and that it "does not request the award of non-exclusive fishing rights".[66] It follows that there

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63 It is recalled that section 3(3) of the Maritime Boundaries and Jurisdiction Act 1978 provides in relevant part: "... where the median line ... between Barbados and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the [Exclusive Economic] 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."

64 Barbados Reply, para. 321.

65 The wording of Barbados' Statement of Claim, para. 15.

66 Barbados Reply, para. 122.

is no need to consider further the factual and legal arguments under this heading.[67]

[67] It is noted, however, that Barbados does not address the contention that the Tribunal would in any event lack jurisdiction over a claim for the award of non-exclusive fishing rights given the restrictions on its jurisdiction that flow from Article 297(3) of UNCLOS.

made by Trinidad and Tobago at paragraph 90 of the Counter-Memorial."[22]

26 Two comments may be made about this passage. First, the statement attributed to Trinidad and Tobago was in fact made by Sir Harold St John, the Head of the Barbados delegation and not by one of the Trinidad and Tobago delegation.

27 Secondly, the assertion that this statement (even if it had been made by someone from Trinidad and Tobago) "contradicts the assertion to the contrary made by Trinidad and Tobago at paragraph 90 of the Counter-Memorial" is incomprehensible. That paragraph states that –

> "At the conclusion of the Fifth Round of Maritime Boundary negotiations and the Fourth Round of Fisheries negotiations, [23] it was the understanding of both States, as recorded in the Joint Reports, that further negotiations would be held in 2004. There had been no suggestion in any of the nine rounds of these two sets of negotiations that the issues of the maritime boundary and a fisheries agreement could not be settled by negotiation and there had been no discussion of arbitration."

28 It is difficult to see that there is any connection between the passage quoted in footnote 134 of the Reply and the statement in paragraph 90 of the Memorial, let alone how one contradicts the other. However, no doubt Barbados will make this clear.

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[22] Barbados Reply, para. 75, footnote 134.

[23] Which took place more than three years after the statement quoted by Barbados and reproduced in para. 24, above, had been made.

CHAPTER 3

THE DISTINCTION BETWEEN THE TWO SECTORS: GEOGRAPHICAL FACT AND GEOGRAPHICAL FICTION

53 In its Counter-Memorial,[68] Trinidad and Tobago set out the geographical context in which the present dispute falls to be decided. There are four central features of that context:

(1) the case concerns two different maritime areas – one (primarily to the west of the two States) is in the Caribbean, while the other (to the east) is in the Atlantic Ocean; [69]

(2) in the Caribbean, neither State can achieve anything like a full 200 n.m. continental shelf and EEZ because of the presence of other island States (notably Grenada and Saint Vincent and the Grenadines). By contrast in the Atlantic sector, both States face an open sea, the nearest landfall being on the coast of West Africa, so that both States can in principle achieve the full 200 n.m. EEZ and a continental shelf to the limits of Article 76 of the 1982 convention and beyond ;[70]

(3) the length of the two coastlines which are actually opposite one another is very short and the relationship between the two coasts is one of oppositeness only over a short distance; outside that area, their relationship is one of adjacency;[71] and

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68 Paras. 13-27 and 174-203.

69 The first area is referred to in the Trinidad and Tobago Counter-Memorial and this Rejoinder as the "western sector" or the "Caribbean sector" (the two names being interchangeable), while the second area is referred to as the "eastern sector" or the "Atlantic sector" (the names again being used interchangeably).

70 See Trinidad and Tobago Counter-Memorial Volume 1(2), Figures 1.2 and 1.3.

71 See Trinidad and Tobago Counter-Memorial Volume 1(2), Figure 5.5.

(4) the effect of the median line boundary proposed by Barbados is to cut off Trinidad and Tobago not only from the continental shelf beyond 200 n.m. but even from the 200 n.m. of continental shelf and EEZ to which all states are entitled under the 1982 convention, regardless of the width of the physical continental margin .[72]

54 In the Reply, Barbados takes issue with each element of this analysis.[73] Thus:

(1) Barbados rejects the distinction between the Caribbean sector and the Atlantic sector drawn by Trinidad and Tobago;

(2) Barbados denies that Trinidad and Tobago faces open sea to the east, arguing that the "direction" of the Trinidad and Tobago coastline is south-eastwards, rather than eastwards, so that its natural extension necessarily encounters the claims of Venezuela and Guyana to its south;

(3) Barbados denies that the relationship between the two States is ever anything other than one of oppositeness; and

(4) Barbados denies that Trinidad and Tobago is being cut off from any entitlement it might have had by the adoption of Barbados' proposed median line boundary.

55 This approach ignores the differences between the island-studded Caribbean and the open Atlantic Ocean which have been obvious to mariners for centuries, adopts a wholly artificial "coastal direction" approach and insists that the relationship between two short stretches of coast (neither longer than 6 n.m.) should dominate a boundary which (even on Barbados' analysis) extends for well over 200 n.m. (between the tripoint in the west – which Barbados now asserts is with Grenada rather than St Vincent and the Grenadines - and the tripoint in the east with Guyana).

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72 See Trinidad and Tobago Counter-Memorial Volume 1(2), Figures 1.1 and 1.3.

73 See, in particular, Barbados Reply, paras. 37-44 and 207-227 and Chapter 5.

56 The advantages to Barbados of this artificial approach are obvious but so are its deficiencies in terms of law and logic. Barbados seeks to compel an approach which leads to a manifestly inequitable result but a proper analysis of the geography of the area shows that no such result need follow.

57 The fallacies in Barbados' approach are analysed further in Chapter 5 of this Rejoinder, because it is in the Atlantic sector that their effects are felt. Nevertheless, three points require brief consideration here as they also have a potential to affect the position in the Caribbean sector.

(1) The Difference between the Caribbean and Atlantic Sectors

58 Even Barbados does not seek to dispute the obvious fact that the Caribbean and the Atlantic are two separate seas. But it does contest Trinidad and Tobago's division of the maritime area in the present case into separate Caribbean and Atlantic sectors on the ground that point A, the turning point in the boundary claimed by Trinidad and Tobago in the Atlantic sector, is not the point at which the Caribbean is divided from the Atlantic.[74]

59 Barbados is seeking to confuse two quite different matters, namely a dividing line between the Caribbean and Atlantic sectors and the turning point in the boundary line in the Atlantic sector.

60 The dividing line between the Caribbean and the Atlantic is a feature of the general geography of the region. While any dividing line between two seas has an element of the arbitrary about it, the International Hydrographic Organisation is clearly the best authority on such questions.

61 In its countermemorial Trinidad and Tobago accepted that the line between the Caribbean and the Atlantic drawn by the International Hydrographic

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74 Barbados Reply, paras. 221-222.

Organisation represents the dividing line between the two sectors. This lies to the West of point A, as map 5.2 in the counter-memorial makes clear.[75]

62 Point A is the turning point in the boundary line. As is explained in Chapter 7 of the Counter-Memorial and further in Chapter 5 of this Rejoinder, Trinidad and Tobago's case is that the equitable delimitation required by the 1982 Convention can be achieved in the western sector by a boundary line which follows the equidistance line out to Point A and then turns north-west. The location of that turning point is a matter entirely separate from the location of the dividing line between the two sectors. The reason for choosing Point A as the turning point is considered in Chapter 5 of this Rejoinder. There is nothing unusual in maritime boundary cases in having two separate sectors where the geography of the region so requires. [76] Nor, in such a case, is there anything unusual in having a turning point in the boundary at some distance from the dividing line between the two sectors. [77]

(2) The Open Character of the Atlantic Sector

62 In a remarkable piece of special pleading, Barbados seeks to argue that Trinidad and Tobago does not face the open sea in the Atlantic sector (although it claims that Barbados does). In order to achieve this result, which would have come as a considerable surprise to any mariner over the last few centuries, Barbados adopts an approach which is part geographical contrivance and part circular reasoning.

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75 See Trinidad and Tobago Counter-Memorial, Volume 1(2), Figure 5.4.

76 See *Anglo-French Continental Shelf case ("Channel Arbitration")*, (1977) 18 UNRIAA 3 or 54 ILR 6, particularly para. 233; *Gulf of Maine*, ICJ Reports, 1984, p. 246 at paras. 189 and 216; *Qatar/Bahrain*, ICJ Reports, 2000, p. 40 at paras. 169-70.

77 See, e.g., the *Anglo-French* case at para. 252.

64 The contrivance is to argue that the eastern coast of Trinidad and Tobago faces not east but south-east. The obvious geographical difficulties are easily overcome, according to Barbados, by the simple expedient of (i) ignoring the actual coastline altogether, (ii) taking instead the archipelagic baseline drawn from the Little Tobago to Galeota Point on the south-east coast of Trinidad, then (iii) drawing two straight lines at 90 degree angles at each end of the base line and thus indicating a south-eastwards facing coast. [78]

65 The circular reasoning then follows. This coast does not face the open sea, so it is said, because other States' claims overlap with any claim by Trinidad and Tobago, so that Trinidad and Tobago would not be able to achieve either the minimum 200 n.m. continental shelf or the full continental shelf which the 1982 convention recognises beyond 200 n.m. in this sector. [79]

66 The reality is quite different. Like all coastlines, the coastline of Trinidad and Tobago on the Atlantic is not a single straight line but most of it faces eastwards into the open Atlantic. The same is true of the east coast of Barbados. There is no land opposite the two coasts until one reaches west Africa. This is quite different from the situation in the Caribbean sector, where the presence of Venezuela (in the case of Trinidad and Tobago) and Grenada and St Vincent and the Grenadines (in the case of Barbados and Trinidad and Tobago) means that there are other opposite coasts close enough to prevent any State achieving a full continental shelf or EEZ or anything like it.

67 It is the reality of the actual coastline, not an artificial approach – based upon an archipelagic baseline and a notional "direction" of the coast – which is

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[78] Barbados Reply, Map 9.

[79] Barbados Reply, Map 8 and paras. 38-40.

determinative for the purposes of maritime boundary delimitation.[80] Barbados makes much of the maxim that "the land dominates the sea" but when it comes to the boundary in the eastern sector, what Barbados is really saying is that the land (at least in Trinidad and Tobago) is irrelevant and the sea is dominated by a series of notional lines.

68 As for the argument that Trinidad and Tobago does not face the open sea because of the competing claims, this reasoning is entirely circular. It is the undeniable geographical fact that Trinidad and Tobago faces the open sea which determines the strength or otherwise of the competing claims (in reality the claim of Barbados since none of the other States have made claims in the relevant area), not the existence of a competing claim which determines whether or not Trinidad and Tobago is to be deemed to face the open sea. If it were otherwise, the *North Sea Continental Shelf* cases [81] would have been decided in the way suggested by the Netherlands and Denmark.

(3) Opposite and Adjacent Coasts

69 In its Counter-Memorial, Trinidad and Tobago explained in detail, and by reference to the jurisprudence of the International Court of Justice and arbitral tribunals, why the two States could not be regarded as in a relationship of oppositeness throughout the relevant maritime area.[82] The Court and the various tribunals which have considered the matter have never accepted the proposition that if two coastlines are opposite at one point, that relationship must always be the dominant one. Rather, they have carefully taken into account the changing nature of the relationships between coasts where the geography so required. Thus, in the *Anglo-French* case, the Court of

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80 The approach which Barbados urges on the Tribunal is similar to the argument of the French Government in the *Anglo-French* case that the United Kingdom possessed no frontage on the area to be delimited in the western approaches. That argument was rejected by the Court of Arbitration on the grounds that "to deny that the [United Kingdom] possesses a maritime frontage upon the region is to mistake form for substance" (54 ILR 6 at para. 234).

81 ICJ Reports, 1969, p. 3.

82 Trinidad and Tobago Counter-Memorial, Chapter 5.

Arbitration held that the relationship between the United Kingdom and France was one of oppositeness in the Channel sector but in the western approaches the relationship was essentially lateral.[83] A similar approach was adopted by the Chamber of the International Court of Justice in the *Gulf of Maine* case.[84]

70 Barbados maintains that this reasoning is not applicable here. The basis on which it seeks to distinguish the authorities relied on by Trinidad and Tobago is that, first, the two coasts are too far apart for the approach taken in the *Anglo-French*, *Gulf of Maine* and *Qatar/Bahrain* cases to be followed[85] and, secondly, that Trinidad and Tobago and Barbados are "small island States" quite different from the lands to which that approach has been applied in the past. [86] Neither argument stands up on closer examination

71 There is no reason why the distance between Barbados and Trinidad and Tobago should preclude the application of the principle in the *Channel* and *Gulf of Maine* cases. Indeed, as Trinidad and Tobago pointed out in its Counter-Memorial,[87] the distances in those two cases were comparable with the distances in the present case: 97.5 n.m. in the *Channel* case and 219 n.m. in the *Gulf of Maine*. Moreover, the argument that two coasts so far apart

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83 54 ILR 6 at paras. 233 and 242.

84 ICJ Reports 1984, p. 246 at paras. 33-3, 189 and 216. In para. 216 of its Reply, Barbados argues that "the Chamber ... never qualified as adjacent the coasts which it had found ('there can be no doubt', it said) to be opposite coasts". This is a rather strange argument. Of course the Chamber did not qualify as adjacent coasts which it had found to be opposite. The point is that it found the two coasts to be in an opposite relationship at one point and an adjacent one at another.

85 Barbados Reply, paras.212 et seq.

86 Barbados Reply, para. 217.

87 Trinidad and Tobago Counter-Memorial, para. 179.

could not be in a lateral relationship was considered and rejected by the Court of Arbitration in the *Anglo-French* case.[88]

72 Nor does the fact that the two States in the present case are relatively small islands preclude the application of that principle. There is no reason at all why the notion that the relationship between the coasts of two States should be capable of being treated as opposite in some places and adjacent elsewhere as the physical relationship between them varies should be treated as confined to larger States. Indeed, if anything, the relatively small size of the island States in the Caribbean makes such an approach more, rather than less, appropriate. The relative shortness of their coasts means that the distances in which the coast of one State is physically opposite the coast of another are bound to be small. By contrast, their relationship to the open sea means that the maritime boundaries between them are likely to cover very considerable distances. This makes it all the more appropriate that the short space in which their coastlines are physically opposed should not control the boundaries many miles away from that space.

73 In the present case, Barbados maintains that a person standing half-way between Barbados and Trinidad and Tobago would see only two opposite coastlines and it pours scorn on the suggestion that his view would somehow be different if he faced east. But it is more pertinent to ask what such a hypothetical person would see if he stood at Point A – or anywhere along the equidistance line to the east of the two States. Such a person would be highly unlikely to describe the view as one of two opposite coastlines (any more than a person standing in the western approaches would have described the British and French coasts in such a way. The simple fact is that, as in the *Anglo-French* case, "the areas of continental shelf to be delimited … lie off, rather than between, the coasts of the two countries".[89]

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88 54 ILR 6 at paras.237 et seq.

89 54 ILR 6 at para. 233.

74 In reality, it is only for a distance of some 6 n.m. that the two coastlines are truly opposite. The further away one gets from that six mile stretch, the more artificial it is to treat the two coasts as opposite rather than adjacent. In the western sector, the distance to the outer limit of either State's shelf and EEZ is relatively small, so no departure from the equidistance line is needed. But in the eastern sector, the effect (as discussed in Chapter 5 of this Rejoinder) is dramatic.

75 In an attempt to distinguish the *Anglo-French*, *Gulf of Maine* and *Qatar/Bahrain* cases, Barbados argues that in each of those cases "the actual physical relationship between the relevant coasts of the Parties changed along their length".[90] But that is precisely what occurs here. From Needham's Point to South Point the Southern coast of Barbados faces the Northern coast of Tobago. A few miles along the coast of each State (in either direction) and the two coasts do not face each other. It is a simple – and highly significant – physical change. To quote the Court of Arbitration in the *Anglo-French* case once more –

> "What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a 'just' or 'equitable' delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the great distance sewards that this shelf extends from their coasts."[91]

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90 Barbados Reply, para. 217.

91 54 ILR 6 at para. 242.

CHAPTER 4

THE WESTERN SECTOR

A. Introduction

76 As already noted in Chapter 1 above, it is not until the very last Chapter of its Reply, Chapter 7, that Barbados makes any attempt to grapple with the very obvious difficulties confronting its claim that relevant circumstances require the adjustment of the median line to the south (up to the limits of Trinidad and Tobago's territorial waters). Central to this claim is the assertion that "Barbadians have fished off the island of Tobago for centuries".[92] That assertion is demonstrably untrue;[93] thus the claim falls away.

77 Although, in the face of the abundant material put before the Tribunal in the Counter-Memorial, Barbados could and should have elected to abandon this frivolous claim, it has chosen not to. However, as the weight of the argument in the Reply makes clear, this case is – as Trinidad and Tobago said in its Counter-Memorial – really about whether and, if so, to what extent the median line should be shifted to the north in the eastern sector (a matter dealt with in Chapter 5 below). In this Chapter, Trinidad and Tobago will respond to the factual assertions (Section B) and legal argument (Section C) relied on by Barbados for its claim in the western sector.

B. Barbadians have fished off the island of Tobago since the late 1970s

78 The greater part of Section 7.1 of the Reply, headed "Barbadians have fished off the island of Tobago for centuries", is taken up by a repetition of the allegations of fact contained in the Memorial. Trinidad and Tobago does not repeat here its detailed rebuttal of those allegations at Appendix B to its

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92 Section 7.1 of the Barbados Reply.

93 See, Appendix B to Trinidad and Tobago's Counter-Memorial.

Counter-Memorial, but merely responds to what is new; and the principal allegation in this respect is that the traditional artisanal fishing that is said to have taken place for centuries was possible because the fishing "was carried out from fishing schooners (or sloops)".[94] This is an inventive response to the fact that, as demonstrated by Trinidad and Tobago in its Counter-Memorial, prior to the late 1970s Barbadian flying fish fishermen simply did not have the long-range boats and other equipment to enable them to fish in the area now claimed by Barbados. But Barbados' response is pure fiction.

79 The Tribunal now has a wealth of scientific reports on the origins and development of the Barbadian flying fish fishery that were produced by Barbadian and other scientists long before this arbitration commenced (all but two of these reports have been introduced by Trinidad and Tobago). These reports are:

(1) Brown, 1942, "The Sea Fisheries of Barbados".[95]

(2) Hickling, 1954, "The Fisheries of Barbados".[96]

(3) Rose, 1954, "Memorandum on the Barbados Fishing Industry".[97]

(4) Wiles, 1959 "Mechanisation of Barbados' Fishing Fleet".[98]

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94 Barbados Reply, para. 358.

95 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 1.

96 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 2.

97 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 3.

98 Barbados' Reply, App. 2, Volume 2. Wiles was Fishery Officer in Barbados and, unsurprisingly, his report is entirely consistent with the other contemporaneous evidence set out in Trinidad and Tobago's Counter-Memorial. At p. 15 of Wiles' report, which Barbados does not cite (see Barbados Reply, para. 362), Wiles states that the speed of the new motorised vessels is 7-9 knots. As appears from Trinidad and Tobago Counter-Memorial, para. 327(3), this restricted the range of the vessels to around 12 miles from shore.

(5) Bair, 1962, "The Barbados Fishing Industry".[99]

(6) Bannerot and Harding, 1986, "Development of a New Long-Range Fishery for Flying Fish in the Southeastern Carribean".[100]

(7) Hunte, 1986, "Status of the Barbados Pelagic Fishery".[101]

(8) Hunte and Hazel Oxenford, 1989, "The Economics of Boat Size in the Barbados Pelagic Fishery".[102]

(9) Willoughby, 1992, Ministry of Agriculture Food and Fisheries Barbados, Fisheries Division, "The Flyingfish Fishery of Barbados".[103]

(10) Christopher Parker, 2001, "Developments in the Flying Fish Fishery of Barbados" (2001).[104]

80 Not one of these reports refers to the use of a "long-range schooner fleet" in the flying fish fishery of Barbados;[105] not one of these reports suggests that Barbados' flying fish fishing grounds took in waters off Tobago prior to the introduction of the first ice boats in the late 1970s; and they all make clear that

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99 Barbados has submitted a notably limited extract at Barbados Reply, Appendix 3, Volume 2. The paper is in full at Exhibit 7 to this Rejoinder (in a slightly different version).

100 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 7.

101 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 3.

102 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 11.

103 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 13.

104 Trinidad and Tobago Counter-Memorial, Volume 5, Exhibit 24.

105 Barbados Reply, para. 361. Brown's 1942 report is used by Barbados to substantiate the claim that schooners regularly traveled further afield than Tobago in the early 20th Century. Barbados Reply, para. 360. This part of the report is concerned with three schooners used in the red snapper fishery. The fact that Brown refers to these three schooners being used in the red snapper fishery, but makes no mention of any schooners being used for the flying fish fishery (despite including detailed sections on "The Flying Fish Boat" and "the Flying Fishery"), makes it all the more clear that schooners were not used for the flying fish fishery.

this was an impossibility as suitable boats and other technical equipment were not available to Barbadian flying fish fishermen. There is no dearth of documentary evidence.[106] The evidence is abundant; and it radically undermines Barbados' claims. It may also be added that the very suggestion that a long-range schooner fleet should be used in traditional artisanal fishing of the 19th and early 20th Centuries is indicative of the extent to which Barbados is now clutching at straws; and the claim in the Reply – in the face of all the above evidence, and the evidence discussed further below – that the motorised fishing vessels introduced in Barbados in the 1950s were capable of fishing off Tobago is little short of disgraceful.[107]

81 Barbados also devotes several paragraphs in an attempt to show that its flying fish fishermen had the means to store fish on board for the long journey back to Barbados. Its contentions are as follows:

(1) There were various ice houses in Barbados. Ice was available. Barbadian schooners on their way back from South America (from the 1930s) used ice, and also sea water to preserve fish.[108]

(2) It is not suggested that the flying fish were preserved by salting or pickling.[109] It is accepted that there is no documentary evidence of the

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106 Cf. Barbados Reply, paras. 355-357. It is quite unclear how the fact that the same colonial power exercised jurisdiction in both Trinidad and Barbados after 1814 somehow precludes the maintenance of records. The more likely explanation for the absence of records is the lack of any significant fishery. See Bair, "The Barbados Fishing Industry", Exhibit 7, at p. 13. It should also be noted that Bair, writing in 1962, was able to discover precise and seemingly obscure information about whaling in Barbados in the early 20th Century. Ibid., p. 33 (e.g. that in 1913 there were 2 whaling boats, and 14 men engaged in whaling).

107 Cf. Barbados Reply, paras. 362 and 367. Of course, as noted in the Trinidad and Tobago Counter-Memorial (fn. 333), two Barbadians came to live in Tobago in the early 1960s and fished for flying fish from Tobago (on a Tobagonian vessel). That esoteric fact is quite irrelevant to Barbados' claim.

108 Barbados Reply, para. 364.

109 Barbados Reply, para. 365; cf. Memorial, para. 65 where it was so suggested.

precise method of storage used: various methods of preservation were available, and it is immaterial which one was used.[110]

82 In other words, Barbados has no evidence whatsoever as to how flying fish were, as a matter of fact, preserved. The fact that one ice house was built in Barbados in 1837, and another in 1894, says nothing. The reference to the practices of Barbadian schooners from the 1930s is calculated to mislead. Those vessels were not part of the flying fish fleet. Barbados also relies on Annette Bair's 1962 paper, "The Barbados Fishing Industry", as an authoritative source.[111] That paper is 86 pages long and contains a detailed chapter on "The Traditional Fishery" as well as long sections on the flying fish fishery. Yet Barbados has elected not to cite from either of these, or to exhibit the relevant extracts. Instead, it has cited a short chapter of the paper dealing with whaling and fishing for red snapper, and to rely on a short passage dealing with preservation methods used for red snapper. The chapter, and the passage, are quite irrelevant to Barbados' claims as to methods of preservation used in the flying fish fishery. Further, as Bair notes, the Barbadians engaged in the red snapper fishery "were few and its life span was short".[112]

83 This is not to say that Bair's paper is not highly relevant to the issues concerning the alleged traditional artisanal flying fishery off Tobago:

(1) In her introductory chapter, Bair notes: "The story of fishing in the island [Barbados] can be divided into periods. The first, one of relative stagnation, endured for most of the island's history – approximately up to 1940 – and the activities of this period will be referred to as the 'Traditional Fishery'. In striking contrast, the second period is one

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110 Barbados Reply, para. 364.

111 Exhibit 7.

112 Exhibit 7, p. 35. It appears that the practice was discontinued in the late 1940s for reasons of high cost.

distinguished by greatly accelerated progress, the work of the past twenty years."[113]

(2) In her chapter on "The Traditional Fishery", Bair relies heavily on Brown's 1942 account "since it is unlikely that any major adaptations in methods or gear occurred through this period".[114] She then describes the open sailing boats used in the "Traditional Fishery", ranging in length from 18-24 feet, and notes that "the capture of pelagic fish was done *exclusively* from them" (emphasis added).[115] She describes the average day of the traditional flying fish fisherman, and notes that the fishing took place "generally at a distance of 3-4 miles offshore".[116]

(3) So far as concerns the storage and preservation of fish, a good part of her paper is devoted to a consideration of the impacts of construction of a cold storage plant in Bridgetown (commenced in 1961). There is no suggestion that flying fish are being put on ice on board. To the contrary, Bair notes:

> "For best results, fish that are to be refrigerated, need to be in an excellent condition if the product is to be satisfactory. This necessitated a review of the customary methods of handling fish after they had been caught ... . This revealed that very rudimentary methods are being used; the fishermen only threw buckets of water on the catch at intervals, to ensure that the fish were kept moist. However, despite exposure to the sun, fishing hours were short, so that fish were generally in good condition for immediate sale. If the fish were to be refrigerated greater care was desirable ...".[117]

(4) So far as concerns the importance of fishing to the Barbadian economy, she notes: "At present, one cannot yet isolate a true fishing village in

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113 Exhibit 7, p. 10.

114 Exhibit 7, p. 17.

115 Exhibit 7, pp. 17-18.

116 Exhibit 7, p. 20.

117 Exhibit 7, pp. 69-70.

Barbados. Fishing is still too insecure an occupation to encourage large numbers of men to make it their sole means of livelihood. Furthermore, it is doubtful whether a sizeable community could be supported by fishing alone".[118]

(5) In her final chapter, "The Scope of the Industry", Bair looks to the future of the industry, noting that: "All appraisals so far indicate limited fish stocks in Barbadian waters".[119] She continues:

> "One way in which the *limitations of local waters* can be overcome is by extending the range of fishing activities. This step is inevitable, and such projects as education of fishermen in the principles of navigation and tracing of migrations of the Flying fish, indicate that it is already being contemplated. It is likely that these long range activities *will be carried out* in the more productive waters of the Caribbean ... ."

In other words, in 1962, fishing for flying fish was carried out solely in local waters.[120] As of 1962, fishing further afield was being contemplated, but nothing more. In the event, it was not until the late 1970s that the range of fishing activities was extended to waters off Tobago.

84 Thus, consistent with Trinidad and Tobago's Counter-Memorial, Bair's paper shows that it is inconceivable that Barbados' flying fish fleet could have fished off Tobago at the times alleged by Barbados. It should be noted that all the above material was omitted from the exhibit to Barbados' Reply.

85 Barbados' careful selection of the evidence goes yet further. It is a matter of some astonishment that Barbados has omitted any reference in its pleadings to a two volume report prepared in 1982 by the FAO entitled "Report of the Barbados Fisheries Development Project Preparation Mission".[121] This

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118 Exhibit 7, p. 45.

119 Exhibit 7, p. 80.

120 Cf. the position so far as concerns whaling and fishing for red snapper, as to which Bair makes it clear that these activities had been carried out "in alien territory". Exhibit 7, p. 34.

121 Exhibit 8. By contrast, Barbados has seen fit in its Reply to refer to a 1995 FAO Report on Eritrea. See fn. 548.

Report is highly material. It was prepared following a request from the Government of Barbados for "IDB assistance in financing a fisheries development project as a part of the Government programme to expand fish production and improve marketing efficiency".[122] The Report was compiled following two lengthy site visits to Barbados, and the team compiling the Report was made up of seven members, who "worked closely with the Fisheries Division of the Ministry of Agriculture".[123] Further, at a final meeting held at the Ministry of Agriculture, chaired by the acting Minister, and attended by the Permanent Secretary, the Deputy Permanent Secretary (Ministry of Agriculture), officials of the Ministry of Finance, the FAO Representative and a staff member of the IDB local office, "full agreement was reached on the mission's findings and proposals".[124]

86 One of the central proposals of the Report was that new offshore fishing vessels be built and day boats be converted to carry ice and engage in offshore fishing.[125] Credit would be provided in this respect. At pages 8-9 of the Report, the mission describes the Barbadian fishing fleet (as of 1982). There are three types of standard fishing vessel. These are made up as follows:

(1) There are 190 dories, which "are too small ... to operate in open waters around the island";

(2) There are 341 day boats, which "operate in a zone not exceeding 30 nautical miles from shore" (emphasis added);

(3) There are 10 offshore vessels "(locally known as ice-boats)" that operate up to 160 miles from shore. As the Report notes: "Since these

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122 Exhibit 8, para. 2.1.

123 Exhibit 8, para. 2.3.

124 Exhibit 8, para. 2.4.

125 Exhibit 8, para. 1.5(ii).

vessels were introduced only recently, little experience exists as to the feasibility of fishing during the off-season".[126]

87 A more detailed consideration of the Barbadian fleet is contained at Annex 2 to the Report. This Annex contains the same figures as to range that are to be found in the passages referred to above. However, greater precision is given to the date of introduction of the offshore vessels (the ice boats). The Report notes at paragraph 30:

> "Offshore vessels. These vessels have only been in operation for about one year and boat owners have been keeping records of daily landings and catch rates. These figures ... are detailed in Table 4. ..."

88 There were no "offshore vessels" before the late 1970s, as the FAO Mission and the Barbadian Ministry of Agriculture and other Barbadian officials all acknowledged. Barbados' claim to traditional artisanal fishing off Tobago is a regrettable invention[127].

89 Strictly speaking, nothing further need be said in relation to Barbados' claim. In its Reply, Barbados continues (and amplifies) the emphasis on the economic importance of its flying fishery.[128] On the one hand, much of the argument is a repetition of the Memorial, albeit in more colourful language; on the other hand, no argument on economic importance can make up for fact that the fishing in the area now claimed by Barbados commenced only in the late 1970s. It is true that, apparently with the help of funding of the International Development Bank, Barbados drastically increased its fishing capacity in the 1980s and 1990s; but that increase cannot be at the expense of Trinidad and Tobago.

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[126] Exhibit 8, paras. 3.11-3.14.

[127] It may also be noted that, since the 1940s, Barbados had had legislation requiring the registration of all fishing vessels. Yet, it has been unable to provide any evidence of the alleged schooners and sloops or any long ranged vessels engaged in fishing for flying fish off Tobago prior to the introduction of the ice boats.

[128] Barbados Reply, paras. 369-380.

90 There are three points on the evidence supporting this aspect of Barbados' argument to which Trinidad and Tobago considers a specific response is merited:

(1) Barbados confuses the importance to it of its fishery generally and the specific importance of the flying fishery (which is the basis of the claim). For example, it is claimed – by reference to a June 2005 report presumably produced with these proceedings in mind[129] – that the true value of the fishery is $94 million.[130] The report, however, shows that the equivalent value of the flying fish fishery is $37 million.[131]

(2) The claim that the best evidence of the contemporary importance of the flying fishery is the witness statements of the Barbadian fishermen exhibited to Barbados' Memorial (and the President of the Barbados National Union of Fisherfolk Organisations) cannot be taken seriously.[132] Their evidence on the catching of flying fish off Tobago prior to the late 1970s is either mistaken or false and must be rejected. It is not to be supposed that their evidence on the importance of the industry, as to which they would have the same interest to exaggerate, is any more credible.

(3) Barbados' comments on Trinidad and Tobago opening up its ports to Taiwanese vessels are both incorrect and misleading.[133] It is alleged that Trinidad and Tobago charges a fee of $30,000 per week to such Taiwanese vessels. The source of this figure is a 1990 newspaper

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129 Barbados Reply, App. 60. Barbados also relies on an "on-the-spot-survey of fishermen" conducted in May 2005 by its Ministry of Agriculture to show how many of its fishermen fish off Tobago and the relative importance of that fishing. Barbados Reply, App. 61. This document was evidently produced for the purpose of these proceedings and is of no evidential value.

130 Barbados Reply, para. 371.

131 Barbados Reply, Volume 6, App. 60, p. 725.

132 Barbados Reply, paras. 373-374.

133 Barbados Reply, para. 380.

article. It is incorrect as well as irrelevant. In fact the Port Authority of Trinidad and Tobago leases land and port facilities at Port of Spain to the National Fisheries Company (1995) Limited, a company owned by Taiwanese interests, for approximately $60,000 per annum. The values of the vessels using the port that are put forward by Barbados are similarly inaccurate.[134] Barbados may also be seeking to give the impression that Taiwanese vessels fish in Trinidad and Tobago's EEZ.[135] They are not licensed to, and do not, fish there.[136]

91 Barbados also maintains its claim that the flying fish fishery is of less importance to Trinidad and Tobago.[137] The simple point is that, while the fishing from Tobago is more truly artisanal, it is of considerable importance to Tobago and the growth of the exploitation of the flying fish stocks should not be curtailed to benefit Barbados' ice boats.

C. International Law and the Barbadian Claim in the Western Sector

92 That is enough to dispose of Barbados' claim that the boundary in the western sector should be "adjusted" to take account of its fishing interests by effectively depriving Tobago of any EEZ or continental shelf to its north, west

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134 Twelve to twenty vessels frequent the port at any one time. The vessels may be carrier vessels or fishing vessels that use the port for offloading fish and re-stocking. There are also dry dock facilities at the port (dry docking and maintenance activities are also carried out in other parts of the Caribbean such as Guyana, Martinique, Suriname, Curacao and Venezuela). Approximately half of the vessels in port are likely to be under 24 metres and around 5 years old, with a value less than $ 1 million. The remaining half will be 10-30 years old, and so their value will be much lower than the $ 1.5 to 2.5 million alleged by Barbados at Reply, para. 380. The carrier vessels and fishing vessels that exceed 24 metres range between 50-70 metres and have a capacity of 100-200 tonnes.

135 Barbados Reply, para. 380.

136 The licensing powers are to be found at s. 26 of Trinidad and Tobago's Archipelagic Waters and Exclusive Economic Zone Act, 1986. Trinidad and Tobago Counter-Memorial, Volume 4, tab. 5.

137 Barbados Reply, paras. 381-387.

and north-east.[138] However, even if the facts were as Barbados alleges them to be, the Barbadian claim would be unfounded in law.

93 Trinidad and Tobago has already set out its arguments on this issue in the Counter-Memorial [139] and will not repeat them here. The point is a very simple one: even if there was the long history of "traditional artisanal fishing" by "Barbadian fisherfolk" which Barbados has sought to portray, that would be relevant only to access for Barbadian vessels to the waters off Tobago; it would not have the extraordinary effect of depriving Trinidad and Tobago of all rights to a shelf or EEZ off Tobago and transferring those rights to Barbados. That is clearly the way in which historic fishing interests have been accommodated within the modern regime of the law of the sea by the 1982 Convention, by the relevant jurisprudence and by State practice. It has also been the way in which Barbados and Trinidad and Tobago dealt with questions relating to Barbadian fishing interests until very recently.

94 The history of the dealings between the Parties on this matter has been comprehensively set out in the Trinidad and Tobago Counter-Memorial.[140] In its Reply, however, Barbados has attempted to misrepresent both the nature of those dealings and the inferences which Trinidad and Tobago has submitted should be drawn from them.[141] This Rejoinder will, therefore, first deal with those misrepresentations before responding to the main Barbadian submissions on the law relating to the impact of historic fisheries upon a single maritime boundary.[142]

(1) Barbados misrepresents the Nature and Effect of the Dealings between Itself and Trinidad and Tobago regarding fisheries

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138 On Barbados' claim, 60% of the coastline of Tobago generates no EEZ or continental shelf at all. Trinidad and Tobago Counter-Memorial, para. 4.

139 Trinidad and Tobago Counter-Memorial, Chapter 2, esp. paras. 42-56 and 80-89, and Chapter 5, paras. 206-223.

140 Trinidad and Tobago Counter-Memorial, Chapter 2.

141 Barbados Reply, paras. 66-71, 337-350 and 397 et seq.

142 Those submissions are set out in Barbados Reply, paras. 388-421.

95 In its Reply, Barbados attempts to distort the historical record by misrepresenting the dealings between the two States regarding fishing off the island of Tobago in three important respects:-

(1) Barbados alleges that Trinidad and Tobago has "adamantly refuses"[143] to "permit limited transboundary access" to the Barbadian fishing vessels;

(2) Barbados asserts that "During the negotiations, Trinidad and Tobago acknowledged that Barbadians had historically fished off the island of Tobago";[144] and

(3) Barbados denies that it ever acknowledged that the areas it now claims south of the median line were subject to the sovereignty of Trinidad and Tobago and asserts that it consistently laid claim to areas which it now claims south of the median line on the basis of "historic fishing rights".[145]

96 All of these assertions by Barbados are false, as the record of the negotiations shows.

97 In addition, Barbados misrepresents Trinidad and Tobago's submissions regarding the inferences to be drawn from the negotiating record by portraying Trinidad and Tobago as advancing an argument of estoppel.[146] But Trinidad and Tobago's case does not rest upon estoppel. As demonstrated below, Trinidad and Tobago invites the Tribunal to draw certain inferences from the history of dealings between the Parties regarding fisheries but that is quite different from a technical argument of estoppel.

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143 Barbados Reply, para. 413; see also para. 397.

144 Barbados Reply, para. 69.

145 Barbados Reply, paras. 67-68 and 3.38-3.50.

146 Barbados Reply, paras 3.37-3.50.

(a) Trinidad and Tobago has not refused Barbadian fishing vessels access to the waters off Tobago

98 Despite the allegations about Trinidad and Tobago's supposedly having "adamantly refused" access for Barbados' fishing industry to the Trinidad and Tobago EEZ, it is clear that the question of access is not before the Tribunal as Barbados has made plain that it is not seeking access in the present proceedings.[147] Nevertheless, Trinidad and Tobago cannot let these unfounded allegations stand. The history of the dealings between the Parties makes abundantly clear that there has been no refusal (whether "adamantine" or otherwise) on the part of Trinidad and Tobago to permit Barbadian fishing vessels access to the EEZ off the island of Tobago.

99 It was Trinidad and Tobago which took the initiative in submitting a draft agreement on access to Barbados in April 1987. [148] That draft did not prove acceptable to Barbados which argued for different conditions. [149] Negotiations followed over the next three years, [150] culminating in the adoption of the 1990 Agreement which created a regime of access for Barbadians to the waters around Tobago. When that Agreement expired at the end of 1991, Trinidad and Tobago offered to extend it but that offer was declined by Barbados which wanted to negotiate a fresh agreement.[151]

100 Trinidad and Tobago continued to express willingness to negotiate a regime of access after the offer mentioned above was declined. Between 2002 and 2004, Trinidad and Tobago held four rounds of negotiations with Barbados the purpose of which was to conclude an agreement on a regime of access.[152]

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147 See, most recently, the statement at Barbados Reply, paras. 119-123 and 400.

148 Trinidad and Tobago Counter-Memorial, Annex Volume 5, No. 10, p. 7.

149 Loc. cit., p. 8.

150 Trinidad and Tobago Counter-Memorial, para. 51.

151 Trinidad and Tobago Counter-Memorial, para. 56 and Annex Volume 3, Nos. 11 and 12.

152 Trinidad and Tobago Counter-Memorial, paras. 79-89. See also the Joint Records of the negotiations, Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part 2, Nos. 1, 3, 5 and 6. The Transcript which Barbados has now submitted of the Fourth Round of Negotiations (Barbados Reply

While these four rounds did not achieve agreement, it was the view of the Trinidad and Tobago Government that securing agreement on a regime of access could be achieved by negotiation. As late as 2 February 2004, that appeared to be the view of Barbados. On 2 February 2004, the Barbados Ministry of Foreign Affairs and Trade issued what it described as a "Statement by the Government of Barbados on the Status of Fisheries Negotiations with the Government of Trinidad and Tobago". That Statement noted that –

> "Barbados has been engaged in formal negotiations with Trinidad and Tobago since March, 2002, in an effort to arrive at a mutually satisfactory Bilateral Fishing Agreement to replace the previous one-year agreement which expired in 1991. To date we have held four rounds of negotiations and have made considerable progress on the drafting of a new text.
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> ...
>
> "Neither side has indicated that the talks have broken down, and there is in fact, a clear determination, as evidenced in the minutes of our last round, to reconvene the talks at the earliest opportunity.
>
> "We would therefore find it perplexing, given these circumstances, if steps were taken at this time to request the intervention of the CARICOM Secretariat in an issue which is very much still the subject of active bilateral negotiations. Having just concluded a substantive meeting in November, at which progress was made and follow-up mutually agreed upon, Barbados sees no need now to refer the matter to the CARICOM Secretariat.
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> ...
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> "The Government of Barbados reiterates its commitment to the bilateral negotiating process and its intention to continue to engage Trinidad and Tobago on these matters."[153]

Annex, Volume 3, No. 36 at pp. 603-630) shows the readiness of Trinidad and Tobago to make concessions in order to achieve agreement.

[153] Barbados Reply, Annex Volume 3, No. 40. In this Statement, issued just over two weeks before it resorted to arbitration, Barbados appeared to share what it now criticizes (Barbados Reply, para. 68, note 108) as Trinidad and Tobago's approach of describing these four rounds of talks as "the fisheries negotiations". It is also noticeable that there is no mention in this Statement of any link between what both States then called the fisheries negotiations and the subject of the maritime boundary negotiations. It is also noticeable that the Prime Minister of Barbados in his press conference statement of 16 February 2004

Indeed, it was the view of Trinidad and Tobago that agreement on a fisheries agreement could be achieved ahead of a conclusion of the maritime boundary negotiations and this point was raised by Prime Minister Manning at his meeting with Prime Minister Arthur on 16 February 2004.[154]

101 The record shows quite clearly that, contrary to what is now suggested by Barbados, Trinidad and Tobago has consistently been prepared to conclude an agreement with Barbados to permit access for the Barbadian fishing industry to the Trinidad and Tobago EEZ off the island of Tobago.

(b) Trinidad and Tobago has not acknowledged that Barbados has "traditional fishing rights" off Tobago

102 At paragraph. 69 of its reply, Barbados alleges that "during the negotiations, Trinidad and Tobago acknowledged that Barbadians had historically fished off the island of Tobago". The passage in the Joint Reports which Barbados cites as the basis for its assertion [155] is the following (taken from the Joint Report of the Fourth Round of Maritime Boundary Negotiations in 2002) –

> "The Trinidad and Tobago delegation also indicated that it acknowledged *the importance that the Barbados delegation attached to fisheries*, but was not in a position at this stage to engage in a general exchange on fisheries, but would be willing to take note of any Barbados proposals and transmit them to the competent authorities, in preparation for the opening of a round of negotiations on fisheries ..." (Emphasis added.) [156]

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announcing his decision to go to arbitration, referred only to the four rounds of boundary negotiations. He did not suggest that the fisheries negotiations could not achieve agreement. Indeed, he did not mention them at all.

[154] Trinidad and Tobago Counter-Memorial, para. 95 and Annex Volume 5 No. 29. While the Parties differ over much of what happened at this meeting (compare the affidavit of Ms T. Marshall, Barbados Reply Annex, Volume 3 No. 59, with the affidavit of Mr Andre Laveau (Exhibit 4) and the report at Trinidad and Tobago Counter-Memorial, Annex Volume 5, No. 29, para. 14.), even Barbados' witness accepts that Prime Minister Manning expressed a willingness to conclude an agreement on access for Barbadian fishing vessels to the resources of the Trinidad and Tobago EEZ (Marshall at para. 11).

[155] Barbados Reply, para. 69, n. 111.

[156] Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) No 4, p. 5 (also reproduced in Barbados Reply, Annex Volume 2, No. 23, p. 266).

To acknowledge that Barbados attached importance to fisheries is not at all to acknowledge that the assertions made by Barbados were well-founded historically. Moreover, a glance at the full text of the Joint Report of the meeting also makes clear that the remark by the Head of the Trinidad and Tobago delegation was made in response to a comment by his opposite number that –

> "the matter of fisheries was of prime importance *to both Barbados and Trinidad and Tobago,* and that the Barbados Government had hoped that the two sides would have been able to work out a mechanism to reach a definitive agreement on this matter prior to the start of the fishing season. This unfortunately had not been the case." (Emphasis added.)[157]

The record thus makes clear that what was being referred to was an agreement on access, a matter quite distinct from the resolution of the maritime boundary issue.[158]

(c) Barbados made no "consistent claim" to the areas off Tobago which it now claims as its own

103 In order to boost its claim in the current proceedings, Barbados now asserts that it had always insisted that it was entitled to a boundary south of the median line in the western sector. There are three limbs to this assertion:

(1) Barbados always insisted that negotiations on fisheries were part and parcel of the maritime boundary negotiations;

(2) Barbados never acknowledged that Trinidad and Tobago had sovereign rights over the areas now claimed by Barbados; and

(3) Barbados always asserted its own rights over those areas.

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157 Loc. cit., p. 3.

158 See, e.g., the statement of the Trinidad and Tobago Head of Delegation at p. 4.

104 With regard to the first limb, it is true that Barbados at various times expressed a desire to link negotiations on the two issues of fisheries and maritime boundaries but it is simply not the case that "the parties were in dispute from the first meeting onward as to the role of fisheries in the delimitation negotiations".[159] More importantly, as Trinidad and Tobago demonstrated in its Counter-Memorial, [160] (and as is clear from the titles of the Joint Reports) this view did not prevail and the fisheries issues were discussed in separate sessions.[161]

105 So far as the second limb is concerned, the fact is that Barbados spent nearly twenty years engaging in a negotiating process the essence of which was to determine how Barbadian fishing vessels were to gain access to the EEZ of Trinidad and Tobago. Barbados has made clear that the waters in which its fishing industry was interested were those which it now claims.[162] Yet those were the very waters with regard to which it sought a regime of access.

106 Thus, while the 1990 Agreement did not define the area to which it applied, it is plain that – at the very least – it substantially overlapped with the area now claimed by Barbados.[163] The Agreement was expressly stated to be about access for Barbadian fishing vessels to the EEZ of Trinidad and Tobago.[164]

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159 Barbados Reply, para. 68. For this assertion, Barbados relies on the opening statement of Sir Harold St. John at the first round of maritime boundary negotiations in July 2000 (Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) No. 1, pp. 17-20; also at Barbados Reply, Annex Volume 2, No. 16, pp. 169-172). What Sir Harold actually said was that "at the launching of the bilateral agenda [between the two States] ... it was agreed that the two countries would address a number of issues in particular maritime delimitation, fisheries as well as trade, tourism, air services, culture and sports". It was also agreed that priority would be given to the delimitation of boundaries and fishing" (ibid., p. 19/171). There was no dispute and it is noticeable that Sir Harold clearly spoke of "maritime delimitation *and* fisheries" as two issues (amongst a long list of matters not obviously connected with one another), rather than adopting what is now Barbados' stance that fisheries are an inherent part of maritime delimitation.

160 Trinidad and Tobago Counter-Memorial, para. 80. See also para. 100 and footnote 150, above. The Statement issued by Barbados on 2 February 2004 (Barbados Reply Annex, Volume 3 No. 40) clearly recognizes the separate character of the two sets of negotiations.

161 The transcripts which Barbados has now submitted confirm this conclusion; see above, para. 15. See also the letter from the Deputy Prime Minister of Barbados, Barbados Reply Annex Volume 2 No. 21.

162 See, most recently, Chapter 7 of the Barbados Reply.

163 Trinidad and Tobago Counter-Memorial, para. 53.

164 See the last para. of the Preamble and Article II.

The reference to the EEZ makes clear that what was in issue was an area beyond the territorial sea of Trinidad and Tobago.[165] But Barbados' current claim leaves Tobago with no EEZ all in the areas where flying fish are caught, so it is plain that the area in which the Agreement operated is contained within the area now claimed by Barbados.

107 In its Reply,[166] Barbados seeks to explain away the significance of the 1990 Agreement by focussing on Article XI, which provides that –

> "Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its internal waters, archipelagic waters, territorial sea, continental shelf or Exclusive Economic Zone; nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent."[167]

This provision was proposed by Trinidad and Tobago in order to ensure that the grant to Barbadian vessels of access to the Trinidad and Tobago EEZ was not subsequently relied upon by Barbados as the basis for a challenge to Trinidad and Tobago's sovereignty in the area in question. It might be important if Trinidad and Tobago were arguing that the 1990 Agreement by itself operated to estop Barbados from making its present claim. But that is not the argument advanced by Trinidad and Tobago.[168] Trinidad and Tobago's case is that until very recently Barbados had not advanced a claim to the areas it now seeks to take from Trinidad and Tobago in the Caribbean sector but rather had sought access for its fishermen on the basis that the waters to which access was sought formed part of the Trinidad and Tobago

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165 See UNCLOS Article 55. The territorial sea was, in any event, excluded by Article III (2) (i) of the Agreement.

166 Barbados Reply, paras. 339-340.

167 Trinidad and Tobago Counter-Memorial, Annex Volume 2(1) No. 7.

168 See, below, paras. 113-115.

EEZ. Article XI in no way affects that argument[169]. It is a reservation of rights which does not alter the simple facts that –

(1) at the time Barbados had not asserted any rights over the EEZ in the area south of the median line;

(2) the Agreement as a whole makes clear that it deals with Barbadian access to the Trinidad and Tobago EEZ;[170] and

(3) if the area which Barbados now claims was indeed part of its EEZ then there would have been no point in the Agreement since all of the fishing areas to which it related would have been Barbadian anyway.

108 The previous draft agreements, the discussions about a successor to the 1990 Agreement, Barbados' own statements to its fishing industry,[171] and the four rounds of fisheries negotiations between 2002 and 2004 also proceeded on the basis that Barbados was seeking access to waters which were part of the EEZ of Trinidad and Tobago.[172]

109 The third limb of the Barbadian argument is wholly unsupported. In a desperate attempt to conceal the fact that it never pressed a claim to the areas off Tobago south of the median line, Barbados is reduced to saying that its Head of Delegation's comment at the first round of maritime boundary negotiations that "Barbados did not accept that there were any special circumstances relevant to the present case" [173] can be explained away on the following basis –

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169 See, paras. 48-49 above

170 See the Preamble and Article II.

171 See, e.g., the press release No. 177/92 (Exhibit 6) discussed at para. 49, above.

172 See, e.g., the Joint Record of the Second Round of negotiations to conclude a Barbados/ Trinidad and Tobago Bilateral Fisheries Agreement (Trinidad and Tobago Counter-Memorial Annex Volume 2(2) Part 2, No. 3, especially pp. 1 and Article 7 of the draft agreement submitted by Barbados at p. 19).

173 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) No. 1, p. 9; Barbados Reply, Annex Volume 2, No. 16, p. 161.

> "During the first two rounds of negotiations, Barbados rejected Trinidad and Tobago's claims of relevant circumstances requiring the median line to be moved to the north. Barbados did not say that there were no relevant circumstances in its favour to the south of the median line."

Indeed it did not, which is rather striking, given that we are now told that Barbados always regarded fisheries as an integral part of the boundary negotiations.[174] If that were so, one might have expected any Barbadian claim to an "adjustment" of the boundary line south of the median line on account of Barbadian fishing interests to receive some mention. Instead, Barbados stated (twice [175]) that it saw no relevant or special circumstances which would justify a departure from the median line. In addition, its delegation referred to the "tripoint" between Barbados, Trinidad and Tobago and St Vincent and the Grenadines.[176] If the maritime boundary between Trinidad and Tobago and Barbados were indeed located where Barbados now claims, there would be no such tripoint and the only relevant tripoint would be one much further south (and west) between Trinidad and Tobago, Barbados and Grenada.

110 The fact is that it was not until much later in the negotiations that there was any mention of the possibility of shifting the boundary south of the median line in the western sector. Even then, Barbados never advanced anything like its present claim. It was not until the third round of maritime boundary negotiations in July 2001 that Barbados spoke – in the most general terms – of "geographical, geomorphological, historical and socio-economic factors, including relevant coastal ratios, exploration, fisheries, surveillance and search and rescue, which would cause a shifting of the line in Barbados'

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174 Barbados Reply, para. 68.

175 See also Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) No. 1, p. 11; Barbados Reply, Annex Volume 2, No. 16, p. 163.

176 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) No. 1, p. 12; Barbados Reply, Annex Volume 2, No. 16, p. 164.

favour to the south of the provisional median line".[177] No line was mentioned and the suggestion that several of these factors (such as search and rescue) are relevant to maritime boundary delimitation is fanciful.[178]

111 At the fourth round of boundary negotiations, held in early 2002, all that Barbados did was to speak in general terms of circumstances which might lead to an adjustment of the boundary line south of the median line.[179] There was no suggestion that Barbados claimed all of the area between Tobago and the median line as it does now.[180] Indeed, if it really had such a claim in mind, one must question whether it conducted either the boundary or the fisheries negotiations in good faith. In the former, it had ample opportunity to set out its claim but did not do so. For example, at the fourth round of boundary negotiations in 2002, the Head of the Barbados delegation, having failed to persuade the meeting to discuss fisheries as well as boundary issues, commented that –

> "The interconnection of the fisheries and boundary issues is underscored by the fact that Trinidad and Tobago's opening position line comes within 42 miles of the coast of Barbados. Barbados finds the idea of having to ask Trinidad and Tobago for permission to fish 42 miles from its own coast to be unacceptable."[181]

It is difficult to see that such a remark could be made in good faith if Barbados already had up its sleeve a claim which would force Trinidad and Tobago to ask Barbados for permission to fish a mere *twelve* miles from its own coast. A

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177 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part I, No. 3, pp. 7-8; also reproduced at Barbados Reply, Annex Volume 2, No. 20, pp. 251-2.

178 It is noticeable that the only one of this list of factors on which Barbados now seeks to rely is fishing.

179 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part I, No. 4, p. 7; also reproduced at Barbados Reply, Annex Volume 2, No. 23, p. 268.

180 And the transcript on which Barbados now relies, suggests that Barbados continued to refer to the tripoint of Barbados, Trinidad and Tobago and St Vincent and the Grenadines (transcript at Barbados Reply, Annex, Volume 2, No. 24, p. 289) as to which, see above, para. 109.

181 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part I, No. 4, p. 12; also reproduced at Barbados Reply, Annex Volume 2, No. 23, p. 273.

far likelier explanation is that Sir Harold St John had no idea at all of what was to become Barbados' claim and nor did anybody else in the Government of Barbados. As for the fisheries negotiations, to have pursued negotiations for an agreement to allow Barbadians to fish in Trinidad and Tobago's EEZ while intending to claim the relevant part of that EEZ is wholly incompatible with the notion of good faith negotiation.

112 Even the statements made by Barbadian delegates and advisers at the final round of boundary negotiations in November 2003, on which Barbados now sets such store, fall far short of establishing that at that meeting Barbados presented its present claim "in a legally and technically precise, coherent and comprehensible manner".[182] On the contrary, the Barbados delegation made clear that the slide show given by their advisers was not an official position of Barbados, as is clearly stated in the Joint Report [183] and in the transcript which Barbados has now submitted and on which it apparently proposes to rely.[184]

113 Finally, it is important to correct a misrepresentation by Barbados of Trinidad and Tobago's arguments regarding the 1990 Agreement. Contrary to what is suggested by Barbados,[185] Trinidad and Tobago has not asserted that the 1990 Agreement operated to estop Barbados from denying Trinidad and Tobago's title to the areas which Barbados now claims.

114 Trinidad and Tobago's argument is quite different. It is that the 1990 Agreement – read together with the prior and subsequent negotiations regarding fisheries – proceeded on the basis that what was involved was a regime by which Trinidad and Tobago would grant access for Barbadian

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182 Barbados Reply, para. 77. See further Chapter 2, para. 32, above.

183 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part I, No. 5, pp. 5 and 9.

184 Barbados Reply, Annex Volume 3 No. 36 at pp. 575-6, 579, 580 and 582-4.

185 Barbados Reply, para. 337 et seq.

vessels to Trinidad and Tobago's EEZ. That is made clear time and again in the negotiating record and is manifest in the text of the 1990 Agreement.[186]

115 That record shows that, until it filed its Memorial in the present proceedings, Barbados had treated the issue of fishing off the coast of Tobago as primarily a matter of access to the Trinidad and Tobago EEZ,[187] not as something which might sustain a claim by Barbados to almost the whole of the EEZ and shelf off Tobago. That claim came "new-minted" in late 2004 and should be treated accordingly. By contrast, the earlier approach of Barbados was in accord with the way in which such fisheries matters are treated by international law.

(2) The Position taken by Barbados in its Reply is contrary to the 1982 Convention, the Relevant Jurisprudence and State Practice

116 In Chapter 7 of its Reply, Barbados responds to the submissions of Trinidad and Tobago under four headings:-

(a) "Barbados' nationals acquired non-exclusive rights to engage in traditional artisanal fishing, which rights survive the establishment of new maritime zones";[188]

(b) "UNCLOS, general principles of law, customary international law and international human rights law all mandate the survival of traditional artisanal fishing rights notwithstanding reclassification of maritime zones formerly part of the high seas";[189]

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[186] See, e.g., the preamble and the other provisions cited in Trinidad and Tobago Counter-Memorial, para. 53.

[187] That was true as late as 2 February 2004; Barbados Reply, Annex Volume 3 No. 40.

[188] Barbados Reply, paras. 389-396.

[189] Barbados Reply, paras. 397-415.

(c) "Adjustment of the median line to ensure the ability of Barbados' fisherfolk to continue to exercise their rights would be appropriate and consistent with UNCLOS";[190] and

(d) "The judgments in *Qatar v. Bahrain* and *Cameroon v. Nigeria* do not cast doubt on the relevance of artisanal fishing rights to maritime boundary delimitation".[191]

117 While this is a somewhat cumbersome way of dealing with the issues, for the convenience of all concerned, Trinidad and Tobago has structured its response around the same headings. It should be made clear, however, that Trinidad and Tobago sees the underlying issues as far simpler.[192]

(a) "Barbados' nationals acquired non-exclusive rights to engage in traditional artisanal fishing, which rights survive the establishment of new maritime zones"

118 This elaborate argument is an attempt to respond to the simple point that even if Barbadian fishing vessels had fished off Tobago for many years prior to 1986, that fact would not have given Barbados sovereign rights in those waters.[193] This statement had seemed to Trinidad and Tobago to be self-evident. Prior to 1986 (when Trinidad and Tobago proclaimed its EEZ), the waters in question were part of the high seas (although the seabed and subsoil were, of course, part of the continental shelf of Trinidad and Tobago and thus subject to its sovereign rights). Fishing by Barbadian nationals in those waters could not give rise to any sovereign rights over those waters, because (a) the high seas were *res communis*; (b) the conduct of private parties does not normally give rise to sovereign rights and (c) fishing by private parties in

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190 Barbados Reply, paras. 416-419.

191 Barbados Reply, paras. 420-421.

192 See paras. 93-94, above.

193 Trinidad and Tobago Counter-Memorial, para. 212.

the high seas could not affect the sovereign rights of the coastal state in the seabed.

119 Barbados accepts the first proposition, endeavours to finesse the second and then – without actually discussing it – attempts the extraordinary coup of refuting the third.

120 The first step in this remarkable chain of reasoning on the part of Barbados is to quote – very selectively – from an article by Sir Gerald Fitzmaurice about the law and procedure of the International Court of Justice between 1951 and 1954 which deals with the subject of "non-exclusive rights".[194] Fitzmaurice advanced the idea (in the context of a discussion of the *Anglo-Norwegian Fisheries* case) that –

> "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 (and although they are private vessels having no specific authority) *acquired a vested interest that the fisheries of that area 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 the fishery in question, which must continue to be recognized."[195]

121 On the basis of this passage,[196] Barbados asserts that "contrary to Trinidad and Tobago's assertion, non-exclusive uses of waters formerly part of the high seas can, over time, create rights under international law".[197] Perhaps they can. Despite what is said in the Reply, Trinidad and Tobago did not assert

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194 Barbados Reply, para. 391; the quotation also appears in the Barbados Memorial at para. 117.

195 Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge 1986), p. 181 (emphasis added).

196 The passage unsurprisingly bears a close resemblance to the pleadings of the United Kingdom in the *Anglo-Norwegian Fisheries case* (in which Sir Gerald appeared as counsel for the United Kingdom). The Court did not, of course, accept the British case.

197 Barbados Reply, para. 392.

that non-exclusive use of waters formerly part of the high seas could not create *rights* under international law; what Trinidad and Tobago actually said[198] was that such uses of the high seas could not generate *sovereign rights*. Non-exclusive rights to fish in the EEZ of another State are not sovereign rights and it is only sovereign rights which are in issue in the present proceedings.

122 Barbados appears to accept the principle – clearly stated by Fitzmaurice – that such rights can only be "non-exclusive rights"; as the italicised words make clear, in the passage quoted Fitzmaurice was referring to a right of access to the fisheries for the vessels of the State concerned, not to sovereign rights over the waters in question. Moreover, a few pages earlier, he referred to "the well-established rule of international law according to which State rights can only be acquired through the acts of persons in the service of the State" or authorized to act on its behalf.[199] That rule was "of chief importance in regard to claims to sovereignty over territory or waters" but could also arise in other connections. He then added that –

> "It has long been well settled that the hunting, whaling, guano collecting, exploring and other similar activities of private individuals acting on their own, however numerous and extensive, do not *per se* confer on their State a title to sovereignty over the areas concerned."[200]

123 That well-established rule did not, however, prevent Barbados from taking the second step in its argument, namely to assert that the supposed history of traditional artisanal fishing in the waters off Tobago means that the median line should be adjusted to ensure that those waters fall within the Barbadian EEZ.

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198 Trinidad and Tobago Counter-Memorial, para. 212.

199 Fitzmaurice, above, at p. 177.

200 Fitzmaurice, above, at p. 178.

124 Although Barbados does not say so, this step involves extending Fitzmaurice's thesis about "non-exclusive rights" into a claim to "exclusive rights". Fitzmaurice had spoken of "a vested interest that the fisheries of that area should remain available to its fishing vessels (of course on a non-exclusive basis)". But Barbados is making no such claim.[201] What it claims is that the alleged activities of its fishing industry have given it exclusive rights to the EEZ and the continental shelf around much of the island of Tobago. The rights of the coastal State (which in Barbados' eyes means Barbados, rather than Trinidad and Tobago, even though we are here speaking of an area which begins only twelve miles from the coast of Tobago and is nowhere less than 58 n.m. and often as much as 147 n.m., from Barbados) are expressly described as "sovereign rights" by the 1982 Convention.[202] Moreover, they are exclusive rights – expressly described as such in relation to the continental shelf [203] and implicitly so in relation to the provisions on the EEZ, subject to the regime in Article 62 of the 1982 Convention. Neither Fitzmaurice, nor the other authorities cited by Barbados provide any authority for the proposition that a State can acquire such sovereign rights as a result of fishing on the high seas by its citizens.

125 However, Barbados' remarkable argument does not stop there, for there is a third step which is logically necessary if Barbados' claim is to succeed but which, for understandable reasons, Barbados prefers to say nothing about. That is that the supposed fishing activities of Barbadian fishing vessels off the coast of Tobago when those waters were high seas are not only said to have created an exclusive right to the resources of the water column when the waters acquired the status of EEZ and ceased to be *res communis*, they also overrode the pre-existing sovereign rights of Trinidad and Tobago over the continental shelf.

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201 Barbados Reply, paras. 119-123 and 400.

202 UNCLOS Article 56(1)(a) (EEZ) and 77(1) (continental shelf).

203 UNCLOS Article 77(2).

126 If one considers the legal position in the period immediately before the waters in question ceased to be part of the high seas and acquired the status of EEZ, it was already clear that the continental shelf below them belonged to a State. That State could only have been Trinidad and Tobago. The relevant area was closer to it than to any other State. No State other than Trinidad and Tobago had attempted to exploit or regulate the exploitation of the resources of the seabed there and no claim had been made by any other State to the continental shelf there. As the International Court held in the *Tunisia/Libya* case, fishing activities would have had no bearing on the rights over the continental shelf.[204]

127 Yet Barbados now claims not only the EEZ but also the continental shelf on the basis of supposed "traditional artisanal fishing". It does so on the basis that the Parties had negotiated to determine a single maritime boundary in negotiations in which Barbados never put forward the remarkable claim which it now asserts.

(b) "UNCLOS, general principles of law, customary international law and international human rights law all mandate the survival of traditional artisanal fishing rights notwithstanding reclassification of maritime zones formerly part of the high seas"

128 Barbados then seeks to find support in the terms of the 1982 Convention, general principles of law and customary international law (as well, remarkably, as international human rights law) for a proposition which it describes – wrongly – as being that traditional artisanal fishing rights survive the "reclassification of maritime zones formerly part of the high seas". [205]

129 The proposition is wrongly described because it is not in reality a matter of the survival of a right as the creation of an entirely new legal title. The "right" which might survive – indeed, the only right which existed before the "reclassification of maritime zones formerly part of the high seas" – is the

204 ICJ Reports 1982, p. 18 at para.100.
205 Barbados Reply, para. 397.

right of access to the fisheries. Barbados, however, is not interested in access and is at pains to stress that what is at issue is not Barbados' right to a share in the fisheries but its "right" to an adjustment of the maritime boundary.[206] That right could not have existed before the reclassification and, accordingly, it is as meaningless to speak of it having "survived" that event as it is to speak of a person born after the end of the Second World War having "survived" that war.

130 Quite apart from this logical defect, the Barbadian argument is not supported by any of the authorities on which it claims to rely. To take the 1982 Convention first, Trinidad and Tobago has already shown that the 1982 Convention addresses the preservation of existing fishing interests through requirements of access, not by depriving a State of the sovereign rights which would otherwise be its own in order to vest them in the State whose nationals have engaged in fishing activities.

131 Thus, Article 62 provides for limited access by the vessels of other States to the resources of the coastal State's EEZ. Barbados' argument that this provision is confined to the case where a coastal State has surplus stocks and is therefore inapplicable here is based on a combination of a misreading of the text and perverse logic.

132 Barbados ignores the structure of this provision and the rest of the 1982 Convention. If Article 62(3) requires the coastal State confronted with surplus stocks in its EEZ to have regard to the "need to minimise economic dislocation in States whose nationals have habitually fished in the zone", it would be perverse to read this as requiring something more – namely the sacrifice of sovereign rights over the EEZ – to such a State when there is no surplus.

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206 Barbados Reply, para 400.

133 Moreover, the other provisions on which Barbados relies – noticeably Article 47(6) – also approach the question of historic interests in terms of a continuation of existing rights, not by way of a requirement that the State possessing those interests, rather than the coastal State, should have sovereign rights in the area in question. In other words, the 1982 Convention treats these cases as one in which existing non-exclusive rights are respected, not in which those rights prevail over everything else to the extent that the coastal State loses the normal rights over the EEZ.

134 With the exception of the *Jan Mayen* case (which is discussed below and in which the circumstances were both wholly exceptional and radically different from those which exist here), the jurisprudence to which Barbados refers here comes nowhere near supporting a concept of changed sovereignty – as opposed to access – as the decisions in *Eritrea/Yemen* make clear. [207] For all the references to fishing cited by Barbados, the Tribunal there rejected the notion that vested fishing interests should affect the line of delimitation between the two States.

135 Nor does the State practice on which Barbados relies for its assertions about "traditional artisanal fishing" affecting a maritime boundary support the conclusions it invites the Tribunal to draw.

136 Barbados takes what can only be described as an innovative approach to the definition of "traditional artisanal fishing". At paragraphs. 408-9 of its Reply, relying on a passage from the *Eritrea/Yemen* award, it advances the case that the meaning of "traditional artisanal fishing" is not set in stone and changes over time. Trinidad and Tobago does not dispute that proposition. But Barbados then seeks to apply today's notion of what constitutes "artisanal fishing" to the activities of the past in such a way that almost any fishing which took place in the last century – however advanced it might have been at the time – is to be treated as "traditional artisanal fishing" if such activity

207 114 ILR 1 and 119 ILR 417.

occurring today would be regarded as artisanal. Moreover, Barbados has a similarly unorthodox approach to the term "traditional". Whatever it says now, the most its delegates were ever prepared to assert in the boundary negotiations or the fisheries negotiations was that Barbadians had fished the waters off Tobago since the 1960's.[208]

137 Barbados seeks to bolster its exceptionally broad interpretation of the phrase "traditional artisanal fishing" by reference to a 1995 FAO report on Eritrea and two treaties (between Honduras and the United Kingdom, and Australia and Papua New Guinea).[209] The FAO report does not use the phrase "traditional artisanal fishing"; it does refer to "artisanal fisheries", but it is unclear how this helps Barbados as there is no definition of this phrase, and the boats referred to are plank boats, dug out canoes and small rafts that operate within six miles of the shore.[210] The Honduras/United Kingdom treaty of 4 December 2001 makes no mention whatsoever of artisanal fishing, and merely allows for the continuation of certain specified "commercial fishing".[211] The Australia/Papua New Guinea Treaty of 18 December 1978 also does not use the phrase "traditional artisanal fishing". This treaty does refer to "traditional fishing", but defines this as "the taking, by traditional inhabitants for their own or their dependants' consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas,

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208 See, e.g., Joint Report of the First Round of Fisheries Negotiations, Trinidad and Tobago Counter-Memorial, Annex Volume 2(2), Part 2, No. 1, para. 7.

209 Barbados Reply, para. 408 and fn. 550.

210 Extract at Exhibit 9, FAO 24/95 ADB-ERI, paras. 3.44-3.55.

211 See at Annex B, para. 1. Exhibit 10.

including dugong and turtle".[212] That definition is scarcely one that Barbados' commercially operated ice boats could fulfil in the instant case.

138 Moreover, the practice to which Barbados refers – like the relevant provisions of the 1982 Convention – concerns the preservation of vested interests by access granted by the coastal State, not the complete negation of the rights of the coastal State.

139 Nor does the reference to general principles – still less the law of human rights – assist Barbados. Barbados is unable to point to any general principle which would compel the conclusion that a maritime boundary should be shifted in order to enhance protection of historic fishing rights which could be protected by means of an agreement recognizing access to fisheries in the area in question. The reference to the law of human rights is entirely beside the point as that has nothing to do with the attribution of sovereign rights between two or more States with rival claims.

(c) "Adjustment of the median line to ensure the ability of Barbados' fisherfolk to continue to exercise their rights would be appropriate and consistent with UNCLOS"

140 This argument falls with the one considered in the preceding paragraphs. Only two further comments are required.

141 First, the only decision of an international tribunal which comes anywhere near to providing support for Barbados is the decision in *Jan Mayen.* [213] But the Reply completely fails to respond to the points made in the Counter-Memorial, namely that *Jan Mayen* was a wholly exceptional case in which a populated territory with an almost total dependence on fishing faced an

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212 See at Article 1(l). Exhibit 11.

213 ICJ Reports 1993, p. 38.

overseas territory with no fixed population to which fisheries were irrelevant, and that the circumstances of the present case bear no relation to that situation.

142 Secondly, the claim [214] that the present case falls within the "catastrophic repercussions" test in the *Gulf of Maine* [215] case is fanciful and is made without any support from the evidence. On Barbados' own case, Trinidad and Tobago has exercised jurisdiction over the area between the Tobago coast and the median line without any catastrophic repercussions for the Barbadian people for nearly twenty years.

(d) *"The judgments in Qatar/Bahrain and Cameroon/Nigeria do not cast doubt on the relevance of artisanal fishing rights to maritime boundary delimitation"*

143 Barbados' final comment – on the decisions in *Qatar/Bahrain* [216] and *Cameroon/Nigeria* – overstates the significance attached to those cases by Trinidad and Tobago and misunderstands the significance which they do possess.

144 *Qatar/Bahrain* involved a rejection of a claim based on supposed historic fishing because it was unsupported by evidence of any degree of State recognition. *Cameroon/Nigeria* saw a similar approach to the significance of oil concessions. To dismiss the former because there were other reasons distinguishing it from the present case is to argue for an approach to international jurisprudence which is even more restrictive than the most traditional approach of the common law (and which sits ill with the decidedly liberal approach to pronouncements of international tribunals which Barbados has espoused elsewhere in its Reply). To dismiss the latter on the basis that statements about oil concessions do not bear on traditional artisanal fishing is

214 Barbados Reply, para. 418.
215 ICJ Reports 1984, p. 246 at para. 237.
216 ICJ Reports 2001.

absurd.[217] The point is that extensive and long-standing practice (involving a greater degree of State intervention than does fishing) did not lead the Court to depart from the boundary indicated by normal criteria.

D. Conclusion

145 That Barbados ends its discussion of this issue in Chapter 7 of the Reply with a curt dismissal of the importance of oil concessions for fishing rights may seem bizarre but is in one sense entirely appropriate. In its Counter-Memorial (at paragraph 221), Trinidad and Tobago observed that the Barbadian argument on the western sector emphasised fishing at the expense of everything else – indeed, that no other relevant circumstance received so much as a mention. In particular, Trinidad and Tobago pointed out that Barbados ignored – and invited the Tribunal to ignore, *inter alia* –

> "the other resources of the area in question, noticeably hydrocarbons. Barbados has no claim that its nationals have traditionally engaged in activities in respect of these resources in the area bounded by points A, B, C and D, yet it expects to acquire a windfall (possibly one of enormous proportions) in relation to these resources on the back of its historic fisheries claim."[218]

After a Reply nearly four times the length of its Memorial and almost twice the length of Trinidad and Tobago's Counter-Memorial, the position is unchanged.

146 It is not difficult to see the contours of the dilemma facing Barbados. First, Barbados has necessarily based its claim in the western sector entirely on the claims to a "traditional artisanal fishery" off Tobago. But Barbados is trying to make bricks without straw, since the evidence overwhelmingly points to there being no long history of anything which could remotely be described as

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217 In fact there was evidence of artisanal fishing activity in that case but neither Party attached any weight to it.

218 Trinidad and Tobago Counter-Memorial, para. 221 .

"traditional artisanal fishing" by Barbadians off Tobago. Secondly, even if the facts were as alleged by Barbados, principle, practice, jurisprudence and the provisions of the 1982 Convention all suggest that the most the law would require is some form of access to the waters in question, not a wholesale transfer to Barbados of all rights over the EEZ and the continental shelf. But Barbados has framed its claim in such a way that the nature of any access and the conditions of its exercise are not before this Tribunal. This dilemma is, however, of Barbados' own making; it has put its faith in an "all-or-nothing" claim which every legal consideration dictates cannot succeed.

CHAPTER 5

THE EASTERN OR ATLANTIC SECTOR

A. The Basis for Trinidad and Tobago's Claim in the Eastern Sector

147. In its Reply, Barbados caricatures Trinidad and Tobago's claim in the eastern or Atlantic sector as unprecedented, as excessively complex, as involving multiple sectors, as refashioning geography and as an evident assault on the rights of third States. Epithets flow: "excessive",[219] "contrived and eccentric",[220] "to put it mildly...audacious",[221] "expansionist",[222] "unlawful",[223] "at best disingenuous",[224] "at best misleading"[225]...

148. This rhetorical torrent has only one purpose – to suggest that the Trinidad and Tobago claim line in this sector is somehow esoteric and convoluted and that it comes unprecedented and unannounced. In fact the claim is graphically a straightforward one (as even Barbados concedes[226]). It is shown once more (in comparison with the Barbados claim-line) on **Figure 5.1**. It is an equidistance line in the western or Caribbean sector, which continues as an equidistance line out into the Atlantic sector for a short distance to a turning point, Point A, and thence as a loxodrome along an azimuth of 88° to the outer edge of the continental shelf. Legally the claim was expressed in the following terms in the Counter-Memorial of Trinidad and Tobago:

> "As a coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector,

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219 Barbados Reply, para. 3.
220 Barbados Reply, para. 12.
221 Barbados Reply, para. 20.
222 Barbados Reply, para. 23.
223 Barbados Reply, para. 33. This phrase refers to Trinidad and Tobago's submission to the Tribunal of agreed joint reports, submission of which was entirely proper as a matter of international law and of which Barbados had three months' prior notice.
224 Barbados Reply, para. 35.
225 Barbados Reply, para. 35.
226 Barbados Reply, para. 2 ("under cover of a deceptively simple proposed single delimitation line"). What the Trinidad and Tobago claim line is a "cover" for Barbados does not disclose.

> Trinidad and Tobago is entitled to a full maritime zone, including continental shelf. The claim that Barbados has now formulated in the Atlantic sector cuts right across the Trinidad and Tobago coastal frontage and is plainly inequitable. The strict equidistance line needs to be modified in that sector so as to produce an equitable result, in accordance with the applicable law referred to in Articles 74 and 83 of the 1982 Convention."[227]

Within 200 n.m. from the coastline of Trinidad and Tobago this is a claim to EEZ and continental shelf. Beyond, it is a claim to continental shelf alone. The position is clear enough.[228]

B. Synopsis of Arguments and Responses as to the Atlantic Sector

149. By comparison with the simplicity of Trinidad and Tobago's claim, in its Reply Barbados makes the following propositions:

(1) The Trinidad and Tobago claim is outside the Tribunal's jurisdiction as it concerns areas beyond 200 n.m. from the coast of Trinidad and Tobago, and (in any event) as it concerns areas beyond 200 n.m. from the coast of Barbados.[229]

(2) Barbados has had no notice of a claim beyond 200 n.m.; there has been no exchange of views upon it and it is accordingly inadmissible under Article 283 of the 1982 Convention.[230]

(3) Trinidad and Tobago's claim impinges on the rights of third States – in particular Guyana and Suriname – and hence cannot be entertained.[231]

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227 Trinidad and Tobago Counter-Memorial, para. 12.

228 Barbados' assertion (Reply, paras. 15-19, 125) that "Trinidad and Tobago is effectively asking the Tribunal to delimit five different maritime zones using eight different boundary lines" simply attempts to baffle the Tribunal with numbers – and not very large numbers at that. Trinidad and Tobago's claim is to a single line which within 200 n.m. from Trinidad and Tobago is a single maritime boundary and beyond that delimits shelf rights. The coexistence of zone and shelf rights is not an invention of Trinidad and Tobago; it is a function of the coexistence of the relevant Parts of the 1982 Convention.

229 Barbados Reply, paras. 125-126, 135-145.

230 Barbados Reply, paras. 127-131.

231 Barbados Reply, paras. 57-58, 203, 260-263.

(4) Even as between Barbados and Trinidad and Tobago the claim must fail, since Trinidad and Tobago is estopped from putting forward a claim north of the equidistance line given its acquiescence in Barbados' seismic and other activities in the area.[232]

(5) Even if Trinidad and Tobago is not estopped from maintaining its claim, it cannot be defended under the law of maritime delimitation even as to areas within 200 n.m.: there is no basis as between opposite States for an adjustment of the kind proposed since Trinidad and Tobago has only a short north-east facing coastal frontage in the relevant area and its remaining coastline is not opposed to that of Barbados, facing instead south-east towards Venezuela.[233]

(6) Trinidad and Tobago's reliance on regional delimitation practice is unjustified both in principle and as to the particular cases relied on (Venezuela and Dominica).[234]

(7) Even if the Tribunal has jurisdiction as to the area beyond 200 n.m. from the coastline of Trinidad and Tobago, Barbados' rights to the EEZ in this region pre-empt any claim to continental shelf on the part of Trinidad and Tobago.[235]

(8) Beyond 200 n.m. from Barbados' coast, even if the Tribunal has jurisdiction, the Trinidad and Tobago claim must fail since the existence of an outer continental shelf is speculative whereas Barbados' EEZ rights are "certain".[236]

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232 Barbados Reply, paras. 320-336.
233 Barbados Reply, paras. 207-319.
234 Barbados Reply, paras. 178-206.
235 Barbados Reply, paras. 146-173, 271-275.
236 Barbados Reply, paras. 146-153, 271-275.

150. These issues will be dealt with succinctly in this Chapter.[237] To summarise, the position in respect of each of Barbados' arguments is as follows:

(1) There is no basis for doubting the Tribunal's jurisdiction as to areas within 200 n.m. of the coasts of either party which are claimed by either of them as against the other. An Applicant in proceedings under the 1982 Convention cannot unilaterally limit the scope of the Tribunal's jurisdiction over maritime areas in dispute between the parties. As to areas beyond 200 n.m. from the coastlines of both States, there is equally no basis for denying the Tribunal's jurisdiction between the Parties.[238] There is no need for the Tribunal to determine the outer limit of the continental shelf, and accordingly the question of the jurisdiction of the Tribunal vis-à-vis "the international community" does not arise.[239]

(2) A Trinidad and Tobago claim to continental shelf beyond 200 n.m. from its coast was put forward in the negotiations.[240] Such a claim was also clearly implicit in the 1990 Agreement with Venezuela, where an open-ended delimitation extends beyond 200 n.m. Even assuming (*quod non*) that Article 283 of the 1982 Convention applies to a Respondent State, there is no question that Barbados had notice of the claim and a sufficient opportunity to discuss it;

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237 In keeping with the character of a Rejoinder (see para. 1 above), this Chapter supplements what is said in Trinidad and Tobago Counter-Memorial, Chs. 5 & 7 and does not replace it. It is true that in its Memorial, Barbados did not present *any* argument specific to the Eastern or Atlantic sector; indeed it did not even present coastal frontages in this sector. In effect it has sought to turn itself into a respondent as to this vital aspect of the proceedings, protesting lack of notice, introducing jurisdictional objections, dragging in third parties, etc. This posture notwithstanding, the Trinidad and Tobago claim in this sector stands as presented in the Counter-Memorial. Barbados' Reply calls only for certain observations and responses.

238 See below, paras. 153-157.

239 See below, paras. 216-219.

240 See Joint Report of the 1st Round of Maritime Boundary Negotiations, Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) Part 1 No. 1, p. 6; 2nd Round, Volume 2(2) Part 1 No. 2, pp. 8-9; 5th Round, Volume 2(2) Part 1 No. 5, p. 9.

that the claim was not further discussed was entirely due to Barbados' own conduct.[241]

(3) As far as Trinidad and Tobago is aware, no third State makes any claim as to the areas to the south of its claim line and to the north of the delimitation line drawn by the 1990 Agreement with Venezuela. Neither Grenada nor Saint Vincent and the Grenadines does so. Venezuela does not do so. There is no indication that Guyana does so: its claim appears to be limited to areas south of the Trinidad and Tobago-Venezuela boundary, which marks the limit of the Tribunal's jurisdiction in any event. In short, not only is the present case formally a bilateral one; there is every indication that this reflects the reality of the situation.[242]

(4) There is no question of any estoppel. As a matter of fact, neither party has engaged in significant oil activity in the disputed area (the area between their respective claim lines, as shown in **Figure 5.1**), and Trinidad and Tobago promptly protested the very limited Barbados. seismic activity that did occur. As a matter of law, as the International Court held in the *Cameroon-Nigeria* case, oil or other activity in that area could not give rise to rights to maritime zones in the absence of an express or tacit agreement, which clearly does not exist in this case.[243]

(5) That the two States are "opposite" in relation to the Atlantic sector cannot be sustained. The Atlantic coastline of Trinidad and Tobago faces generally eastwards and is wholly unobstructed by any other coast. Various measurements of this east-facing frontage can be taken but they are within a few n.m. of each other (i.e. they are all in the range of 66-89 n.m.).[244] The argument that Trinidad

241 See below, paras. 158-165.
242 See below, paras. 166-169.
243 See below, paras. 170-178.
244 See Trinidad and Tobago Counter-Memorial, para . 198.

and Tobago only faces towards third States (a) implies incorrectly that coastlines only face in a single direction, as distinct from radiating, (b) in any event does not reflect the geographical reality of a generally eastwards-facing coastline (in a ratio of circa 8:1 to that of Barbados, whichever measurement of coastal lengths is employed).[245]

(6) The principle that regional considerations are to be taken into account is not decisive – but neither is it irrelevant, and the *Guinea/Guinea Bissau* case, which so decides, is unexceptionable. In fact the two treaty delimitations in the region (between Trinidad and Tobago and Venezuela (1990) and between France and Dominica (1987)) support Trinidad and Tobago's position.[246]

(7) As to the areas beyond 200 n.m. from Trinidad and Tobago but within 200 n.m. from Barbados, Barbados asserts that EEZ rights trump continental shelf rights and that the concept of a single maritime boundary excludes any overlapping entitlements. But continental shelf rights are historically and legally prior to the EEZ, and the International Court's treatment of the "single maritime boundary" demonstrates that it is not a distinct legal institution. Both States had continental shelf rights *ab initio* to the full extent permitted by general international law prior to the entry into force of the 1982 Convention, which anyway discloses no intention to override or displace these rights. The subsequent acquisition by Barbados of EEZ rights in respect of the water column could not have deprived Trinidad and Tobago of its pre-existing sovereign rights over the continental shelf.[247]

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245 See above, paras.69-75; below, paras. 181-192, 202-203.

246 See below, paras. 193-201.

247 See below, paras. 204-213.

(8) Trinidad and Tobago's claim involves a continuous shelf as a projection of its unobstructed eastwards-facing coastline, out to the outer limits of the continental margin as determined in accordance with the 1982 Convention.[248] The Parties agree that an outer continental shelf exists in the area east of Trinidad and Tobago and south-east of Barbados, so the issue is not speculative or hypothetical at all.

C. Delimitation in the Eastern or Atlantic Sector: The issues of principle

151. It is proposed to deal in this Section with the issues of principle raised by delimitation in the Atlantic sector, before turning in Section D (paragraphs 222-243 below) to questions concerning the precise method of delimitation. It is also proposed to deal with the issues of principle in two parts – first, as to the area within 200 n.m. of the coasts of the Parties, secondly as to the area beyond 200 n.m. from those coasts.

(1) Delimitation within 200 n.m. of the coasts of the Parties

(a) Jurisdiction and admissibility

152. In an attempt to confine the Tribunal to dealing with Barbados' claim alone, Barbados seeks to use the 200 n.m. limit from Trinidad and Tobago as a limit to the Tribunal's competence. This raises three issues: (i) the jurisdiction of the Tribunal over claims within 200 n.m. from the coast of Barbados; (ii) the scope of the dispute between the Parties and the related question of Article 283 (exchange of views), and (iii) the position of third States.

(i) Jurisdiction in principle over areas within 200 n.m.

153. It is respectfully submitted that—on the footing that the present proceedings were duly commenced by Barbados (as to which see Chapter

[248] See below, paras. 215-221.

2)—the Tribunal's jurisdiction extends as a minimum to areas claimed by both Parties which are within 200 n.m. of the coast of either of them.

154. Indeed, this is evident from Barbados' own Statement of Claim, which referred in the most general terms to "the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago".[249] As the Tribunal will recall, Barbados put forward no specific claim line in its Statement of Claim; rather it put in issue a dispute between the Parties as to their respective maritime zones, a dispute over which (in its opinion) there had been a full exchange of views. But the position would have been no different had Barbados' subsequent claim line been expressly included and depicted in its Statement of Claim. Issues of maritime delimitation before international courts and tribunals have always extended to the different claims of both parties, and not only to the claim of one of them.

155. It is true that Barbados' claim as eventually disclosed in its Memorial deals only with EEZ and continental shelf within 200 n.m. of Trinidad and Tobago; this is because its claim-line both shelf-locks and zone-locks Trinidad and Tobago. But a State which submits a maritime delimitation claim to arbitration under the 1982 Convention cannot limit the Tribunal's jurisdiction to the scope of its own claim. Quite apart from any issue of counterclaims (which hardly make sense in the context of maritime delimitation), the jurisdiction of a Tribunal to which a delimitation dispute is submitted extends to determining the maritime boundary (as between the two Parties) to the full extent of their potential jurisdiction under international law.

156. International courts and tribunals dealing with maritime delimitation have never regarded themselves as limited to the actual maritime claims put

[249] Barbados, Statement of Claim and the Grounds on which it is Based, 16 February 2004, para. 2.

forward by the parties but have asserted freedom (sometimes considerable freedom) to determine their own line.[250] Only an express agreement could deprive a tribunal of such freedom, and there is no question of such an agreement here.

157. To the extent that the Arbitral Tribunal in the *Saint Pierre et Miquelon* case decided otherwise, it was incorrect. In that case the 200 n.m. corridor awarded to the French islands stopped well within 200 n.m. of the Canadian coast (whether measured from the mainland coast of Nova Scotia or from Sable Island). The Tribunal declined to say whether France had any maritime entitlement beyond the southern end of the 200 n.m. corridor, pleading its inability to delimit vis-à-vis the international community as represented by the Commission on the Limits of the Continental Shelf.[251] But as to areas within 200 n.m. of any coast this cannot be right. There is no issue of delimitation of 'common heritage' areas within 200 n.m. from the coast of any party: the Commission on the Limits of the Continental Shelf lacks any jurisdiction over such areas.

(ii) The scope of the dispute and the issue of exchange of views

158. In its Reply, Barbados repeatedly asserts that Trinidad and Tobago's claim insofar as it extends beyond 200 n.m. is "new and unprecedented" and that the claim was never made in the negotiations between the parties.[252] The corollary, according to Barbados, is that there is no dispute and there has been no exchange of views as to this aspect of Trinidad and Tobago's claim; the Tribunal therefore lacks competence to make any determination in connection with these issues.[253] These contentions are incorrect both in fact and in law.

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250 See e.g. *Gulf of Maine* case, ICJ Reports 1984 p. 246, *Jan Mayen* case, ICJ Reports, 1993, p. 38.
251 (1992) 95 ILR 645, 674, paras. 78-79.
252 Barbados Reply, paras. 14, 70, 129-131.
253 Barbados Reply, paras. 14, 70, 131.

159. So far as concerns the facts, from the very first round of the maritime delimitation negotiations, as the Joint Report records, Trinidad and Tobago was looking to agree a boundary extending beyond 200 n.m..

> "Trinidad and Tobago is looking at a single all purpose delimitation line for the seabed and subsoil and the superjacent waters. Trinidad and Tobago is not looking to stop at 200 nautical miles but to extend its seabed jurisdiction up to the maximum limit of 350 nautical miles or 100 n.m. from the 2500 metre isobath which is subject to approval by the Commission on the Limits of the Continental Shelf."[254]

There are, evidently, two component elements to Trinidad and Tobago's statement: first, as concerns the area within 200 n.m. from its coast and secondly as to the area beyond and out to the "maximum limit... which is subject to approval by the Commission on the Limits of the Continental Shelf". As to this second element, obviously the delimitation line would concern only the continental shelf and would not be an all-purpose line.

160. Moreover Trinidad and Tobago reiterated its position at the second round of negotiations, as recorded in the Joint Reports,[255] and also in Barbados' transcript of the negotiations.[256] The principle of Trinidad and Tobago's position was clear.[257]

161. Barbados seeks to dismiss these instances as too general to be material.[258] It then relies heavily on the claim line that Trinidad and Tobago submitted in the negotiations, and alleges that Trinidad and Tobago confirmed at the fifth round of maritime delimitation negotiations that its claim line stopped

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254 Trinidad and Tobago Counter-Memorial, Annex Volume 2(2) Part 1, No. 1, p. 6; Barbados Reply, Volume 2, App. 16, p. 158.

255 Barbados Reply, Vol. 2, App. 17, p. 184.

256 Barbados Reply, Vol. 2, App. 18, pp. 212, 219, and 223 (referring to the approach established in the 1990 Trinidad and Tobago/Venezuela Treaty).

257 Trinidad and Tobago Counter-Memorial, para. 11.

258 Barbados Reply, para. 70.

at the 200 n.m. arc.[259] The passage from the transcript on which Barbados relies is notably unclear; the Joint Report, by contrast, is not. It shows that Trinidad and Tobago did not give the confirmation that Barbados now alleges, and that "Barbados expressed its hope that Trinidad and Tobago could respond to this question at the next round".[260] The transcript of a negotiating round (made without the knowledge of the other party) evidently cannot stand against the clear language of the agreed Joint Report of the negotiations.[261]

162. In any event and as a matter of law, Barbados' allegations that the claim is new, as well as its reference to the negotiations, entirely miss the point. Article 286 provides in relevant part that "...any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1 [of Part XV], be submitted at the request of any party to the court or tribunal having jurisdiction under this section." As already noted in Trinidad and Tobago's Counter-Memorial,[262] and as now appears to be common ground, it follows from Article 286 that the provisions of section 2 of Part XV apply subject to the provisions of section 1, and the exercise of jurisdiction by an Annex VII tribunal in respect of a notification under Article 286 is thus made expressly subject to (in this case) fulfilment of the conditions established in Article 283(1).

163. However, Trinidad and Tobago is *not* seeking to seise this Tribunal by virtue of Article 286, and the requirements of Article 283(1) do not have to be fulfilled for the Tribunal to exercise jurisdiction in respect of Trinidad and Tobago's claim. It is evident from Chapter 2 above that, had Trinidad and Tobago sought to invoke Article 286, it would have

259 Barbados Reply, Vol. 3, App. 36, p. 600.
260 Barbados Reply, Vol. 3, App. 35, p. 567.
261 See above, paragraph 20.
262 Trinidad and Tobago Counter-Memorial, paras. 103-104.

approached Article 283(1) in quite a different way (in particular by making clear to Barbados that in its view the negotiations were exhausted – which is not and has never been Trinidad and Tobago's position).

164. That Article 283(1) does not apply to Trinidad and Tobago's claim may be shown by reference to the following scenario. States A and B engage in negotiations under Articles 74(1) and 83(1). Both States put forward general positions on a without prejudice basis without submitting definitive claims. State A then concludes that there has been an exchange of views and (following Barbados' approach) invokes Article 286 unannounced. In such circumstances it could not reasonably be suggested that an Annex VII tribunal has jurisdiction to consider State A's claim but no jurisdiction so far as concerns any different claim made by State B. A State which unilaterally refers a dispute to arbitration cannot seek to prevent the Tribunal from dealing with the whole dispute (including claims made against it) by reference to Article 283. Any other conclusion would encourage not only extreme claims but premature applications.

165. In the present case Barbados commenced arbitration at a time when further negotiations were planned (and confidently expected by Trinidad and Tobago). Barbados' decision to commence arbitration in a precipitate way cannot act so as to freeze in time the claim of Trinidad and Tobago, and to prevent that claim from being elaborated as it undoubtedly would have been in the course of continuing good faith negotiations. Assuming that the Article 283 threshold has been crossed with respect to Barbados' claim (a matter dealt with in Chapter 2 above), the only constraint on the Tribunal's jurisdiction and on the admissibility of the claim put forward by Trinidad and Tobago as the Respondent State is that it should form part of the overall dispute submitted to arbitration. This is evidently the case: (a) there was no agreement between the Parties as to their respective positions in the Atlantic sector; (b) the Tribunal is faced with competing

claims in that sector, as in the west, and (c) Trinidad and Tobago's claim falls squarely within the description of the dispute formulated by Barbados in paragraph 2 of the "Statement of the Claim and the Grounds on which it is Based". Nothing in the 1982 Convention, in particular Article 283, precludes the Tribunal from considering the claims of both Parties as developed before it, once it has determined that it has jurisdiction and that the Application is admissible. Yet again Barbados fails to grasp the implications of the fact that it is the Applicant in the present proceedings.

(iii) The position of third States

166. Finally, Barbados argues that Trinidad and Tobago is "seeking nothing less than the Tribunal's assistance in accomplishing its and Venezuela's ambitions to acquire the maritime territory of Barbados and Guyana", and that it does so "without regard to [the Tribunal's] jurisdiction and to the mandate of international law".[263]

167. As explained in the Counter-Memorial, the 1990 Agreement with Venezuela involved a northwards shift in the median line between Trinidad and Tobago and Venezuela (i.e. a shift which was adverse to Trinidad and Tobago). It is the case – and was made clear by Trinidad and Tobago at the time – that the delimitation of the area to the south of the 1990 line as between Venezuela and Guyana is not affected by that Agreement. Trinidad and Tobago leaves the settlement of that maritime issue to those two States.

168. No doubt so far as Guyana is concerned the 1990 Venezuela-Trinidad and Tobago Agreement is *res inter alios acta*. But the fact is that Guyana has made no claim vis-à-vis Trinidad and Tobago to any areas to the north of the 1990 line. (The so-called "Zone of Cooperation" lies to the south of that line.) Indeed it is not only Guyana which has made no claim to the

263 Barbados Reply, para. 25.

areas in dispute between the Parties to the present case. *No State has done so*. Despite Barbados' intimations of "expansionist" intent on the part of Trinidad and Tobago,[264] the areas in dispute between the Parties (a) are closer to the coastlines of the Parties than to the coastlines of any third State and (b) to Trinidad and Tobago's knowledge are not claimed by any other State. The spectre of third State interests, so heavily relied on by Barbados, is illusory.

169. Of course the mandate of the Tribunal is a bilateral one. But in the present case this necessary formal consideration reflects the substantial reality: only two States are concerned with the areas in dispute and those States are (subject to what is said in Chapter 2) before the Tribunal. Subject to the same proviso, the Tribunal's competence extends as a minimum to delimiting the maritime zones of the Parties which lie within 200 n.m. of either of them and which are claimed by both.[265]

(b) Barbados' arguments based on estoppel and acquiescence

170. In its Reply Barbados argues that Trinidad and Tobago is estopped from making any claim to the north of the equidistance line in the Atlantic sector, or that it has acquiesced in Barbados' jurisdiction in that sector.[266] There are two answers to this argument, each sufficient but taken together decisive. They are, first, that in fact there has been no acquiescence and there is not the faintest hint of any basis for an estoppel; and secondly that the evidence put forward by Barbados, even if accepted on its own terms, is insufficient to amount to a recognition of maritime entitlements under international law.

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264 Barbados Reply, para. 23.

265 For the Tribunal's competence as to areas beyond 200 n.m. from the coasts of both Parties (i.e. the outer continental shelf) see paras. 215-221 below.

266 See Barbados Reply, paras. 327-31 (acquiescence), 335-6 (estoppel). It is a curiosity that the estoppel and acquiescence arguments are presented in Chapter 6; whereas if those are arguments are accepted they are preclusive and render Chapters 3-5 unnecessary.

171. As to the underlying facts, it is telling that although the relevant section of Barbados' Reply employs the lengthy rubric "*For more than 25 years Barbados and its concessionaires have been active in the maritime area to the north of the median line now claimed by Trinidad and Tobago*", it comprises just six paragraphs. Further, of these six paragraphs one is introductory and two consider sugar production in Barbados and the relative wealth of the two Parties (issues irrelevant not merely to the rubric but to the case as a whole).[267] Barbados' argument comes down to an assertion that it granted concessions (in 1979 to Mobil; in 1996 to CONOCO) to the north of the median line in the area claimed by Trinidad and Tobago without any protest from the latter, and that such area has now been "extensively explored" by Barbados' concessionaires and others.[268] In this respect, Barbados relies heavily on its Map 13.

172. There are three points to make about Map 13. First, it is notably unclear what Map 13 shows. According to the rubric it shows "diverse seismic survey lines... or other activities performed with Barbados' permission". There is no clue as to what those other activities are or as to how they constitute "extensive exploration".

173. Secondly, Map 13 shows considerable activity around Barbados, but all the lines stop at the median line in the western sector. This is consistent with Trinidad and Tobago's position as to Barbados' recognition of the median line in the western sector.[269] Map 13 shows, by contrast, very little activity in the area to the north of the median line which is claimed

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267 Barbados Reply, section 1.6, paras. 51-56.

268 Barbados Reply, paras. 55-56; also paras. 323 and 335-336.

269 See Trinidad and Tobago Counter-Memorial, App. A. It should be noted that the seismic survey lines in Map 13 appear to be incorrect as Barbados has requested Trinidad and Tobago's permission to conduct seismic surveys to the south of the median line. See Trinidad and Tobago Counter-Memorial, paras. 292-296, and see Exhibit 12, which is the base map referred to at Trinidad and Tobago Counter-Memorial, para. 295, but omitted in error. This shows Barbados seeking the permission of Trinidad and Tobago to conduct a seismic shoot to the south of the median line in the western sector.

by Trinidad and Tobago. There is nothing that even remotely suggests "extensive exploration" in this area.[270]

174. Thirdly, so far as concerns the allegedly unopposed grant of concessions to Mobil and CONOCO, the position is not at all as Barbados claims, i.e. an absence of any protest "for well over 20 years".[271] As early as March 1992, Trinidad and Tobago informed Barbados by diplomatic note that it "does not recognize the equidistance method of delimitation as being an obligatory method of delimitation and consequently rejects its applicability, save by express agreement, to a maritime boundary delimitation between Trinidad and Tobago and Barbados... in the Caribbean Sea and Atlantic Ocean".[272] There was no such express agreement so far as concerns the application of any delimitation to the concessions granted by Barbados to Mobil and CONOCO.

175. Moreover, subsequent to correspondence from CONOCO and Elf of 28 February 2001, in which those companies asserted that they were holders of concessions in areas where Trinidad and Tobago was then planning to carry out a seismic shoot, Trinidad and Tobago informed Barbados by Diplomatic Note of 8 June 2001:

> "Until the exact location of the Trinidad and Tobago-Barbados maritime boundary in the Atlantic Ocean east of Trinidad and Tobago and southeast of Barbados is agreed upon, Trinidad and Tobago cannot acquiesce in any authorization by Barbados of exploration or

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[270] Barbados asserts that from 1996-2004 CONOCO and Elf have spent approximately $ 65 million on reconnaissance, seismic testing and exploratory drilling under their Barbados concession. Barbados Reply, para. 55. This is supported by CONOCO financial statements for 2002-2003. Barbados Reply, Vol. 3, App. 38, p. 636. It is unclear where the figure of $ 65 million comes from. More important, Barbados gives no indication as to where the relevant activities took place. For example, it is clear from the financial statements that CONOCO spent $ 32 million on drilling an exploratory well at Sandy Lane (which was protested by Trinidad and Tobago: see further below) which is not in the area now claimed by Trinidad and Tobago. It is suspected that this is also true of the vast bulk of the expenditure of CONOCO.

[271] Barbados Reply, para. 335.

[272] Diplomatic Note No. 266, 27 March 1992, Trinidad and Tobago Counter-Memorial, Vol. 3, Annex 15. Note the reference in this Diplomatic Note to Barbados Government Information Press Release No. 177/92 to the effect that Barbados fishing vessels "should remain within the waters of Barbados" and "*that this zone extends to points midway between Barbados and Trinidad and Tobago*" (emphasis added). See Chapter 2 above for a further consideration of this press release.

exploitation of the natural resources of the area that is the subject of overlapping claims to maritime jurisdiction.

The Government of Trinidad and Tobago, therefore, does not recognize the validity of any concessions that may have been granted by Barbados to Conoco and Elf in so far as and to the extent that they encroach on marine and submarine areas claimed by Trinidad and Tobago, and it expressly reserves its rights..."[273]

176. In a similar vein, by Diplomatic Note of 27 November 2001, Trinidad and Tobago protested the drilling of an exploratory well in an area just to the north of the median line.[274] The "recognition and acquiescence" by Trinidad and Tobago of Barbados' exercise of sovereignty to the north of the median line does not exist.[275] To the contrary, not only has Trinidad and Tobago objected to such exercise of sovereignty by Barbados, but also Trinidad and Tobago has – to no lesser degree than Barbados – asserted its jurisdiction over the area that Trinidad and Tobago now claims, as is evidenced by the seismic shoots that it has performed which are depicted in **Figure 5.2**.

177. Barbados also relies on its Maritime Boundaries and Jurisdiction Act 1978 as an assertion of jurisdiction over the whole area to the north of the median line.[276] The point has already been made in Chapter 2: Barbados relies on the 1978 Act so far as concerns its claim to the north of the median line but asks the Tribunal to ignore the Act when it comes to its claim to the south of the median line. This is quixotic. Barbados adopts a similar approach when it comes to its protests against development activity by Trinidad and Tobago to the south of the median line. It says it was "quick to protest" invitations to tender made by Trinidad and Tobago

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[273] Diplomatic Note No. 1048, 8 June 2001, Trinidad and Tobago Counter-Memorial, Vol. 3, Annex 46.

[274] Diplomatic Note No. 2257, 27 November 2001, Trinidad and Tobago Counter-Memorial, Vol. 3, Annex 50.

[275] Cf. Barbados Reply, paras. 320 and 335-336.

[276] Barbados Reply, para. 321.

in 1996, 2001 and 2003 in respect of various hydrocarbon blocks.[277] The "quick" protest was in fact made on 1 March 2004, i.e. after the commencement of this arbitration.[278] Nonetheless, Barbados sees fit to claim that Trinidad and Tobago was so late in protesting Barbados' grant of concessions to Mobil and CONOCO, that it is estopped from making any claim to the north of the median line.[279] Quite apart from the double standard of "quickness" applied in Barbados' Reply, this position is unsustainable as a matter of fact.

178. It is also unsustainable as a matter of law. The position concerning estoppel or acquiescence as a basis for maritime delimitation was authoritatively stated by the International Court in the *Cameroon/Nigeria* case, in a passage already cited by Trinidad and Tobago.[280] As noted in the Counter-Memorial, the extent of hydrocarbon activity in that case vastly exceeded anything that has occurred in the Atlantic sector here. There is nothing remotely approaching an "express or tacit agreement between the Parties" which the Court in that case held was required (and denied existed).[281] Nor are the conditions for an estoppel met—at least,

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277 Barbados Reply, para. 326.

278 Diplomatic Note No. IR/2004/43, Trinidad and Tobago Counter-Memorial, Vol. 3, Annex 91. Barbados refers to various earlier Diplomatic Notes of 2001-2002 at Memorial, para. 89 and fn. 131. These concerned a different matter – protests by Barbados at seismic shooting carried out by Trinidad and Tobago to the north of the median line.

279 Barbados Reply, para. 335. Contrast Barbados' claim that it took "immediate steps to counteract the illegal arrests of Barbadian fisherfolk" off Tobago in 1989 and again between 1994 and 2004. As shown in Appendix A to the Counter-Memorial, one of the "immediate steps" taken by Barbados to arrests by Trinidad and Tobago in 1994 was for the Barbadian High Commissioner to say that such "fisherfolk" were "properly fined" by Trinidad and Tobago and that it was "legally permissible" for their boats to be forfeited: see Trinidad and Tobago Counter-Memorial, para. 308. This reflects the position taken by Barbados when the 1990 Fisheries Agreement expired, as shown in paragraph 49 above.

280 Trinidad and Tobago Counter-Memorial, para. 165.

281 ICJ Reports, judgment of 10 October 2002, para. 301. It may be noted in any event that the principal maritime activity relied on by Barbados which covers the area actually claimed by Trinidad and Tobago is occasional seismic activity. As shown in **Figure 5.2**, both Parties have shot seismic in this general area; but it is implicit in the cases dealing with State conduct in maritime delimitation that transient seismic activity itself will not found a claim: apart from *Cameroon/Nigeria,* see *Aegean Sea case (Provisional Measures)*, ICJ Reports 1976 p. 3 at pp. 10-11, paras. 30-33; *Tunisia/Libya*, ICJ Reports 1982 p. 18 at pp. 71, paras. 96, 84, paras. 117-19. In the latter case a number of wells had been drilled. See the discussion in *Nova Scotia/Newfoundland, Second Phase Award*, 26 March 2002, paras. 2.4-2.5 and especially 3.9: "In the Tribunal's view it is difficult to accept that seismic activity, of itself, could give rise

for an estoppel as against Trinidad and Tobago. Trinidad and Tobago has never made any representation that it did not claim areas to the north of the equidistance line—quite the contrary. But even if it had done so there is no showing that Barbados relied on any such representation to its detriment.[282] Barbados' arguments based on recognition, acquiescence and estoppel should accordingly be rejected.

(c) Relevant circumstances

179. In its Counter-Memorial Trinidad and Tobago analysed at some length what counts as relevant circumstances for the purpose of maritime delimitation and showed how these apply in the Atlantic sector.[283] The following comments supplement that treatment, focusing on the issues on which the Parties disagree.

(i) The oil practice

180. In addition to its argument based on estoppel, Barbados places considerable emphasis on the oil practice of the Parties as a factor supporting the equidistance line in the Atlantic sector.[284] The oil practice of the Parties has already been discussed (see paragraphs 170-177 above). As contrasted with the Caribbean or western sector, there has never been anything approximating to an "express or tacit agreement between the parties" in the Atlantic sector, and no such agreement is to be inferred from the very limited oil practice. Barbados' claims based on oil activities thus do not need to be addressed further.

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to a situation analogous to that in *Tunisia/Libya*, and anyway there is no evidence that there was seismic activity in the critical areas close to the equidistance line, or that Nova Scotia should have been aware of such activity, if indeed it occurred." By contrast, in the present case when Trinidad and Tobago was made aware of seismic activity in the vicinity of the equidistance line it protested: see above, paragraphs 174-176.

[282] Barbados asserts "substantial reliance" on Trinidad and Tobago's failure to object, but fails to give any particulars: Barbados Reply, para. 335.

[283] Trinidad and Tobago Counter-Memorial Ch. 4 (criteria for delimitation), Ch. 7 (application to the present case).

[284] Barbados Reply, paras. 26-9, 51-6, 320-6, 335-6.

(ii) *Coastal frontages*

181. In its Counter-Memorial, Trinidad and Tobago analysed the lengths of the various coastlines which are relevant to this delimitation, something Barbados signally failed to do in its Memorial.[285] It noted that the eastwards-facing coastal frontage of Trinidad and Tobago could be measured in a number of ways—the actual length of coastline (88.8 n.m.), its simplified length (65.8 n.m.), the archipelagic baseline (74.9 n.m.) or the actual north-south length, referred to as the north-south vector (69.1 n.m.).[286] The point of determining coastal frontages of course is not to generate precise figures which are then used as ratios of apportionment; it is to establish the approximate proportionality or otherwise of the relevant coasts. Thus nothing turns in the present case on whether the relevant measurement is 65.8 n.m. or 88.8 n.m. or somewhere in between: the order of magnitude is the same. Whichever measurement is taken, the comparison with the east-facing coastline of Barbados is of the order of 8:1 in favour of Trinidad and Tobago.

182. Barbados seeks to avoid the implications of this situation in three ways. First and most importantly it argues that the two coastlines are opposite and not adjacent; this enables it to ignore entirely Trinidad and Tobago's east-facing coastal frontage. Secondly it argues that Trinidad and Tobago faces well to the south-east, opposing Venezuela, Grenada, even Suriname – anyone but Barbados. Thirdly it argues that the relevant coasts on the Trinidad and Tobago side are much shorter, on the basis that relevant coasts are defined as coasts between the points which generate the equidistance line.

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285 See Trinidad and Tobago Counter-Memorial, para. 185.

286 See Trinidad and Tobago Counter-Memorial, para. 198.

183. As to the first argument, it is crucial to Barbados' case that the coastlines of the Parties must be treated throughout as opposite each other.[287] Indeed this is the *sole* geographical assertion made in Barbados' "Statement of Claim and the Grounds on which it is Based".[288] Delimitation is essentially based on geography, and this is Barbados' sole or essential geographical "fact". It allows Barbados to ignore most of the coastlines of Trinidad and Tobago (even if it requires it to ignore some of its own coastlines as well[289]).

184. It is also geographically incredible. A mythical observer treading water on the 200 n.m. arc in the Atlantic would be disinclined to believe she was located "between" Tobago and Barbados. She would rather believe she was located a long way offshore. Assume that the westerly coasts of Tobago and Barbados constituted a continuous coastline joining up somewhere in the Caribbean, a tropical version of the Gulf of Maine: would anyone doubt that in moving eastwards of the "closing line" between them one was moving from a situation of relative oppositeness to one of adjacency? Barbados seeks to avoid this conclusion by relying on the fact that it is small and isolated:[290] this is, apparently, the first time in maritime delimitation that a State has sought to draw advantage from its being small!

185. Secondly, Barbados takes Trinidad and Tobago's archipelagic baseline as if it were a coast, and argues that it points exclusively south-east, away from Barbados and therefore irrelevant to the delimitation.[291] But coasts do not "point", they radiate; and anyway the east-facing coastline of

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287 See Barbados Reply, paras. 212-222

288 See Barbados, Statement of Claim and the Grounds on which it is Based, 16 February 2004, para 3 (of 16 paragraphs).

289 See Trinidad and Tobago Counter-Memorial, paras. 188, 203.

290 See Barbados Reply, para. 212-217.

291 As noted in Trinidad and Tobago Counter-Memorial, para. 196, it has not been decided that archipelagic baselines are to be treated as actual coasts for the purposes of delimitation. Most probably they are not.

Trinidad runs essentially north-south—as much as any coast is liable to do. Our mythical Atlantic swimmer, finding herself alone in the "Zone of Cooperation",[292] would be ill advised to treat the coasts of Trinidad and Tobago as irrelevant on the ground that they face Venezuela and Guyana. In fact those coasts would look directly on to her predicament. In short, the reductivist thesis of Barbados that the only relevant coasts are the few miles of directly opposing coasts, must be rejected.

186. Thirdly, Barbados continues to argue that the only relevant coasts are those which generate the basepoints – that is to say, which generate the median line.[293] This issue was discussed by Trinidad and Tobago in its Counter-Memorial – at a point of time when Barbados had not even bothered to tell the Tribunal what in its view were the relevant coasts. The Tribunal is respectfully referred to the relevant paragraphs.[294] Yet again Barbados assumes that the equidistance line governs unless displaced, and therefore that only basepoints which generate the equidistance line are relevant. But the true position, it is submitted, is that determination of the relevant coasts is a preliminary issue. Relevant coasts are not only those which incorporate the points which generate the eventual lines; they are those coasts which look on the area to be delimited, or (as it is sometimes said) those coasts which generate overlapping entitlements. Trinidad and Tobago's east-facing coastal frontage does both.[295] Which basepoints or other features will be decisive in generating an eventual line is a subsequent question: it is first necessary to determine whether the relevant coasts are or are not approximately equal or are significantly disproportionate; and in the light of that determination and of the specific geographic circumstances to decide what overall method of delimitation is

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[292] She would be alone. There is no evidence of any actual cooperation there; indeed, of any activity of any kind. Barbados certainly provides none in its Reply, paras. 203-205.

[293] Barbados Reply, paras. 250-259.

[294] Trinidad and Tobago Counter-Memorial, paras. 185-188.

[295] See Trinidad and Tobago Counter-Memorial, Figure 5.2 for the area of overlapping EEZ entitlements.

to be employed. For example if (as in *Yemen-Eritrea*) offshore islands are to be ignored in drawing the line, the resulting basepoints will be different – but it is absurd to say that in determining the relevant coasts the islands should be treated as if they did not exist, or that the relevant coasts change during the delimitation process. Barbados' third argument for ignoring the east-facing coastal frontage of Trinidad and Tobago should also be rejected.

(iii) Non-encroachment

187. In its Reply, Barbados denies that its claim line cuts off Trinidad and Tobago's eastwards-facing coastal frontage. At the same time it alleges that it is cut off by Trinidad and Tobago's claim.[296]

188. The non-encroachment principle goes back to the *North Sea Continental Shelf Cases*, and is well established as a relevant consideration.[297] As explained in the Counter-Memorial, it is not an absolute rule; inevitably where the potential maritime entitlements of two coasts overlap there will be some measure of encroachment. What the non-encroachment principle enjoins is that as far as possible the maritime areas attributable to one State should not preclude the other from access to a full maritime zone – should not cut across its coastal frontage so as to zone-lock it – as Libya's claim self-evidently did in the *Tunisia/Libya* case[298] and as Barbados' claim in both sectors does here.

189. Barbados tends to formulate the non-encroachment principle in terms of non-encroachment upon *zones* that would be attributed to a coastal State in accordance with strict equidistance. But this is a confusion. What the principle reflects is a concern that *coastlines* of roughly equal or greater length not be shut out from access to maritime areas, and in this respect

296 Barbados Reply, paras. 20, 122-126, 233-241.
297 See the review of authorities in Trinidad and Tobago Counter-Memorial, paras. 152-160.
298 ICJ Reports 1982 pp. 62-63, para. 76, cited in Trinidad and Tobago Counter-Memorial, para 156.

the principle qualifies equidistance – it does not merely restate it. Thus in the *North Sea Continental Shelf Cases* the West German coastline was cut off from its natural prolongation by the application of the equidistance method, and it was no answer for Denmark and the Netherlands to say that a broader zone attributed to the Federal Republic of Germany would encroach on "their" maritime areas (i.e., the area they would acquire on the basis of strict equidistance). To some extent it would do so, but the claim of the approximately equal West German coastline to access to maritime zones from which it was cut off by strict equidistance prevailed.[299]

190. Questions of non-encroachment are to some extent matters of impression. But one way of checking on non-encroachment is to ask whether a coastline, not obstructed by other coasts lying in front of it, is represented on the 200 n.m. line or not.[300] In the eastern or Atlantic sector there are no coastlines obtruding between Barbados, Tobago and Trinidad and their respective 200 n.m. limits to the east. Indeed, there are no coastlines between these States and the west coast of Africa. Yet the effect of Barbados' claim is to prevent the much longer east-facing coastline of Trinidad and Tobago from being represented *to any extent* on the 200 n.m. line. This is a clear case of encroachment.

191. The point may be seen from **Figure 5.3**, which shows the equidistance-based division of maritime space that would result if Barbados did not exist. The area shaded with red hatching is the area to the north of the Barbados-Trinidad and Tobago equidistance line that would accrue to

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299 ICJ Reports 1969, p. 3; and see Trinidad and Tobago Counter-Memorial, paras. 154-155.

300 In the *North Sea Continental Shelf* cases, none of the States parties could get out as far as 200 n.m. because of the long opposite coastline of the United Kingdom, and the question was whether the three adjacent coastal States were represented to some degree on the opposite-coast median line. In the present case this is not an issue since the coastlines of the Parties stand open and unobstructed to the Atlantic. But equidistance zone-locks Trinidad and Tobago short of 200 n.m., just as it did the Federal Republic of Germany short of the opposite-coast median line – the difference being that whereas the German coastline

Trinidad and Tobago under such a scenario. It will be seen that on this basis Trinidad and Tobago would acquire an outer-EEZ margin more than 125 n.m. in length. By contrast, if Trinidad and Tobago did not exist, the outer EEZ margin of Barbados would be unaffected. The comparatively short east-facing coastline of Barbados is massively magnified at the 200 n.m. line by virtue of its standing somewhat to the east of Tobago – whereas the much longer east-facing coastline of Trinidad and Tobago is not represented at all on the 200 n.m. line if strict equidistance is applied. This is cut-off in anyone's language (except the language of Barbados).

192. By contrast – despite the repeated allegations of refashioning nature – Trinidad and Tobago's claim line does not cut across the Barbados coastal frontage or deny it a major presence on the 200 n.m. line. Of the area hatched in red on Figure 5.3 (totalling 13,853 n.m.^{2}), Trinidad and Tobago's claim line attributes to it less than a third (4439 n.m.^{2} or 32%). Trinidad and Tobago is represented on the 200 n.m. line (though to a reduced extent as compared with its east-facing coastal frontage), and the much shorter east-facing coastal frontage of Barbados is still magnified greatly on the 200 n.m. line. The consequence is that whereas the non-encroachment principle is satisfied by Trinidad and Tobago's claim line, it is clearly violated by Barbados'.

(iv) The regional dimension

193. Another issue on which the Parties disagree concerns the regional implications of the Tribunal's decision in the present case. Of course Barbados repeatedly invokes the rights of third States (rights which those States show no sign of invoking for themselves). But at the same time it says that regional implications of the delimitation should be ignored.[301]

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was approximately the same length as its neighbours', Trinidad and Tobago's east-facing coastline is about 8 times as long as Barbados'.

[301] See Barbados Reply, paras. 57-9 and associated cartwheelographics.

194. The relevance of regional factors was explained by Trinidad and Tobago in its Counter-Memorial, both at a level of general principle (with reference to the *Guinea/Guinea Bissau* case)[302] and specifically in relation to this region (with reference to the two significant delimitation agreements concluded there).[303]

195. In its Reply, Barbados offered the Tribunal not a word in justification of the actual shape of its beak-like protrusion around the territorial sea of Tobago. But it spent no fewer than 10 paragraphs attacking the *Guinea/Guinea Bissau* decision.[304] According to Barbados that decision is "idiosyncratic", "anachronistic" and generally irrelevant. But all the tribunal said (as far as relevant here) was that its delimitation should "take overall account of the shape of [the relevant larger] coastline",[305] that a delimitation to be equitable "cannot ignore the other delimitations already made or still to be made in the region".[306] And this is a reasonable position, in a situation where many coastal States coexist and where claims potentially overlap. In the present case, in the Eastern Caribbean, the application of a rigid equidistance principle would give Barbados a massively disproportionate continental shelf at the expense of its neighbours, including Trinidad and Tobago. This can be seen at a glance from Figure 1.1 of Trinidad and Tobago's Counter-Memorial. The fact is that the two delimitation treaties actually concluded in the eastern Caribbean region diverged from equidistance precisely in order to give expression to the natural prolongation of the relevant coasts – those of Martinique, Dominica and Guadeloupe to the north and Venezuela (and by inference Guyana) to the south. In acceding to a strict equidistance line in

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302 Trinidad and Tobago Counter-Memorial, para. 22, 251.

303 Trinidad and Tobago Counter-Memorial, paras. 13-15, 231, 252-6.

304 Barbados Reply, paras. 179-189.

305 (1989) 77 ILR 635, 683, para. 108.

306 Ibid, 635, para. 93; the whole passage is cited at Trinidad and Tobago Counter-Memorial, para. 251.

the east the Tribunal would be rejecting considerations which the States concluding those agreements evidently thought highly material.

196. Turning to the two Agreements themselves, Barbados engages in a lengthy excoriation of the 1990 Agreement with Venezuela,[307] although its own protest against that Agreement was curiously delayed (not made until 2000). So indeed was that of Guyana (not made until January 2002). By contrast the 1990 Agreement with Venezuela has been praised in the literature as a constructive approach to the situation. For example Nweihed (in the American Society of International Law's authoritative *International Maritime Boundaries* series) states that:

> "Trinidad and Tobago achieved an equitable delimitation without addressing the core issue between Venezuela and Guyana; Venezuela achieved an equitable delimitation with 'Salida al Atlántico', while improving its already good relations with Guyana.
>
> Taken as a whole the Trinidad and Tobago-Venezuela line may be described as a search for equity which brought four distinct patterns, including equidistance, strict or modified."[308]

197. Barbados evidently does not agree, regarding the Treaty as a violation of the *nemo dat* principle and an "expansionist"[309] measure; "a simple appropriation of the land and maritime territory of nearby States".[310] Frankly, it is baffling to see what authoritative independent observers regard as a reasonable concession portrayed as a form of maritime colonialism. As to the appropriation of land territory, Trinidad and Tobago has consistently supported the territorial integrity of Guyana in the context of the Essequibo dispute between Venezuela and Guyana. It is simply untrue to claim that the 1990 Agreement with Venezuela recognized Venezuela's claim; that it did not do so was made clear in the Exchange of Notes of 23 July 1991 accompanying the instruments of

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307 Barbados Reply, paras. 193-206.

308 J Charney & LM Alexander (eds), *International Maritime Boundaries* (1993) Vol I, 675-689, 682.

309 Barbados Reply, para. 23.

310 Ibid, and see the remarkable reference in the same paragraph to colonialist policies which have nothing whatever to do with the present case.

ratification of the Agreement.[311] But Trinidad and Tobago was not required to wait for the resolution of this dispute before completing its maritime boundary with its major southern neighbour. As to the appropriation of maritime territory, Trinidad and Tobago made what was in its view a reasonable settlement in respect of EEZ and continental shelf claims, without prejudice to the delimitation as between Venezuela and Guyana of their respective maritime zones. It may be noted that Guyana only protested the 1990 Agreement with Venezuela 12 years later, at the time of the negotiation of the 2002 Cooperation Agreement with Barbados. Moreover its only articulated claim appears to be to areas to the south of the line established by the 1990 Agreement with Venezuela.

198. As to the France-Dominica Agreement of 1987 and its implications, Barbados is curiously silent: its main point concerns the fact that the 1987 Agreement did not attribute to Dominica any outer continental shelf,[312] a matter discussed at paragraph 211 below. In particular Barbados does not respond to the points made concerning the 1987 Agreement and its equitable character which are made at paragraphs 254-255 of the Counter-Memorial.

199. It is convenient to conclude this section with two general observations.

311 Trinidad and Tobago Counter-Memorial, Vol. 2(1), Annex 6.

312 Barbados Reply, para. 151.

200. First, Barbados' heated invocation of the *nemo dat* rule, and its use of the language of territorial cession,[313] displays its position very clearly. Barbados proceeds on the basis that it *already* has exclusive sovereign rights over all maritime territory on its side of the equidistance or median line, maritime territory which it can generously agree to "cede" to the other State in a delimitation agreement. (How this position is consistent with its western or Caribbean zone claim is another matter on which it is silent.) But maritime delimitation agreements are not cessions of territory; they are agreements as to the location of a maritime boundary which was previously undetermined.[314] There is no presumption of equidistance in maritime delimitation beyond 12 n.m., and even a territorial sea delimitation agreement departing from equidistance is not a cession of territory. *A fortiori* in the case of EEZ and continental shelf. By its use of the language of cession and territorial sovereignty, Barbados reveals that its whole approach to maritime delimitation is ultimately at variance with the applicable rules of international law.

201. The second point concerns the issue of regional implications, which so exercises Barbados. Here there is a further fallacy underlying Barbados' position. As with its position on non-encroachment, Barbados supposes that a guiding principle in delimitation is a rigid rule, then caricatures the consequences of so applying it. Trinidad and Tobago does not say that the delimitation in the present case is *determined* by other agreements concluded in the region, or by the implications for third States. It does say that these are relevant factors, matters to be taken into account – and that they support a delimitation which would be an equitable result in any

[313] See e.g. Barbados Reply, para. 201 ("It may well be true that the Trinidad-Venezuela Agreement represented a legal cession by Trinidad and Tobago of its own maritime territory to Venezuela, insofar as it applies to territory to the south [*sic* –presumably this should read 'north'] of the median line.").

[314] As the Court explained in the *North Sea Continental Cases*, title to the shelf does not in itself generate a boundary: boundary delimitation as between overlapping or competing claims is a distinct process. See ICJ Reports 1969 p. 6 at p. 22, para. 20, pp. 29-32, paras. 39-48.

event, as between the Parties, since it does not zone-lock or shelf-lock either of them.

(v) Overview of relevant circumstances

202. To summarise, the relevant circumstances in the Atlantic sector are:

(1) the fact that the coasts of both States are unobstructed (to the north of the line laid down in the 1990 Agreement with Venezuela);

(2) the fact that Trinidad and Tobago's coastal frontage is in an approximate ratio of 8:1 to Barbados';

(3) the fact that the equidistance line would cut off Trinidad and Tobago well south of the 200 n.m. line and clearly violates the principle of non-encroachment;

(4) the fact that a modified equidistance line giving expression to the natural prolongation eastwards of the Trinidad and Tobago coastal frontage would not encroach to any significant degree on the equivalent expression of Barbados' (much smaller) coastal frontage;

(5) the fact that such a modification would be consistent with the only other agreements concluded in the immediate region, and would thus "lead towards a delimitation which is integrated into the present or future delimitations of the region as a whole".[315]

Irrelevant both in principle and in fact are the very limited oil activities of either Party in the disputed area, not amounting or even approaching a tacit or express agreement.

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315 (1989) 77 ILR 635, 684, para. 108.

203. Barbados seeks to refute this conclusion by arguing that a notional "'B-TT' east-facing coast" would generate a line virtually identical to its actual claim line, a construction depicted on its Map 21.[316] Again the underlying assumption is that maritime areas are to be treated as having already accrued and as forming a basis for the operation of the delimitation process; in other words that the equidistance principle operates as a vesting mechanism and the adjustment of equidistance is a sort of divestiture analogous to a territorial cession. But in maritime delimitation, one starts from coasts, not lines unsupported or unbacked by coasts, and it is evidently invalid for Barbados to treat the water area between its coast and the median line as if it were land territory. It is the fact of the 8:1 disparity between actual coastal lengths which (with the other factors mentioned in the preceding paragraph) generates the basis for an adjustment, a point which Barbados' Map 21 completely elides.

(c) Barbados' Argument for the Priority of EEZ over Continental Shelf

204. As to the area within 200 n.m. of the coasts of the Parties, the third general issue is the relationship between Trinidad and Tobago's continental shelf claim and Barbados' claim to EEZ. This concerns the area which is beyond 200 n.m. from the coast of Trinidad and Tobago and within 200 n.m. of the coast of Barbados: it is shown in red and green hatching on Figure 7.5 of the Counter-Memorial. It has already been demonstrated (a) that delimitation in this area is within the Tribunal's jurisdiction (see paragraphs 153-157 above), and (b) that Barbados had ample notice that Trinidad and Tobago advanced such a claim, and a full opportunity to discuss it (see paragraphs 158-165 above).

205. In its Counter-Memorial, Trinidad and Tobago argued that under general international law as well as under the 1982 Convention, claims to

316 See Barbados Reply, para 321.

continental shelf are prior to claims to EEZ.[317] It gave examples of cases where rights over continental shelf resources are treated differently from water column resources.[318] It noted relevant dicta of the International Court: in particular its denial that "the concept of the continental shelf has been absorbed by that of the exclusive economic zone",[319] and its subsequent affirmation that "the concept of a single maritime boundary does not stem from multilateral treaty law"[320] but from the wishes and convenience of the States concerned.

206. For Barbados, by contrast, the concept of the continental shelf has evidently been absorbed by that of the EEZ, and this not only for the purpose of giving it priority within 200 n.m. of its coast. It seeks exclusive rights to continental shelf resources *beyond* 200 n.m. on the basis of its position as to the EEZ.[321]

207. In particular Barbados rejects Trinidad and Tobago's argument on the following three grounds:

(1) Overlap between sea-bed and water column rights would be unworkable and is unprecedented; it can only be adopted by consent of the States concerned;[322]

(2) It is not adopted in the France-Dominica Agreement of 7 September 1987, on which Trinidad and Tobago otherwise relies;[323]

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317 Trinidad and Tobago Counter-Memorial, paras. 273-286.

318 Trinidad and Tobago Counter-Memorial, paras. 280-281. See also the approach of the Conciliation Commission in *Continental Shelf Area between Iceland and Jan Mayen* (1981) 62 ILR 108, where Norway's concession of a 200 n.m. EEZ to Iceland did not determine the allocation of continental shelf rights as between the two coastal States which are less than 400 n.m. apart.

319 *Libya/Malta*, ICJ Reports 1985 p. 13 at p. 33, para. 33.

320 *Qatar/Bahrain*, Judgment of 16 March 2001, para. 173.

321 See Barbados Reply, paras. 146-153, 271-275.

322 Barbados Reply, paras. 146-173, esp. para. 150.

323 Barbados Reply, para. 151.

(3) Trinidad and Tobago's rights over the EEZ in this area are "theoretical (and highly speculative)", whereas Barbados' EEZ rights are undisputed.[324]

208. As to the first of these arguments, the coexistence of water column rights in one State with seabed rights in another is provided for in a number of treaties, as has been shown. To say that one coastal State has a veto over the continental shelf rights of another – as Barbados effectively does – is precisely to subordinate the older regime of the continental shelf to the later EEZ, which the International Court has repeatedly refused to do.[325] To argue that the situation is unworkable is pure assertion. There is no evidence that *any* fishing occurs in the area concerned, whereas both Parties agree that the depth and distance criteria for outer continental shelf are met eastwards of their respective coasts.[326] Nor is there any evidence of artificial islands or other conflicting activities to which Barbados refers.[327]

209. More generally it is the case that fisheries and oil activities have often coincided without appreciable difficulty (e.g. during the long period when the continental shelf was without prejudice to superjacent high seas rights).[328] To argue that a solution of this kind can only be reached by agreement ignores the role of third party settlement in the law of the sea:

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[324] Barbados Reply, para. 153.

[325] In *Jan Mayen* neither party asked the Court to draw any distinction between shelf and water-column rights; the areas concerned were all within 200 n.m. of *both* coastal States, and it was common ground that the only actual or prospective resources were fisheries, i.e. the capelin stock.

[326] See Trinidad and Tobago Counter-Memorial, Figure 7.4, which is based on information provided to the Tribunal by Barbados. The depiction shown in Figure 7.4 is consistent with the fact that over geological time, sedimentation from the huge Orinoco river system on the north-east coast of South America, combined with tectonic activity, has created the prospect for hydrocarbon resources in this area, both inshore and in the outer continental shelf, even if exploration for the latter is in its infancy.

[327] Barbados Reply, para. 157.

[328] From the date of the Truman Proclamation until at least the mid-1970s, seabed rights of coastal States coincided with the rights of other States freely to fish and make other use of the water column. There is no evidence that during this 30-year period the interaction of these States was "utterly unworkable in practical terms" (but cf. Barbados Reply, para. 155).

tribunals are called upon to act precisely because the parties cannot agree, and they act in their stead. It may well be the case – as it was between Norway (Jan Mayen) and Iceland and between the United Kingdom and Denmark (Faroes) – that an island's exceptional dependence on fisheries is acknowledged, but this acknowledgement does not entail, as a matter of overriding international law an abandonment of all claims to seabed resources as well.

210. It is true – as Churchill and Lowe state – that "*in general* it is desirable for continental shelf and EEZ boundaries to coincide",[329] and in most circumstances they will do so (including here within 200 n.m. of the coasts of Trinidad and Tobago). But it is one thing to say that this is desirable and another that it is legally required in all cases—something which neither the 1982 Convention, nor the International Court, nor the learned authors cited by Barbados, actually say. Indeed virtually all of the academic discussion about the "single maritime boundary" concerns the issue of delimitation within 200 n.m. from both coasts, and not the very special case presented here where an area of continental shelf of one State is found to fall within the EEZ regime.

211. As to the second argument, there does not appear to be any public record of the reason why the 1987 France-Dominica Agreement stopped the Dominica maritime zone at 200 n.m.[330] However it should be recalled that all the chain of Caribbean islands north of Tobago (Dominica included) are effectively seamounts created by volcanism, and they are remote from any historic delta systems (such as the Orinoco, the Amazon, or in the Gulf of Benin the Niger) which could produce sedimentary rocks and a prospect of hydrocarbons. In short there is not the slightest evidence that

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329 RR Churchill & AV Lowe, *The Law of the Sea* (3rd edn, 1999) 195 (emphasis added), cited in Barbados Reply, para. 160.

330 That it does so stop is shown clearly in Trinidad and Tobago Counter-Memorial, Figure 7.2, which also shows the extent to which the Parties to the Agreement diverged from a median-line solution.

there is geomorphological continental shelf to the east of Dominica in any event.[331]

212. As to the third argument, this is another version of the theory that the EEZ trumps the continental shelf. Since it is a pure function of distance, the existence of EEZ rights within 200 n.m. of a coast will always be indisputable, but the 1982 Convention does not provide that continental shelf rights are subordinated to EEZ rights. Moreover there are good indications in this area that there are continental shelf resources beyond 200 n.m. from the coasts of the Parties.[332]

213. To summarise, Barbados' reasons for asserting that EEZ trumps continental shelf in this sector are unconvincing and unsubstantiated. On the contrary, the continental shelf is the prior institution, and in accordance with the "most fundamental of all the rules of law relating to the continental shelf",[333] Trinidad and Tobago had continental shelf rights without reference to a 200 n.m. limit prior to 1976 and prior to the entry into force of the 1982 Convention. Those rights, based on natural prolongation and existing "*ipso facto* and *ab initio*" were not intended to be abrogated by the 1982 Convention.

(d) Conclusion as to delimitation within 200 n.m. of the coasts of either Party

214. Taken together these relevant circumstances outlined in paragraph 202 above, and whose relevance is unrebutted by Barbados, justify the northwards adjustment of the equidistance line in the Atlantic sector, both as to the EEZ of Trinidad and Tobago and, beyond 200 n.m. from its

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331 By inference Barbados concedes as much when it refers in passing to "its barren maritime territory in the north of its EEZ": Barbados Reply, para. 201, fn 307.

332 Indeed Barbados admits that it has begun preparation for a submission to the Commission on the Limits of the Continental Shelf: Barbados Reply, para. 56. Evidently it believes there is outer continental shelf in this area.

333 ICJ Reports 1969 p. 3 at p. 22, para 19, cited in Trinidad and Tobago Counter-Memorial, para. 274.

coasts, as to its continental shelf. Barbados' critique of the proposed method of adjustment will be considered in Section D below.

(2) Delimitation beyond 200 n.m.

215. It is necessary to consider next, at the level of principle, the question of delimitation beyond 200 n.m. beyond the coasts of the Parties. This is the area shown with orange hatching in Figure 7.4 of the Counter-Memorial.

(a) Extent of Tribunal's competence and admissibility of Trinidad and Tobago's claim

216. In its Counter-Memorial, Trinidad and Tobago explained why the present Tribunal has jurisdiction to delimit the outer continental shelf as between the Parties.[334] Barbados seeks to refute this argument on the following three grounds:

(1) There was no negotiation between the Parties as to the claim beyond 200 n.m.[335]

(2) There is no dispute between the Parties as to areas beyond 200 n.m. from their coasts.[336]

334 See Trinidad and Tobago Counter-Memorial, paras. 264-269.
335 Barbados Reply, paras. 127-131
336 Barbados Reply, paras. 132-134.

(3) Any determination by the Tribunal as to these areas would "affect the rights of the international community".[337]

217. These jurisdictional arguments have already been largely canvassed. As to the first, it was shown in paragraphs 162-165 above that Article 283 does not apply to a claim made by a Respondent in proceedings under the 1982 Convention. If Barbados feels it did not have a sufficient opportunity to discuss Trinidad and Tobago's outer continental shelf claim, the reason is that it chose hastily to commence the present proceedings. Trinidad and Tobago had already made clear that its claim extended to the outer limit of the continental shelf. Indeed Barbados concedes that it had notice that Trinidad and Tobago's claim went beyond 200 n.m. It states that "[t]he Trinidad-Venezuela Agreement line demonstrates that their ambitions included maritime territory beyond 200 nautical miles from their coasts".[338] Barbados had notice of that Agreement as soon as it was concluded, although its protest against it was delayed for approximately a decade. But its notice of Trinidad and Tobago's claim was not simply the result of an inference from the line laid down in the 1990 Agreement with Venezuela; it was expressly referred to by Trinidad and Tobago on several occasions during the aborted negotiations (see paragraphs 159-161 above).

218. For the same reasons, *inter alia*, the claim to outer continental shelf forms part of the dispute presented in perfectly general terms to the Tribunal.

219. As to Barbados' third objection, there is no need for the Tribunal to 'speculate as to the outer limits of the continental shelf'.[339] As explained in the Counter-Memorial, all the Tribunal is called on to do is to determine the direction of a delimitation line as between the respective continental

337 Barbados Reply, paras.135-143.
338 Barbados Reply, para. 25.
339 Barbados Reply, paras. 144-5.

shelves of the Parties to the outer limit of the continental margin as determined in accordance with the 1982 Convention. It is for the Annex II Commission to determine those outer limits; by contrast the Commission has no competence in the matter of delimitation between adjacent coastal States; that competence is vested in a tribunal duly constituted under Part XV of the Convention. The refusal by such a tribunal to exercise that competence would lead to an incomplete resolution of the issue and a prolongation of the dispute;[340] more generally it would create a significant gap in the dispute settlement provisions of Part XV, which were intended to be comprehensive.[341]

(b) The merits of the delimitation in relation to the outer continental shelf

220. Turning to the merits of the claim to an outer continental shelf beyond 200 n.m.,[342] the first point to note is that, since all either party can claim in this sector is continental shelf rights, there is no question of any conflict or overlap between rights. The only relevant provision for present purposes is Article 83 of the 1982 Convention.

221. The same circumstances and factors apply as with respect to the continental shelf in the Atlantic sector generally; indeed Barbados does not suggest otherwise.[343]

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340 Just as the refusal of the *St Pierre and Miquelon* tribunal to decide the issue has led to an incomplete resolution of the dispute presented to it and to a need for continuing negotiations between Canada and France.

341 It is true that compulsory arbitration of sea boundary delimitation disputes is subject to the terms of Article 298(1) of the 1982 Convention. But a State making a declaration under Article 298(1) is still subject to compulsory conciliation: the scope of Part XV *ratione materiae* is unchanged.

342 Cf. Barbados Reply, paras. 155-73.

343 See further Trinidad and Tobago Counter-Memorial, paras. 287-288.

D. Delimitation in the Eastern or Atlantic Sector: The method of Delimitation

222. For these reasons, there is a strong and unrebutted case for an adjustment of the median line in the Atlantic sector: the question is how to achieve that adjustment in an appropriate and equitable way. Again it is necessary to distinguish between the area within 200 n.m. and the outer continental shelf which lies more than 200 n.m. from any relevant coast.

(a) Delimitation within 200 n.m.

223. In its Counter-Memorial Trinidad and Tobago explained in detail its proposed method for taking into account the relevant circumstances summarised above, and demonstrated that the outcome was equitable.[344]

224. Barbados' caricatures—but also misunderstands—Trinidad and Tobago's proposed method.[345] There is (of course) the usual charge of refashioning nature to which (of course) Trinidad and Tobago pleads "not guilty, your Honours". There is no need to respond further to the caricatures;[346] but something should be said briefly about the misunderstandings.

(i) Relevant coasts

225. Trinidad and Tobago has already explained the notion in principle of relevant coasts and has shown why Barbados' argument that Trinidad and Tobago has only a few miles of relevant coast in the Atlantic sector cannot prevail.[347] Apart from the usual epithets ("contrived", "self-serving", etc.), Barbados does not challenge the actual figures given. Nor does it deny that as between relevant coasts a discrepancy of 8:1 in coastal lengths could be considered disproportionate—although, as will be seen, it

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344 See further Trinidad and Tobago Counter-Memorial, paras. 246-288.

345 Barbados Reply, paras. 223-7, 242-59.

346 As to the (non-existent) issue of third State claims in the disputed area see above, paragraphs 166 – 169.

347 See above, paragraphs 181-186, and see further Trinidad and Tobago Counter-Memorial, Ch. 5.

attributes an altogether subordinate and residual operation to the notion of proportionality.

226. There is accordingly nothing further to be said at this stage on the question of relevant coasts.

(ii) Location of the turning point

227. In its Counter-Memorial Trinidad and Tobago proposed a point (Point A) on the equidistance line in the Atlantic sector as a convenient and appropriate turning point. This was on the footing that the combination, in particular, of (a) the encroachment of the Barbados' claim line and consequent cutting off of Trinidad and Tobago's coastline and (b) Trinidad and Tobago's much greater eastwards-facing coastal frontage, warranted a departure from the median line in this sector. Of course the precise selection of a turning point marking the beginning of an adjustment in the line is a different question from the factors which justify the adjustment in general terms. But Point A is by no means arbitrary. As explained in the Counter-Memorial, "Point A is the last point on the equidistance line which is controlled by points on the south-west coast of Barbados".[348] It thus marks the end of that segment of the delimitation line which could reasonably be described as "between" opposite coasts.

228. In its Reply, Barbados criticises the selection of Point A as "contrived and self-serving",[349] but its principal basis for doing so is its general thesis that its relevant coasts are the short opposite coasts between Tobago and Barbados. The Tribunal is invited to compare Barbados' Map 12, to which the relevant passage of the Rejoinder refers, and Figure 7.1 of the Counter-Memorial. Barbados' Map 12 is highly generalised and does not show any geographical detail at all, unlike Insets A and B on Figure 7.1.

348 Trinidad and Tobago Counter-Memorial, para. 238 and see Figure 7.1.

349 Barbados Reply, para. 223.

229. The fact is that Barbados' coastline so far as relevant faces slightly west of south before turning at South Point to face to the south-east. Even a glance at a map of Barbados reveals this turn in direction as significant: it is one of the five turns in coastal direction that make the shape of Barbados so recognisable. Moreover Point A allows for the eastwards projection of the generally east-facing coastline of Trinidad and Tobago without impeding an easterly and even south-easterly projection of the Barbadian coast.

230. Given Barbados' criticism of Point A as arbitrary, one awaited with eager anticipation Barbados' response to the criticism that it gave no reason at all for its Point D. It will be recalled that Point D marks the junction of a line drawn from Point C along "an azimuth of 048°" and the equidistance line. As the Counter-Memorial pointed out, Barbados gave no trace of a rationale for the azimuth of 048°, and there was no basis whatever in the evidence of "traditional fishing", such as it is, for the selection of Point C either.[350] Now that Barbados has chosen to set out its case at some length, one might have expected a detailed rationale for its claim to these Atlantic waters bounded by Points C and D.

231. The issue of a southwards adjustment of the median line is discussed in Chapter 7 of the Reply. The terms "Point C" and "Point D" do not occur in Chapter 7. The term azimuth does not occur in Chapter 7. The numeral 048 does not occur, whether or not accompanied by a degree sign (048°). This key aspect of the Barbados claim remains wholly without ratiocination of any kind after two rounds of written pleadings.

232. In its "Statement of the Claim and the Grounds on which it is Based", Barbados devoted two of 16 paragraphs to the assurance that "Details...

350 Trinidad and Tobago Counter-Memorial, para. 207.

will be particularized at the appropriate stage in this arbitration, as determined by the Tribunal."[351] There is one stage left (viz., the hearing in October) at which Barbados can explain this central element of its claim. Meanwhile the position is that both States propose a turning point in the Atlantic sector away from the median line – Barbados' Point D; Trinidad and Tobago's Point A. The difference is that Trinidad and Tobago has given a number of justifications for its turning point, which are of course for the Tribunal to assess. As for the Barbados turning point, there is so far nothing to assess.

(iii) Direction of the proposed delimitation line

233. Turning to the question of the direction of the proposed delimitation line from Point A, as a general matter it is appropriate and equitable that Trinidad and Tobago's eastwards' facing coastal frontage be represented on the 200 n.m. line. It will be recalled that that coastal frontage – a frontage which generates competing maritime entitlements – is substantial, unobstructed by other coasts to the east, and approximately the same length however it is measured. As soon as the correct approach to relevant coasts is adopted, there is no question of artificiality in taking that coastline into account in an appropriate manner.[352]

234. Where the Parties do disagree at this point of the delimitation process is over the role to be given to proportionality in delimitation, both in principle and in this particular case.

235. As to the question of principle, Trinidad and Tobago analysed the relevant case-law in its Counter-Memorial, and will not repeat what is said there.[353]

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351 Barbados, "Statement of the Claim and the Grounds on which it is Based", 16 February 2004, paras. 14, 16.

352 But see Barbados Reply, paras 260-3.

353 Trinidad and Tobago Counter-Memorial, paras. 161-164.

236. By contrast, Barbados argues for an altogether subsidiary and residual role for proportionality—it might be called "last-ditch" but for the absence of ditches at sea.[354] Barbados starts by stating that proportionality is "not a positive delimitation method".[355] If by that it means that the relevant area should not simply be divided in proportion to the relevant coasts, Trinidad and Tobago agrees—but of course it does not propose any such division.

237. However Barbados then moves from this point of (agreed) orthodoxy to the extreme of saying that "in practice, disproportionality should have no impact on a delimitation line".[356] In effect we are brought full circle back to Barbados' starting point of equidistance. Equidistance is *prima facie* equitable; all relevant circumstances (except the alleged flying fishery) are dismissed as irrelevant; proportionality (or substantial disproportion—in this case it makes no difference which formula is applied) "should have no impact"; *ergo* we are back at equidistance. This is not the existing law of maritime delimitation but a rule of equidistance except in totally exceptional circumstances, an overriding presumption of equidistance barring catastrophe which the International Court and other tribunals have repeatedly rejected.

238. As to the role of proportionality in the present case, so far as Trinidad and Tobago's claim in the eastern sector is concerned it applies the concept of proportionality in an orthodox way, as one of a number of relevant circumstances indicating the need for an adjustment from the equidistance line (see above, paragraph 202 for a summary of these circumstances), and as a method of assessing the equity of the result, as required by Articles 74 and 83 of the 1982 Convention. As to the method of adjustment, Trinidad and Tobago proposed to give effect to its unobstructed coastal frontage and to the principle of natural prolongation in the manner and to the extent

354 See Barbados Reply, paras. 276-303.
355 Barbados Reply, para. 277.
356 Barbados Reply, para. 288.

explained in its Counter-Memorial.[357] In effect, and by analogy with the procedure adopted by the *St. Pierre et Miquelon* tribunal, the natural prolongation of the Trinidad and Tobago east-facing coastline is expressed on the 200 n.m. EEZ boundary to the east. But unlike the *St. Pierre et Miquelon* tribunal, this is not done to the full extent of the coastal frontage but to a proportionately lesser degree, by taking the north-south vector of the coastal frontage, measured along the 200 n.m. line from the Venezuela-Trinidad and Tobago equidistance line.

239. Rhetoric apart, Barbados makes two objections to this approach, both misconceived.[358] First, it asserts that Trinidad and Tobago is using proportionality as a method of delimitation. But this is simply untrue: Trinidad and Tobago is not proposing the division of the area of overlapping claims in a ratio of 8:1; it is proposing a method of reflecting and representing the natural prolongation of its eastward-facing coastline to a degree which bears no relation to the ratio of coastal frontages but which produces what seems overall to be an equitable solution.[359]

240. Secondly, Barbados argues that Trinidad and Tobago has simply passed on at Barbadian expense concessions made to Venezuela. The underlying assumption of this argument – that in this geographical situation Barbados was already entitled to a full equidistance boundary in the south – has already been criticised (see paragraph 200 above). But in any event Barbados' comment is misconceived; the Trinidad and Tobago eastwards coastal frontage is given partial effect only (by taking the north-south vector of that coastline only) and it is measured from the Barbados-Guyana equidistance line, not the 1990 Trinidad and Tobago-Venezuela Agreement line.[360] There is no question of a mere transfer to its northern

357 Trinidad and Tobago Counter-Memorial, paras. 257-58, and see Figure 7.3.
358 See Barbados Reply, paras 276-280, 304-8.
359 See Trinidad and Tobago Counter-Memorial, para. 259, and Figure 7.5.
360 See once more Trinidad and Tobago Counter-Memorial, Figure 7.3.

neighbour of concessions made to the south, but rather an operation analogous to that found equitable as between Martinique, Dominica and Guadeloupe to the north.[361] Moreover there is no refashioning of nature: Barbados' small eastern-facing coastal frontage is still greatly magnified on the 200 n.m. line, whereas the coastal frontages of the other States in the region are reduced. But they are not annihilated, which is what Barbados would have.

(b) Delimitation beyond 200 n.m. from the coasts of either Party

241. For the reasons stated in the Counter-Memorial, it is appropriate to continue the delimitation line without deviation to the outer edge of the continental margin as determined in accordance with the 1982 Convention.[362] Barbados of course objects on all possible grounds to any delimitation in this sector. The Tribunal will recall Barbados' arguments (and Trinidad and Tobago's responses): (a) the matter falls outside the scope of the dispute submitted to arbitration (it does not); (b) there has been no exchange of views (there has been a sufficient exchange, given that it was Barbados which cut short the negotiations; in any event Article 283 conditions the admissibility of the Application, not the scope of the Tribunal's jurisdiction); (c) the matter is outside the Tribunal's jurisdiction because of the Annex II Commission's role (the Annex II Commission has no role in delimitation between adjacent or opposite coasts); (d) the Tribunal should not determine the outer edge of the continental margin (it has no need to do so); (e) any delimitation of outer continental shelf would infringe on Barbados' rights (but the process of delimitation determines the extent of rights, and the result of Trinidad and Tobago's proposal is equitable to both Parties).

361 See Trinidad and Tobago Counter-Memorial, Figure 7.2.

362 Trinidad and Tobago Counter-Memorial, paras. 287-88.

(c) The equity of the overall solution

242. Trinidad and Tobago demonstrated in its Counter-Memorial that the effect of its proposed line was to divide the area of overlapping potential EEZ entitlements approximately equally.[363] It may be observed that in the absence of other indications, the International Court and other tribunals have often proceeded on the basis that equality is equity – for example in giving half-effect to islands or other features.

243. In its Rejoinder Barbados did not query the figures presented – though it does attack the case for an adjusted median line on grounds of "principle" – principally that the two States are exclusively in a relation of oppositeness. On the basis that an adjusted equidistance line is to be used, as proposed by Trinidad and Tobago, there is no reason to doubt the overall equity of the solution as between the Parties. By contrast, the solution proposed by Barbados is radically inequitable. It both shelf-locks and zone-locks Trinidad and Tobago within 200 n.m. and gives to Barbados exclusive rights to an outer continental shelf claim from an arc of EEZ approximately 275 n.m. in length, and all this predicated on a total east-facing coastal frontage of around 28 n.m.

E. Conclusion

244. For all these reasons, Trinidad and Tobago maintains its claim in the Atlantic sector as set out in its Counter-Memorial.

363 Trinidad and Tobago Counter-Memorial, para. 259.

CHAPTER 6

CONCLUSIONS AND SUBMISSIONS

1. For the reasons given in Chapters 1 to 5 of this Rejoinder, the arguments set out in the Reply of Barbados are unfounded.

2. Trinidad and Tobago repeats and reaffirms, without qualification, the submissions set out on page 103 of its Counter-Memorial, namely that it requests the Tribunal:-

   (1) to decide that the Tribunal has no jurisdiction over Barbados' claim and/or that the claim is inadmissible;

   (2) to the extent that the Tribunal determines that it does have jurisdiction over Barbados' claim and that it is admissible, to reject the claim line of Barbados in its entirety;

   (3) to decide that the maritime boundary separating the respective jurisdictions of the Parties is determined as follows:

      (a) to the west of Point A, located at 11° 45.80' N, 59° 14.94' W, the delimitation line follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;

      (b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88° extending to the outer limit of the EEZ of Trinidad and Tobago;

      (c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

Senator, the Hon. John Jeremie
Agent for the Republic of Trinidad and Tobago

18 August 2005