

International Dispute Resolution Centre
Fleet Street
London, England

Monday, 17th October, 2005

ARBITRAL TRIBUNAL CONSTITUTED UNDER
ANNEX VII TO THE UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA

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In the matter of an arbitration between

BARBADOS

and

THE REPUBLIC OF TRINIDAD AND TOBAGO

- - - - -

Before:

JUDGE STEPHEN M SCHWEBEL (The President)
PROFESSOR VAUGHAN LOWE
MR IAN BROWNLIE CBE QC
PROFESSOR FRANCISCO ORREGO VICUNA
SIR ARTHUR WATTS, KCMG QC

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PROCEEDINGS - DAY ONE

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ATTENDANCES

Barbados was represented by:

Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General
and Minister of Home Affairs, Agent for Barbados

Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham &
Watkins

Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate

Professor Michael Reisman, Counsel and Advocate

Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus
Deringer, Paris

Sir Henry Forde QC, Counsel and Advocate

Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins

Mr Adrian Cummins QC, Counsel

Dr David Berry, Counsel

Ms Megan Addis, Counsel, Latham & Watkins

Ms Teresa Marshall, Permanent Secretary, Foreign Affairs

Mr Edwin Pollard, High Commissioner for Barbados in London

Mr Anthony Wiltshire, Minister/Counsellor at the Barbados High
Commission, London

Mr Francois Jackman, Senior Foreign Services Officer

Mr Tyronne Brathwaite, Foreign Services Officer

Mr Christopher Parker, Fisheries Biologist, Fisheries Division

Ms Angela Watson, President of Barbados Association of
Fisherfolk Organisations, BARNUFO

Mr Anderson Kinch

Mr Oscar Price, Information Technology Support, Latham &
Watkins

Ms Phillippa Wilson, Information Technology Support, Latham &
Watkins.

Mr Dick Gent, UK Hydrographic Office

Dr Robin Cleverly, UK Hydrographic Office.

Ms Michelle Pratley, Assistant, Latham & Watkins

Ms Claudina Vranken, Assistant, Latham & Watkins

The Republic of Trinidad and Tobago was represented by:

Senator the Hon John Jeremie, Attorney-General, Agent
Mr John Almeida, Co-Agent, Messrs Charles Russell
Mr Laurie Watt, Co-Agent, Messrs Charles Russell
Ms Lynsey Murning, Charles Russell
Professor James Crawford SC
Professor Christopher Greenwood, CMG, QC, Counsel
Mr Samuel Wordsworth, Counsel
Ambassador Phillip Sealy, Trinidad and Tobago Ambassador to the
United Nations
Mr Gerald Thompson, Director, Legal Affairs, Ministry of
Foreign Affairs
Mr Eden Charles, Foreign Service Officer at the United Nations,
Ministry of Foreign Affairs
Mr Martin Pratt, International Boundaries Research Unit
Mr Francis Charles, Expert
Dr Arthur Potts, Ministry of Fisheries and Agriculture
Mr Charles Sagba, Ministry of Foreign Affairs
Mr Andre Laveau, Ministry of Foreign Affairs
Ms Glenda Morean, High Commissioner for Trinidad and Tobago

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

1 THE PRESIDENT: Good morning, ladies and gentlemen. It is a
2 privilege to open this first session of the arbitral
3 proceedings between Barbados and Trinidad and Tobago.
4 With me are Sir Arthur Watts, Professor Vaughan Lowe,
5 Professor Orrego Vicuna and Professor Emeritus Ian
6 Brownlie.

7 I should first like to call on the distinguished
8 agent of Barbados, Deputy Prime Minister and Attorney
9 General Mottley, who will introduce her team.

10 THE HON MIA A MOTTLEY: Thank you, Mr President. I have the
11 honour of leading the team from Barbados, which includes
12 my co-agent Mr Robert Volterra, Professor Sir Elihu
13 Lauterpacht, Professor Michael Reisman, Mr Jan Paulsson,
14 Sir Henry Forde of Barbados, Mr Stephen Fietta, Mr Adrian
15 Cummins of Barbados, Dr David Berry of the University of
16 the West Indies, Ms Megan Addis, Ms Michelle Pratley of
17 Latham and Watkins, Ms Claudina Vranken, Latham and
18 Watkins, Ms Teresa Marshall, Permanent Secretary, Foreign
19 Affairs, Mr Edwin Pollard, High Commissioner for Barbados
20 in London, Mr Anthony Wiltshire, Minister/Counsellor,
21 Barbados High Commission, Mr Francois Jackman, Senior
22 Foreign Service Officer, Mr Tyrone Brathwaite, Foreign
23 Services Officer, Mr Christopher Parker, Fisheries
24 Biologist in the Fisheries Division, Ms Angela Watson, the
25 President of the Barbados Association of Fisherfolk
26 Organisations, Mr Anderson Kinch, a fisherman of Barbados
27 of long standing, Mr Oscar Price, Ms Phillippa Wilson and
28 Mr Dick Gent of the UK Hydrographic Office and Dr Robin
29 Cleverly, UK Hydrographic Office.

30 Thank you, sir.

31 THE PRESIDENT: Thank you. I call now on the distinguished
32 agent for Trinidad and Tobago, the Attorney General, Mr
33 John Jeremie.

34 MR JEREMIE: Thank you very much, Mr President, members of the
35 Tribunal. Good morning. I am the Attorney General of
36 Trinidad and Tobago and I have the honour to appear before
37 you in these proceedings as agent of Trinidad and Tobago.
38 Can I join my learned friend and colleague, the Hon

1 Attorney General of Barbados, Mia A Mottley, in saying
2 that it is an honour - I say a mixed one - for me and my
3 colleagues in the Trinidad and Tobago team to appear
4 before you on behalf of the Republic of Trinidad and
5 Tobago. Today is, of course, Barbados' day as claimant in
6 these proceedings for opening its case. So the task that
7 I have to perform at this stage is to introduce you to the
8 members of the team representing Trinidad and Tobago.

9 Mr Laurie Watt and Mr John Almeida are of the firm of
10 Charles Russell. They are joint co-agents. Also with me
11 are Ambassador Philip Sealy, Ambassador of Trinidad and
12 Tobago to the United Nations, Professor James Crawford,
13 Senior Counsel, Professor Christopher Greenwood, QC and Mr
14 Samuel Wordsworth. They will be assisted by Mr Gerald
15 Thompson, the legal advisor of the Ministry of Foreign
16 Affairs of Trinidad and Tobago. Mr Francis Charles, Dr
17 Arthur Potts, Mr Charles Sagba, Mr Martin Pratt of the
18 International Boundaries Research Unit of Durham
19 University and Ms Lynsey Murning of Charles Russell.

20 Mr President, as I have said before, it is a
21 privilege for us all to be here, but, when I spoke of it
22 being a mixed honour for me this morning, what I meant is
23 that we were brought here somewhat peremptorily, in my
24 view, but we are here as we should be to defend the vital
25 interests of the state of Trinidad and Tobago before this
26 distinguished Tribunal. We look forward keenly to
27 presenting Trinidad and Tobago's case to you later this
28 week. Until then I need take no more of your time. Thank
29 you very much.

30 THE PRESIDENT: Thank you. May I on behalf of the Tribunal
31 welcome you all very warmly. We apologise for the fact
32 that the room is a bit small. I hope that you can all
33 find seats or else we will have a few more seats brought
34 in. Certainly no one will wish to stand for these
35 proceedings, however engrossing they prove to be.

36 I call now on the agent or co-agent, as the case may
37 be, of Barbados, to begin the presentation of Barbados.

38 THE HON MIA A MOTTLEY: Thank you very much, Mr President,

1 members of the Tribunal, the Honourable John Jeremie, my
2 learned friend and distinguished colleague the Attorney
3 General from Trinidad and Tobago and his team. It is
4 honour for me to appear on behalf of the Government and
5 people of Barbados, representing our case in this matter.

6 I wish at the outset to take this occasion to convey my
7 very best regards to the team of Trinidad and Tobago and,
8 indeed, to the people of Trinidad and Tobago, a country
9 which we have formally come to call the "Twin Island
10 Republic". I want to begin by thanking you, Mr President,
11 and the members of you Tribunal for having agreed to
12 undertake this task and, indeed, for having allowed the
13 conduct of these proceedings to be as swift as it has been
14 over the course of the last 20 months. My country
15 considers this to be of the utmost importance to its
16 present and future development. I know that we have
17 placed this dispute with Trinidad and Tobago - and it is
18 no more than a dispute - into the most capable hands which
19 will fashion, as you have before, an equitable solution
20 which the Law of the Sea requires. Indeed the Caribbean
21 and the entire international community as a whole has
22 taken a keen interest in this process which will have, I
23 believe, a determining effect on the practice of maritime
24 boundary delimitations in other regions of the Caribbean
25 where much still remains to be accomplished.

26 This is the first time that Barbados finds itself
27 involved in an arbitration of this kind, and we have not
28 come here lightly. Barbados' foreign relations over the
29 course of time as a country has been one that has been
30 marked by an assiduous pursuit of negotiated agreement,
31 one that has been marked by consensus and the pursuit of
32 consensus and one that is rooted in regional unity.
33 Barbados indeed has been a founding member of the three
34 organisations in our region; the now defunct Federation
35 of the West Indies, CARIFTA, and its successor body the
36 Caribbean Community, which is a community of the sovereign
37 nations of the English speaking Caribbean, Haiti and
38 Surinam. Domestically it is generally recognised, and we

1 take pride in this, that Barbados is a society known for
2 its respect for human rights and the rule of law. We
3 believe that our political and economic progress and our
4 social stability are rooted in these factors. Indeed, I
5 say further that it is our belief that it is only through
6 the rule of law that small countries can gain any sort of
7 progress in an international community where otherwise
8 might would be brutish and unfortunate in respect of the
9 activities that it perpetrates against small countries.

10 In summary, Mr President, this is a perspective that
11 Trinidad and Tobago I believe is likely to share.
12 Barbados says what it does and does what it says. Indeed,
13 to use the words of another Caribbean neighbour, a
14 colloquial expression, we not only talk the talk but we
15 walk the walk.

16 Mr President, for the benefit of members of the
17 Tribunal and yourself it may be useful for me just to
18 recite briefly some facts on Barbados. Barbados is a
19 small island developing state. Our land territory is 430
20 square kilometres, very small, a population of 270,000
21 people however, making it one of the most densely
22 populated countries in the world. Its principal
23 agricultural product today continues to be sugar, that
24 which was predominant throughout its modern settlement in
25 the early 17th century until now. However, sugar
26 production has been on the decline, and indeed to date
27 faces the additional pressure of a radical downward shift
28 of prices in its principal export market, the European
29 Union. The options for agricultural transformation are
30 few in view of the limited land space which we have, and
31 indeed the relatively poor soil quality.

32 Tourism over the course of the last two decades has
33 taken over as a principal foreign exchange earner in the
34 island, followed closely by the international financial
35 services sector. But as we all know the cost of air travel
36 and security concerns that face all of us across this
37 globe have made this sector of tourism and its future more
38 unpredictable. We therefore have recognised over the

1 course of the last decade that we must pursue economic
2 diversification as a matter of urgency to better secure
3 our sustainable development and to maintain the quality of
4 life which our people have come to enjoy. It is all the
5 more so now that we do so particularly since there is a
6 recognition in the last decade across the globe of the
7 inherent vulnerability of small states as they seek to
8 provide for themselves and their citizens, particularly in
9 relation to external economic shocks and natural
10 disasters. Given this, it is trite almost for me to
11 suggest that Barbados' maritime space assumes a critical
12 importance with regards to its natural resources, both
13 living and non-living. I will return in greater detail to
14 this. Indeed, it is fair to say that those of us in
15 Barbados believe that unless there is a appropriate
16 exploitation of all of our resources, land or maritime,
17 our gains and developments thus far will be in fact
18 marginalised in this century.

19 Our bond with Trinidad and Tobago, one of the
20 countries closest to us geographically, as well as
21 historically and in social terms, is a very tight one.
22 Let us be absolutely clear about that. It exists at all
23 levels, the political level, the economic level as well
24 as, perhaps, more importantly than anything else, at the
25 level of individuals and families. The movement between
26 the two countries is daily. Countless Trinidad and Tobago
27 companies successfully operate in Barbados and, indeed,
28 own many of the of major enterprises which function in
29 Barbados today. Countless Barbadians and Trinidadians
30 spend holidays in each other's countries and together
31 there has been a collaborative effort on the part of the
32 two private sectors as we seek now to move into the very
33 innovative and exciting Caribbean single market and
34 economy where we seek to develop and to bring to the
35 Caribbean one economy and one single market across 15
36 different countries, hitherto never existing before.

37 This present dynamism is rooted indeed in that long
38 history of association to which I referred. The fact that

1 we are committed to being able to work together as one in
2 as many areas as possible. Barbados' written pleadings
3 will speak to the strong history in more detail than I
4 will at this stage. But suffice it to say that of
5 particular interest in this context is that Barbadians
6 were amongst the first in the 17th century to settle in
7 Tobago. It also should be noted that in the 17th century
8 for over 50 years Tobago was administered as a part of a
9 quasi-confederal system with other islands of the Lesser
10 Antilles by a Government who was based in Barbados. Those
11 who visit Tobago will remark on its striking similarity to
12 that of Barbados.

13 During this time in the immediate post-emancipation
14 period in the 1830s and indeed well into the early 20th
15 century, Barbadians emigrated in their thousands to
16 Trinidad and Tobago.

17 Another interesting and relevant aspect of the
18 special relationship which exists between our two
19 countries - and I believe that Trinidad and Tobago does
20 not contest this in their pleadings - is that Tobago's
21 small inshore length fishery was developed from as early
22 as 1962, largely with the help of Barbadian fisherfolk who
23 taught the Tobagonians the very fine art which many do not
24 know of de-boning flying fish and ensuring that it is,
25 therefore, edible and in the process many of the
26 Barbadians worked with the Tobagonians to establish
27 themselves there.

28 These close relations between the two countries moved
29 beyond the point of fishing and indeed of the Barbadians
30 in Tobago in 1962 helping with the fishing. After the
31 independence of the two countries in 1962 for Trinidad and
32 Tobago and 1966 for Barbados, it was just under 15 years
33 when the two Prime Ministers, then Honourable Dr Eric
34 Williams, commonly known as the Father of Independence in
35 Trinidad and Tobago, and the Right Honourable Tom Adams,
36 got together and signed the Economic Co-operation
37 Agreement in 1979. Another one indeed was signed later in
38 1987. These agreements underlined the close relations

1 that the two countries enjoyed and their political and
2 economic interdependence. Both agreements referred
3 explicitly to co-operation in the area of marine affairs
4 and energy. Indeed, were testament to the goodwill of
5 both parties to deepen the relationship in these two areas
6 of critical importance to them both. Barbados and
7 Trinidad and Tobago have therefore had these issues on a
8 common agenda for over 25 years. We felt, as we do now,
9 that after these co-operation agreements there was a
10 natural journey towards the development of a fisheries and
11 maritime boundary agreement. Indeed, intense interrelated
12 negotiations took place between 2000 and 2003 under the
13 distinguished leadership of our former Prime Minister of
14 Barbados, the late Sir Harold St John, who we regret is
15 unable to be here with us today, given his intimate
16 involvement in this process. Unfortunately, these
17 negotiations rather than bringing us together were to
18 undermine the gulf which separated the two countries,
19 particularly with regard to the position of the fisheries
20 and the related issue of maritime boundaries. During
21 these meetings it was evident that the parties were not in
22 agreement, whether it was as regards the consequences of
23 the interrelated nature of fisheries and boundaries or,
24 indeed, as to the methodology which was to be pursued.
25 While Barbados stated what methodology it applied,
26 Trinidad and Tobago did not reveal the materiality basis
27 of its own approach for the delimitation of the boundary.
28 Nonetheless, some nine meetings were held of formal
29 negotiations in order to try to bring the parties closer
30 together. These negotiations were effectively ended in
31 February 2004. The Prime Minister of Trinidad and Tobago
32 in a meeting with the Prime Minister of Barbados, in
33 Barbados, made it clear that the matter of the boundary
34 was, to use his words, intractable. Indeed, Prime
35 Minister Manning of Trinidad further invited us to take
36 Trinidad and Tobago to court. The Tribunal will no doubt
37 understand Barbados' grave concern when it learnt shortly
38 before this arbitration commenced that in August 2003,

1 even during the continuing round of negotiations between
2 our two countries, Trinidad and Tobago had signed a letter
3 of intent and a memorandum of understanding with Venezuela
4 dealing with the issue of co-operation in exploiting
5 hydrocarbons along the entirety of the Trinidad-Venezuela
6 Agreement line, including possibly into Barbados'
7 exclusive economic zone in an area beyond the 200 nautical
8 mile arc of Venezuela and Trinidad and Tobago.

9 Reports began circulating shortly before this
10 arbitration commenced that an agreement between those two
11 states had been reached and the hydrocarbon activities
12 would commence shortly thereafter. Indeed, in the weeks
13 before the arbitration commenced, Trinidad and Tobago
14 opened a new round of concession tenders in the disputed
15 areas south of the median line. These reports led
16 Barbados on 19th February 2004 to request Trinidad and
17 Tobago to provide details of these agreements. Trinidad
18 and Tobago has admitted in its Counter Memorial that it is
19 currently planning to commence licensing for exploration
20 and development in the disputed area in early 2006. I
21 trust that this will not be in disregard of this
22 arbitration and this Tribunal.

23 It should also be noted, Mr President, that shortly
24 before the meeting of the Prime Ministers in February
25 2004, Prime Minister Manning publicly indicated that
26 Trinidad and Tobago was considering referring the matter
27 to CARICOM, that is the Caribbean Community to which I
28 referred earlier. This clearly reflected an understanding
29 on the part of Trinidad and Tobago that there was a
30 dispute and that they were indeed contemplating the use of
31 third-party dispute resolution. These, Mr President, were
32 the circumstances that have led us to this present
33 arbitration.

34 I now turn, however, to the substantive part of my
35 opening and, with your leave, will first address very
36 quickly the subject of Barbados' traditional fisheries off
37 Tobago.

38 Mr President, our traditional fisheries have existed

1 off Tobago for some time. Most coastal states around the
2 world have fishery sectors. Barbados is no exception.
3 However, there is something that sets the Barbadian
4 fisheries sector and consequently the Barbadian fish
5 consumer apart from all others in the Caribbean and dare I
6 say even the rest of the world, that is the four-wing
7 flying fish. The fish is eaten in significant quantities
8 in Barbados so much so that Barbados is known throughout
9 the world as the "land of the flying fish". In the 19th
10 century here in Europe the flying fish were referred to as
11 the "Barbados Pigeon". Indeed, it is a staple of the diet
12 of Barbadians not just now but for centuries since modern
13 settlement. Merely by way of illustration, and my
14 colleagues will later speak in greater detail to this, you
15 find the flying fish on our one dollar coin, on our bank
16 notes. You find that our national dish is a dish called
17 "Flying Fish and Cou Cou" and for those who do not know
18 Cou cou, it is a form of polenta. It tastes a little
19 better than polenta, but nevertheless similar, being made
20 from cornmeal.

21 It is also a fish associated with the dolphin, what
22 is commonly known now in North America and Europe as
23 "mahi-mahi" and not "Flipper". The dolphin is another
24 pelagic species that, in fact, follows the flying fish and
25 preys upon the flying fish and the dolphin is also found
26 on the coat of arms of the nation of Barbados. I am not
27 going to go into the detail of the fisheries evidence,
28 because my learned friends, Professor Michael Reisman,
29 Stephen Fietta and, of course, Sir Henry Forde, who sits
30 here at the front table with me, who is a distinguished
31 former Attorney General and Minister of Foreign Affairs
32 for Barbados, and who for over 32 years - I believe the
33 longest serving Member of Parliament in the 20th century
34 would have represented a constituency in which fishing
35 really is one of the major activities in the parish in
36 which his constituency is found. Rather, Mr President,
37 allow me to adduce a short series of facts which will
38 demonstrate the traditional and artisan nature of

1 Barbados' fishing practices, the catastrophic consequences
2 that will ensue if these practices were abruptly
3 terminated, as well as the need for guaranteed access to
4 the fisheries resources which is essential if an equitable
5 solution is to be reached. The evidence clearly
6 demonstrates the existence of a long tradition of
7 Barbadian fishing, not just the flying fish, as I said,
8 but also other pelagic species and, indeed turtles off
9 Tobago. A remarkable treaty which you will hear more of
10 dated 1749 between the Governor of Martinique and the
11 Governor of Barbados is the earliest evidence legally of
12 close relations between the two countries in the area of
13 fishing, speaking, of course, giving the residents of our
14 country the right to fish in waters off Tobago. We will
15 trace these practices throughout the period of
16 emancipation into the 1800s, into the first half of the
17 20th century and right through to the present day, through
18 various models of fishing boats, sloops, schooners, etc,
19 different types of fishing techniques, and an evolving
20 social and economic landscape. All of this, Mr President,
21 is in the context of an oral culture. I must say that it
22 is noticeable to me that there has been an abundance of
23 written materials, in the context of a culture which is
24 largely oral, from so many different sources, from so many
25 different countries, from so many different decades and,
26 indeed, this cannot be explained away as mere coincidence.

27 They constitute clear and credible evidence of Barbados'
28 traditional artisanal fishery off Tobago. Today, the
29 fishing sector, you may ask, employs approximately 6,000
30 persons, some 5 per cent or so of our workforce. A
31 further 18,000 people, however, depend on it for their
32 living. In total, the industry has estimated that it
33 contributes some \$100 million, approximately 2 per cent of
34 Barbados' GDP. Our fishing communities, as the map in
35 this case will show, has spread throughout the entire
36 country and is not structured in compact entities. The
37 economic impact of any disruption would, thus, be
38 significant and nationwide. You can imagine, therefore,

1 Mr President, members of the Tribunal, that Barbados'
2 fishing communities have been, in fact, following the
3 development of this case with a very keen interest. Two
4 representatives are in this room today. Ms Angela Watson
5 and Mr Anderson Kinch, both of whom are leading spokesmen
6 of the fishing community in Barbados.

7 To a significant degree their fate and that of those
8 whom they represent rests in this Tribunal's hands. Their
9 future livelihoods, in the words of Prime Minister
10 Williams of Trinidad and Tobago, their fundamental rights
11 and essential economic interests as he described the right
12 of fishermen in a speech in 1975, rest in your hands.

13 Finally with regard to our case on fisheries it is
14 important to note that Barbadian and Tobagonian fisherfolk
15 are not in competition, and this is critical. On the
16 contrary, as our written pleadings will show, Barbadian
17 fisherfolk traditionally have fished beyond the 12
18 nautical mile limit of Tobago, whereas Tobagonian
19 fisherfolk traditionally have fished within 12 nautical
20 miles of their own coast. Nor do Barbadian and Tobagonian
21 fisherfolk fish the same resource. There is a small
22 Tobago based fishery, the majority of their fishing is for
23 fish, not caught outside the 12 mile limit, but caught on
24 their shores. Thus there is no competition between the
25 two countries' fishermen. Rather, there is a well-
26 established tradition of co-operation and goodwill among
27 the fisherfolk of Both Tobago and of Barbados. We have
28 never fished in the territorial sea of Trinidad and
29 Tobago, either as defined in the old or the current
30 international law regime. But what is most telling to me,
31 Mr President, is the fact that until recently Barbadian
32 fishermen went off to Tobago engaged in a completely
33 hassle free activity of fishing. Through no fault of
34 their own, this exercise has now become a source of major
35 contention, and only by reason of international law and
36 consequently domestic law this exercise has led in many
37 cases to loss of liberty and loss of property for some of
38 them.

1 It was surely never intended by the nations of the
2 world that the law, and certainly this international
3 treaty that we were working under in this matter, should
4 be an instrument of oppression and deprivation. In short,
5 Mr President, this is the plight that now confronts our
6 fishermen. This cannot be fair and cannot be just. They
7 are looking to this Tribunal for fairness and justice, and
8 Barbados indeed is looking within the framework of a
9 maritime delimitation for a guarantee of continuing access
10 to a resource to which these people have traditionally had
11 unfettered access.

12 Mr President, I have outlined the matter of fishing
13 as applied to the traditional fishing practices of the
14 north west, north and north east coasts of Tobago along
15 with the adjustment of the boundary that we believe is
16 necessary. But let me state clearly that where this
17 aspect of fisheries is crucial to a part of our
18 population, the matter which is of paramount significance
19 and importance to us as a nation is the exploitation of
20 other resources within the maritime boundaries and indeed
21 I refer specifically to the issue of hydrocarbon
22 resources, and our interests lie equally and perhaps even
23 more so in relation to the access and the planning of our
24 economic development on that basis. Our exclusive
25 economic zone and our outer continental shelf in the south
26 east are of the highest importance to Barbados' future
27 development.

28 As I turn my attention to the eastern part of the
29 boundary, where Barbados considers that equidistance line
30 produces the requisite equitable solution, since in that
31 area we contend there are no special circumstances which
32 require adjustment. I have already mentioned earlier the
33 nature of Barbados' economy and the extremely limited
34 natural resources it possesses, the limited prospects for
35 long term economic development and the consequent extreme
36 vulnerability to external economic shocks and natural
37 disasters. The hydrocarbon resources which preliminary
38 research suggests exist in this area will enable Barbados

1 to diversify its productive base and develop its economy
2 in a way that is presently impossible. It would allow
3 policy options that are simply not available to the
4 country in the same way today, and we believe that the
5 ability to plan one's economy and to provide for one's
6 people, taking into account all of the available living
7 and non-living resources, is a natural action on the part
8 of governments. It is in pursuit of these perfectly
9 legitimate goals that Barbados has licensed the entire
10 area of its exclusive economic zone, including that in the
11 south east, north of the equidistance line with Trinidad
12 and Tobago. Since 1978, when we passed a Marine
13 Boundaries and Jurisdiction Act, Barbados has exercised
14 jurisdiction over the north of the equidistance line. It
15 licensed Mobil in 1979 and Conoco in 1996 to conduct
16 exploration and exploitation activities in the entirety of
17 our exclusive economic zone and continental shelf. We
18 have conducted extensive oil exploration in the area to
19 the north of the median line, now claimed by Trinidad and
20 Tobago, for the last 30 years and indeed without objection
21 from Trinidad and Tobago until the advent of this
22 arbitration. In short, Mr President, Trinidad and Tobago
23 acquiesced to and recognised Barbados' sovereign rights in
24 this area and only objected recently. Trinidad and
25 Tobago's claim to the north of the median line runs
26 counter to the settled expectations of the oil
27 concessionaires of both countries.

28 I should state for the benefit of the record that
29 Trinidad and Tobago, as we know, possesses an
30 extraordinary onshore and offshore wealth in hydrocarbons,
31 and indeed it is one of the strongest economies in the
32 region, and a principle supplier of liquid natural gas to
33 the United States of America. And we do not envy them
34 that access to wealth thus far. It is worth repeating a
35 point here that we make in our Reply at paragraph 53:
36 "Trinidad and Tobago has geography to thank for its
37 abundant hydrocarbon resources. The maritime territory
38 that it has overflows with hydrocarbon resources, unlike

1 Barbados'. By way of comparison whereas currently
2 Barbados produces approximately 1,000 barrels a day of oil
3 in a declining number of wells, Trinidad and Tobago
4 produces almost 125,000 barrels per day with its
5 production expanding. In terms of natural gas the
6 imbalance is even more striking. Trinidad and Tobago
7 produces significantly more, over four times more natural
8 gas in one day, 2,983 million cubic feet, than Barbados
9 does in an entire year, 718m cubic feet".

10 It may even be said, Mr President, by an observer and
11 certainly not Barbados that this might be a case of those
12 who have wanting more at the expense of those who do not
13 have.

14 I wish to conclude my remarks, sir, on this subject;
15 by informing you and the members of the Tribunal, that
16 Barbados has, in accordance with Article 76 of the United
17 Nations Convention on the Law of the Sea, began the
18 process of accumulating information and prepared its
19 submission to the Commission on the Limits of the
20 Continental Shelf regarding the nature of its continental
21 shelf beyond 200 nautical miles. Recent studies have
22 shown so far that the continental shelf that is Barbados'
23 does fulfil the conditions of Article 76 and, indeed,
24 arrangements are in place to conduct the necessary survey
25 work in order to provide the Commission with the relevant
26 information by the deadline set of 2009.

27 I turn quickly, sir, to the Barbados/Guyana Exclusive
28 Economic Zone Co-operation Treaty. You will be aware that
29 in 2003 Barbados and Guyana concluded an Exclusive
30 Economic Zone Co-operation Treaty, which provides for the
31 exercise of joint jurisdiction within their overlapping
32 economic zones in an area that lies beyond the 200
33 nautical mile arc of any third state. Under the aegis of
34 this treaty, the parties have established a joint Non-
35 Living Resources Commission and are negotiating for
36 fisheries licensing and security agreements. In Barbados'
37 view this is the kind of regional co-operation in the area
38 of the law of the sea that is beneficial not just to the

1 parties but to the region as a whole. It is worth noting
2 that, unlike the agreement between Trinidad and Tobago
3 and Venezuela, the Barbados/Guyana treaty does not purport
4 to apportion between the parties territory which might
5 belong to another state. Indeed, the maritime space under
6 the jurisdiction of the parties to the treaty falls
7 entirely within the economic zone of the parties and
8 completely beyond the economic zone of any other state.

9 I also wish to underline that Barbados and Guyana
10 have adopted a co-operative rather than a confrontational
11 approach to the management of the maritime space to which
12 they both have stated a claim. It is also noteworthy that
13 this is the first maritime boundary-related treaty between
14 two members of CARICOM. We sincerely hope that it will
15 not be the last.

16 Mr President, members of the Tribunal, I turn now to
17 the 1990 Trinidad and Tobago-Venezuela Agreement very
18 briefly. I have referred from time to time to this
19 agreement, which purports to include as part of the area
20 divided between the two countries a significant area of
21 marine territory falling within Barbados' 200 nautical
22 mile arc, as well as an area potentially forming part of
23 Barbados' outer continental shelf.

24 I wish to emphasise the fact that, according to the
25 terms of that agreement itself, it is not opposable to
26 Barbados nor could it be so under the Vienna Convention on
27 the Law of Treaties or customary international law. The
28 non-opposability of this treaty to Barbados was made clear
29 to Trinidad and Tobago throughout the most recent set of
30 boundaries and fisheries negotiations between 2000 and
31 2003 and, as the negotiation records show, it was in fact
32 conceded by Trinidad and Tobago. The effects of this
33 approach if applied in the Caribbean or, indeed, elsewhere
34 for that matter, would be problematic in many regards, to
35 put it mildly. It is my conviction, Mr President, that
36 the UN Convention on the Law of the Sea was designed to
37 bring order to the oceans, to create stable regimes upon
38 which States can rely in order to exercise their

1 jurisdiction and make peaceful and sustainable use of the
2 ocean and its resources. Trinidad and Tobago has been
3 forced to make this exorbitant claim because of the terms
4 of its treaty with Venezuela we contend, according to
5 which, in Trinidad and Tobago's own words, it has made a
6 contribution to Venezuela's ambitions for a Salida Al
7 Atlantico, a corridor to the Atlantic. The problem is
8 that Trinidad and Tobago has contributed not just its own
9 territory, which it is perfectly entitled to do, but
10 Barbados' territory over which of course it has no rights.

11 Nemo dat quod non habet is a phrase that comes to mind
12 immediately. As I said earlier, small states such as mine
13 rely especially on international law to create a
14 predictable and equitable environment in which the
15 behaviour of states is regulated not by virtue of economic
16 or military might, but on the basis of internationally
17 accepted and negotiated norms. It is the view of Barbados
18 that the claims made by Trinidad and Tobago with respect
19 to the proposed boundary in the east undermine the very
20 basis of the law of the sea. Even if the agreement
21 between Trinidad and Tobago and Venezuela does represent
22 in part a legal concession by Trinidad and Tobago of its
23 own territory to Venezuela, Barbados cannot be required to
24 compensate Trinidad and Tobago for this concession. One
25 state cannot be affected by its neighbour choosing to
26 concede territory to a third state. Such a legal
27 principle would be absurd, yet this would be the natural
28 result of Trinidad and Tobago's regional implications
29 argument, which turns upon the misplaced assertion that
30 the agreement should have a domino effect upon the
31 delimitation of maritime boundaries between Barbados and
32 Trinidad.

33 Mr President, Barbados can understand why Trinidad
34 and Tobago is making these extravagant claims. Trinidad,
35 in our view, has clearly decided that its future lies in
36 co-operation with its fellow oil rich neighbour Venezuela.

37 It has abandoned its regional commitments. In the 1990
38 agreement with Venezuela, it may even be said to have

1 betrayed Guyana, Barbados and itself. But these are not
2 my words, Mr President. These are the words of the Prime
3 Minister of Trinidad and Tobago speaking in 1990 as leader
4 of the Opposition. Trinidad clearly does not want to face
5 the consequences of its concessions to Venezuela by
6 seeking a readjustment of these concessions with
7 Venezuela. Instead, it prefers to seek compensation from
8 Barbados by this extravagant claim. Even if they are
9 unwilling or unable for political and/or diplomatic
10 reasons to present a claim that is consistent with the
11 applicable international law, this Tribunal, Mr President,
12 you and your members, are not constrained by similar
13 possibilities. Thankfully, this Tribunal is a judicial
14 body established under UNCLOS and your duty is to
15 determine and apply the law.

16 I trust, Mr President, that this arbitral process -
17 and I really mean so - will lead to better and stronger
18 relations between the two countries. Indeed only last
19 week our two Prime Ministers met last Tuesday on other
20 matters of deep economic co-operation. The need for
21 certainty is vital if both countries are to move forward
22 with clarity and with confidence and in the spirit of
23 deeper regional co-operation. We do not relish our being
24 here, but it is clear that certainty and clarity is needed
25 not only for the benefit of our fishermen, who have
26 continued to be harassed over the course of the last
27 decade, but, indeed, for the capacity to plan our economic
28 development in the future, as is our right, with the
29 certainty that when we do so that persons can, in fact,
30 take our word and take evidence of our legal concessions
31 as that which is rooted in law appropriately. We
32 recognise that the two countries have a shared history and
33 I trust and pray a shared future. We really do. I look
34 forward, Mr President, to the resolution of these matters
35 in a manner that allows that type of development to
36 continue, because I truly believe that this process, to
37 the extent that it constitutes a dispute, is the most
38 amicable way of resolving what is a clear and intractable

1 difference of opinion between the two countries, but that
2 will allow us to move forward clearly and confidently in
3 relation to all the other areas of economic, political,
4 social and cultural co-operation that have allowed us to
5 formally regard each other. Even if on occasion, as in a
6 family, there are disputes which have to be resolved by an
7 outside party.

8 I thank you and look forward to your resolution of
9 this matter and, indeed, as I said, to the Caribbean
10 people moving forward as one, with Barbados and Trinidad
11 continuing to play the anchor roles that we have played
12 thus far and must do in the future.

13 I am obliged to you, sir.

14 THE PRESIDENT: I thank the distinguished agent of Barbados for
15 her statement. Before proceeding to the next speaker, may
16 I note that we have the support in these proceedings of
17 the Permanent Court of Arbitration, which is represented
18 here by Ms Anne Joyce and Mr Dane Ratliff.

19 Sir Elihu, are you the next speaker?

20 PROFESSOR SIR ELIHU LAUTERPACHT: Yes, I am. Mr President and
21 members of the Tribunal, I am sure that you will
22 understand the great pleasure that it gives me to be able
23 to appear before you on this occasion. It is an honour to
24 participate before so distinguished a Tribunal in these
25 proceedings and to do so on behalf of Barbados and,
26 moreover, to do so in the company on both sides of so many
27 old friends and colleagues.

28 Just before I enter the substance of the matter, I
29 shall just refer to the Judges' folder, which is a rather
30 substantial volume, that is before you. It contains
31 copies of the various items that will appear on your
32 screens or may be cited by me.

33 My task is a relatively brief one. It is to present
34 a short introductory tour d'horizon of the case. In order
35 to avoid unnecessary duplication of what is to be said by
36 my colleagues, I will however limit myself to a number of
37 significant points.

38 First, a passing word about the relative positions of

1 the two parties. It is true that Barbados initiated the
2 proceedings in this case. In that sense, it is formally
3 the claimant. But it is not so in substantive terms. The
4 issue is one of maritime delimitation, an issue which both
5 sides approach on equal terms. It is not one in which
6 Barbados is claiming territory that belongs to Trinidad
7 and Tobago. Each side must, of course, establish the
8 facts and the law on which it relies. There is no heavier
9 burden on Barbados than there is on Trinidad and Tobago.
10 In this connection, it must be said that, if one party
11 disputes a fact advanced by the other, it is up to that
12 party to disprove that fact. Mere denial is insufficient.

13 Secondly, a word about jurisdiction and
14 admissibility. So far as the Tribunal's jurisdiction is
15 concerned, there is a distinct element of unreality,
16 indeed of absurdity, in the continuing suggestion by
17 Trinidad and Tobago that there is no dispute between the
18 parties ready for disposition by this Tribunal. Of the
19 only relevant pre-condition in Article 283 of the 1982 UN
20 Convention on the Law of the Sea, it is difficult to say
21 in the light of the record that the parties have not
22 proceeded expeditiously to an exchange in views regarding
23 its settlement by negotiation or other peaceful means.
24 There is no express or even an implied requirement that
25 before proceeding to section 2 of Part XV, the two sides
26 must reach an agreement that the negotiations are getting
27 nowhere. At some point either of them is entitled to
28 reach that conclusion and thereupon to proceed
29 unilaterally to this compulsory procedure. That is the
30 view that Barbados took on 16 February 2004 after five
31 rounds of discussion on delimitation of a single maritime
32 boundary and four rounds of discussion on related fishery
33 matters.

34 If the alleged failure by Barbados to satisfy the
35 negotiation requirements of Article 283 is to be regarded
36 as so important as to render the present proceedings
37 procedurally ill-founded, is it not strange that Trinidad
38 and Tobago has not pursued with any vigour the idea of a

1 return to the negotiating table? Is it not strange also
2 that, if the defect in Barbados' institution of these
3 proceedings was so fundamental and Trinidad and Tobago
4 thought that its view of the matter was so well-founded,
5 that it did not ask for the preliminary objection of 23
6 December 2004 to be treated separately at the outset so as
7 to bring these proceedings to an end? After all, if
8 Trinidad and Tobago genuinely felt that its objection was
9 well-founded, how could it in good faith have allowed the
10 argument on the merits to proceed in such detail and to
11 culminate in the present hearing? The Trinidad and Tobago
12 objection should now be peremptorily dismissed.

13 Also to be dismissed is the Trinidad and Tobago
14 objection to the scope of the powers of the Tribunal to
15 award non-exclusive fishing rights to Barbados fishermen
16 should it not recognise to the full Barbados' claim of the
17 area to the west and north of Tobago.

18 I recall in this connection paragraph 223 of the
19 Trinidad and Tobago Counter Memorial. I quote it, "In
20 reality, this is manifestly a bad claim, devoid of any
21 merit and apparently brought in the hope that, when it is
22 rejected, it will nevertheless encourage the Tribunal to
23 give Barbados some part of what it seeks. Barbados' claim
24 in the western section should be rejected in its
25 entirety." That is what Trinidad and Tobago have had to
26 say.

27 Let us turn it around. For Barbados read Trinidad
28 and Tobago. For Barbados' claim read Trinidad and
29 Tobago's assertions. Then you have an exact picture of
30 what should be thought of the Trinidad and Tobago denial
31 of jurisdiction and admissibility. It is a manifestly bad
32 contention, devoid of any merit and, apparently, brought
33 in the hope that, when rejected, it will, nevertheless,
34 encourage the Tribunal to give Trinidad and Tobago
35 something of what it seeks.

36 Barbados' objection to the introduction by Trinidad
37 and Tobago of a claim to delimit the outer continental
38 shelf between the parties is different. This aspect of

1 the case was never the subject of negotiations between the
2 parties such as to identify the dispute between them in
3 respect of it. Trinidad and Tobago's response in this
4 respect is, in effect, to say that any matter that it sees
5 as connected to the issues raised by Barbados may be
6 introduced without the need to satisfy the requirements of
7 UNCLOS Article 283. Trinidad and Tobago invokes in this
8 connection its theory that this is a case in which
9 Barbados is claimant and Trinidad and Tobago is respondent
10 and that therefore Trinidad and Tobago is not constrained
11 by the terms of Article 283. I have already submitted
12 that this is wrong and that both parties are in an equal
13 position so I say no more about it.

14 At this point, Mr President, I should turn to the
15 geography involved in the case. I appreciate that the
16 Tribunal is already familiar with it to a large extent,
17 but forgive me for making sure by presenting the geography
18 anew.

19 On geology, I need say nothing since it is not
20 disputed between the parties that the whole of the area of
21 the seabed between them is either economic zone or
22 continental shelf. But there are major issues between
23 them as to the proper description to be given to the
24 juxtaposition of the two parties and its pertinence to an
25 impact upon the delimitation. These require close
26 reference to the geography.

27 I start with the broad picture. The Eastern
28 Caribbean and the Western Atlantic. Barbados is in the
29 centre of the northern part of the map. The small island
30 of Tobago to the south west and the larger separate island
31 of Trinidad to the south west of that. Trinidad and
32 Tobago has proclaimed itself an archipelagic state and
33 declared archipelagic baselines. These are now marked on
34 the map.

35 To the south of Trinidad and Tobago lie Venezuela,
36 adjacent to Venezuela, further south east along the South
37 American coast, lies Guyana, and to the south east of
38 Guyana is Suriname. Then moving to the north west corner

1 of the map we see the southern most islands of the
2 Antilles, Grenada, St Vincent and the Grenadines, St Lucia
3 and Martinique; both Grenada and St Vincent and the
4 Grenadines have proclaimed archipelagic base lines.

5 Before I go any further I should refer to a map which
6 appears as Fig 6.1 in Trinidad and Tobago's Counter
7 Memorial map volume. This purports to show Barbados'
8 maritime claim. It shows Barbados with a significant
9 extent of ocean space embraced within its 200 mile
10 economic zone, presumably to be contrasted with the
11 relatively small area to be enjoyed by Trinidad and Tobago
12 under Barbados' median line delimitation. No doubt the
13 map was inserted because of its possible prejudicial
14 quality. Barbados does not deny that in rough terms this
15 map is an accurate reflection on the extent of Barbados'
16 Exclusive Economic Zone contemplated in the Barbados
17 Maritime Boundaries and Jurisdiction Act. But what it
18 does not show is the significant qualification that
19 appears in section 3(3) of the Act: where there is less
20 than 400 nautical miles between Barbados and one of its
21 neighbours, the boundary between them is to be fixed by
22 agreement between them. The median line operates only
23 when there is no agreement. As there has as yet been no
24 agreement between Barbados and any of the nearby states to
25 the west and north west of Barbados, the map cannot be
26 regarded as a firm or final depiction of the Exclusive
27 Economic Zone of Barbados. For that reason the Tribunal
28 should not allow itself to be influenced by an assumption
29 as to the eventual size of Barbados' Exclusive Economic
30 Zone. Moreover, as hardly needs saying, the map is not an
31 illustration of Barbados' dispute with Trinidad and
32 Tobago, this is limited to the area south of Barbados.
33 The issues between Barbados and Trinidad and Tobago,
34 should, we respectfully submit, be approached solely in
35 terms of the area lying between Barbados and Tobago.

36 The distance between the south east corner of
37 Barbados and the north east corner of Tobago is
38 approximately 116 nautical miles. It is in this area

1 between and controlled by the opposite coasts of Barbados
2 and Tobago that the delimitation is to take place.

3 We now add to this map the median line between the
4 two islands. The median line is a line every point of
5 which is equidistant from the nearest point on the base
6 lines of the two states. The drawing of this line is, as
7 a matter of established law, the first stage of the
8 delimitation. It is accepted as such by Barbados. It
9 appears also to have been accepted at one stage by
10 Trinidad and Tobago. In more recent pleadings however,
11 Trinidad and Tobago has replaced the construction of a
12 median line as the first stage in the delimitation by
13 emphasis on relevant coastlines. Nonetheless Barbados
14 adheres to the median line as the starting point, in
15 accordance with now well established practice. The median
16 line stretches south-eastwards from the equidistant tri-
17 point between the maritime area of St Vincent and the
18 Grenadines, Barbados and Tobago. In its natural extension
19 it stretches to a point equidistant 192 nautical miles
20 from the nearest point on the coastlines of Barbados,
21 Trinidad and Tobago and Guyana.

22 As already stated, the identification of the median
23 line is only the starting point. Barbados proposes an
24 adjustment to the median line in order to reach what it
25 regards as the equitable solution.

26 Barbados contends that the line should be modified in
27 the north west to encompass the area of artisanal
28 fisheries traditionally exploited by Barbados. This
29 modification is now shown on the map. This traditional
30 artisanal fisheries area is coloured green. It is defined
31 by a line starting from the tri-point of the median line
32 between the coasts of St Vincent and the Grenadines,
33 Barbados and Tobago, proceeds south-westwards along the
34 median line between St Vincent and the Grenadines and
35 Tobago, and extends along the median line between Grenada
36 and Tobago as far as point A, which lies in the meridian
37 of 61 degrees 15 minutes west.

38 It then runs south along this meridian to point B,

1 which is the intersection of this meridian with the 12
2 nautical mile territorial sea limit of Trinidad and
3 Tobago. It then follows the 12 mile territorial sea
4 limit of Trinidad and Tobago from point B around the
5 northern shores of Tobago to point C, and the intersection
6 of the parallel 11 degrees 8 minutes north and the 12
7 nautical mile territorial sea limit of Trinidad and Tobago
8 lying south east of the island of Tobago.

9 From point C the line turns to the north east and
10 follows a geodesic line along an azimuth of 48 degrees,
11 until it reaches the calculated median line between
12 Barbados and Trinidad and Tobago at point D. From that
13 point the line follows the median line south-eastwards
14 towards point E at the intersection with the boundary of a
15 third state, Guyana.

16 The justification for the modification of the median
17 line that is thus claimed by Barbados lies in the fact
18 that Barbados fisherfolk have traditionally fished for
19 flying fish and associated species in the green area, and
20 the dependence of Barbados on that fishery. It is an
21 important part of the Barbados economy, as Her Excellency
22 The Attorney General has already stated. Its firm
23 protection is essential. As a matter of international
24 law, the existence of traditional artisanal fishing rights
25 for an extended period can generate a vested interest or
26 an acquired right. These have in varying degrees been
27 recognised as constituting a relevant special circumstance
28 requiring adjustment of a provisional median line in such
29 cases as the Gulf of Maine, Eritrea/Yemen (Second Phase)
30 and St Pierre and Miquelon. This point will be developed
31 in fuller and more persuasive detail in the speech of my
32 learned colleague Professor Reisman. In this geographical
33 introduction I need say no more about it.

34 Before passing to the modification of the median line
35 proposed by Trinidad and Tobago, there is one additional
36 feature of the claims in this area that calls for mention.

37 As can be seen from the map now on the screen, the
38 Exclusive Economic Zones of Barbados and Guyana overlap

1 with each other. In part of that area of overlap the two
2 states established in 2003 a Co-operation Zone in which
3 they exercise joint jurisdiction. The zone lies some
4 distance from the east of the Trinidad and Tobago 200 mile
5 limit and of the tri-point between Barbados, Trinidad and
6 Tobago and Guyana. Nor does it infringe upon the claims
7 of any other third state.

8 I now pass to the modification of the median line
9 proposed by Trinidad and Tobago. For this purpose it is
10 necessary to turn to map 19. This shows two Trinidad and
11 Tobago claim lines. The first is a line put forward by
12 Trinidad and Tobago during the fourth round of
13 negotiations in early 2002. It starts, as does Barbados'
14 line, from the equidistance tri-point with St Vincent and
15 the Grenadines and follows the median line in a south-
16 eastwards direction for 19.3 nautical miles until it veers
17 off in a north-easterly direction as far as the 200
18 nautical mile limit, measured from the north eastern point
19 of Tobago.

20 However, by the time of its Counter Memorial,
21 Trinidad and Tobago had developed a new theory, based upon
22 a distinction drawn between what it claims are the two
23 sectors of the boundary, the Caribbean or western sector
24 and the Atlantic or eastern sector. The distinction is
25 based on the assertion that the line in the western sector
26 can be justified as a median line, constructed by
27 reference to base points on the opposite coasts of
28 Barbados and Tobago respectively; while the line in the
29 eastern sector has a different basis altogether. This is
30 illustrated on map 22 now before you. Here we see point A
31 presented by Trinidad and Tobago as the eastern most
32 equidistant point capable of construction from base points
33 on the opposite facing coasts of Barbados and Tobago.
34 South eastward of that point it is still possible to
35 extend the median line by constructing it from base points
36 on the coasts of Barbados and Tobago. However, Trinidad
37 and Tobago rejects this possibility. Instead it uses its
38 point A as the point of departure for a loxodrome with an

1 azimuth of 88 degrees, extending slightly north east to
2 the outer limit of its claimed economic zone.

3 Beyond the limit of the claimed economic zone of
4 Trinidad and Tobago, the respective continental shelves of
5 the two states are delimited by the extension of the same
6 line to the outer limits of the continental shelf.

7 How does Trinidad and Tobago seek to justify this
8 departure from the median line? It does so by moving to a
9 delimitation involving not opposite but adjacent coasts;
10 Barbados and Trinidad and Tobago are, it claims, no longer
11 opposite each other, they are next to each other. And
12 because they are next to each other, or adjacent, the
13 basis of delimitation eastward into the Atlantic must be,
14 so Trinidad and Tobago contends, their Atlantic-facing
15 coastlines.

16 The detailed legal response to this remarkable
17 contention will be provided by my colleagues. However, in
18 the context of these observations on geography I need only
19 invite the Tribunal to note the elements of artificiality
20 of this new construct. First, it is presented as a
21 special circumstance justifying a variation of the median
22 line, but actually it is not a special circumstance, it is
23 first and foremost, an attempt to refashion geography. It
24 rests on a theory of coastal frontage. But of what is
25 this the coastal frontage? It cannot be the frontage of
26 the island of Tobago, because that faces in the wrong
27 direction, towards the south east. If extended it would
28 generate the continental shelf towards the South American
29 coastline. Anyway, it is far too short to support the
30 claim to the inner continental shelf area let alone to the
31 outer area.

32 As a second possibility one must consider the
33 possibility of the archipelagic baseline stretching from
34 the south east corner of Trinidad and Tobago north
35 eastward towards and reaching the north east corner of
36 Tobago. But again this is a south east facing line. No
37 band of continental shelf constructed upon it could
38 support the present claim of Trinidad and Tobago. So

1 there remain two other ways in which to look at the
2 Trinidad and Tobago invocation of the coastal front. The
3 first is to see it as generating not a band of continental
4 shelf extending seawards between parallel lines drawn from
5 its extremities, as now shown on the map, but as a basis
6 for a claim that radiates outwards, rather like a fan.
7 However, if one accepts a coastal front as the basis for a
8 radiated claim by Trinidad and Tobago, why should not the
9 same concept of radiation apply to the claim of Barbados
10 based upon its south east facing coastline?

11 Also, where on the Trinidad and Tobago coastal front
12 is the location of the base or hinge of the fan? Its
13 location can make a significant difference to the spread
14 of the fan.

15 So one is left with the Trinidad and Tobago approach
16 of proportionality, namely that the areas of the claims of
17 the parties must be proportional to the length of their
18 relevant coastlines. But that is to disregard the
19 established judicial view that the function of
20 proportionality is not to support a claim but only to test
21 whether a claim established by other means can be accepted
22 as an equitable solution. In other words the relevance of
23 the concept of proportionality is to determine whether
24 there is any substantial disproportionality. Trinidad and
25 Tobago has not demonstrated that its approach provides an
26 equitable solution; it has merely asserted it. But it is
27 not self-evident. The fact is that Trinidad and Tobago's
28 arguments are evolutionary in character. They have
29 developed and altered during the two stages of written
30 pleadings and even now in Trinidad and Tobago's outline of
31 oral argument they are presented in different terms.

32 In the Counter Memorial three relevant circumstances
33 are mentioned requiring adjustment of the median line in
34 the Atlantic. They were listed as (1) disparity in
35 eastern facing coastal lengths; (2) eastward projection
36 of the coastlines of both parties; and (3) regional
37 implications, the Guinea-Guinea Bissau test.

38 In the Rejoinder however, the relevant circumstances

1 have become five in number. (1) The fact that the coasts
2 of both states are unobstructed; (2) the fact that
3 Trinidad and Tobago's coastal frontage is in approximate
4 ration of 8-1 to Barbados'. (3) The fact that
5 equidistance would cut off Trinidad and Tobago well short
6 of the 200 nautical mile line and clearly violate the
7 principle of non-encroachment; (4) the fact that a
8 modified equidistance line giving expression to the
9 natural prolongation eastward on the Trinidad and Tobago
10 coastal frontage would not encroach to any significant
11 degree on the equivalent expression of Barbados' much
12 smaller coastal frontage; and (5) the fact that such a
13 modification would be consistent with the only other
14 agreements concluded in the immediate region and would
15 then lead towards a delimitation which is integrated into
16 the present or future delimitation of the region as a
17 whole.

18 Now, in the outline of oral argument, the relevant
19 circumstances are listed as (1) coastal frontages; (2)
20 non-encroachment (3) the regional dimension and (4) oil
21 practice and Barbados' argument on estoppel and
22 acquiescence. If for any reason, God forbid, there were
23 to be more pleadings in this case, it is not to be
24 excluded that the inventive ingenuity deployed on behalf
25 of Trinidad and Tobago would produce additional relevant
26 circumstance. However, I venture to suggest that whatever
27 the number of so-called relevant circumstances invoked by
28 Trinidad and Tobago, they cannot override the commanding
29 simplicity of Barbados' extension of the median line south
30 eastward from point A.

31 There are, however, three aspects of Trinidad and
32 Tobago's claim that I have not yet mentioned and which
33 should not be overlooked. The first is Trinidad and
34 Tobago's attempt to introduce as a relevant fact its 1990
35 delimitation agreement with Venezuela. As can be seen the
36 agreed delimitation line between Trinidad and Tobago and
37 Venezuela cuts across the south eastern corner of
38 Barbados' economic zone, and into the area of extended

1 continental shelf belonging to Barbados. Barbados is not
2 a party to the agreement and, as hardly needs saying, is
3 not bound by it. Indeed Trinidad and Tobago acknowledges
4 this. Yet Trinidad and Tobago contends that the existence
5 of this treaty is a relevant circumstance mitigating
6 against the south eastward extension of the median line
7 asserted by Barbados. Barbados requests the Tribunal to
8 reject this contention.

9 Moreover, we should not forget that the Trinidad and
10 Tobago government specifically affirmed in the
11 delimitation negotiation with Barbados that it could only
12 be conducted on the basis of the continuing operation of
13 the Trinidad and Tobago-Venezuela treaty. By itself this
14 stance introduced a basic element of intractability into
15 the situation which condemned to failure any further
16 continuation of the negotiations until they ended in
17 February 2004.

18 The second matter to which reference must be made is
19 Trinidad and Tobago's contention that where there is an
20 overlap between Barbados' Exclusive Economic Zone as a
21 direct projection seawards of Barbados' maritime rights
22 and Trinidad and Tobago's extended continental shelf,
23 Trinidad and Tobago's continental shelf rights must be
24 treated, so Trinidad and Tobago asserts, as superior to or
25 overriding Barbados' exclusive economic zone rights. For
26 this proposition Trinidad and Tobago produces no specific
27 authority, but argues that as the legal concept of the
28 continental shelf existed before the concept of the
29 economic zone, the later acknowledgment in international
30 law of the economic zone cannot deprive neighbouring
31 states of their pre-existing continental shelf rights.
32 With respect, this is an unsustainable proposition, and it
33 should come as no surprise that there is little if any
34 support for it.

35 For one thing, it has to be recalled that the concept
36 of the economic zone emerged into customary international
37 law well before it appears in the 1982 Law of the Sea
38 Convention. It was already a prominent feature of the

1 1974 and 1975 Law of the Sea negotiations in Caracas and
2 Geneva. In 1978 Barbados' Maritime Boundaries and
3 Jurisdiction Act included provisions regarding the
4 economic zone clearly on the basis of customary
5 international law; not a convention that had not yet been
6 concluded. The fact that Trinidad and Tobago did not
7 legislate for its own economic zone until 1986 pursuant to
8 the 1982 Convention does not mean that it was not entitled
9 to an economic zone under customary international law
10 before that date. More to the point is the fact that we
11 are looking at a situation in which both states are
12 parties to, and bound by, the 1982 Law of the Sea
13 Convention. This is now the sole determinant of their
14 rights to maritime zones. The law relating to the
15 economic zone is laid down in Part V of the Convention.
16 Article 36 provides expressly that the sovereign rights of
17 a coastal state extend to the natural resources of the
18 seabed and subsoil of the economic zone. The statement of
19 rights is extensive and comprehensive. The law relating
20 to the continental shelf on the other hand is laid down in
21 the next part of UNCLOS, Part VI. There is a logic to the
22 sequence between Parts V and VI. It is that the content
23 of Part V is not subject to the content of Part VI.

24 Contrary to what Trinidad and Tobago argues, the
25 terms of Article 56 of UNCLOS do not speak decisively
26 against the view that economic zone rights prevail over
27 continental shelf rights; Article 56 refers only to the
28 exercise - and I emphasise the word exercise - that is to
29 the manner in which they may be used. Article 56 does not
30 accord a priority to continental shelf rights.

31 Nor is there anything in Part VI, especially Article
32 77, expressed to override the rights of the aggrieved
33 states under Part V. Moreover, in general terms the
34 concept of the continental shelf is less expansive than
35 the concept of the economic zone. The rights of the
36 coastal state in the economic zone extend beyond the
37 exploration of the resources of the seabed and subsoil,
38 while the rights of a coastal state in the continental

1 shelf are limited to the exploration and exploitation of
2 those resources. In short Barbados submits that there
3 really is no basis for the assertion that extended
4 continental shelf rights trump neighbouring economic zone
5 rights.

6 It has to be said, and this is my final point, that
7 the Trinidad and Tobago case appears to proceed on the
8 theory that an accumulation of many weak arguments should
9 prevail over the single strong Barbados argument, namely
10 that the median line should be adjusted by reference to a
11 single special circumstance, that is to say Barbados'
12 dependence upon the traditional artisanal fishing grounds
13 south of the median line.

14 There are two consequences of the Trinidad and Tobago
15 approach. One is that Trinidad and Tobago has not
16 presented a single consistent explanation of the
17 methodological basis on which it rests its claim to
18 adjustment of the median line. I have already referred to
19 the various ways in which the Trinidad and Tobago
20 arguments have been deployed. Unless remedied, and
21 Barbados looks forward to hearing some remedial
22 explanation, the absence of a consistent argument imbues
23 the Trinidad and Tobago claim with an arbitrary quality
24 that necessarily excludes any genuine equitable solution.

25 The second consequence is that Trinidad and Tobago,
26 in its conclusions and submissions, ultimately appears to
27 get itself into rather a muddle. Let us look at the
28 conclusions in Chapter 6 of the Trinidad and Tobago
29 Rejoinder. In paragraph 2(2) Trinidad and Tobago requests
30 the Tribunal "to reject the claim line of Barbados in its
31 entirety." Then, in paragraph 2(3) it asks the Tribunal
32 to decide that the boundary is to be determined as
33 follows: (a) to the west of their point A, the
34 delimitation follows the median line between Barbados and
35 Trinidad and Tobago until it reaches the maritime area
36 falling within the jurisdiction of St Vincent and the
37 Grenadines. For the purpose of this point I am about to
38 make I need not repeat the terms of paragraphs 3b and c.

1 Let us look at the Barbados claim line. In part it also
2 follows the median line. We have marked on the map the
3 point A at which Trinidad and Tobago claim turns north-
4 eastwards away from the median line. As can immediately
5 be seen, there is a section of the median line that is
6 common to both claims. Yet Trinidad and Tobago has asked
7 the Tribunal to reject the claim line of Barbados in its
8 entirety. If the Tribunal does this it will take a bite
9 of approximately 16 nautical miles out of that part of the
10 median line that also forms part of the Trinidad and
11 Tobago claim line. If the median line southeast of
12 Barbados point D cannot form part of the Barbados boundary
13 how can it form part of the boundary for Trinidad and
14 Tobago? The Trinidad and Tobago submission contains no
15 qualification that can cover this gap. One might have
16 expected that Trinidad and Tobago's submission would have
17 included the words "save for that part of the Barbados
18 claim line that coincides with the Trinidad and Tobago
19 claim line", but it does not. Perhaps Trinidad and Tobago
20 may ask the Tribunal for leave to amend its submission on
21 the ground that its real intention is clear, but Barbados
22 is entitled to observe that a submission that contains
23 such a defect is a reflection of a more fundamental
24 malaise by which the complexities of the Trinidad and
25 Tobago case are enfeebled to the point of ineffectiveness.

26 Mr President, I have now said enough by way of
27 summary introduction of Barbados' case, and if you are
28 contemplating taking the coffee break presently I would
29 respectfully ask you to call on those of my colleagues who
30 will address the question of jurisdiction. In the first
31 place Mr Fietta will introduce the evidence of Ms Teresa
32 Marshall, the Permanent Secretary of the Barbados Ministry
33 of Foreign Affairs. She will testify to certain aspects
34 of the conduct of the negotiations between the parties
35 which have been put in issue by Trinidad and Tobago. And
36 after she has given her evidence Professor Reisman will
37 present the legal arguments on the question of
38 jurisdiction. I thank you, Mr President, and members of

1 the Tribunal.

2 THE PRESIDENT: Thank you very much, Sir Elihu. We will now
3 adjourn for a coffee break and resume at 11.45.

4 **(Short Adjournment)**

5 MR FIETTA : Mr President, members of the Tribunal, Barbados
6 will now present Teresa Marshall to provide evidence in
7 accordance with its final communication on witnesses dated
8 26th September 2005.

9 Mr President, would you like the witness to be sworn
10 in?

11 THE PRESIDENT: Please.

12 **TERESA MARSHALL, Affirmed**

13 **Examination in Chief by Mr Fietta**

14 MR FIETTA : Please state your full name?

15 A. My name is Teresa Ann Marshall.

16 Q. Ms Marshall has copies of her two affidavits before her.
17 They also appear a tabs 22 and 23 of your Judges' folder.
18 The first affidavit is dated 1st June 2005. The second
19 affidavit is dated 17th September 2005.

20 Ms Marshall, have you read the two affidavits before
21 you?

22 A. I have.

23 Q. Is the signature at the end of each of those affidavits
24 yours?

25 A. Yes.

26 Q. Did you wish to make any changes to either of the
27 affidavits?

28 A. No.

29 Q. Do they constitute your testimony?

30 A. They do.

31 Q. Mr President, members of the Tribunal, I would like to ask
32 your permission for each of Ms Marshall's affidavits to be
33 added to the record?

34 THE PRESIDENT: They may.

35 MR FIETTA: Thank you. Ms Marshall, please state your
36 occupation.

37 A. Currently, I am the Permanent Secretary for Foreign
38 Affairs at the Ministry of Foreign Affairs and Foreign

1 Trade of Barbados.

2 Q. How long have you worked at the Ministry?

3 A. I joined in August 1974, so that makes it just over 31

4 years.

5 Q. How long, Ms Marshall, have you been Permanent Secretary?

6 A. Since January 1999.

7 Q. How many rounds of negotiations were there between

8 Trinidad and Tobago and Barbados between 2000 and 2003 on

9 the related issues of maritime delimitation and fisheries?

10 A. Starting in 2000, there were in total nine rounds of

11 negotiations.

12 Q. How many of those rounds did you attend?

13 A. I attended all nine, all parts of it

14 Q. Which party hosted the first round of the negotiations in

15 July 2000?

16 A. The first round took place in Port-of-Spain, Trinidad, at

17 the Crown Plaza Hotel.

18 Q. Were those negotiations tape recorded?

19 A. They were. They were tape recorded and I can attest to

20 that because I myself saw the tape in the tape recorder.

21 The reason I did so was because the main conference room

22 was also used as the Barbados breakout room and before we

23 began our first session of consultations, I stopped our

24 chief negotiator, Sir Harold, and asked him not to begin

25 the session until we had checked to make sure that the

26 tape was stopped and that we had asked the technician to

27 leave the room. There were other members of the

28 delegation that were present and heard those comments.

29 Q. Can you confirm that those tape recording were not taken

30 by Barbados?

31 A. They were not taken by Barbados. The set up in the room

32 was done by the host country, Trinidad and Tobago.

33 Q. The second round of negotiations was hosted by Barbados in

34 October 2000, is that correct?

35 A. Correct.

36 Q. Did the Government of Barbados have those negotiations

37 tape recorded?

38 A. We did.

1 Q. Why?

2 A. In terms of our conference set up, any time there are
3 meetings, bilateral or multilateral, the standard set up
4 that our protocol and conferences division organises is
5 for microphones, an amplifier and a tape recorder and in
6 instances where there is going to be a record and a need
7 to check against memory and notes it is standard practice
8 that a tape is run during the sessions.

9 Q. So the recording would have been obvious to all persons?

10 A. Yes. In each instance that the taping was done at the
11 Barbados end, the technician and the machinery similar to
12 this, but of course a lot smaller, was visible inside the
13 room where the meeting was taking place. The technician
14 actually sat in the room and changed the tapes as we
15 proceeded.

16 Q. Ms Marshall, in your long experience of working for the
17 Ministry of Foreign Affairs of Barbados, is it normal
18 practice for inter-governmental negotiations of this type
19 to be tape recorded?

20 A. Certainly, it is. In CARICOM it is done at all meetings,
21 except the retreat of caucus of heads of Government where
22 only heads are present.

23 Q. Could you please explain the process by which the
24 transcripts of this negotiations hosted by Barbados and
25 produced by Barbados, which the Tribunal now has before it
26 in the evidence, were produced?

27 A. As I said before, these were for internal use, for the
28 records internally. The first set of meetings the
29 transcriber was the confidential secretary at the Ministry
30 of Foreign Affairs who was assigned to our chief
31 negotiator, Sir Harold St John. After that individual
32 went on study leave and the transcriber was a former
33 public servant, retired public servant, who had been a
34 court transcriber and who was hired specifically to fulfil
35 this role because we had lost our in-house capacity. But
36 that individual had been a secretary at the Cabinet Office
37 and was therefore an individual of confidence and trust
38 who had signed the Official Secrets Act and who would

1 obviously know that these things were for internal use
2 only.

3 Q. Ms Marshall, I would like to move on to the meeting
4 between the Prime Ministers of Barbados and Trinidad and
5 Tobago that took place on 16th February 2004, immediately
6 prior to the commencement of this arbitration. Did you
7 attend that meeting between the Prime Ministers?

8 A. I did.

9 Q. Did anyone else on the Barbadian delegation here today
10 attend that meeting?

11 A. The Attorney General was present, Mr Robert Volterra was
12 present, Mr Tyronne Brathwaite was present.

13 Q. I wonder if you could describe for the Tribunal the events
14 of the months that led up to that meeting, please.

15 A. Well, I should begin by saying that the meeting took place
16 in an atmosphere of extreme tension. There had been a
17 build up for several weeks. In December, I think it was,
18 the Commonwealth heads of Government met in Abuja and, as
19 is the tradition within CARICOM, the CARICOM heads had a
20 private caucus. At that meeting it was reported back to
21 us by our Prime Minister that Prime Minister Manning had
22 been challenged by both himself and by the Prime Minister
23 of Guyana regarding the prejudicial effect of the 1990
24 Trinidad and Tobago and Venezuela agreement and he had
25 agreed that he would take the matter back to his Cabinet.

26 So, first and foremost, we were expecting some kind of
27 reaction from Prime Minister Manning, following the
28 fulfilment of his promise to raise the matter again with
29 his Cabinet.

30 Very soon after that there were several
31 pronouncements in the newspapers quoting Prime Minister
32 Manning as saying that he was taking the dispute to
33 CARICOM. We were totally confused by this because we had
34 not been consulted on this. As far as we knew, we were
35 awaiting word from him as to the results of his Cabinet
36 deliberations.

37 Thereafter there was an arrest of two fishing vessels
38 which escalated tensions considerably. Then there was a

1 letter from the Trinidadian Foreign Minister, Foreign
2 Minister Gift, in reply to a letter we had sent in
3 November suggesting that we reconvene the session of the
4 negotiations for maritime delimitation and fisheries. His
5 letter suggested that we should proceed only with
6 fisheries since the other matter was somewhat more
7 complicated.

8 All of this suggested to us that we were reaching a
9 crisis situation.

10 At the same time we discovered that Trinidad and
11 Tobago had signed an unitisation agreement with Venezuela
12 and that they were proposing to start exploration along
13 the entire boundary line, including in parts that we
14 believed encroached on to our territory.

15 There were concessions about to be granted for
16 exploration in some of those areas that we thought we had
17 a legitimate claim to. So, all in all, there was a fairly
18 strong concern on our part that Trinidad and Tobago was
19 moving in a direction that would pre-empt any possibility
20 of a resolution of the dispute and, to the contrary, that
21 they were attempting to separate the fisheries aspects and
22 leave the delimitation aspects in abeyance while, at the
23 same time, attempting to exploit what could very well be
24 ours.

25 Q. Ms Marshall, who was it that proposed that the meeting
26 should take place?

27 A. Which meeting is this?

28 Q. The meeting between the Prime Ministers on Monday, 16th
29 February.

30 A. As I recall it, it was proposed during a telephone
31 conversation between Prime Minister Manning and Deputy
32 Prime Minister Mottley. I was told that Prime Minister
33 Manning had called Deputy Prime Minister Mottley and had
34 requested a meeting on the Sunday, but, since our Prime
35 Minister was not available, it was fixed for the Monday.
36 The initiative came from the side of Trinidad and Tobago.

37 Q. That call requesting the meeting was made on which day?

38 A. On Sunday, 15th.

1 Q. Given the concerns that you have outlined that Barbados
2 had had

3 A. I am sorry, can I Correct that?

4 Q. Yes.

5 A. Saturday evening the call was made for Sunday and then it
6 changed to Monday, but I think the first phone call was
7 made on Saturday evening.

8 Q. Given the concerns generally that you have explained that
9 Barbados had in relation to the status of negotiations
10 with Trinidad and Tobago, what did you do in the short
11 number of hours in between the telephone call proposing
12 the meeting and the meeting itself?

13 A. Well, as you can imagine, and as I have described, the
14 situation was escalating. We had had the arrest of the
15 fishermen in circumstances where we had hoped we had
16 reached an understanding that these things would no longer
17 occur. We had tremendous commentary in the press about
18 the arrests and we had commentary, as I have said, about
19 taking a dispute to CARICOM and that commentary came from
20 the Prime Minister of Trinidad and Tobago. We were so
21 concerned that we decided that we needed to have meetings
22 over the weekend. This was prior to our receiving the
23 phone call to say that the Prime Minister was arriving.
24 We met on the Saturday and the Sunday and we flew in one
25 of our experts to discuss the implications of what was
26 evolving.

27 Q. Moving on to the meetings between the Prime Ministers
28 itself, I will not take you through the details of your
29 recollection which appear in your affidavit, but what did
30 Prime Minister Manning of Trinidad and Tobago say about
31 the outcome of the Trinidad and Tobago Cabinet's review of
32 the 1990 Treaty to which you referred a second ago?

33 A. He confirmed that the Cabinet had reviewed the Treaty, but
34 that it was law and Trinidad and Tobago had to abide by
35 the law and, therefore, there was no possibility of them
36 reneging on the Treaty.

37 Q. What was the response of Prime Minister Arthur of
38 Barbados?

1 A. The Prime Minister reiterated the points that he had made
2 earlier, to the effect the Treaty was prejudicial to both
3 Guyana and Barbados, that it took territory from both of
4 us, that it could not possibly be opposable to Barbados or
5 Guyana and that it was necessary for Trinidad and Tobago
6 to understand that this Treaty could not in any way affect
7 the outcome of our own delimitation process.

8 Q. How did Prime Minister Manning respond to that?

9 A. Prime Minister Manning reiterated that the Treaty stood.
10 He said very specifically that if we wanted to take him to
11 an international Tribunal we could do so. He also said
12 that the matter was intractable and suggested that we
13 leave maritime delimitation aside and that we proceed with
14 fisheries. Prime Minister Arthur then, as I recall,
15 pulled one of the copies of the joint report and pointed
16 to paragraphs from our chief negotiator which had stressed
17 that the two matters were inextricably linked and could
18 not be separated in that arbitrary manner.

19 Q. How did the meeting between the Prime Ministers end on
20 that day?

21 A. I would say that at the wrap up it was agreed that we
22 would see if there was any possibility of issuing a
23 statement at the end of the day, because, of course, there
24 was quite a lot of expectation on the part of the press,
25 with two Prime Ministers meeting in fairly tense
26 circumstances, but we broke fairly abruptly. Prime
27 Minister Arthur invited Prime Minister Manning to stay for
28 lunch. He said, "no thank you" and his delegation left.
29 I would say that it was a fairly abrupt ending.

30 Q. And immediately after the meeting what happened then?

31 A. Immediately after the meeting we went to a breakout room
32 that we had prepared for our delegation. Prime Minister
33 Arthur called our chief negotiator on the phone because he
34 was ill and could not come. They conferred, we conferred.
35 I would say that there were probably eight or ten of us
36 who had just come from the meeting. We all went into this
37 room. We all looked at our notes. We all said, "Did you
38 hear him use the word "intractable"?" Everybody agreed.

1 Others said, "Did he say we should take him to an
2 international Tribunal?" Everybody agreed that they had
3 heard that. We then asked the Prime Minister for
4 instructions because there was to be a report to Cabinet
5 that afternoon and the Prime Minister instructed us to
6 proceed to write a Cabinet note detailing what had
7 happened and suggest to the Cabinet that they make a
8 determination as to whether or not we should pursue our
9 dispute settlement given the circumstances. We drafted
10 the Cabinet note precisely at that point. It would have
11 been within ten minutes of the conclusion of the meeting
12 that we wrote the note to Cabinet.

13 MR FIETTA: Thank you, Ms Marshall. Mr President, this
14 concludes my examination in chief of Ms Marshall.

15 THE PRESIDENT: Thank you, Mr Fietta. Do we move now to the
16 argument of Mr Reisman?

17 PROFESSOR GREENWOOD: May I cross-examine Ms Marshall, please?

18 THE PRESIDENT: Of course, you may.

19 PROFESSOR GREENWOOD: Thank you.

20 **Cross-examination by PROFESSOR GREENWOOD**

21 PROFESSOR GREENWOOD: Ms Marshall, you say that you attended, as
22 you put it, all nine rounds of negotiations.

23 A. Yes.

24 Q. But there were, in fact, two separate sets of
25 negotiations, were there not - five rounds on the maritime
26 boundary and four on fisheries?

27 A. I do not think that we ever agreed to that. If you look
28 at the round where we began talking in detail about
29 fisheries, you will see that it has no name, because
30 Barbados insisted that it was really the fifth round of
31 negotiations and Trinidad and Tobago insisted that it was
32 the first round of fisheries and it ended up being called
33 "a round". I would not say that there were specifically
34 five rounds of one and four rounds of the other. Neither
35 side agreed, and we certainly insisted from day one, that
36 because of the aspects of fisheries that were involved in
37 delimitation the two matters could not be separated.

38 Q. I had hoped that there were going to be a clean set of the

1 pleadings in front of you for you to refer to. I do not
2 know whether the PCA have these ready now. I did ask
3 about these yesterday. (Handed) If you could look, first
4 of all, at Trinidad and Tobago's Counter Memorial volume
5 2, part 2, which is the joint records of meetings. The
6 next volume that I will need is volume 3 of the Reply of
7 Barbados. Would you turn to the second part of that, the
8 large figure 2, first of all to tab 1? Could you just
9 read what the title of that joint report is?

10 A. I am not sure that I have it.

11 Q. It is divided into two parts. There is a large figure one
12 and then there are six insets after that. Then there is a
13 large figure with six insets following that one. If you
14 will go to the first inset at the big figure two. Could
15 you just read the title of that joint report, please?

16 A. "The joint report on the negotiations for Trinidad and
17 Tobago and Barbados fishing agreement, Port-of-Spain,
18 Trinidad, 20th to 22nd March 2002".

19 Q. Thank you. Just turn back, please, to inset 4 in the
20 previous bundle. That is the previous round of
21 negotiations, the last negotiations of January 30th to
22 February 1st, 2002.

23 A. Correct.

24 Q. Would you just read the title of that?

25 A. "Joint report on the fourth round of negotiations for a
26 maritime boundary delimitation treaty between the
27 Government of Barbados and the Government of the Republic
28 of Trinidad and Tobago, Barbados January 30th to February
29 1st 2002".

30 Q. Thank you. There is no suggestion here that the first set
31 of fisheries negotiations are, in fact, the fifth round
32 of ongoing negotiations?

33 A. Well, you are not giving me much time, but, if you look in
34 that report itself, I am sure that I can find Sir Harold's
35 comments where he objected to the notion that it was a
36 separate process.

37 Q. Indeed, it is paragraph 3 of the first round of fisheries
38 negotiations.

1 A. Correct.

2 Q. Would you read the last sentence of paragraph 3?

3 A. Can I read the one before that?

4 Q. By all means, yes.

5 A. The sentence before from the Barbados negotiator said,
6 "Fisheries should not therefore be viewed as a separate
7 process". The sentence you asked me to read coming
8 immediately thereafter says, "The Trinidad and Tobago
9 delegation, on the other hand, considered this round to be
10 the first round of fisheries negotiations".

11 Q. There is clearly a difference between

12 A. As I said, there was a difference of position.

13 Q. Would you turn to tab 3, the immediately following tab.
14 And the title there?

15 A. "Joint report of negotiations to conclude the
16 Barbados/Trinidad and Tobago bilateral fisheries
17 agreement. Barbados March 24th and 25th 2003".

18 Q. Thank you. Again, no numbering?

19 A. No numbering.

20 Q. Tab 5, please.

21 A. "Joint report of the third round of negotiations for the
22 conclusion of a new fisheries agreement between the
23 Governments of Trinidad and Tobago and Barbados. Port-of-
24 Spain, June 12th and 13th". Of course, this was the Port-
25 of-Spain, so the preparation of the report would have been
26 done by the host country.

27 Q. Indeed, it would. Would you turn to page 8, please, of
28 that minute? Can you confirm that is Sir Harold St John's
29 signature at the bottom of it?

30 A. Correct.

31 Q. It was accepted by the Barbadian delegation, this report?

32 A. Yes.

33 Q. Lastly, can you turn to tab 6? Would you read the title,
34 please?

35 A. "Joint report of the fourth round of negotiations for the
36 conclusion of the new fisheries agreement between the
37 Government of Barbados and the Government of Trinidad and
38 Tobago. Bridgetown. November 19th to 21st 2003".

1 Q. This is a minute prepared by the Barbadian team, because
2 the meeting was held in Barbados, identifying this as the
3 fourth round of fisheries negotiations?
4 A. Correct.
5 Q. Would you turn to volume 3, please, of the Barbados Reply?
6 Please go to tab 40. Would you identify what the
7 document is?
8 A. It is the Nation Newspaper which is a Barbados newspaper.
9 Q. That I think is tab 39. Tab 40.
10 A. "Statement of the Government of Barbados on the status of
11 fisheries of negotiations between the Governments of
12 Trinidad and Tobago".
13 Q. Was this prepared by your Ministry?
14 A. Yes, this is a press release from the Prime Minister,
15 correct.
16 Q. Were you personally involved in preparing it?
17 A. I would have seen it. I do not think that I drafted it
18 personally.
19 Q. Would you go to the third paragraph on the first page,
20 please, beginning with "Barbados has been engaged" and
21 just read that?
22 A. "Barbados has been engaged in formal negotiations with
23 Trinidad and Tobago since March 2002 in an effort to
24 arrive at a mutually satisfactory bilateral fisheries
25 agreement to replace the previous one-year agreement which
26 expired in 1991. To date we have held four rounds of
27 negotiations and have made considerable progress on the
28 drafting of a new text. At our most recent round held in
29 November last year it was agreed that a further round
30 would take place at a date and time to be mutually agreed.
31 Immediately thereafter by diplomatic note of November 26,
32 2003, the Ministry of Foreign Affairs and Foreign Trade of
33 Barbados formally proposed the convening of the next round
34 in the latter half of February 2004. There has as yet
35 been no response to that note from the Ministry of Foreign
36 in Trinidad and Tobago".
37 Q. In view of the point that you have just made about these
38 being nine rounds of negotiations on the same topic, could

1 you explain why two weeks before those negotiations were
2 broken off, your Ministry told the press that there had
3 been four rounds of negotiations on fisheries?

4 A. There were four rounds within the context of a
5 delimitation process which dealt specifically with the
6 topic of fisheries.

7 Q. The delimitation process is not mentioned here.

8 A. No. I would think it fair to say that the Republic of
9 Barbados was more interested and more intrigued by the
10 fishing situation since it involved fishing communities
11 and fishermen being arrested. Therefore, in terms of the
12 press, there was very little coverage of what was in
13 essence a complicated matter of delimitation of which they
14 had very little understanding or interest, but in
15 fisheries they did and this is a press release.

16 Q. Thank you very much. I do not want to ask anything else
17 about that. I will probably come back to that particular
18 document in a minute, but could you go to tab 36 in the
19 same volume, please? Could you just confirm that this is
20 a transcript of the talks entitled "Boundary delimitation
21 negotiations and fisheries talks held in Barbados on 19th
22 to 21st November 2003"?

23 A. It is.

24 Q. This is a transcript made from the tape recording that you
25 explained was made by the Barbadian team.

26 A. Yes.

27 Q. Would you turn, please, within that to page 575 in the
28 volume? The comment of Mr Volterra at the bottom of page
29 575 - would you just read the four lines on that page?

30 A. "Permanent Secretary Marshall and Ambassador Sealy, I will
31 open the presentation with a few preliminary remarks. The
32 first of which is to apologise to everybody who is here
33 for the fisheries discussions. I am sorry if this is very
34 boring for you and largely [blank]. Thank you for your
35 patience in any event". Would you like me to explain the
36 circumstances of that remark?

37 Q. I would like you to explain what is represented by the
38 four dots - from the word "largely", actually.

1 A. I presume that either the transcriber could not understand
2 Mr Volterra's Canadian accent or it was a change in the
3 tape.
4 Q. I have listened to the tape, and I have more practice,
5 perhaps, of Mr Volterra's Canadian accent, the word that
6 is missing is "irrelevant".
7 A. OK.
8 Q. You have not listened to the tape yourself?
9 A. I have not listened to the tape myself.
10 Q. Had you read the transcript yourself?
11 A. I have scanned the transcript. I have not had the chance
12 to read the whole thing in detail.
13 Q. May I ask when you read the transcript?
14 A. This particular one?
15 Q. Yes.
16 A. Probably a couple of months ago.
17 Q. When was the transcript made?
18 A. I have no idea. You would have to ask one of my
19 delegation members.
20 Q. Were the transcripts made at the time that the meetings
21 were being held?
22 A. Not all of them, because, as I said, the individual in the
23 Foreign Ministry who had the training to work with the
24 Dictaphone went on study leave and then we had to find a
25 replacement so some of the tapes were there for a while
26 before they were transcribed.
27 Q. You said in your second witness statement that the purpose
28 of making tape recordings was the need to check against
29 memory and notes.
30 A. Correct.
31 Q. That was the way that you put it in examination in chief.
32 A. Correct.
33 Q. When was there a need to check against memory and notes?
34 A. We played the tapes several times during breakout sessions
35 when we were preparing the joint reports.
36 Q. So it was important, was it, in assisting with the
37 preparation of a joint report?
38 A. Yes, to confirm what has been said, especially in

1 instances where we wanted to be very precise in how we
2 recorded what was said.

3 Q. Ms Marshall, help me with this. If it was important in
4 preparing the joint report and you thought that Trinidad
5 and Tobago were making tape recordings at the sessions
6 that they hosted, why did you not ask for those tape
7 recordings so that they could help you prepare your joint
8 report of the Trinidad sessions?

9 A. Because from the very first session a methodology was
10 adopted which I found unusual, which was that there was
11 not a drafting group which sat together and came up with
12 an agreed record but that each side retired to its
13 breakout room and determined what it wanted to record as
14 having been its position. The word "joint" is really a
15 misnomer. What we had was something that reflected our
16 position and what Trinidad provided was one that reflected
17 their position. The only thing that we did was to make
18 sure that what was reflected on their side was not
19 misleading and they did the same with ours. In essence,
20 we were more concerned in getting our comments correct.

21 Q. I can understand that, but if you found it helpful to
22 listen to tape recordings of the meetings held in Barbados
23 in order to perform that task, I cannot see why it would
24 not have been equally helpful to have listened to the tape
25 recordings of the sessions in Trinidad.

26 A. I think that the majority, in total, were held in
27 Barbados. The very first session that was held in
28 Trinidad was a very preliminary session where we were all
29 feeling our way. There was only really, apart from that
30 one session, that would have been held in Trinidad and
31 Tobago. I am assuming that if we had had instances where
32 our notes did not reflect what we thought was our
33 position, we would have requested that the tapes were
34 played, as we would assume they would have if they wished
35 to do so.

36 Q. Ms Marshall, if you look at tab 1.3 in the Counter
37 Memorial volume 2.2, which is the joint records volume
38 that you were looking at a moment ago, that is the third

1 round of maritime boundary negotiations. Where were they
2 held?

3 A. Trinidad and Tobago.

4 Q. Thank you. The fourth round are held in Barbados. That
5 is the next tab.

6 A. Yes.

7 Q. The fifth round was in Barbados.

8 A. Correct.

9 Q. Then turning to the fisheries negotiations, tab 2(i),
10 first round in Trinidad?

11 A. Yes.

12 Q. The second round in Barbados.

13 A. Yes.

14 Q. The third round I Trinidad?

15 A. Yes.

16 Q. The fourth round in Barbados?

17 A. Correct.

18 Q. So it is roughly 50:50?

19 A. Correct.

20 Q. Except that you cannot have it as 50:50 if there are nine
21 sessions, I accept that.

22 A. Fisheries was, however, working from a text, a draft
23 agreement.

24 Q. I realise that, but does that make a difference to whether
25 it was tape recorded or not?

26 A. No, but it makes a difference as to whether you need to
27 check, because, if you are taking down suggested
28 amendments to a text in front of you, you will probably
29 have more accurate notes, because there are a number of
30 you taking down the same words.

31 Q. But then, in terms of the sessions held in Trinidad and
32 Tobago, at no stage did you or any members of your team
33 ever ask to check the tapes that you thought were being
34 made.

35 A. No.

36 Q. And at no stage did anyone from Trinidad and Tobago ever
37 ask you for the tapes that were made in Barbados.

38 A. They did not ask me personally. I do not know if they

1 asked anybody else.

2 Q. Is there, in fact, any evidence whatever that the Trinidad
3 and Tobago team realised that they were being tape
4 recorded?

5 A. Well, you will see from the affidavit of the technician
6 that he was approached at one stage by a member of the
7 Trinidad and Tobago team. I would think that it would be
8 hard to ignore equipment of that size in the meeting room
9 and the technician and a pile of tapes that he was
10 putting. Because they were cassettes, when he put them on
11 top of each other, it was a substantially large pile,
12 because, as you know, cassettes record an hour at a time.
13 If you have a session for two or three days, you end up
14 with a large pile of tapes. I do not think that it was a
15 mystery to anybody that that taping was proceeding.

16 Q. You pointed to the equipment over there as an example.

17 A. Yes. I said that it was slightly smaller than that.

18 Q. That is actually audio equipment, that is the tape
19 recorder.

20 A. Yes.

21 Q. So it is quite easy to confuse the two, is it not?

22 A. Not necessarily. Most of us in the Caribbean use slightly
23 lesser technology with a cassette recorder going around
24 and it is right that there is one box with the cassette
25 recorder and one box for the amplifier. A very simple set
26 up.

27 Q. Judging from the interference that I am getting in my left
28 ear from the speaker system over here, technology is
29 rather superior in the Caribbean.

30 A. I think that the interference comes from people who will
31 not switch off their cell phones.

32 Q. I need not take you to the documents as such. You have
33 read the witness statement of Mr Bidaisee, the hotel
34 manager at the Cascadia Hotel?

35 A. Yes.

36 Q. And the affidavit of Mr Eden Charles.

37 A. Correct.

38 Q. Both of which state that no tape recordings were made in

1 Trinidad and Tobago.

2 A. Correct.

3 Q. Have they misunderstood the situation?

4 A. Well, I cannot speak for them. I can speak for myself. I
5 can tell you that I saw the tape at the Crown Plaza. It
6 is very interesting that there is no statement from the
7 management of Crown Plaza. I note that that manager of
8 Cascadia simply says that he did not provide equipment for
9 taping. I cannot say what Mr Eden Charles swore to, but I
10 can say that I swore to what I knew and what I saw and
11 what members of my delegation also confirmed that they
12 saw.

13 Q. We can ask those questions of Mr Eden Charles, of course.

14 A. I am certain you will.

15 Q. Can we turn to the comment you make in your second witness
16 statement, please? You made the point a moment ago in
17 answer to one of my questions that these were rather
18 strange joint records.

19 A. Correct.

20 Q. You say that they were highly selective records, in
21 essence the joint reports reflect what each of the parties
22 wished to have recorded as its official statements of the
23 negotiations that had taken place.

24 A. Correct.

25 Q. To the extent that the joint reports reflect statements
26 made by Trinidad, they are what Trinidad and Tobago wanted
27 to be in the record.

28 A. Yes.

29 Q. And, conversely, to the extent that they attribute remarks
30 to the Barbadian delegation that is the position that
31 Barbados wants to have recorded?

32 A. If you look at the records you will see that there are
33 sub-headings for the delegation of Trinidad and Tobago and
34 for the delegation of Barbados. If Trinidad and Tobago in
35 its comments inferred something as a position of Barbados,
36 we would have challenged it if it did not represent our
37 views, but generally speaking each side drafted the part
38 that came under the heading saying "for the delegation of

1 Barbados" or "for the delegation of Trinidad and Tobago".
2 Therefore, the Barbados side would never have drafted the
3 language that appeared on the heading for Trinidad and
4 Tobago.

5 Q. But you would have been the determining factor in what
6 appeared under the statements of Barbados.

7 A. Correct.

8 Q. Would you turn to tab 1.1 in that volume of the joint
9 records, please?

10 A. Can you tell me the volume again?

11 Q. The joint records, volume 2.2 of the Trinidad and Tobago
12 Counter Memorial, the large tab 1 and then the small tab 1
13 within that.

14 A. Yes.

15 Q. Would you go to page 11, please? Under the heading, "From
16 the perspective of Barbados", this is, to use the words in
17 your witness statement, what Barbados wished to have
18 recorded as its official statements.

19 A. Yes.

20 Q. Would you read the first paragraph, please, beginning
21 "essentially"?

22 A. "Essentially the Barbados position is that the principle
23 of equidistance would be the most equitable way of
24 determining a boundary between the two countries. Indeed,
25 this principle is enacted in the Marine Boundaries and
26 Jurisdiction Act 1978. Barbados considered that the
27 relevant coastlines were opposing coastlines and not
28 adjacent coastlines as proposed by Trinidad and Tobago.
29 Barbados therefore proposed a median line solution for
30 arriving at a boundary. Barbados did not recognise any
31 special circumstances as put forward by Trinidad and
32 Tobago which would justify deviation from the median line
33 position".

34 Q. Thank you very much. Over the page, at page 12, please,
35 the third full paragraph, beginning, "Barbados has also
36 pointed out", would you read that, please?

37 A. "Barbados also pointed out that the geological and
38 geographical features of the Barbados ridge constituted a

1 factor which could have a bearing on the delimitation
2 process. Moreover, the practice since the seventies has
3 been an observance of the median line between the two
4 countries by fishermen and coast guard officials on patrol
5 and search-and-rescue missions".

6 Q. Thank you. An observance of the median line between the
7 two countries by fishermen. That was what Barbados wanted
8 to have recorded?

9 A. An observance of the existence of the median line.

10 Q. That is not what it says. "The practice since the
11 seventies has been an observance of the median line
12 between the two countries by fishermen ...". That was the
13 considered position of the Barbadian delegation, was it?

14 A. That was the statement at the beginning of the proceedings
15 in round one.

16 Q. Thank you. Earlier on on that page, would you just read
17 the paragraph immediately below that, "both delegations
18 also agreed"?

19 A. "Both delegations also agreed on the preparation of a
20 joint report at the end of each round of negotiations to
21 record accurately points discussed and agreed upon so as
22 to avoid having to rely upon memory".

23 Q. So the agreement was, was it not, that the joint record
24 would be the definitive record of the meetings?

25 A. Yes.

26 Q. There is no reference to tape recordings?

27 A. No.

28 Q. No reference to checking against anything else?

29 A. No.

30 Q. You said both in your witness statements and in your
31 answers in examination in chief a few minutes ago that
32 between 29th January and 5th February the Prime Minister
33 of Trinidad and Tobago commented on the existence of a
34 dispute between Barbados and Trinidad and Tobago.

35 A. Correct.

36 Q. What did you understand that dispute to be or, rather, to
37 be more precise, what did you understand the Prime
38 Minister of Trinidad and Tobago to mean when he used the

1 term "dispute"?

2 A. Well, to be quite frank we were mystified by what he
3 meant, because there were several comments both in the
4 printed media and on the television where he mentioned
5 referring the dispute to CARICOM or he said CARICOM, but
6 we assumed that he meant the CARICOM secretariat. There
7 was a lack of definition and our interpretation since it
8 came immediately after the Abuja meeting which was in
9 December, our interpretation was that it had to do with
10 the delimitation process.

11 Q. That is interesting. If you turn to Barbados volume 3,
12 please, tab 40, Barbados Reply volume 3, tab 40, that is
13 the press statement of 2nd February which we have already
14 talked about.

15 A. Which was for the consumption of the general public which
16 was more interested in fisheries.

17 Q. Yes, but I would just like to see how you put it to the
18 general public, because I am sure that your Government
19 would not have dreamt of misleading them. If you go to
20 the first paragraph, "Our two Governments have reached
21 agreement", would you read the final sentence of that
22 first paragraph? Perhaps you had better read the whole of
23 the first paragraph, perhaps that would be more
24 appropriate.

25 A. Yes, because that last sentence does not make sense unless
26 you read the first phrase. "The Government of Barbados
27 has noted with concern recent statements attributed to the
28 Prime Minister of Trinidad and Tobago, the Honourable
29 Patrick Manning, referring in Saturday's press, which
30 suggests that following informal discussions in Nigeria
31 our two Governments have reached an agreement to refer the
32 ongoing fisheries negotiations to the CARICOM
33 secretariat".

34 Q. Thank you. What was at issue was the reference of ongoing
35 fisheries negotiations to the CARICOM secretariat - is
36 that correct?

37 A. Except that fisheries was not discussed in Abuja,
38 delimitation was.

1 Q. With the greatest of respect, that is not what was said
2 here, is it?

3 A. I agree.

4 Q. Thank you. Then the reference to "the negotiations" in
5 the next paragraph ... Actually, read the second paragraph
6 in its entirety, that may clarify matters for the
7 Tribunal.

8 A. "The Government of Barbados wishes to make it clear that
9 there was no bilateral meeting in Nigeria between the two
10 Prime Ministers. Although the matter of fisheries arose
11 incidentally during the caucus of CARICOM heads, there was
12 never any discussion between the two parties to the
13 negotiations regarding the possible intervention of the
14 CARICOM secretariat".

15 Q. Could we just stop you there for a minute? You said that
16 there was never any discussion, but you have misread that,
17 have you not? "There was never any decision" is what it
18 says.

19 A. No, it says that it arose incidentally. The discussion in
20 Abuja as reported to us was on the

21 Q. Unless we have different copies of it, the final sentence
22 of that paragraph reads, "Although the matter of fisheries
23 arose incidentally during the caucus of CARICOM heads,
24 there was never any decision between the two parties".

25 A. Yes.

26 Q. You said "discussion between the two parties" when you
27 read it out. This paragraph again is a reference to a
28 discussion of fisheries which did not result in a
29 decision.

30 A. I would not call it a discussion if it arose incidentally.

31 Q. Well, the matter of fisheries arose incidentally.

32 A. Correct.

33 Q. Fair enough. If we go over the page, please, would you
34 read the first paragraph on page 2?

35 A. The one beginning "While"?

36 Q. Yes, please.

37 A. "While they acknowledged that there are still outstanding
38 issues, Barbados believes that with good faith on both

1 sides these can be resolved through the negotiating
2 process. In this belief the Barbados Government has kept
3 in place a high-level negotiating team with a
4 comprehensive negotiating mandate to bring the matter to
5 some satisfactory resolution. Neither side has indicated
6 that the talks have broken down and there is, in fact, a
7 clear determination as evidenced in the minutes of our
8 last round to reconvene the talks at the earliest
9 opportunity".

10 Q. Thank you. And the paragraph after that, please.

11 A. "We would therefore find it perplexing given these
12 circumstances if steps were taken at this time to request
13 the intervention of CARICOM secretariat in an issue which
14 is still very much the subject of active bilateral
15 negotiations. Having just concluded a substantive meeting
16 in November at which progress was made and follow up
17 mutually agreed upon, Barbados sees no need now to refer
18 the matter to the CARICOM secretariat. We have taken no
19 steps to do so nor have we received any formal indication
20 that Trinidad and Tobago has taken or intends to take such
21 action. As the matter stands, we are awaiting a response
22 to our diplomatic note to fix a mutually-convenient date
23 for the next round". Of course, this is dated February
24 2nd and the diplomatic note arrived on February 9th said
25 specifically let us stop fisheries and let us leave
26 delimitation aside.

27 Q. Yes, I quite accept that, Ms Marshall, but that is not the
28 question I was about to ask you. The question I was about
29 to ask you was as things stood on the 2nd February the
30 Government of Barbados is treating what Prime Minister
31 Manning said as relating to fisheries?

32 A. I would not say that we de-linked the two. We had
33 concerns about the both.

34 Q. But this statement mentions -----

35 A. The statement talks about fisheries.

36 Q. And indeed it says lower down the page from the very
37 outset of the negotiations Barbados proposed the
38 establishment of a joint technical working group.

1 A. Yes.

2 Q. That could only refer to the first round of fisheries
3 negotiations?

4 A. Yes. Correct.

5 Q. If it is a single process that statement is patently
6 untrue. In this statement you treat Prime Minister
7 Manning's suggestion about referring the matter to CARICOM
8 as relating to fisheries. You also state in terms that
9 considerable progress had been made at the last round of
10 fisheries negotiations and you were awaiting the
11 opportunity for a further round of negotiations.

12 A. At that point we were. Three days later fishermen were
13 arrested.

14 Q. At this point there was no suggestion of a deadlock
15 arising out of the earlier rounds of negotiation?

16 A. At that point as far as we were concerned, there was no
17 deadlock. Then Prime Minister Manning talked about
18 referring matters to the CARICOM Secretariat and then
19 there were the arrests of the fishermen and then we were
20 notified that there was a unitization agreement, that
21 concessions were being offered. Then we were told by
22 Prime Minister Manning at a meeting which I attended that
23 the matter of delimitation was intractable.

24 Q. We will come to the question of what Prime Minister
25 Manning said at the Prime Ministers' meeting on the 16th
26 February in a few minutes, but let us just stay with this
27 document for a minute. It is not true to say that then
28 Prime Minister Manning suggested a reference to CARICOM
29 because the whole purpose of this statement on the 2nd
30 February was to react to an earlier suggestion about
31 reference to CARICOM.

32 A. Correct.

33 Q. So the CARICOM suggestion came before the 2nd February
34 statement.

35 A. Yes. In fact there were two or three statements beginning
36 at the end of January.

37 Q. And in the light of what was said by Prime Minister
38 Manning about going to CARICOM the Government of Barbados

1 issued a statement saying We do not think the fisheries
2 matter should be taken to CARICOM. The fisheries
3 negotiations have not broken down, and there is no mention
4 of the maritime boundary.

5 A. Correct.

6 Q. Shall we go to the Prime Ministers' meeting please, your
7 first affidavit. In paragraph 2 of that first affidavit
8 you say that "to our surprise and concern on the 29th
9 January and again on the 5th February 2004 public
10 statements were made by Prime Minister Manning to the
11 effect that a dispute existed between the two countries.
12 He stated publicly there is the battle and there is the
13 war." What did you understand him to mean by that?

14 A. We did not know what he meant.

15 Q. He then stated that Trinidad and Tobago intended to refer
16 the dispute to the CARICOM secretariat and we assume that
17 that is the fisheries dispute. Barbados subsequently
18 protested against this but Prime Minister Manning stated
19 publicly that we would lodge our statement of case with
20 CARICOM. At the same time there appeared to be some
21 ambiguity about what he intended. Is that right?

22 A. Correct.

23 Q. You stand by that?

24 A. Yes. I do not know if you were privy to all of the press
25 statements and all of the clippings on the television but
26 it was not that crystal clear when Prime Minister Manning
27 spoke exactly what he was referring to in each instance,
28 and there was a genuine concern on our part that he was
29 referring at some points to delimitation, and there was a
30 further concern that if he was suggesting that the matter
31 be taken to the CARICOM secretariat that it would not be a
32 matter that would be resolved in the short term.

33 Q. Could I ask you to go to tab 43 in the same bundle as you
34 are in at the moment, volume 3 of the Barbadian Reply.
35 Five paragraphs up from the bottom would you just read
36 that, please?

37 A. "Asked specifically if CARICOM was to be used to resolve
38 the dispute Manning said No, no, no, we are not inviting

1 anybody into our affairs yet".

2 Q. Thank you. And the very first paragraph at the top of
3 that page, this article from the Trinidad and Tobago
4 Express.

5 A. Yes. "Prime Minister Patrick Manning yesterday insisted
6 that Trinidad and Tobago would take the fishing dispute
7 with Barbados to CARICOM".

8 Q. And then paragraph 4, perhaps it would be a good idea to
9 read that as well, because it does suggest what was meant
10 by the battle and the war.

11 A. "If we allow small issues to sidetrack us then we will not
12 be able to achieve the major objectives that we set for
13 ourselves and on which our populations elected us. It is
14 for me a very small matter and I do not propose to allow
15 it to interfere in cordial relations in the region".

16 Q. Thank you very much. Can we go to the Prime Ministers'
17 meeting please.

18 A. It would be nice if we could finish one thing and then
19 turn to the other. I am not used to this, I must say.

20 Q. I apologise for the fact that you have had to keep looking
21 at different volumes of documents, the documents are
22 scattered through I think 18 volumes all told, but I think
23 we can put that one volume to one side, and would you look
24 at Trinidad and Tobago Counter Memorial, volume 5, reports
25 and other documents. If you could turn to tab 29. Could
26 you tell us what that document is?

27 A. Notes of Cabinet, reported visit of the Prime Minister of
28 Barbados on 16th February 2004.

29 Q. This is a note to the Trinidad and Tobago Cabinet.

30 A. Yes.

31 Q. Have you read this?

32 A. No, I have not.

33 Q. You referred in your examination-in-chief to a similar
34 document, a note to the Cabinet, which you helped to
35 prepare for the Cabinet of Barbados.

36 A. Correct.

37 Q. That document is not in evidence in these proceedings.

38 A. Constitutionally our Cabinet notes are not public

1 documents.

2 Q. But presumably you also kept notes of that meeting of the
3 Prime Ministers?

4 A. We did.

5 Q. Have you refreshed your memory from those notes --

6 A. Yes, all of them.

7 Q. -- before drafting your first witness statement?

8 A. I looked at my notes, yes. I consulted with others who
9 were present. I looked at my notes and I consulted with
10 others who were present and they looked at their notes.
11 As I say the report was written contemporaneously,
12 immediately following the meeting itself.

13 Q. Which report?

14 A. The note to Cabinet was written immediately following the
15 meeting of the two Prime Ministers, within ten minutes.

16 Q. Was that the note which in correspondence with the
17 Permanent Court of Arbitration it was originally suggested
18 by Counsel for Barbados that Barbados would be putting
19 before the Tribunal in its additional evidence?

20 A. I do not think so.

21 Q. Because there is a reference there to contemporaneous
22 notes?

23 A. It might be notes of officers at the meetings; it would
24 not have been the Cabinet notes because as I said the
25 Attorney General would have to advise me but I believe
26 that constitutionally we are not permitted to bring
27 Cabinet notes into the public domain under any
28 circumstances.

29 Q. Would you please read paragraph 5, which is at the bottom
30 of page 1 and the top of page 2 in this Trinidad and
31 Tobago note to the Cabinet.

32 A. "In his opening remarks Prime Minister Manning indicated
33 that the administration in Port-of-Spain considered the
34 proposed imposition of a licensing regime a hostile act
35 and he expressed the hope that even at this late stage the
36 government of Barbados would reconsider the course of
37 action contemplated. While the proposed action of the
38 government of Barbados could give rise to a dangerous

1 deterioration in bilateral relations the government of the
2 Republic of Trinidad and Tobago had taken a conscious
3 decision to do nothing that would cause such a
4 deterioration. Prime Minister Manning also referring to
5 diplomatic note dated 14th February received from the
6 Ministry of Foreign Affairs and Foreign Trade of Barbados
7 which in both tone and content the administration in the
8 Port-of-Spain found objectionable. The Prime Minister
9 emphasised that it was the view of Port-of-Spain that the
10 issue of access by Barbados boats to the fisheries
11 resources of Trinidad and Tobago was eminently solvable".

12 Q. Does that concur with your recollection of what was said
13 at the meeting?

14 A. Certainly they discussed the licensing. This is not
15 related to the communication on fisheries, this is related
16 to trading goods, and Barbados was imposing a licensing
17 regime, not a quota system or a restriction, but a
18 licensing regime to monitor and Trinidad and Tobago was
19 obviously somewhat perturbed by this, and at the point in
20 time when the meeting took place they had not yet been
21 made aware of the nature of the regime that was to be
22 imposed. I would say that Prime Minister Manning - I
23 would not say that the words eminently solvable were used,
24 but I do recall that Prime Minister Manning said that the
25 boundary delimitation issue was intractable. The
26 Venezuela treaty complicated the matter and that that
27 should be left aside and that they should proceed to see
28 if they could come to a resolution on fisheries. I do not
29 remember the words eminently solvable, and I certainly did
30 not write them down.

31 Q. Fair enough. Leaving aside the licensing regime which I
32 accept is a different matter, that last sentence that you
33 have just read "the Prime Minister emphasised that in the
34 view of Port-of-Spain the issue of access by Barbados
35 boats to the fisheries resources of Trinidad and Tobago
36 was eminently solvable", whether he used the words
37 eminently solvable or not is that an accurate reflection
38 of what was said and an accurate reflection of the

1 sentence?

2 A. I think he implied that there was a possibility of
3 proceeding to an agreement on fisheries. However you will
4 have to recall that this is taking place approximately a
5 week after yet more Barbadian fishing boats had been
6 arrested, and this is taking place approximately a year
7 after the same two Prime Ministers met and came to an
8 agreement on fisheries ---

9 Q. Ms Marshall, I am merely asking where ---

10 A. And more arrests took place.

11 Q. I am merely asking whether this was what was said, not the
12 background of the negotiation.

13 A. I would say something to that effect was conveyed.

14 Q. Thank you. Would you turn to paragraph 14, please.
15 Paragraph 14 appears on page 4 at the top, beginning the
16 proposal by Prime Minister Manning. Would you please read
17 that out?

18 A. I am sorry, I am going to have to ask you to read it
19 because my throat is getting sore.

20 Q. Would you like some water?

21 A. I have some water. "The proposal by Prime Minister
22 Manning for an interim agreement on fisheries was made in
23 the context of a recognition of the Trinidad and Tobago
24 position that the issue could be solved, but Trinidad and
25 Tobago had never agreed to link fisheries and maritime
26 boundary delimitation negotiations and that Trinidad and
27 Tobago is now agreeable to link in the two negotiations on
28 the understanding that the delimitation negotiations are
29 likely to be more protracted than the fishery
30 negotiations. At this point Prime Minister Arthur turned
31 to Deputy Prime Minister Mottley and asked that it be
32 recorded that Trinidad and Tobago was of the view that the
33 fisheries issue could be solved before a final resolution
34 is achieved on maritime boundary delimitation."

35 Q. Thank you. Again is that an accurate reflection of what
36 was said?

37 A. That is not how I recall it.

38 Q. How do you recall it?

1 A. I do not recall any mention of a final resolution being
2 achieved on maritime boundary delimitation. I recall a
3 very distinct attempt to separate the two and say let us
4 proceed on fisheries and leave the other matters aside.

5 Q. And did somebody record as Prime Minister Arthur asked
6 Deputy Prime Minister Mottley should be done, that
7 Trinidad and Tobago was of the view that the fisheries
8 issue could be solved before a final resolution of
9 maritime boundary delimitations?

10 A. It is not in my notes to that effect. I do not know if it
11 is in others, but Deputy Prime Minister Mottley is here.

12 Q. Yes, but of course she is not a witness and cannot give
13 evidence any more than others who were in the room at the
14 time can do.

15 A. But you also have to be aware of the fact that Deputy
16 Prime Minister Mottley was sitting next to the Prime
17 Minister and right opposite from Prime Minister Manning,
18 and therefore if he turned to her and said something it is
19 not likely that any of the note takers in the back row
20 would have heard precisely what was said. So therefore I
21 cannot verify that. And this paragraph in any event is an
22 interpretation rather than a factual transcription.

23 Q. But would you accept that this interpretation - it does
24 not purport to be a factual transcription - would you
25 accept that this interpretation is difficult to reconcile
26 with the suggestion that the Trinidad and Tobago side
27 considered the negotiations had broken down?

28 A. I would accept that this as drafted would convey that
29 suggestion, but I would also reiterate that this is not
30 our interpretation of what was said or what was intended.

31 Q. In your evidence you said that Prime Minister Manning said
32 that the maritime boundary dispute as opposed to the
33 fisheries dispute was intractable. Did he use that
34 precise word, intractable?

35 A. Yes, he did.

36 Q. Why is it that you remember that?

37 A. We all remembered it. It was such a striking use of the
38 word, that when we went next door to draft our Cabinet

1 paper we said over and over again he said intractable. We
2 asked each other and everybody said are you sure, and
3 everybody said yes, he said intractable.

4 Q. You have read the witness statement of Mr Laveau?
5 A. I have.

6 Q. He was also at the meeting?
7 A. Yes.

8 Q. He does not recall that word being used or anything like
9 it.

10 A. No. It is significant though that Mr Laveau was not part
11 of the negotiating team and had not attended any of the
12 negotiating sessions. I found it significant that the
13 witness statement from Trinidad and Tobago would come from
14 the Prime Minister's protocol officer rather than from a
15 senior member of the team who had been at all the
16 negotiations and who would understand the nuances of the
17 discussions.

18 Q. That is very interesting, but of course if it is a matter
19 of giving evidence as to what was said at the meeting
20 between the Prime Ministers it does not matter two hoots
21 whether the person concerned was at any of the previous
22 meetings or not, does it?

23 A. I would not say so if you are taking notes on material you
24 are familiar with.

25 Q. You would remember whether the word intractable was used,
26 would you not?

27 A. You would take better notes if you ----

28 MR VOLTERRA: Mr President, I would just ask that counsel for
29 Trinidad and Tobago allow the witness to finish her
30 statement. Thank you.

31 PROFESSOR GREENWOOD: It is actually not a statement,
32 Mr President, as I recall it, it is the answer to a
33 question, and I was trying to ensure that it was indeed
34 the answer to the question I was asking rather than a
35 statement about something else. You would be able to
36 remember the word intractable being used whether you had
37 been at previous meetings of the negotiating team or not?

38 A. Probably. It would depend on what you were looking for.

1 For example I took very few notes on the matter of trade
2 discussions because they were not relevant to what I was
3 following, and other officers took notes on the trade
4 discussions.

5 Q. But you have said yourself that the members of your
6 delegation found the use of this word particularly
7 striking.

8 A. Correct.

9 Q. So is it not striking that somebody from the Trinidad and
10 Tobago delegation does not recall that sentence being used
11 at all?

12 A. It depends, as I say. If it were an individual familiar
13 with the negotiations and the build up to the negotiations
14 that word would have been striking.

15 PROFESSOR GREENWOOD: Thank you very much, Mr President.

16 I have no further questions.

17 THE PRESIDENT: Thank you, Professor Greenwood. Do you have
18 any further questions.

19 MR VOLTERRA: Mr President, Barbados has no redirect questions.

20 I have no doubt that the PCA in its usual efficiency has
21 kept track of the time of the cross-examination. Barbados
22 certainly has and we will pass that on for it to be
23 deducted from Trinidad and Tobago's time allocated.

24 THE PRESIDENT: Thank you, and thank you, Ms Marshall. We have
25 come to a felicitous point to adjourn, and we will resume
26 at 3 o'clock.

27 **(Adjourned for a short time)**

28 THE PRESIDENT: Professor Reisman.

29 PROFESSOR REISMAN: Mr President, may I say before I start that
30 I mean no disrespect by sitting, but this is a rather
31 small hearing room and I am afraid that, if I stand it
32 will appear that I am towering over, which is exactly the
33 opposite of the situation.

34 Mr President, members of the Tribunal, it is a great
35 honour to appear before this distinguished Tribunal on
36 behalf of Barbados. I have been asked to address you on
37 Trinidad and Tobago's objections to jurisdiction and also
38 on our objection to Trinidad and Tobago's belated claim to

1 part of the ECS or extended continental shelf.

2 Attorney General Mottley has reviewed the history of
3 the negotiations between the parties, including the most
4 recent negotiations over the past five years. A verbatim
5 transcript of negotiations which were conducted in
6 Barbados is part of the record before you. There is some
7 disagreement between the parties as to whether the
8 meetings in Trinidad and Tobago were also recorded, but it
9 is abundantly clear from the records, more than half of
10 the negotiations that you have before you, that all of the
11 issues that Barbados presented in its notice of
12 arbitration and in its Memorial were thoroughly discussed
13 in the course of those five years. Five years is a long
14 time and it would have been quite odd if all of those
15 issues had not been thoroughly discussed, and it would
16 certainly have said something about the feasibility of
17 further negotiations. It is evidence that the
18 negotiations had deadlocked to the point that Trinidad and
19 Tobago itself spoke of going to arbitration and the
20 intractability of the maritime boundary.

21 The issue is not whether Barbados and Trinidad and
22 Tobago concluded separately or agreed jointly that there
23 were no further possibilities for fruitful negotiations.
24 If there had to be a bilateral decision then the right to
25 invoke arbitration would have been meaningless. In
26 applying the relevant cases dealing with this issue,
27 Southern Blue Fin Tuna, MOX Plant, Land Reclamation,
28 Malaysia and Singapore and Nigeria/Cameroon, one of the
29 parties always felt that there should be more and still
30 more negotiation. In each of those cases the Tribunal
31 found that the other state was entirely entitled to make
32 its own judgment as to whether further negotiations would
33 be fruitful, or whether it was time to go to arbitration.

34 Barbados was more than entitled to conclude that
35 negotiations could not accomplish its minimum goals, even
36 though Trinidad and Tobago seemed to believe that further
37 negotiations were convenient for it and could accomplish
38 whatever goals it may have had.

1 Just consider the outstanding differences that
2 emerged over five years. The parties disagreed as to the
3 scope of what was in dispute. Barbados had wanted to
4 negotiate the maritime boundary and fishery rights
5 together, since in its view they are inseparable. Indeed,
6 I will explain later that where the maritime boundary lies
7 depends on whether there is agreement on fishing.
8 Trinidad and Tobago opposed that and sought to segregate
9 the boundary issues from the special circumstance of
10 Barbadian artisan fishing. Despite assurances from
11 Trinidad and Tobago's highest levels, arrests of Barbadian
12 fisherman continued and, indeed, occurred just as Prime
13 Minister Manning, apparently, told his Cabinet that
14 everything could be resolved by negotiation. Prime
15 Minister Manning in Trinidad and Tobago's Cabinet notes
16 finally seemed willing to integrate fishing and maritime
17 delimitation but just after he told Barbados that the
18 boundary issue was intractable. Indeed, Mr President, it
19 was.

20 There was a fundamental disagreement as to the very
21 existence of the special circumstances of Barbadian
22 artisan fishing, not to speak of its legal implications.
23 The parties disagreed as to the method to be deployed in
24 delimitation and apparently they still do.

25 In its Counter Memorial, Trinidad and Tobago finally
26 seems to accept the delimitation method which it had
27 rejected through the negotiations only apparently to
28 retreat from it once again in its Rejoinder. Trinidad and
29 Tobago complains that explicit maps were not delivered by
30 Barbados. That is not correct. But, in any event, the
31 method proposed by Barbados, one which is the procedure of
32 contemporary international law, generates an unequivocal
33 delimitation line which serves as the provisional boundary
34 subject to the demonstration of any relevant special
35 circumstances. That is one of the advantages and
36 attractions of the median line special circumstances rule
37 and one of the reasons why international jurisprudence
38 after a number of unsuccessful experiments with other

1 techniques has come to adopt it. The method was the
2 message and Trinidad and Tobago was under no doubt
3 whatsoever as to where Barbados' line ran. Indeed,
4 Trinidad and Tobago consistently rejected the
5 applicability of the median line special circumstances
6 method for precisely that reason and not on theoretical,
7 academic or aesthetic grounds. They were against the
8 method because they did not like the outcome that the
9 method generated.

10 The question is whether Barbados was entitled to
11 conclude that issues had been joined and they could only
12 be resolved to its minimum satisfaction by reference to
13 arbitration.

14 Mr President, a party that suddenly finds itself the
15 object of a law suit when there had been no anticipation
16 or indication or intimation of a dispute may feel
17 aggrieved and in such circumstances many legal systems,
18 including international law, may say that, if it is
19 appropriate in the circumstances to parties, "Why don't
20 you go back and see if you can work this out and only if
21 you can't come back to us with a clearly delineated
22 dispute?". That is the thrust of Part XV of UNCLOS. But,
23 Mr President, can anyone seriously contend that that was
24 the situation that obtained between Barbados and Trinidad
25 and Tobago at the time Barbados initiated the arbitration?

26 Can anyone who has looked at the written submissions
27 exchanged in this arbitration seriously contend that the
28 differences between the parties are not clear, are not
29 stark and that five years of fruitless negotiation have
30 demonstrated that the time for third party decision has
31 come? Yet Trinidad and Tobago has argued that Barbados
32 failed to engage in sufficiently lengthy negotiations with
33 a view to reaching a settlement without having recourse to
34 arbitration. In its Counter Memorial Trinidad and Tobago
35 actually states "The negotiations ongoing as at 16
36 February 2004 were still at an early stage" - "were still
37 at an early stage". The Tribunal has before it evidence
38 of five years and nine rounds of related negotiations,

1 many more years of informal exchanges before that, and in
2 Trinidad and Tobago's view "negotiations were still at an
3 early stage".

4 Mr President, one is reminded of Marvell's sonnet "To
5 a Coy Mistress", "Had we but world enough in time".

6 The parties disagree about the substance, the scope
7 and the characterisation of dispute, but far from casting
8 doubt on jurisdiction, this disagreement only further
9 reinforces the existence of the dispute that falls
10 squarely within the Tribunal's jurisdiction, for surely
11 whatever else those records establish it cannot be doubted
12 that they disclose a legal dispute as that term is
13 understood in the case law. In view of the clear impasse,
14 it would be very odd indeed for the Tribunal to disclaim
15 jurisdiction as Trinidad and Tobago prays for want of a
16 sufficiently lengthy exchange of views in favour of the
17 now certainly futile gesture of directing the parties to
18 return to negotiations and, in any event, that is not what
19 the Convention requires, as I would like to explain.

20 The parties continue to disagree on several
21 jurisdictional issues of law, but they agree on the
22 essential policy expressed by Part XV, whether
23 characterised, as a strict jurisdictional pre-condition or
24 otherwise, the parties agree that the Convention's policy
25 is to maximise the resolution of disputes by agreement
26 and, therefore, to ensure that the parties engage in good
27 faith reasonable efforts to resolve their differences by
28 negotiations and consultations before the institution of
29 some form of binding dispute resolution. Indeed, this
30 policy permeates the entire Convention, not only Part XV;
31 Articles 74 and 83, which authorise resort to binding
32 dispute resolution refer in their first clause to the
33 circumstances where "no agreement can be reached within a
34 reasonable period of time". Mr President, members of the
35 Tribunal, all of the quotations and references to the
36 documents are in your Judges' folders, I will not mention
37 them in each case. Before instituting the adversarial
38 proceedings, the parties should exchange views according

1 to Article 283 and negotiate not only with a view to
2 settlement, which both sides may recognise as unlikely,
3 but also to clarify the issues and the respective views of
4 the parties on them for the benefit for a future Tribunal.

5 By application of this essential policy, it is clear that
6 the Tribunal has jurisdiction to decide issues submitted
7 to it by Barbados and it is equally clear, we submit, that
8 it lacks the jurisdiction to determine the eleventh hour
9 claim to extend the continental shelf.

10 Mr President, it would be wasteful of the Tribunal's
11 time to recite in detail in this phase of the arbitration
12 what the documentary evidence submitted by the parties
13 establishes about the nature and scope of the issues
14 framed over the course of five years and nine rounds of
15 related negotiations. I would draw the Tribunal's
16 attention to section 2(2) of our Reply for a summary of
17 that evidence which you will also find in your folders.
18 Let me emphasise the key points.

19 First, while Trinidad and Tobago insist on a hermetic
20 separation between the fisheries and maritime delimitation
21 issues, and notwithstanding the nominal structure of the
22 negotiations, Barbados made absolutely clear from the
23 outset that it viewed these two issues as fundamentally
24 inextricably intertwined. This makes perfect sense for a
25 paramount interest of Barbados throughout the negotiations
26 has been to ensure that whatever form the final maritime
27 boundary ultimately takes, its artisan fisherfolk will
28 continue to enjoy their traditional right of access to
29 economically-essential fishing regions off the coast of
30 Tobago. The only times when Barbados indicated as a
31 negotiating position that it might accept a median line
32 throughout the entire boundary was precisely when the
33 accommodations of its fishing requirements seemed
34 imminent.

35 The Tribunal should appreciate that when the parties
36 differed as to the proper scope and subject of the
37 negotiations the extent to which fisheries and
38 delimitation issues were linked or distinct this was not a

1 formality with procedural technicality. It went to the
2 very heart of the dispute. Trinidad and Tobago by denying
3 the connection between the two effectively rejected
4 Barbados' position on both issues.

5 The second point is just an abstraction of the long
6 negotiations. Throughout the negotiations, the parties
7 disagreed not only on the ultimate issue of where to draw
8 the boundary, its precise location, but on initial
9 methodology, how to draw the boundary in conformity with
10 the Convention and general international law. Barbados
11 maintained then, as it does now, that international law
12 establishes a clear methodology. First, identify a
13 provisional median line between the opposing coasts and
14 then determine whether any relevant special circumstances
15 requires its adjustment. Trinidad and Tobago insisted
16 throughout the negotiations on applying what it called
17 "equitable principles, relevant circumstances rule".
18 Since the institution of this arbitration, Trinidad has
19 apparently conceded that it had been negotiating based on
20 an incorrect or unsupported position for it now seems to
21 agree that the Tribunal's first task should be to identify
22 the provisional median line, although I should say that it
23 appears to have retreated somewhat from this position in
24 its Rejoinder. The parties continue to disagree among
25 other things about the existence and influence of
26 potential relevant circumstances, whether the two states
27 lie only in a position of coastal opposition, as Barbados
28 thinks is self-evident, or partly in a position of coastal
29 opposition and partly coastal adjacency as Trinidad and
30 Tobago maintains, the role, if any, of disproportionality
31 and the relevance, if any, of the Trinidad and Tobago-
32 Venezuela agreement. In its Counter Memorial, Trinidad
33 and Tobago asserted that "there was no dispute between the
34 parties as of 16 February 2004", but the voluminous record
35 before the Tribunal and the diametrically opposed
36 positions of the parties speaks for itself. Whatever may
37 be said of the merits of the parties' claims, the
38 existence of the legal dispute or, perhaps more

1 accurately, disputes giving rise to jurisdiction cannot in
2 our view be doubted.

3 But Trinidad and Tobago still continues to deny the
4 existence of a dispute or at least the existence of a
5 dispute for a sufficiently reasonable period of time. In
6 its Rejoinder it describes a very formal and technical
7 definition to the term "dispute", for it denies that
8 parties negotiating under Articles 74 and 83 can be said
9 to be in a state of dispute. Were they in dispute, so the
10 argument runs "parties seeking to effect an agreement
11 would always be in a state of dispute, save in the unusual
12 situation when they instantly agree on all matters".

13 As we emphasised in our Reply, what this means in
14 practical terms is that parties negotiating disputed
15 issues in an effort to reach an amicable solution must
16 according to Trinidad and Tobago's view at some point
17 artificially enter into what I would call for lack of a
18 better term pre-dispute negotiation under Articles 74 and
19 83 and then again to begin with what they might term the
20 dispute proper process, at which point the parties must
21 re-exchange all of the views and positions articulated in
22 the course of years of negotiation. This time however
23 explicitly under the rubric of Article 283. This dispute
24 proper exchange of views must then also continue for a
25 reasonable period of time. One would assume for at least
26 another five years at least because that did not
27 constitute a reasonable period of time for the first pre-
28 negotiation or pre-dispute phase, and it is only then, Mr
29 President, that one party may finally invoke its rights to
30 compulsory dispute resolution. In Trinidad and Tobago's
31 arithmetic the five years is only an early stage. Imagine
32 how long negotiations are to continue before they amount
33 to a reasonable period of time.

34 We would respectfully refer the Tribunal to the
35 record for evidence that Barbados did indeed make quite
36 plain its proposed boundary line in graphic form, but it
37 is surely implausible to think that the existence of a
38 legal dispute as opposed to what Trinidad and Tobago would

1 presumably characterise as non-dispute negotiations turns
2 exclusively on Barbados' introduction of that graphic
3 depiction at one of the rounds of negotiation.
4 International law has never suggested the need for such an
5 artificial and arbitrary jurisdictional trigger where, as
6 the records before the Tribunal plainly establish, both
7 parties understood perfectly well the nature and scope of
8 the matters in contention. The paramount policy of Part
9 XV - to ensure that the parties engage in meaningful, good
10 faith efforts to resolve their disputes by negotiation
11 before one invokes its compulsory dispute resolution
12 rights - we submit, is fully satisfied with respect to
13 Barbados' claim. Again the record speaks for itself here.
14 Barbados negotiated formally with Trinidad and Tobago for
15 more than five years and informal exchanges stretch back
16 for two decades. Barbados remained prepared to continue
17 to negotiate notwithstanding Trinidad and Tobago's refusal
18 to acknowledge, for example. the propriety of the
19 provisional median line relevant circumstances test.
20 Notwithstanding its episodic and needlessly provocative
21 harassment of Barbadian fisherfolk, notwithstanding
22 Trinidad and Tobago's discussions with Venezuela about
23 licensing the exploitation of hydrocarbons in regions
24 clearly claimed and long claimed by Barbados as its
25 maritime space. At that time Barbados also had reason to
26 believe that Trinidad and Tobago intended imminently to
27 exercise its right to denounce its obligation to submit to
28 third party dispute resolution under Article 298 paragraph
29 1; precisely to avoid this Tribunal's jurisdiction, as
30 Trinidad and Tobago is straining to do in this very
31 procedure. Then on February 16 2004 Prime Minister
32 Manning made a visit to Barbados at which he declared the
33 maritime delimitation issue intractable. It was at that
34 meeting as Ms Marshall has testified in her affidavit that
35 Prime Minister Manning stated "are you saying that you are
36 going to take us to an international Tribunal? If so by
37 all means, go ahead." Only then did Barbados institute
38 arbitration.

1 The Convention cannot reasonably be construed to
2 require that a state refrain from instituting proceedings
3 in these circumstances.

4 I would like to emphasise at this point, as Barbados
5 made clear in its Reply, that the authorities relied on by
6 Trinidad and Tobago in support of its construction of pre-
7 conditions to jurisdiction not only fail to support that
8 construction. They make it clear that international law
9 generally and the Convention in particular, does not
10 impose such formalistic pre-conditions. All the cases
11 cited by Trinidad and Tobago, Southern Blue Fin Tuna, MOX
12 Plant, Straits of Johor, stand for the same fundamental
13 proposition, that as the Law of the Sea Tribunal said in
14 Southern Blue Fin Tuna "A state party is not obliged to
15 pursue procedures under Part XV section 1 when it
16 concludes that the possibilities of settlement have been
17 exhausted". In other words as a matter of law, even if
18 Prime Minister Manning had not characterised the central
19 issue of maritime delimitation as intractable, thereby
20 effectively making clear that his government's position in
21 future negotiations would be rigid, and even if he had not
22 tauntingly dared Barbados to take Trinidad and Tobago to
23 arbitration, Barbados had every right under the
24 Convention's jurisprudence and general international law
25 to conclude for itself that further exchanges of views, in
26 the words of Singapore/Malaysia "could not yield a
27 positive result" and therefore to invoke its right to
28 arbitration. The international court affirmed the same
29 principle as a rule of general international law in
30 Cameroon/Nigeria. It would be unreasonable to suppose
31 that the Convention requires a state party having
32 concluded that further negotiations are exchanges of view
33 would be unproductive, to then begin a new exchange of
34 views under Article 283 which surely it would find futile
35 and thus immediately terminate.

36 Mr President, members of the Tribunal, in its
37 Rejoinder Trinidad and Tobago faults us for characterising
38 its theory of jurisdiction as manifestly absurd or

1 unreasonable, but then faults us again for failing to look
2 at the travaux of the Convention to resolve the issue. We
3 believe that the pertinent text of UNCLOS, interpreted in
4 accordance with Article 31 of the Vienna Convention,
5 produces a perfectly reasonable result requiring no
6 reference to the travaux of the treaty. It is Trinidad
7 and Tobago's proposed interpretation that is absurd. It
8 is, Mr President, a tactic reminiscent of Baron Van
9 Munchausen for a party to impose an absurd reading on a
10 clear text, and then to use its own absurd concoction as a
11 warrant to rummage through an enormous travaux in search
12 of a document that ostensibly supports its position. And
13 what international conference does not include some absurd
14 statements?

15 Barbados' point is that the plain reading of the text
16 of the Law of Sea Convention does not lead to a manifestly
17 absurd and unreasonable view, which we think Trinidad and
18 Tobago still apparently advances whereby one party can
19 subvert the third party dispute resolution obligation of
20 Part XV unilaterally by simply insisting on further
21 negotiations or declaring that Article 283 negotiations as
22 opposed to so-called pre-dispute Article 74 and 83
23 negotiations have not yet begun, and then conveniently
24 taking the opportunity to denounce unilaterally its
25 obligation to submit to arbitration.

26 There is no need to look to the travaux to appreciate
27 that this reading cannot be correct. A plain reading of
28 the text would not and does not yield an absurd
29 implausible result.

30 Yet even were it necessary to look to the travaux to
31 resolve this jurisdictional issue it should be emphasised
32 first that the Virginia Commentary on which Trinidad and
33 Tobago relies is not travaux. Nor does it support
34 Trinidad and Tobago's position. As we noted in our Reply,
35 the Commentary correctly ascribes to the drafters an
36 intention to ensure proper consultations between all
37 concerned parties to a dispute, and indeed the Commentary
38 explains that Article 283 originated in the insistence of

1 certain delegations that the primary obligation should be
2 that the parties to a dispute should make every effort to
3 settle the dispute through negotiation. Barbados would
4 respectfully draw the Tribunal's attention to another
5 paragraph of the Commentary, not quoted by Trinidad and
6 Tobago, which emphasises that, consistent with general
7 principles of domestic and international law alike, "the
8 obligation is to negotiate", not to reach an agreement or
9 settlement, that this means that the parties should "make
10 reasonable proposals for the settlement of a dispute", but
11 by no means permits parties to "present ultimatum to the
12 other party, or demand that it unconditionally surrender
13 its point of view".

14 Parenthetically I would note that Trinidad and
15 Tobago's refusal to acknowledge the proper methodology
16 during the course of five years as well as the declaration
17 of its Prime Minister describing the issue as intractable,
18 certainly sounds like an ultimatum, and Trinidad and
19 Tobago's efforts, sporadic though they may have been, to
20 exclude Barbadian fisherfolk from the waters which they
21 have traditionally fished when this was a critical subject
22 of negotiation, would certainly sound like an ultimatum to
23 those to whom it was directed.

24 But above all, however erudite the Virginia
25 Commentary may be, and even if it did support Trinidad and
26 Tobago's view, it does not and cannot transform the plain
27 meaning of the Convention's text from a clear unilateral
28 right to invoke compulsory dispute resolution in the event
29 that a settlement cannot be reached into "no more than a
30 bilateral negotiation subject to the unilateral veto of
31 one party". And that, Mr President, members of the
32 Tribunal, would be the upshot of adopting Trinidad and
33 Tobago's view; and it would render Part XV's dispute
34 resolution provisions virtually worthless. After all, it
35 is always open to two states to agree ex post to submit a
36 dispute to arbitration. A convention would not go out of
37 its way simply to reaffirm this. It gives states' parties
38 an ex ante guarantee that, should negotiations and

1 consultations fail, third party dispute resolution will be
2 available at the initiative of either one of them, and
3 that is of course a principal reason why states enter the
4 Convention.

5 The sole excerpt from the actual travaux that
6 Trinidad and Tobago includes in its written pleadings is
7 we believe equally misleading. I refer to the isolated
8 statement in the summary prepared by the conference
9 president, which Trinidad and Tobago quotes in its
10 Rejoinder, that "an exchange of views is also prescribed
11 whenever any procedure for settlement has failed to bring
12 about a settlement". In the first place, this statement
13 refers to a version of the text not ultimately adopted by
14 the drafters of the Convention, but substantively read in
15 context it is clear that the document refers to an
16 exchange of views being prescribed not as a stringent
17 jurisdictional pre-requisite but, as the next paragraph
18 clarifies, as part of the liberal and flexible structure
19 for dispute settlement which "does not limit in any way
20 the method that the parties may wish to utilise".

21 Mr President, members of the Tribunal, the only
22 pertinent question raised by the conjunction of Article 74
23 and 83 on the one hand and Article 283 on the other, is
24 one of good faith and reasonableness; that is did the
25 parties negotiate in good faith for a reasonable period of
26 time before one instituted binding third party dispute
27 resolution? The Virginia Commentary anticipates that
28 disputes may arise over what constitutes a reasonable
29 period of time in the context of these provisions, and it
30 opines that "a conciliation commission must be presumed to
31 have the competence to decide on this issue when it
32 addresses the merits of the dispute". And of course this
33 Tribunal has the competence to decide whether, given the
34 voluminous record, the parties negotiated for a reasonable
35 period of time. While the travaux offer little guidance
36 on this issue it is worth noting that the initial draft on
37 the settlement of disputes employed as a negotiating text
38 in 1975 in a different part of the Convention referred to

1 an obligation of the parties to "first seek a solution
2 through consultation, negotiation, conciliation or other
3 such means of their own choice" and providing "if the
4 dispute has not been resolved by such means within one
5 month" - within one month - "of its commencement any party
6 to the dispute may institute proceedings". Surely five
7 years of formal negotiations, preceded by more than two
8 decades of disagreement cannot be thought unreasonable,
9 particularly where one of the parties declares that the
10 negotiations have reached an impasse, invites the other
11 party to go to arbitration, and actively, if
12 ineffectively, excludes the traditional artisanal
13 fisherfolk of the other from their fishing grounds when
14 that is one of the issues under negotiation.

15 Mr President, I turn to Trinidad and Tobago's
16 objection to jurisdiction based upon an alleged lack of
17 good faith. Trinidad and Tobago's Rejoinder disclaims any
18 objection based on bad faith or abuse of rights to be
19 found in Barbados' decision to initiate arbitration. But
20 it claims that Barbados is guilty of an abuse of rights
21 because its positions in this arbitration are allegedly
22 incompatible with its purported prior recognition of
23 Trinidad and Tobago's exclusive economic zone and because
24 of certain parts of its domestic legislation. We believe
25 that this is false on its own terms and irrelevant. It is
26 false because the supposed recognition consists of a
27 creative mosaic of a selected assortment of statements
28 made during the negotiations, somewhat mysteriously
29 coupled with what Trinidad and Tobago sees as the
30 implications of a one-year provisional arrangement
31 embodied in the 1990 modus vivendi on fishing rights.
32 Some of Barbados' statements express a willingness to
33 consider recognising Trinidad and Tobago's claim to
34 exclusive economic zone. Trinidad and Tobago's objection
35 here betrays a misunderstanding of what negotiation
36 entails and as a result explains its own intransigence in
37 the negotiations. In North Sea Continental Shelf, the
38 court said, "The parties are under an obligation to enter

1 into negotiations with a view to arriving at an agreement
2 and not merely to go through a formal process of
3 negotiation as a sort of prior condition for the automatic
4 application of a certain method of delimitation in the
5 absence of agreement. They are under an obligation so to
6 conduct themselves if the negotiations are meaningful,
7 which will not be the case when either of them insists
8 upon its own position without contemplating any
9 modification of it". Mr President, far from being a sign
10 of bad faith or abuse of rights, the fact that Barbados
11 was willing to explore alternative arrangements
12 illustrates that it was negotiating in good faith,
13 attempting to reach a fair compromise even though it did
14 not agree with Trinidad and Tobago's claim.

15 It is false and it is irrelevant. It is irrelevant
16 because even were Barbados' statements construed as
17 recognition of Trinidad and Tobago's claimed exclusive
18 economic zone, it does not show bad faith, still less an
19 abuse of rights, for Barbados to take a contrary position
20 in this arbitration. An abuse of rights, Trinidad and
21 Tobago argues, occurs, to quote Jennings and Watts from
22 Oppenheim, "when a state avails itself of its right in an
23 arbitrary manner in such a way as to inflict upon another
24 state an injury which cannot be justified by a legitimate
25 consideration of its own advantage".

26 A legal claim made in an arbitration is not by any
27 stretch of the term an injury. It is not arbitrary even
28 were it contrary to a position taken by Barbados during
29 settlement negotiations. In both domestic and
30 international litigation, parties frequently advance
31 arguments or take positions contrary to those taken for
32 purposes of settlement negotiations. Consider the draft
33 Canadian/US Treaty for the Gulf of Maine, which was
34 adopted by the Canadian Parliament but failed the US
35 Senate. It did not preclude the parties from advancing
36 wholly different claims in the subsequent litigation.
37 Indeed, it could not preclude them. Meaningful
38 negotiations import a willingness to accept less than

1 legal entitlement in order to reach a settlement. When
2 negotiations fail and arbitration or adjudication ensues,
3 parties are entitled to insist upon their full legal
4 rights without regard to contingent concessions which they
5 might have been willing to make in the preceding
6 negotiation. That entitlement does not make the
7 subsequent litigation positions arbitrary and it certainly
8 does not make them actions that "cannot be justified by
9 legitimate consideration of the state's own advantage", to
10 quote the Jennings and Watts summary. If that were the
11 case, Mr President, there could be no incentive to explore
12 options for compromise and negotiations would degrade to
13 each side stating and restating its own position.

14 I would like to turn to the one-year provisional
15 modus vivendi of 1990. It contains an express
16 preservation of rights clause that forecloses any argument
17 that Barbados recognised Trinidad and Tobago's claimed
18 exclusive economic zone - this is an express provision.
19 Trinidad and Tobago argues in its Rejoinder that the
20 context of the modus vivendi somehow or other vitiates the
21 plain meaning of the clause, quoting the relevant context
22 for Article 11, that is the preservation of rights, is
23 constituted by the central provisions of the agreement,
24 that is Article 2, entitled "Access to exclusive economic
25 zone of Trinidad and Tobago". The title of Article 2 does
26 not define the context, object and purpose of the treaty,
27 all of which quite clearly concern access to fisheries,
28 not maritime boundary delimitation. And what theory of
29 treaty interpretation, Mr President, says that the chapeau
30 of one provision in the Treaty can completely negate the
31 explicit meaning of another provision?

32 Mr President, members of the Tribunal, plain meaning
33 is plain meaning. And the 1990 modus vivendi provides
34 absolutely no support for Trinidad and Tobago's claims.

35 Trinidad and Tobago also argues that Barbados'
36 domestic law precludes it from making the claims that it
37 has submitted to this Tribunal. Three points must be made
38 here. First, Trinidad cannot allocate to itself an

1 authoritative right to interpret Barbados' laws and, if it
2 is going to interpret them, it should do so accurately.
3 The law on which Trinidad and Tobago bases its abuse of
4 rights objection, as we said in our Reply, creates default
5 principles pending agreement. It does not preclude
6 Barbados from entering into agreements establishing its
7 own exclusive economic zone other than by a median line.
8 Second, the issue is not the median line, for even
9 Trinidad and Tobago has now accepted that a projection of
10 a median line is international law's provisional
11 methodology, though it has replaced its former methodology
12 with a rather incredible claim that Barbados and Trinidad
13 are not opposite each other but somehow adjacent. The
14 issue is the scope to be applied to the special
15 circumstance which by its nature requires a third-party
16 decision maker. Third, even were Barbados law construed
17 as Trinidad and Tobago suggests, no international
18 precedent suggests that espousing a position in an
19 arbitration which differs from the municipal law that was
20 necessarily provisional pending authoritative
21 determination by a third-party decision maker rises to the
22 level of an arbitrary and capricious injury to another
23 state.

24 Mr President, members of the Tribunal, I would like
25 to turn now to Trinidad and Tobago's objection to the
26 scope of Barbados' application.

27 During the negotiations, Barbados had requested
28 recognition of non-exclusive fishing rights for its
29 traditional artisanal fisherfolk in the disputed areas in
30 which they had fished. Trinidad and Tobago consistently
31 rejected the request and began to pursue a policy of
32 excluding Barbadian artisanal fisherfolk from these
33 grounds and they thereby created a situation which
34 constitutes a special circumstance, as we will elaborate
35 later in our presentation.

36 We are now in a maritime boundary delimitation
37 arbitration in which the international legal methodology
38 is median line special circumstances. When Barbados

1 establishes that this special circumstance attains, the
2 Tribunal will have at its disposal a spectrum of remedies,
3 ranging from an adjustment of the median line, as in Jan
4 Mayen, to the establishment of an appropriate regime for
5 Barbados' fisherfolk in waters which the Tribunal would
6 then determine pertained to Trinidad and Tobago, as in
7 Eritrea-Yemen. Barbados is requesting an adjustment of
8 the median line as in Jan Mayen for we believe that it is
9 the most appropriate remedy. But the crafting of a remedy
10 is the province of the Tribunal and our specific prayer
11 cannot preclude the Tribunal's competence to award a
12 remedy at another point on the spectrum. As long as it is
13 less than what Barbados has requested, it will still be
14 *infra petita*. Barbados does not request an award of non-
15 exclusive fishing rights, the possibility raised during
16 the course of separate negotiations, but it does not agree
17 that a hypothetical award of this sort would exceed the
18 Tribunal's competence. In fact, in the jurisdictional
19 context, Barbados would respectfully draw the Tribunal's
20 attention to the relevance of non-exclusive fishing rights
21 as a special circumstance. We submit that artisanal
22 fishing by Barbadian fisherfolk in waters to the west of
23 the median line and the manifest dependence of the
24 Barbadian fishing community and the national economy upon
25 such fishing constitutes a special circumstance that must
26 be considered in the delimitation of the maritime
27 boundary. As I noted earlier, one of the intractable
28 issues between the parties in the course of the long
29 negotiations that preceded this arbitration was the
30 inseparability of the artisanal fishing access and
31 maritime delimitation issues. By insisting on treating
32 these issues as distinct and unlinked, Trinidad and Tobago
33 utterly rejected our fundamental position on both issues.
34 Its refusal to recognise artisanal fishing rights was a
35 rejection of the boundary claim. Trinidad and Tobago's
36 refusal and its continued, if episodic, efforts at
37 excluding our fisherfolk from their traditional waters
38 generated a special circumstance. This issue is an

1 inseparable part of boundary delimitation and, to use the
2 language of the ICJ in the Fisheries Jurisdiction case,
3 arises "directly out of the question which is the subject
4 of that application". When this species of special
5 circumstance has been established, an international
6 Tribunal has two options: either to adjust the boundary,
7 as occurred in Jan Mayen, or to install a regime
8 protecting the artisanal fishing, the predicate of the
9 special circumstance, as occurred in Eritrea-Yemen.

10 The negotiations and exchanges of views preceding
11 Barbados' institution of arbitration clearly established
12 the Tribunal's jurisdiction to decide.

13 Mr President, members of the Tribunal, for the same
14 reason Trinidad and Tobago's claim to an extended
15 continental shelf which was advanced in the form of a
16 clear claim for the first time after the institution of
17 this arbitration falls outside the Tribunal's
18 jurisdiction.

19 Trinidad relies on the broad language of UNCLOS
20 article 286 as its basis for jurisdiction, but that
21 provision, as Trinidad itself argues, is subject to the
22 general requisites for the activation of a jurisdiction by
23 exhausting certain prescribed procedures and, we would
24 add, by the competence of a Part XV Tribunal to take up a
25 particular issue.

26 If it please the Tribunal, I will take you to these
27 issues in turn. Despite five years and nine rounds of
28 negotiations, the parties never exchanged views or engaged
29 in negotiations within the meaning of UNCLOS on Trinidad's
30 claim to an extended continental shelf reaching beyond 200
31 nautical miles from its territorial sea, for the simple
32 reason that until this arbitration began Trinidad and
33 Tobago never presented the claim. To mention an issue in
34 passing is not to exchange views. But to exclude
35 something explicitly is to exclude it and to remove it
36 from the spectrum of possible disputes. In the fifth
37 round of negotiations, Trinidad and Tobago confirmed that
38 its claim line stopped at the 200 nautical mile arc. That

1 is what Trinidad and Tobago said. It is part of the
2 transcript that records exactly what was said and it is
3 not taken out of context.

4 Trinidad and Tobago now claims that it intended to
5 raise the issue in further negotiations, but was precluded
6 by the initiation of this arbitration. Five years was
7 ample time and opportunity to make this claim. Indeed, if
8 it were making the claim, to make it in numbing detail.
9 Assertions made after the fact of would have and should
10 have are not evidence of what happened. The transcript is
11 evidence of what Trinidad and Tobago is claiming and the
12 transcript tells us that Trinidad and Tobago was only
13 claiming up to 200 nautical miles. In fact, Barbados
14 could not even have foreseen that Trinidad and Tobago
15 might submit a claim to Barbados' extended continental
16 shelf, given that Trinidad and Tobago's 200 nautical mile
17 arc falls within Barbados' 200 nautical mile arc.
18 Trinidad and Tobago did not even reach the extended
19 continental shelf. Only in relation to the drawing of a
20 single maritime boundary, which includes the special
21 circumstance of artisanal fishing, was there a full
22 exchange of views. The dispute submitted to the Tribunal
23 therefore does not and cannot, we submit, include a newly-
24 minted claim to an extended continental shelf.

25 Mr President, there is an additional and more serious
26 obstacle which goes to the competence of the Tribunal.
27 The Tribunal under Part XV lacks jurisdiction and
28 competence over Trinidad and Tobago's claim to an extended
29 continental shelf, because adjudication of such claim
30 would prejudice the right of states not parties to this
31 arbitration. Article 76, paragraph 8, provides in
32 relevant part that it is the Commission which shall make
33 recommendations to coastal states on matters related to
34 the establishment of the outer limits of their continental
35 shelf. The limits of the shelf established by a coastal
36 state, on the basis of these recommendations, shall be
37 final and binding. "The recommendations shall be final
38 and binding".

1 Trinidad and Tobago contends that the Commission's
2 function is to form a view as to the application of these
3 criteria on the basis of information provided by the
4 coastal state, but, according to Trinidad and Tobago, the
5 Commission's function is exclusively with the location of
6 the outer limit of the shelf not with any question of
7 delimitation inter se as between adjacent coastal states.

8 But we would ask, can any sensible distinction be drawn
9 between these two?

10 In its Rejoinder, Trinidad argues that refusing to
11 decide its extended continental shelf claim would create a
12 gap in Part XV, which, according to Trinidad and Tobago,
13 "was intended to be comprehensive". But, of course, Part
14 XV was not intended to be comprehensive, as Trinidad and
15 Tobago acknowledges in the footnote to its statement in
16 the text and Trinidad's statement of concern for a
17 comprehensive solution rings false when it says in
18 paragraph 72 of its Counter Memorial that it is not for
19 the Tribunal to resolve what it calls "practical issues
20 that might arise in the future". Southern Blue Fin Tuna
21 is compelling authority for fidelity to the text of Part
22 XV and the general principle of consent to jurisdiction.

23 Mr President, members of the Tribunal, delimitation
24 of the continental shelf in excess of 200 nautical miles
25 from the territorial sea of either party would compromise
26 common rights or heritage of mankind to the seabed, the
27 ocean floor and its subsoil, matters that the Convention
28 entrusts to the exclusive competence of other organs of
29 that area. In St Pierre and Miquelon the Tribunal
30 addressed this issue directly. I would like to read
31 several sentences from it. You will see on the screen the
32 entire selection.

33 "Any decision by this court recognising or rejecting
34 any rights of the parties over the continental shelf
35 beyond 200 nautical miles would constitute a pronouncement
36 involving a delimitation not between the parties but
37 between each one of them and the international community,
38 represented by organs entrusted for the administration and

1 protection of the international seabed area (the seabed
2 beyond national jurisdiction) that has been declared to be
3 the common heritage of mankind. This court is not
4 competent to carry out a delimitation which affects the
5 right of a party which is not before it."

6 Barbados submits that the Tribunal in St Pierre and
7 Miquelon had it exactly right: claims to the extended
8 continental shelf do not fall within the competence of
9 this Tribunal.

10 Mr President, members of the Tribunal, before I
11 conclude I would like to mention very briefly Barbados'
12 jurisdictional objection to Trinidad and Tobago's so-
13 called regional implications theory.

14 This Tribunal has jurisdiction over Barbados and
15 Trinidad and Tobago and is empowered by virtue of their
16 adherence to UNCLOS to delimit their maritime boundary.
17 It may certainly look to the practice of states, including
18 nearby states, as evidence of a general practice accepted
19 as law, in the language of article 38.1(b) of the ICJ
20 Statute, but it cannot look only at bits of that practice.

21 It does not have jurisdiction to delimit the maritime
22 boundaries of any other states nor do any of those states
23 have the legal power to delimit the boundaries of
24 Barbados. We will return to this matter when Barbados
25 presents its detailed objections to the substance of the
26 so-called theory of regional implications.

27 Mr President, members of the Tribunal, this concludes
28 Barbados' presentation with respect to jurisdiction. May
29 I ask the Tribunal now to call upon Mr Volterra.

30 THE PRESIDENT: Thank you, Professor Reisman. Mr Volterra,
31 please.

32 MR VOLTERRA: Thank you, Mr President. I anticipate that my
33 intervention will last about 45 minutes, so, with your
34 indulgence, I will try to choose a moment about half way
35 through to have the coffee break. If I forget and go on,
36 do not hesitate to interrupt me.

37 Mr President, members of the Tribunal, I have the
38 honour to present Barbados' submissions to this

1 distinguished panel on the related issues of estoppel and
2 acquiescence. Barbados' submissions on estoppel and
3 acquiescence can be distilled into five propositions.
4 One, the doctrines of estoppel and acquiescence apply and
5 are determinative in the present case. Two, to the north
6 of the median line the evidence on the record confirms
7 that Barbados has exercised its sovereign rights and
8 jurisdiction in the area now claimed by Trinidad and
9 Tobago for a prolonged period of time and in a notorious
10 manner, without protest from Trinidad and Tobago. Three,
11 the Tribunal is therefore precluded from considering
12 Trinidad's claims to the north of the provisional median
13 line. Four, to the south of the median line the evidence
14 on the record establishes that Barbados has never
15 acquiesced with Trinidad and Tobago's recent and limited
16 activities in the area claimed by Barbados and, therefore,
17 five, the Tribunal is not precluded from considering
18 Barbados' claim to the south of the provisional median
19 line.

20 I will address each of these propositions in turn.
21 First, the applicability of the doctrines to the present
22 case. Section 6.3 of Barbados' Reply discussed the legal
23 authority for the proposition that the doctrines of
24 estoppel and acquiescence apply as a matter of law in the
25 present case. I incorporate that analysis here by
26 reference but I do not propose to repeat it because,
27 ultimately, the parties do not appear to be at odds on the
28 issue of the applicability of estoppel and acquiescence as
29 legal doctrines in the case.

30 At first glance, Trinidad and Tobago's position on
31 the question of the applicability of estoppel and
32 acquiescence appears inconsistent. On the one hand,
33 Trinidad and Tobago contends that the doctrines cannot
34 apply to its claim to the north of the median line as a
35 matter of law. On the other hand, the concepts of
36 estoppel and acquiescence were first introduced to the
37 arbitration by Trinidad and Tobago itself in relation to
38 Barbados' claims to the south of the median line. In

1 fact, on closer analysis, Trinidad and Tobago's objections
2 to the doctrines appear to be limited to questions of fact
3 in relation to Barbados' oil activities to the north of
4 the median line in the area that Trinidad and Tobago now
5 claims.

6 Thus, for example, at paragraphs 165 of its Counter
7 Memorial and 178 of its Rejoinder, Trinidad and Tobago
8 relies upon passages from the Cameroon-Nigeria and Nova
9 Scotia-Newfoundland cases in relation to its arguments
10 about Barbados' oil activities in relevant area. Trinidad
11 and Tobago's reliance on the rationes of those cases is
12 misplaced. In those cases, the existence of oil
13 activities was being evaluated as a relevant circumstance,
14 seeing whether it required an adjustment of the
15 provisional median line. The Tribunals in those cases
16 held that such oil activity did not constitute a relevant
17 circumstance. And they did so expressly on the basis of
18 the facts before them.

19 In the present arbitration, Barbados is not seeking
20 to use the existence of its oil activities or of its other
21 multitudinous non-oil activities in the relevant area to
22 the north of the median line to adjust the provisional
23 median line.

24 Barbados is not seeking to use estoppel or
25 acquiescence as a sword. On the contrary, Barbados is
26 seeking to use the existence of its various activities as
27 a shield from Trinidad and Tobago's attempt to adjust the
28 provisional median line to the north. The absence of any
29 protest by Trinidad and Tobago over a long period of time
30 has confirmed the settled expectations of Barbados and
31 other states in the region as to Barbados' rights to the
32 north of the median line in the area belatedly claimed by
33 Trinidad and Tobago.

34 They have also confirmed the settled expectations of
35 oil companies operating in the region. That includes
36 companies that are concessionaires of Barbados in this
37 area to the north of the median line, whilst at the same
38 time being concessionaires of Trinidad and Tobago well to

1 the south of the median line and I should add well away
2 from the area of Barbados' claims.

3 In the Fisheries case, the United Kingdom was silent
4 for 60 years about Norway's legislative activities
5 relating to its maritime rights. The International Court
6 of Justice held that to be a sufficiently prolonged
7 abstention for it to conclude that the United Kingdom had
8 acquiesced to the existing state of affairs. Trinidad and
9 Tobago in our case was silent for 30 years in the face of
10 Barbados' abundant activities. Barbados submits that that
11 period is likewise a sufficiently prolonged abstention to
12 require this Tribunal to conclude that Trinidad and Tobago
13 has acquiesced to Barbados' jurisdiction in the area that
14 it has belatedly claimed.

15 This brings me to Barbados' second proposition.
16 Barbados has consistently exercised sovereign rights and
17 jurisdiction in the relevant area to the north of the
18 provisional median line without protest from Trinidad and
19 Tobago. Trinidad and Tobago has responded to Barbados'
20 arguments on this point by focusing on the evidence of
21 Barbados' oil activities in the relevant area. However,
22 Barbados' exercise of sovereign rights and jurisdiction
23 over this maritime area has taken a number of different
24 forms. The Tribunal has before it in this arbitration
25 evidence of Barbados' exercise of sovereign rights and
26 jurisdiction to the area to the north of the median line
27 now claimed by Trinidad and Tobago in relation to no less
28 than five spheres of activities. I have listed them on
29 your screen and this list can be found at tab 42 of the
30 Judges' folder.

31 The first is Barbadian legislation. The second
32 Barbadian Coast Guard patrolling activities. The third
33 Barbadian oil exploration. The fourth the Barbados-Guyana
34 Joint Co-operation Zone Treaty and its implementation.
35 The fifth Barbados' programme for submitting its extended
36 continental shelf claim to the Commission on the Limits of
37 the Continental Shelf. Although Trinidad and Tobago seeks
38 to reinterpret the legal effect of certain of these

1 spheres of activities and has chosen to ignore the rest,
2 the evidence remains on the record unchallenged. I will
3 overview this evidence briefly.

4 Barbados' domestic legislation asserts a clear and
5 consistent claim to sovereignty to the north of the median
6 line. Its Maritime Boundaries and Jurisdiction Act of
7 1978 provides that, in the absence of any agreed EEZ
8 boundaries with its maritime neighbours, the outer limit
9 of Barbados' exercise of sovereign rights and jurisdiction
10 in relation to an EEZ is the median line. This Act can be
11 found at tab 43 of your Judges' folders. This three
12 decades old piece of legislation is clearly incompatible
13 with Trinidad and Tobago's claim to the north of the
14 median line. Yet not once has Trinidad and Tobago
15 protested it, despite knowing of its existence. Indeed,
16 in its pleadings related to Barbados' claim to the south
17 of the median line, with respect to the artisanal fishing
18 of Barbados' fisherfolk, Trinidad and Tobago even seeks to
19 rely on the Act. Furthermore, since 1979 Barbados has
20 enacted a wide range of domestic legislation. The effect
21 of this legislation is to provide a comprehensive
22 regulation of all forms of activity in the maritime
23 territory to the north of the median line, including the
24 area now claimed by Trinidad and Tobago. Trinidad and
25 Tobago has never protested any of this legislation. For
26 its part, Trinidad and Tobago has failed to submit
27 evidence of any Trinidadian legislation that purports to
28 exercise jurisdiction over the area that it, or indeed
29 Barbados, claim in this arbitration, either to the north
30 or to the south of the median line.

31 The delimitation line proposed by Barbados is thus in
32 no way incompatible with Trinidadian legislation. In
33 contrast, Trinidad and Tobago's proposed delimitation line
34 is incompatible with Barbados' long settled legislation.

35 Barbados' Coast Guard has been conducting routine
36 patrols for no less than three decades in the area now
37 claimed by Trinidad and Tobago. Those patrols have been
38 conducted for such usual purposes as maritime safety,

1 national defence and security and fisheries management.
2 More recently, they have also been conducted pursuant to
3 Barbados' international obligations as provided in the
4 Barbados Guyana Joint Co-operation Zone Treaty.

5 In its Reply, Barbados submitted an affidavit of the
6 Head of its Coast Guard, Lt Commander David Dowridge.
7 His affidavit can be found at tab 44 of your judges'
8 folder. Lt Commander Dowridge described the history of
9 Barbadian coast guard patrolling in the relevant area to
10 the north of the median line now claimed by Trinidad and
11 Tobago. Trinidad and Tobago chose not to address this
12 evidence in its Rejoinder. It has chosen not to examine
13 Lt Commander Dowridge at this hearing. It has submitted
14 no evidence of its own to challenge Barbados' evidence on
15 this point, and it has made no assertion that Trinidad and
16 Tobago's Coast Guard has patrolled the area that it now
17 claims to the north of the median line. I put it to the
18 Tribunal that this evidence stands entirely unchallenged.

19 The map before you now on the screen is map 13 of the
20 Reply. Tab 45 of the folder. For more than 30 years
21 Barbados and companies acting exclusively under its
22 jurisdiction have engaged in oil exploration, exploitation
23 and resource management activities to the north of the
24 median line. This includes in the area belatedly claimed
25 by Trinidad and Tobago. Trinidad and Tobago never
26 protested this activity until after the commencement of
27 the most recent round of bilateral negotiations. Not a
28 word until after the negotiations started.

29 Trinidad and Tobago's own pleadings confirm that its
30 acquiescence in this respect was consistent with the
31 settled expectation of global oil companies including its
32 own concessionaires.

33 The first seismic work in the area to the north of
34 the median line now claimed by Trinidad and Tobago took
35 place in 1974. The scope and extent of some but not all
36 of the exploration activities conducted by Barbados since
37 1974 in that area is illustrated on the map before you.
38 Barbados first granted a licence that included the

1 relevant area in 1979. That was to a subsidiary of Mobil
2 Oil. In 1996 Barbados granted a new concession over the
3 same area to a consortium comprised of subsidiaries of
4 Conoco and TotalFinaElf. All three of these companies
5 were and are concessionaires of Trinidad and Tobago,
6 although well to the south of the median line and off the
7 island of Trinidad.

8 Trinidad and Tobago was aware of the existence and
9 extent of these Barbadian concessions, yet it did not
10 protest them.

11 Mr President, members of the Tribunal, Barbados and
12 its concessionaires have invested considerable human and
13 financial resources in the area to the north of the median
14 line now claimed by Trinidad and Tobago. By way of
15 example, from 1996 to 2004 Conoco and Total spent
16 approximately \$65m on reconnaissance, seismic testing and
17 exploratory drilling under their Barbados concession.
18 Trinidad and Tobago seeks to play down Barbados'
19 investment in oil activities. Its Rejoinder at paragraph
20 174 mocks the sum of \$65m as being insignificant. This
21 sum, Barbados submits, may be insignificant for Trinidad
22 and Tobago. Barbados would not disagree that Trinidad and
23 Tobago's hydrocarbon industry is considerably larger than
24 Barbados' to date. Nor would Barbados deny that Trinidad
25 and Tobago's oil and gas industry produces enormous wealth
26 for Trinidad and Tobago. In comparison with its energy
27 investments, \$65m must indeed seem modest to Trinidad and
28 Tobago. Certainly the evidence before the Tribunal, is
29 that the fortunes of geography have provided Trinidad and
30 Tobago with abundant hydrocarbon resources. However,
31 although the imbalance in the two countries' natural
32 resources is undisputed, that does not mean that \$65m is
33 an insignificant expenditure for Barbados.

34 Barbados' Memorial and Reply have described the
35 Barbados Guyana Joint Co-operation Zone Treaty, signed in
36 2003. It is at Tab 46. The Co-operation Treaty is
37 consistent with international law and it violates no third
38 party rights. The Barbados Guyana Joint Co-operation Zone

1 is located entirely within Barbados' and Guyana's EEZ and
2 entirely beyond 200 nautical miles from the coast of any
3 third party. Maps 9 and 10 of the Memorial show this
4 clearly. Tab 47 of the judges' folder.

5 This is map 10 from the Memorial and shows the
6 parameters of the Barbados Guyana Joint Co-operation Zone.

7 That zone represents an exercise of sovereign rights in
8 jurisdiction by Barbados albeit jointly with Guyana, in
9 relation to a part of its maritime territory that falls
10 outside the jurisdiction of any third state. And the
11 Tribunal will no doubt have noted that the Co-operation
12 Zone lies both to the north and to the south of the
13 Barbados-Guyana median line.

14 Barbados' agent has identified to the Tribunal that
15 Barbados and Guyana have subsequently engaged in a number
16 of activities to implement that treaty. As described
17 under the terms of the treaty they have arranged to
18 continue to do so in the future.

19 Finally, Barbados has undertaken a submission
20 programme in relation to the Commission on the Limits of
21 the Continental Shelf, the CLSC. The origin of this
22 programme in Barbados dates back to the mid-1990s. At
23 that time the Commonwealth Secretariat began to assist its
24 developing state members including Barbados to take steps
25 to protect and manage their natural resources and other
26 interests within their maritime territory. This included
27 making submissions to the Commission on the Limits of the
28 Continental Shelf on extended continental shelf rights.
29 Barbados responded to this by taking the initiative, inter
30 alia, to begin its CLSC programme. At Barbados' request
31 the Commonwealth Secretariat sponsored the United Kingdom
32 Hydrographic Office to conduct a technical study of
33 Barbados' base points and maritime territorial
34 entitlements. That report was produced for Barbados in
35 1999 and shortly thereafter Barbados began the process of
36 preparing its submissions to the CLSC in relation to its
37 entitlement to an extended continental shelf. Barbados
38 subsequently engaged geological and geomorphological

1 experts to begin the laborious and costly process of
2 preparing its CLSC submissions. That process is currently
3 ongoing and of course relates to all of Barbados'
4 entitlement to the extended continental shelf abutting its
5 full 200 nautical mile EEZ limit.

6 Barbados has expended significant time and resources
7 on this programme. In contrast Trinidad and Tobago has
8 not even claimed to have begun a CLSC submission programme
9 or to have undertaken any such activities. The Tribunal
10 is entitled to conclude that if Trinidad and Tobago had
11 such a programme it would have said so. This must lead to
12 the inescapable conclusion that Trinidad and Tobago has
13 engaged in no such activities to date. As the Tribunal is
14 no doubt well aware, the deadline for CLSC submissions is
15 but a few years away. Trinidad and Tobago's failure even
16 belatedly to have started a CLSC submission programme is
17 inconsistent with the new claims that it is making in this
18 arbitration.

19 The Tribunal is entitled to conclude from this
20 evidence, or lack of evidence, that Trinidad and Tobago
21 recognises that in truth it has no plausible claim to
22 appropriate Barbados' EEZ and extended continental shelf.

23 Trinidad and Tobago seeks to re-interpret some of the
24 evidence that I have just reviewed, but it has not
25 otherwise challenged it or presented evidence of its own
26 to contradict it. In its Rejoinder at page 75, Trinidad
27 and Tobago attempts to obfuscate the facts by asserting
28 that neither it nor Barbados has engaged in significant
29 oil activities in the area now claimed by Trinidad and
30 Tobago to the north of the median line. I have already
31 described Barbados' significant oil activities over the
32 past three decades and more. Trinidad and Tobago's
33 evidence of its purported activities in that area is that,
34 in 2003, at the same time that it was supposedly
35 negotiating in good faith with Barbados, and very shortly
36 before this arbitration was commenced, it proposed to
37 conduct seismic testing to the north of the median line.

38 Trinidad and Tobago makes much of this and Barbados

1 has five observations to make in relation to that
2 evidence. First, the proposal was only made several years
3 after the start of the most recent round of negotiations
4 between the parties. It was part of a pattern of
5 aggressive and provocative tactics being used by Trinidad
6 and Tobago in relation to the delimitation shortly before
7 the start of the arbitration. And both Barbados' agent
8 and Ms Marshall spoke to the facts pertinent to this case
9 leading up to the commencement of the arbitration.

10 Second, Barbados protested this proposal.

11 Third, the proposal includes area to the north of the
12 median line over which Trinidad and Tobago makes no claim.

13 This proposed seismic programme goes well beyond to the
14 north and west of where its 88 degree azimuth is located.

15 It therefore cannot be said to have been contemplated by
16 Trinidad and Tobago a titre de souverain.

17 Fourth on Trinidad and Tobago's own evidence before
18 this Tribunal a number of its own concessionaires wrote to
19 Trinidad and Tobago to warn it that this proposed seismic
20 testing would violate Barbados' maritime territory to the
21 extent that it took place north of the median line. Those
22 were Trinidad and Tobago's own concessionaires.

23 Finally Trinidad and Tobago has submitted no evidence
24 that it ever actually undertook its proposed seismic
25 testing. The most that Trinidad and Tobago's evidence
26 shows is that when it proposed to undertake seismic
27 activity to the north of the median line, including areas
28 over which it makes no claim, that oil companies protested
29 this proposal as a violation of their rights and of
30 Barbados' territory, and that in the end Trinidad and
31 Tobago somehow acquired - and that is the term used by
32 Trinidad and Tobago - seismic data to the north of the
33 median line. There is no evidence that it was acquired as
34 a result of a seismic programme operated by Trinidad and
35 Tobago, as opposed to having been purchased commercially.

36 Other than its claim to have engaged in seismic
37 activity to the north of the median line in 2003, Trinidad
38 and Tobago has submitted no evidence of having undertaken

1 any other activities north of the median line.

2 It appears to have been the constant working
3 assumption of the authorities of Trinidad and Tobago until
4 at least 2003 that the maritime boundary between Barbados
5 and Trinidad and Tobago followed the median line
6 throughout its course. For example, before you now is the
7 cover page of a 2003 Trinidad and Tobago government
8 maritime report. See Tab 49. This report was prepared by
9 the Fisheries Division of the Trinidad and Tobago Ministry
10 of Agriculture, Marine and Land Resources. The map that
11 is magnified for you now on the screen is the illustrated
12 reference point for this document. It clearly shows that
13 the boundary between Barbados and Trinidad and Tobago is
14 the median line. Barbados does not of course agree with
15 the boundary illustrated on the map, to the extent that it
16 fails to recognise the special circumstances which are the
17 basis of Barbados' sovereign rights and jurisdiction to
18 the south of the median line, and to the extent that it
19 appears to endorse the line derived from the 1990
20 Venezuela/Trinidad and Tobago Agreement. But it is
21 another example of Trinidad and Tobago having publicly
22 recognised that Barbados has jurisdiction to the north of
23 the median line.

24 This public recognition appears to have extended even
25 to its negotiations with Venezuela over their boundary
26 back in 1990 and before. I would like to direct the
27 Tribunal's attention to tab 48 of the judges' folder and
28 may I ask you to extract the map that you will find
29 located there for the next part of my presentation.

30 This is a blow up of the map that was submitted at
31 tab 6 of Barbados' supplementary evidence submission. A
32 copy of it is also shown on the screen in front of you.
33 This map is Trinidadian and dates from 1990. Its
34 provenance is the current Prime Minister of Trinidad and
35 Tobago. In 1990 Prime Minister Manning, as he now is,
36 circulated this map showing the history of the then just
37 concluded maritime boundary delimitation negotiations
38 between Trinidad and Tobago and Venezuela. This map

1 shows a number of interesting things. The bottom left
2 hand of the map shows the continental land mass of South
3 America. You can see Venezuela and Guyana shown there.
4 Above them are the islands of Trinidad and Tobago. The
5 interesting information on the map is found in the middle.

6 It is interesting because it provides us with an insight
7 into the history of the Trinidad and Tobago and Venezuela
8 negotiations. Thus, if you look at the middle, you can
9 see what was Venezuela's first proposal for a maritime
10 delimitation with Trinidad and Tobago. If you look
11 towards the northern most line that goes across the middle
12 of the map, you will see that it is clearly marked as
13 Venezuela's proposal number one. That is the line that is
14 in the middle of the map, it is the northern most line but
15 then cuts across underneath the second most northern line.

16 That second line is Venezuela's second proposal and that
17 is similarly labelled. It is similarly labelled as
18 "Venezuela's proposal number two". Below that, Trinidad
19 and Tobago's proposal is also labelled along the line to
20 the south of Venezuela's proposals.

21 What is immediately striking, of course, is that all
22 of these proposed delimitation lines stop at the
23 Barbados/Trinidad median line - all of them.

24 The final line chosen as their bilateral boundary is
25 shown on this map as stopping at the Barbados/Trinidad
26 median line as well. That is the darkest line on the map.

27 The idea to extend that line beyond the median line
28 appears on the basis of this map to have been such a late
29 afterthought that it has not been printed on the map, but
30 only appears represented as a rough hand sketch on the
31 right side of the map. Barbados will be making its more
32 detailed submissions in relation to the 1990 line
33 tomorrow. It is of course not opposable to Barbados, nor
34 does it have any effect on this arbitration. Nonetheless,
35 this map, showing the record of the history of
36 negotiations between Trinidad and Venezuela, appears to
37 indicate that until the very last moment they both
38 recognised that Trinidad and Tobago's territory and, thus,

1 its ability to concede territory to a third state was
2 circumscribed by its median line with Barbados.

3 I have now finished with this piece of evidence for
4 the moment. You may wish to put it back at tab 48. You
5 will be relieved to know that I have about half a page
6 before I am going to propose the coffee break, Mr
7 President.

8 This review of the evidence leads to Barbados' third
9 proposition. Barbados has submitted evidence covering a
10 period of more than 30 years of its consistent and regular
11 exercise of sovereign rights and jurisdiction in the area
12 to the north of the median line now claimed by Trinidad
13 and Tobago. This continuing exercise of sovereign rights
14 and jurisdiction was never contested by Trinidad and
15 Tobago until after the start of the recent bilateral
16 negotiations on fisheries and delimitation. On the
17 contrary, Trinidad and Tobago has consistently recognised
18 and acquiesced in Barbados' jurisdiction over this area.
19 Barbados and others have relied on that to their material
20 detriment. This evidence confirms Barbados' third
21 proposition: Trinidad and Tobago's recognition and
22 acquiescence gives rise to an estoppel as a matter of
23 international law. It prevents Trinidad and Tobago from
24 now asserting any legal claim over maritime territory to
25 the north of the median line and the Tribunal is, thus,
26 precluded from considering these claims.

27 Mr President, it might be appropriate now before I
28 turn to consider the evidence related to the claim of
29 Barbados to the south of the median line to take a coffee
30 break.

31 THE PRESIDENT: Thank you so much, Mr Volterra. We will resume
32 at twenty-to-five.

33 **(Short Adjournment)**

34 THE PRESIDENT: Mr Volterra, will you resume please.

35 MR VOLTERRA: Thank you, Mr President. Members of the
36 Tribunal, just to reiterate, I am talking about issues of
37 estoppel and acquiescence. I started off by talking about
38 Barbados' five propositions, that the doctrines are

1 applicable and determinative in this arbitration, that the
2 evidence to the north of the median line shows that
3 Barbados has consistently exercised sovereign rights and
4 jurisdiction without protest from Trinidad and Tobago. I
5 just concluded that meant that the Tribunal was precluded
6 from considering Trinidad and Tobago's claims to the north
7 of the provisional median line. I am about to talk about
8 points 4 and 5 which are No 4 looking at the south of the
9 median line, the evidence there, and showing that Barbados
10 never acquiesced to Trinidad and Tobago's recent limited
11 activities in the area, and then concluding therefore that
12 the Tribunal is not precluded from considering Barbados'
13 claim there. I just went through the various evidence of
14 Barbados in relation to its activities in the relevant
15 area to the north of the median line, the legislation, the
16 Barbadian coast guard patrols; the oil exploration, the
17 Joint Co-operation Zone Treaty and Barbados' programme for
18 submitting its extended continental shelf claim to the
19 Commission on Limits of the Continental Shelf.

20 Mr President, I now turn to Barbados' fourth
21 proposition, and the body of evidence that is related to
22 Barbados' claim to the south of the median line.

23 Trinidad and Tobago argues that Barbados is estopped
24 from making a claim for an adjustment to the provisional
25 median line to the south. It will not surprise the
26 Tribunal to know that Barbados confirms its submissions to
27 date that there is no evidence to support the assertion
28 that the doctrines of acquiescence and estoppel apply here
29 in fact.

30 The factual circumstances in relation to Barbados'
31 claim to the south of the median line stand in stark
32 contrast to those related to Trinidad and Tobago's claim
33 to the north of the median line. Trinidad and Tobago's
34 few attempts to exercise sovereign rights and jurisdiction
35 in the area to the south of the median line that belongs
36 to Barbados are recent. The evidence confirms that
37 Barbados has never acquiesced in any of these activities
38 in either word or deed. As a result Barbados cannot be

1 estopped from making its claim for an adjustment of the
2 median line to the south.

3 In its Counter Memorial Trinidad and Tobago refers to
4 what it claims are "many instances where Barbados has
5 recognised Trinidad and Tobago's rights in respect of the
6 areas that Barbados now claims". However, even a brief
7 examination of the evidence relied upon to support that
8 claim both exposes it as empty and confirms that Barbados
9 never recognised Trinidad and Tobago as exercising any
10 form of sovereign rights or jurisdiction in the area
11 concerned. In the context of hydrocarbons, Barbados
12 protested against Trinidad and Tobago's three and only
13 attempts to engage in oil activities in the relevant area
14 to the south of the median line. Trinidad and Tobago
15 offered concessions off Tobago in 1996, 2001 and 2003; and
16 of course those later two offers came well after the start
17 of the most recent bilateral negotiations. Barbados
18 protested those attempted concessions and the evidence
19 before this Tribunal unambiguously confirms that no oil
20 company disregarded Barbados' protests and took up
21 Trinidad and Tobago's offers.

22 Similarly the single piece of correspondence between
23 the parties concerning a seismic programme to be
24 undertaken by a Barbados licensee in 1998 around the coast
25 of the island of Tobago does not assist Trinidad and
26 Tobago either. That correspondence did no more than
27 recognise that "any data acquired in the areas under
28 Trinidad and Tobago jurisdiction is the property of
29 Trinidad and Tobago". That correspondence did not
30 prescribe what the parameters of those Trinidad and Tobago
31 areas might be. Trinidad and Tobago asks the Tribunal to
32 read into the plain language of that letter the very
33 conclusion for which it seeks to use the letter as
34 evidence. Trinidad and Tobago tries to do the same thing
35 with the plain language of Barbados' various oil
36 concessions. It requires a vivid imagination and a
37 liberal re-writing of those documents to support the self
38 serving interpretation proposed by Trinidad and Tobago.

1 In the context of fishing the record before the
2 Tribunal is again unchallenged. Barbados took immediate
3 steps to counter-act Trinidad and Tobago's illegal arrests
4 in 1989, and again between 1994 and 2004, of Barbadian
5 fisherfolk fishing off Tobago.

6 Of course since the start of this arbitration
7 Trinidad and Tobago has stopped arresting the Barbadian
8 fisherfolk fishing off Tobago.

9 Trinidad and Tobago claims at paragraph 297 of its
10 Counter Memorial that all of the fisheries negotiations
11 between the parties since 1990 had been predicated on
12 Barbados' recognition that Trinidad and Tobago had
13 sovereignty in all the maritime areas to the south of the
14 median line. Trinidad and Tobago bases its argument in
15 this respect on the 1990 Barbados/Trinidad and Tobago
16 fishing agreement. As described by Professor Reisman
17 shortly before me, this was no more than a one year modus
18 vivendi, and as he described, just as with the Barbados
19 oil documents, the plain language of the 1990 modus
20 vivendi does not support Trinidad and Tobago's self
21 serving current interpretation.

22 Trinidad and Tobago seeks to read into the plain
23 language of the fishing agreement the very conclusion that
24 it now asserts. However, Trinidad and Tobago has been
25 forced to concede - for example I refer you to the Counter
26 Memorial at paragraph 53 sub-paragraph 3 - that the
27 fishing agreement nowhere defines the limits of the
28 parties' EEZs. If there were any doubt, Article 11 of the
29 fishing agreement is unequivocal in contradicting Trinidad
30 and Tobago's claims in this arbitration.

31 For those of you who want to follow the documents, I
32 am going to be referring to a series of documents, three
33 in a row, starting at tab 50. The first one is this modus
34 vivendi, this 1990 modus vivendi, and you will find
35 Article 11 at tab 50. It is also up on the screen. It
36 reads: "Nothing in this agreement is to be considered as
37 a diminution or limitation of the rights which either
38 contracting party enjoys in respect of its internal

1 waters, archipelagic waters, territorial sea, continental
2 shelf or exclusive economic zone. Nor shall anything
3 contained in this agreement in respect of fishing in the
4 maritime areas of either contracting party be invoked or
5 claimed as a precedent".

6 There is nothing in this language that gives comfort
7 to the mistaken view that the fishing agreement shows an
8 acceptance by Barbados of Trinidadian sovereign rights and
9 jurisdiction in any specific territory; nor indeed the
10 reverse.

11 In the same manner Trinidad and Tobago also seeks to
12 rely on the records of the recent negotiations between the
13 parties on fisheries and maritime delimitation. However,
14 the draft fishing agreement that was proposed by Barbados
15 during those talks contained as its Article 16 a
16 preservation of rights clause identical to Article 11 of
17 the 1990 fishing agreement - tab 51. Professor Reisman
18 again referred to that document.

19 Article 16 of the draft agreement proposed by
20 Barbados is identical to the Article 11 preservation of
21 rights clause found in the 1990 modus vivendi.

22 Lest there be any misunderstanding about what
23 Trinidad and Tobago thought that meant, the effect of
24 Article 16 of the recent proposed fishing agreement, which
25 is the same as Article 11 from the modus vivendi, was
26 agreed. The meaning was agreed between the parties, and
27 it was expressly recognised by Trinidad and Tobago at the
28 time. See Tab 52. You there find Trinidad and Tobago's
29 contemporary position referring to the preservation of
30 rights clause in Article 16, which is obviously the same
31 as Article 11 and therefore their understanding must have
32 been the same.

33 I quote it: "it was agreed that the agreement should
34 include a provision indicating that the fishing agreement
35 should in no way effect the parties respective maritime
36 jurisdictional claims."

37 Mr President, members of the Tribunal, frankly it is
38 difficult to imagine language that could be clearer in its

1 contradiction of Trinidad and Tobago's current argument
2 than that contemporary statement. That statement alone
3 undercuts Trinidad and Tobago's arguments entirely on this
4 point.

5 In the same way the various warnings that were given
6 by Barbados to its fisherfolk following the sporadic
7 arrests by Trinidad and Tobago in 1989 and between 1994
8 and 2004 do not constitute recognition that the area to
9 the south of the median line claimed by Barbados is part
10 of Trinidad and Tobago's EEZ.

11 The evidence in relation to the parties' activities
12 to the south of the median line supports Barbados' fifth
13 and final proposition; that the Tribunal is not precluded
14 from considering Barbados' claim there. Trinidad and
15 Tobago does not have a prolonged claim over the area in
16 question. There is no evidence of any domestic Trinidad
17 and Tobago legislation to that effect, and Barbados has
18 protested against each of the few recent and limited
19 activities engaged in by Trinidad and Tobago in this area.

20 In short, there is no evidence that Barbados has
21 acquiesced to Trinidad and Tobago's current claim in the
22 area.

23 Mr President, this brings me towards the end of my
24 intervention. Barbados' prolonged and notorious exercise
25 of sovereign rights and jurisdiction in the area to the
26 north of the median line now claimed by Trinidad and
27 Tobago called for a timely reaction from Trinidad and
28 Tobago if it wished to object to Barbados' rights over the
29 area. Trinidad and Tobago's first and only protest came a
30 few years ago, well after the dispute had materialised and
31 only in relation to oil activities. During the interim
32 for three decades Barbados, its oil concessionaires, other
33 states and others relied upon that lack of objection.
34 Trinidad and Tobago's belated claim seeks to disrupt the
35 settled expectation of even its own oil concessionaires.
36 Its failure to protest constitutes acquiescence to
37 Barbados' sovereign right to jurisdiction to the north of
38 the median line. Trinidad and Tobago is thus estopped

1 from making a belated claim to that area. In contrast, as
2 I have just discussed, the Tribunal is not precluded from
3 considering Barbados' claim to the south.

4 Mr President, members of the Tribunal, I conclude my
5 remarks with four closing observations. First, if
6 Trinidad and Tobago were awarded any maritime territory to
7 the north of the median line, it would be incompatible
8 with Barbados' legislation, Barbados' Coast Guard
9 patrolling practice, oil activity, the expectation of oil
10 companies on both sides, the Barbados-Guyana Treaty and
11 Barbados' CLSC submission programme.

12 Second, if Trinidad and Tobago were not awarded any
13 maritime territory to the north of the median line, it
14 would not be incompatible with any Trinidad and Tobago
15 legislation. It would not be incompatible with any
16 Trinidad and Tobago Coast Guard patrolling practice, pre-
17 dispute oil activities or CLSC programmes for the simple
18 reason that there were no such or, indeed, any Trinidadian
19 activities in that area.

20 My third observation is that, by way of contrast, if
21 Barbados were awarded maritime territory to the south of
22 the median line, it would be compatible with both Barbados
23 and Trinidad's legislation, as well as the fishing
24 practices of the fisherfolk of both countries.

25 Finally, and most importantly, if Barbados' sovereign
26 rights and jurisdiction to the south of the median line
27 were not confirmed, it would be incompatible with
28 Barbados' traditional artisanal fishing activities off
29 Tobago.

30 Mr President, members of the Tribunal, I thank you
31 for your attention and I invite you, Mr President, to call
32 upon my colleague, Professor Reisman, who will begin
33 Barbados' presentation on the relevant circumstances that
34 require an adjustment of the provisional median line to
35 the south.

36 THE PRESIDENT: Thank you so much, Mr Volterra. Professor
37 Reisman.

38 PROFESSOR REISMAN: Thank you, Mr President, members of the

1 Tribunal. If I may paraphrase John Donne, no part of
2 international law is an island entire of itself. Maritime
3 delimitation practice has taken account of general
4 transformations in public international law, as it must.
5 In particular, the delimitation practice of Tribunals has
6 manifested an acute sensitivity to the consequences of new
7 boundaries and maritime zones in areas theretofore high
8 seas in three often related circumstances. First, where
9 there has been a long-term fishing practice; second, where
10 affected individuals rely on the sea for artisanal
11 fishing, and, third, where affected states or parts of
12 their populations will likely suffer catastrophic
13 consequences because of the putative boundary or maritime
14 zone changes.

15 Where the facts show traditional use and artisanal
16 reliance on the sea by individuals or the potential for
17 catastrophic consequences for a state, or both,
18 international Tribunals have taken one of two approaches.

19 Either they have adjusted the provisional boundary
20 generated by the general principles of maritime law, so as
21 to ensure the ultimate boundary will accommodate this
22 special circumstance by guaranteeing access to the
23 artisanal fisherfolk who rely on the relevant waters, or
24 they have established a regime to ensure that those
25 fisherfolk and the affected state enjoy continued access
26 for the limited purpose of artisanal fishing. Barbados
27 submits that the facts here clearly warrant an award that
28 follows one of these two legal approaches. Barbados'
29 prayer is for the first, but the second is *infra petita*.

30 Specifically, it is Barbados' case in this
31 arbitration that the Barbadian traditional artisanal
32 fishery off the north west, north and north east coasts of
33 Tobago, upon Barbados' fishing communities are dependent
34 throughout much of the fishing season, requires adjustment
35 of the median line to the south. The area of adjustment
36 required is shown on map 3 of Barbados' Memorial and map
37 22 of its Reply and is reproduced here. It is of course
38 also in your judges' folders.

1 Barbados' case for this special circumstance
2 comprises three core factual submissions. First,
3 Barbadian fisherfolk have been fishing off the island of
4 Tobago for centuries. Second, Barbadian fishing
5 communities, which form a substantial part of the working
6 population of the island's small economy, are dependent
7 upon fishing in the area claimed off Tobago, particularly
8 for flying fish. Any delimitation that left Barbadian
9 artisanal fisherfolk unable to fish in that area would
10 have catastrophic repercussions for the communities
11 concerned. And third, the fisherfolk of Trinidad and
12 Tobago do not fish in the area claimed by Barbados and,
13 thus, are in no way dependent upon it for their
14 livelihoods. In other words, the adjusted median line
15 proposed by Barbados would ensure equitable access by the
16 fisherfolk of both Barbados and Tobago to the fisheries
17 upon which their respective livelihoods depend.

18 Mr President, my colleagues, Sir Henry Forde and Mr
19 Fietta, will speak to each of these factual submissions in
20 turn. Sir Henry will address the first and second
21 submissions and that will conclude our presentation for
22 today. Tomorrow morning, Mr Fietta will further address
23 the second submission and then move on to the third
24 submission.

25 For our convenience, Mr President, members of the
26 Tribunal, Sir Henry and Mr Fietta will direct you where
27 appropriate to evidence appearing in your Judges' folders,
28 but please note that where passing reference is made to
29 issues of fact, they will not speak all of the specific
30 references to the relevant evidence. Full references
31 will, however, appear in footnotes to the transcript and
32 will be provided to the President of the Tribunal and to
33 Trinidad and Tobago. It goes without saying, Mr
34 President, that all of the evidence concerned has already
35 been submitted to the Tribunal and to Trinidad and Tobago
36 in accordance with the Rules of Procedure.

37 Mr President, with your permission, I will now hand
38 over to Sir Henry Forde, who will address the history of

1 the maritime fishery of Barbados and, in particular, the
2 history of its traditional artisanal fishery off Tobago.
3 He will then describe the catastrophic consequences that
4 would be felt by the fishing communities of Barbados and
5 by Barbados as a whole if the Barbadian fisherfolk were to
6 lose access to that fishery. As Attorney General Mottley
7 mentioned, Sir Henry is a former Foreign Minister and
8 Attorney General of Barbados.

9 Mr President, may I ask you to turn the floor to Sir
10 Henry.

11 THE PRESIDENT: Thank you, Professor Reisman. Sir Henry,
12 please.

13 SIR HENRY FORDE: Thank you, Mr President. It is for me, Mr
14 President and members of the Tribunal, a distinct honour
15 to address you as part of the team representing the
16 government and people of Barbados in this historic case,
17 the outcome of which is of paramount importance to the
18 fisherfolk and people of Barbados. My assignment is
19 essentially to address two of Barbados' three core factual
20 submissions in relation to the special circumstance that
21 requires adjustment of the median line to the south. My
22 first submission is that Barbadian fisherfolk have been
23 fishing off the island of Tobago for centuries. The
24 second is that Barbadian fishing communities today are
25 overwhelmingly dependent on the fishery off Tobago,
26 particularly the fishery for flying fish. Mr President, I
27 have had the distinct honour of representing the people of
28 the constituency of Christchurch West in Barbados'
29 Parliament for some 32 years. My constituency was on the
30 outskirts of our capital city of Bridgetown. It included
31 several landing areas for fishing boats and many of my
32 constituents earned their living from the sea. This is
33 typical of almost every constituency in Barbados. Owing
34 to the small size of the island, urban and rural are
35 intimately intermingled, but the sea is never far away.

36 Permit me first to make some brief observations by
37 way of background to this essential part of Barbados'
38 case. Maritime fishing has always played a central role

1 in the culture, society and economy of the island.
2 Historical records of Barbadian fishing date back to pre-
3 colonial times when Arawak Indians inhabited the island.
4 Following the arrival of the first British settlers in the
5 early part of the 17th century and the subsequent growth
6 of the colonial plantation system, fishing became a
7 mainstay of the Barbadian economy. Fresh and salted fish
8 provided an essential source of protein for the island's
9 slave population. It is well known that slaves
10 participated widely in fishing activities, often spending
11 long periods at sea in their fishing boats. Indeed,
12 following emancipation in 1838, fishing offered former
13 slaves one of the very few real alternatives to work on
14 the plantations and became an extremely important source
15 of income for the black population of the island, such
16 that, in 1868, a white Barbadian named John Bezzin Tyne
17 described the black fisherfolk as the chief fishermen on
18 the island and observed that they caught far more fish by
19 that time than their comparatively poor white
20 counterparts. [John Bezzin Tyne, *Tropical Reminiscences*
21 (1909), unpublished manuscript, Barbados Museum and
22 Historical Society. (Memorial of Barbados, Vol. 2,
23 Appendix 21, at p. 196)]

24 Throughout the island's history, the flying fish has
25 provided the bulk of the Barbadian fisherfolk catch. The
26 British observed widespread fishing by Barbadians for
27 flying fish as early as 1722. It was observed that the
28 season "goes off" at the autumnal equinox. To this day
29 the equinox marks the beginning of the flying fish season
30 off Tobago for Barbadian fisherfolk. By 1770 visitors to
31 the island were noting that in Barbados "everything is
32 dear but flying fish". [Edward Thompson, *Sailor's Letters*
33 Vol. II, Dublin, (1770). (Memorial of Barbados, Vol. 2,
34 Appendix 10, at p. 58)] In 1812 an American prisoner of
35 war on the island wrote that "one could hardly escape the
36 sight of them anywhere". [The *Yarn of a Yankee Privateer*,
37 edited by Nathaniel Hawthorne, New York: Funk and
38 Wagnell's 1920). (Memorial of Barbados, Vol. 2, Appendix

1 22, at p. 227)] But the widespread harvesting and
2 consumption of flying fish was unique to Barbados. For
3 this reason, by the end of the 18th century flying fish
4 were known in Europe as "Barbados' pigeons". [Edward
5 Thompson, *Sailor's Letters* Vol. II, Dublin, (1770).
6 (*Memorial of Barbados*, Vol. 2, Appendix 10, at p. 58)]
7 As we can see from this extract which appears at tab 55 of
8 your Judges' folder, in 1868 John Bezzin Tyne commented
9 that the catch of this delicate flavoured fish is an
10 industry peculiar to Barbados and observed that 30 years
11 after emancipation the flying fish industry gave
12 employment to hundreds of boats built and equipped for the
13 purpose, "each of which is manned with two to five men,
14 according to its size". By 1894 in an article appearing
15 at page 56 of your Judges' folder, a US newspaper was able
16 to report that the flying fish fishery had been for many
17 years the mainstay of a large part of the population of
18 Barbados and a source from which the most popular food
19 known on the island was derived. Again, it was observed
20 that about 200 boats were engaged in the fishery. Today
21 maritime fishing remains as essential as ever to the
22 Barbadian economy and national diet. Primarily, it is a
23 source of employment in a society with historically high
24 levels of unemployment. Indeed, nearly 5 per cent of
25 island's working population, equating to approximately
26 6,000 people are employed in one way or another in the
27 maritime fishery, whether as fisherfolk or in associated
28 employment as fish boners, scalers, processors or sellers,
29 as fishing boat builders, gear suppliers or boat
30 mechanics. [Fisheries Management Plan 2004-2006,
31 Fisheries Division, Ministry of Agriculture and Rural
32 Development, Barbados, section 2.2. (*Memorial of Barbados*,
33 Vol. 3, Appendix 60, at p. 686)] They make up a diverse
34 and vibrant fishing community.

35 Equally important, Mr President, is the contribution
36 that fish continues to make to the diet of Barbadians
37 providing them with a relatively cheap and healthy supply
38 of protein. According to the Food and Agricultural

1 Organisation's statistics that appear at table 57 of your
2 folder, the per capita annual consumption of fish is 31.8
3 kilograms in Barbados, more than four and a half times the
4 annual consumption of Trinidad and Tobago, which is only
5 seven kilograms. [FAO Report (2000). (Memorial of
6 Barbados, Vol. 3. Appendix 47, at p. 569)] Indeed, more
7 than 80 per cent of Barbadians eat fresh fish every week.
8 [FAO Field Document, Robin Mahon and Stephen Willoughby,
9 "Impacts of Low Catches on Fishermen, Vendors and
10 Consumers in Barbados", FAO Barbados (1990). (Memorial of
11 Barbados, Vol. 3, Appendix 39, at p. 436)]

12 The maritime fishery sector is equally vital to the
13 foreign exchange regime. It reduces the need for Barbados
14 to import foreign foods for domestic consumption and thus
15 helps us to regulate our balance of payments. What is
16 more, the flying fish remains uniquely integral to the
17 culture, society and well being of the island and its
18 people. Flying fish constitutes almost two thirds of the
19 annual Barbadian fish catch by weight and over 90 per cent
20 of the island's fisherfolk are directly reliant upon the
21 flying fish fishery for their livelihoods. [Fisheries
22 Management Plan 2004-2006, Fisheries Division, Ministry of
23 Agriculture and Rural Development, Barbados. (Memorial of
24 Barbados, Vol. 3, Appendix 60, at p. 729)]

25 Barbados is constrained to import flying fish to
26 supplement the local catch in order to meet the huge
27 demand for the fish across the island.

28 Trinidad and Tobago observes at paragraph 90 of its
29 Rejoinder that the value of the flying fish fishery to
30 Barbados is around Barbados \$37 million - that is about
31 US \$18.5 million - per year. But this figure completely
32 ignores the value of the dolphin, the principal predator
33 of the flying fish which is fished simultaneously. When
34 the value of the dolphin fish is added, the overall value
35 increases to approximately 51 million Barbados dollars,
36 more than 25 million US, per year. [The value of
37 Barbados' Fisheries: a preliminary assessment, Fisheries
38 Division, Ministry of Agriculture and Rural Development,

1 Barbados (Reply of Barbados, Vol. 3, Appendix 60, at p.
2 724)] This figure represents the equivalent of more than
3 US \$4000 for each person employed in the maritime fishery,
4 a sector in which incomes are unfortunately well below the
5 Barbadian national average and where poor communities live
6 on extremely narrow margins. Yet Trinidad and Tobago in
7 its Counter Memorial accuses Barbados of greatly
8 exaggerating the economic importance to us of fishing for
9 flying fish. This dismissive attitude pervades Trinidad
10 and Tobago's response to Barbados' argument about
11 fisheries as a special circumstance in this case. But the
12 allegation of Trinidad and Tobago simply bears no relation
13 to the reality, as shown by the weight of the evidence
14 that is before this Tribunal.

15 The fundamental importance of the flying fish to the
16 social and cultural, as well as the economic, fabric of
17 Barbados is perhaps best summarised by the fact that
18 Barbados has for centuries been known as "the land of the
19 flying fish". Flying fish is the national dish of
20 Barbados. As you can see from the examples shown on these
21 slides, which appear at tabs 58 to 60 of your folder, the
22 flying fish appears on all of the country's bank notes, as
23 well as on a wide variety of its coins, and stamps. Given
24 the fact that the flying fish is known throughout the
25 Caribbean region as the national symbol of Barbados,
26 Trinidad and Tobago's assertion that Barbados has sought
27 to exaggerate the importance of it is completely
28 unsustainable.

29 Mr President, members of the Tribunal, it is against
30 this background that Barbados' case on the artisanal
31 fishery off Tobago as a special circumstance requiring
32 adjustment of the median line stands to be decided. This
33 is because the fishery off Tobago today, just as it had
34 always done, provides an essential source of the Barbadian
35 catch of flying fish and other associated species that
36 prey upon it, such as the dolphin fish.

37 I will now move on to address the first of Barbados'
38 three core factual submissions. Barbadian fisherfolk have

1 been fishing off the island of Tobago for centuries. The
2 season for flying fish off Tobago runs from November to
3 July. During the months of November to February and June
4 to July flying fish and associated species are very scarce
5 off Barbados. This seasonal scarcity is a natural
6 phenomenon because of the regular migratory patterns of
7 the flying fish. Barbadian traditional artisanal
8 fisherfolk followed, and continue to follow, this natural
9 movement in the months of scarcity. The historical record
10 clearly demonstrates that significant numbers of Barbadian
11 fishermen, using fishing sloops or small schooners, were
12 already fishing off the coasts of Tobago as early as the
13 first half of the 18th century. At that time Barbados was
14 a British colony, and it remained so until independence in
15 1966, and Tobago was a French colony. One such Barbadian
16 fisherman, Stephen Charnock, was accused in 1724 of having
17 raided a French party in Tobago and having made off with
18 its wares. This is the deposition that was taken from
19 Charnock in relation to the incident. It appears at tab
20 61 of your folders. In it Charnock explained that he
21 believed that he had a right to fish in and about the
22 island of Tobago, an assertion that was subsequently
23 corroborated by the Governor of Barbados in his report of
24 the incident on 16 November 1724. That report, which
25 appears at tab 62 of your folders, described how Charnock
26 had set out from Barbados in his sloop to fish off Tobago
27 immediately prior to the incident.

28 It is well known that from the early 18th century and
29 throughout the colonial period there was substantial and
30 unregulated maritime traffic between Barbados and Tobago.

31 Whilst some Barbadians travelled freely to the waters off
32 Tobago to fish in the rich fishing grounds there, others
33 travelled freely to the island itself, which provided the
34 primary source of timber for Barbados. As a result there
35 developed what one historian from Trinidad and Tobago has
36 called a "long enduring association between Barbados and
37 Tobago" where Barbados came to rely upon a constant supply
38 of timber from the island of Tobago until well into the

1 first half of the 20th century.

2 This association between Barbados and Tobago, which
3 was founded upon the need for Barbadians to access the
4 rich natural resources of Tobago and its near-by waters,
5 was formally recognised as early as 1749 in a Treaty
6 between the French Governor of Martinique and the British
7 Governor of Barbados. The transcript of the treaty
8 appears at tab 63 of your folders. It provided that,
9 pending final resolution of the question of which colonial
10 power had sovereignty over Tobago, "it shall be permitted
11 to both nations to go to the island of Tobago to wood,
12 water and fish." Such was the widespread importance of
13 their continued right to fish off Tobago that all the
14 people of Barbados were informed of the treaty by way of a
15 public notice known as a broadsheet, which was posted at
16 churches and other public places throughout the island.
17 The public notice appears at tab 64 of your folders. It
18 reported that an agreement had been reached that "the
19 subjects of both nations shall be permitted to frequent
20 the island of Tobago there to wood, water and fish, as
21 likewise to build huts of straw for shelter against the
22 injuries of the weather during the short abode that they
23 may be obliged to make while wooding or fishing".

24 Mr President, I would like to focus for a moment on
25 the second part of this passage, since it is particularly
26 enlightening as to the nature of Barbadian fishing
27 activities around Tobago throughout the 18th century. The
28 passage is directed at those Barbadian fisherfolk who had
29 occasionally been obliged to land on Tobago during bad
30 weather for the purposes of shelter. It is reasonable, I
31 submit, to infer that during all but the worst weather
32 Barbadian fisherfolk fishing off Tobago would therefore
33 not land on the island at all, but instead, as fishermen
34 tend to do, they would return home with their catch direct
35 from the fishing grounds. After all, it was only in
36 Barbados that they had a market for their catch.

37 In the year following the 1748 Fishing Treaty, a
38 British colonial official writing home from Barbados

1 confirmed that Englishmen continued to fish off Tobago and
2 to use small huts there as they had been doing for years.

3 This material appears at tab 65 of your folders.

4 In both its written pleadings and its outline for
5 this hearing, Trinidad and Tobago contends that Barbadian
6 fisherfolk were utterly incapable of fishing off Tobago
7 until the seventies. To the contrary, I submit that the
8 serial evidence demonstrates clearly that Barbadians were
9 capable of fishing off Tobago and were, in fact, doing so
10 in the early part of the 18th century. Just as the
11 fisherfolk of Barbados were capable of fishing off Tobago
12 at the beginning of the 18th century, they were capable of
13 doing so throughout the 19th and 20th centuries and, as we
14 shall see, they continue to do so in substantial numbers
15 today at the beginning of the 21st century.

16 By 1814 the question of sovereignty over Tobago had
17 been finally settled in favour of the British. The
18 maritime space bounded by Grenada, St Vincent and the
19 Grenadines, St Lucia, Barbados and Tobago, each of which
20 is highlighted on this slide, in time effectively became a
21 British colonial lake, governed from Barbados for most of
22 the 19th century. Barbadians were allowed to travel
23 freely between the islands, particularly following
24 emancipation in 1838, and Barbadian fishing activities off
25 Tobago naturally continued. Traditional artisanal fishing
26 by its nature does not generate elaborate and detailed
27 record keeping. The paucity at that time of direct
28 documentary evidence of the practice is, therefore,
29 unsurprising. Furthermore, it should be recalled that
30 during the 19th and early 20th centuries there was a
31 single British administration throughout the region, a
32 lack of regulation of maritime traffic and a lack of
33 educational opportunities among the bulk of the
34 population, particularly the poorest of that population.
35 Oral tradition generally took the place of written
36 history. The fact that Barbadians continued to fish off
37 Tobago throughout the British colonial period is
38 demonstrated by at least five independent factors. First,

1 the commentary of leading historians in the region
2 confirms the unique ocean-going nature of the Barbadian
3 fishing fleet throughout the colonial period. Thus, Dr
4 Karl Watson, who is Senior Lecturer in the Department of
5 History at the University of the West Indies, states (in
6 an extract appearing at tab 66 of your folders) "Of all
7 the English speaking West Indian islands during the
8 colonial period, Barbados had the most developed fishing
9 industry. Whereas the other islands concentrated their
10 efforts on in-shore or reef fishing, Barbados from as
11 early as the 17th century employed a fleet of ocean-going
12 vessels which engaged in fishing for pelagic or deep water
13 species". This demonstrates that the Barbadian fishing
14 fleet did not suddenly change from being a comparatively
15 sophisticated and longer-range fleet in the 18th century
16 into being a simple, unsophisticated in-shore fishing
17 fleet throughout the British colonial period as Trinidad
18 and Tobago invites this Tribunal to believe. Rather, the
19 Barbadian fishing fleet remained throughout that time one
20 that included longer-range fishing sloops alongside
21 common-day boats. It was those longer-range sloops that
22 continued to fish off Tobago throughout the 19th and early
23 20th centuries just as they had throughout the 18th
24 century. The reason for this is that, as one Tobagonian
25 historian has observed, Barbadians have always been
26 "oriented to the sea" in contrast to their neighbours on
27 Tobago.

28 The second factor that shows that Barbadians
29 continued to fish off Tobago throughout the British
30 colonial period is the contemporaneous record of the
31 time. This demonstrates the mixed nature of the
32 Barbadian fishing fleet during colonial times, with
33 boats that varied enormously in size and fishing range.

34 We have already seen that in 1868 John Bezsins Tyne
35 commented that hundreds of boats in the Barbadian
36 fishery were manned with two to five men, according to
37 their size. This confirms Dr Watson's observation about
38 the comparative sizes of some of the Barbadian fishing

1 vessels, since a five-man sloop or schooner is very
2 different to a two-man day boat fishing near the shore.

3 The third factor is the oral histories of the
4 Barbadian fisherfolk which are recounted in many of the
5 affidavits that Barbados has submitted to this Tribunal.

6 It would be remarkable for any historian in any part of
7 the world to ignore this very valuable source of
8 evidence when researching the history of Barbados'
9 fishing people throughout the British colonial period
10 and particularly throughout the 20th century. After
11 all, the fisherfolk of those times did not keep records
12 in writing, having received only in some cases a basic
13 formal education and in many none at all. They passed
14 on information through the generations by word of mouth,
15 just as many societies around the world would have done
16 throughout history. Furthermore, no fishing boat logs
17 or other administrative records of fishing boat
18 movements were kept at the time. In all these
19 circumstances the assertion of Trinidad and Tobago at
20 paragraph 316 of its Counter Memorial that it would be
21 unusual for an international Tribunal to place any
22 weight upon the oral testimony of Barbadian fisherfolk
23 is completely misconceived. It is based upon what I
24 describe as a narrow and outdated perspective that all
25 history must be derived from contemporaneous written
26 records.

27 Mr President, in the available time I cannot
28 recount all of the relevant passages from the affidavits
29 of the Barbadian fisherfolk and their representatives
30 confirming the fact that Barbadians have fished off
31 Tobago for centuries. But we invite the Tribunal to
32 read the passages at your leisure. Suffice it to say,
33 though, that many of the affidavits address the issue
34 along similar lines, including some by fisherfolk who
35 have been fishing for more than 50 years, long before
36 the 1970s. Trinidad and Tobago has not adduced the
37 evidence of even a single witness to rebut this
38 consistent historical account, which is striking given

1 that there will be many still alive in Tobago whose
2 memories should stretch back that far.

3 The fourth factor that shows that Barbadians
4 continued to fish off Tobago throughout the British
5 colonial period are the comments made on the record by
6 the Ministers and officials of Trinidad and Tobago
7 itself. Such comments are unsurprising given the
8 notorious nature of Barbadian fishing activities off
9 Tobago throughout history. Thus for example the
10 Minister of External Affairs and International Trade for
11 Trinidad and Tobago, in a speech given at the signing of
12 the 1990 fishing modus vivendi between Barbados and
13 Trinidad and Tobago, referred to the fact that, as a
14 result of the adoption by his country in 1986 of the UN
15 Convention of the Law of the Sea, those fishermen of
16 Barbados who used to fish in waters adjacent to the
17 territorial sea of Trinidad and Tobago found that they
18 were no longer fishing in the high seas but in the
19 exclusive economic zone of Trinidad and Tobago. This
20 text appears at tab 67 of your folders.

21 Similarly a recent report of the Fisheries Division
22 of Trinidad and Tobago's Ministry of Agriculture Land
23 and Marine Resources stated in a section referring to
24 fishing off Tobago that "traditionally boats from
25 Barbados have fished in the EEZ of Trinidad and Tobago
26 primarily for flying fish and associated large
27 pelagics." This appears at tab 68 of your folders.
28 Barbados does not of course agree with the references in
29 those quotations to the waters concerned forming part of
30 the EEZ of Trinidad and Tobago, but the essential point
31 is that the Ministers and competent officials of both
32 parties in this case have recognised that Barbadians
33 have traditionally, to quote their words, fished off
34 Tobago in the area claimed by Barbados to the south of
35 the median line.

36 The fifth factor that shows that Barbadians
37 continued to fish off Tobago throughout the British
38 colonial period is the fact that, as soon as Trinidad

1 and Tobago gained independence from Britain in 1962,
2 documentary records of that practice resurface. By that
3 time, a report published by the government of Trinidad
4 and Tobago, which appears at tab 69, describes how
5 Barbadians were beginning to introduce to Tobagonian
6 fisherfolk their ancient Barbadian techniques of fishing
7 for flying fish. Around the same time Barbadians also
8 introduced the people of Tobago to the special Barbadian
9 technique for boning the fish.

10 But in addition to all of this evidence confirming
11 that Barbadians continued to fish off Tobago throughout
12 the many years of British colonial administration,
13 common sense also indicates that this must have been the
14 case. After all, we have established that Barbadians
15 were already fishing in significant numbers off Tobago
16 throughout most of the 18th century. The abundance of
17 the fish off Tobago at certain times of the year were
18 thus well known to Barbadians by the time that Tobago
19 became a British colonial possession in 1814. We have
20 also established that the flying fish that are so
21 abundant off Tobago at those times of the year were a
22 staple of the diet of the Barbadian population
23 throughout the 19th and early 20th centuries.

24 The scientific evidence submitted by Barbados
25 furthermore confirms what historical and clear
26 documentary evidence establishes, and what every
27 Barbadian fisherman has known for centuries, namely that
28 the flying fish seasonally aggregate in the waters off
29 Tobago and therefore that throughout much of the year it
30 is necessary to follow the fish to Tobago. Finally, the
31 evidence clearly establishes that Barbadians were
32 fishing off Tobago at the time of Trinidad and Tobago's
33 independence from Britain in 1962. In those
34 circumstances it is inconceivable that Barbadians were
35 not involved in any way in fishing in the traditional
36 fishing grounds off Tobago during the long period of
37 unified colonial jurisdiction and governance.

38 Mr President, members of the Tribunal, Trinidad and

1 Tobago maintains, at paragraph 84 of its Rejoinder on
2 the basis of a paper written in 1962 by a post graduate
3 student at a Canadian university, that it is
4 inconceivable that Barbadians could have fished off
5 Tobago for flying fish at the times alleged by Barbados.

6 Barbados contends that this theoretical assertion is
7 utterly unsupported. That same student's paper
8 demonstrates that by the early 20th century Barbadian
9 fisherfolk were sailing in their schooners to fish
10 snapper off the coast of Brazil and then returning to
11 Barbados with their catch. Those fishing grounds are
12 located off the coast of Brazil over 700 miles away from
13 Barbados, or more than six times the distance between
14 Barbados and the traditional artisanal fishery off
15 Tobago. It would have been remarkable for Barbadians to
16 be fishing that far from home for fish of unsubstantial
17 demand in Barbados whilst at the same time leaving
18 completely unfished the rich flying fish fishing grounds
19 off Tobago, fishing grounds that had been known to
20 Barbadians for centuries.

21 Barbados' second core factual submission stands
22 independence of its first submission, Mr President. It
23 is that the Barbadian fishing community, which forms a
24 substantial part of the working population of the
25 island's small economy, is today dependent upon fishing
26 in the area claimed off Tobago, particularly for the
27 flying fish. I will address the bulk of Barbados'
28 submission on this critical aspect of the case today,
29 and tomorrow with your permission, Mr Fietta will
30 complete that submission before moving on to address the
31 third core factual submission.

32 Before I address the second core factual submission
33 permit me to make some introductory remarks about the
34 island of Barbados as it is today, its economy and its
35 people.

36 We possess and live on a very small land territory,
37 Mr President, only 166 square miles. And we refer to it
38 fondly as "Bin" or "the Rock". This physical reality is

1 at the base of Barbados' extreme vulnerability to
2 external shocks, both economic and environmental. You
3 have seen the devastation wrought in recent times in the
4 United States and the Indian sub-continent by natural
5 disasters. Barbados' location on the outskirts of the
6 Atlantic hurricane belt means that on a yearly basis it
7 is periodically exposed to the threat of extreme storms
8 and their environmental, economic and social
9 consequences.

10 The second physical reality that has shaped our
11 island home of Barbados, particularly over recent times,
12 is its relative lack of natural resources. Unlike our
13 neighbour, and our friend, Trinidad and Tobago,
14 Barbados' on-shore natural resources are few. Barbados'
15 small on-shore hydrocarbon industry produces an average
16 of 1,000 barrels of oil per day. By contrast Trinidad
17 and Tobago produces approximately 125,000 barrels of oil
18 per day. Comparisons of natural gas production between
19 Barbados and Trinidad and Tobago are even more striking.

20 Trinidad and Tobago produces four times more natural
21 gas in one day than Barbados does in one year. [See
22 Reply of Barbados, para. 53, and evidence appended
23 thereto.] Even Barbados' centuries-old sugar industry
24 is in systemic decline and no longer provides the levels
25 of employment that it did in the past. [See Reply of
26 Barbados, para. 52, and evidence appended thereto.]
27 Today Barbados' principal source of wealth is its people
28 and we are a determined people. The tourism industry in
29 Barbados, predicated largely on the quality of the
30 environment and of the service provided, is one of the
31 principal engines of growth of the economy. Although it
32 has met some natural success, this Tribunal I am sure
33 will appreciate the vulnerability of such a sector to
34 factors well beyond our control, of which the recent and
35 dramatic rise in oil prices is merely one example.

36 Against this background the fisheries sector in
37 Barbados plays a crucial role in maintaining the
38 economic and social equilibrium by which the island has

1 been able over the years to sustain itself, to remain
2 stable and to be a true democracy. I will not repeat
3 the various details and statistics to which I referred
4 earlier in connection with the numbers employed in the
5 fishery sector, the economic value of that sector or the
6 persistently high levels of consumption of fish
7 throughout Barbados. But I must address the issue of
8 the Barbadian communities that are so dependent on the
9 fishery off Tobago as a source of their livelihoods
10 throughout much of the year.

11 Barbados' maritime fishing communities are spread
12 out throughout much of the island, as this map shows. A
13 copy of the map is also included at tab 70 of your
14 folders. The tiny island state of Barbados is in a
15 sense a small fishing community or sometimes I call it
16 our own fishing village. Each of those small squares on
17 the map represents a discrete small community populated
18 by fisherfolk, although the number of fisherfolk
19 concerned varies enormously from place to place. The
20 reason for the wide distribution of fisherfolk
21 throughout the island is simple. The small island of
22 Barbados has a well developed road infrastructure. No
23 point in the island is more than five and a quarter
24 miles from the coast. In addition property prices
25 inland are generally far lower than those in most
26 coastal areas, and thus more affordable to many of those
27 who work in the maritime fishery. Recent decades have
28 therefore witnessed a dispersal of the island's
29 fisherfolk away from some of the more traditional
30 coastal communities. There is an equally diverse
31 distribution of fish landing areas throughout Barbados.

32 They are dotted along the west, south and east coast of
33 the country and create when the fish is landed small,
34 temporary but constantly renewed pockets of economic
35 activity. Nevertheless it is certainly the case that
36 discrete fishing communities do still exist in Barbados.

37 This can be illustrated by reference to more detailed
38 maps of the most densely populated areas of the fishing

1 population on Barbados, in the parishes of Christ Church
2 and St Michael, and these more detailed maps, Mr
3 President, appear at tab 71 and 72 of your folders. For
4 example Silver Sands in Christ Church is the home of
5 some 80 fisherfolk, Black Rock in St Michael is the home
6 of some 84 fisherfolk. These figures do not include the
7 many more in each community who are dependent on the
8 fisherfolk, but it is no coincidence that the greatest
9 concentration of fishing communities in Barbados is
10 located on the southern and western sides of the island
11 where the waters are calm, the coast is sheltered and
12 the fishing grounds for flying fish, particularly those
13 off Tobago, are that much more proximate.

14 Within these economically disadvantaged
15 communities, the fisherfolk and their dependants live on
16 extremely narrow margins. So do the vast majority of
17 those in associated employment. An on-the-spot survey
18 of fisherfolk conducted in May of this year by the
19 fisheries division of the Barbadian Ministry of
20 Agriculture and Rural Development showed that the
21 overwhelming majority of Barbadian fisherfolk earn less
22 than two-thirds of the national average. An income of
23 that level is barely sufficient to cover the most basic
24 costs of living in Barbados. Without access to the
25 fishery off Tobago, the people of Barbados' fishing
26 communities would face a complete loss of their
27 livelihoods for substantial parts of the season. Many
28 would be forced to abandon fishing altogether, since the
29 annual cost of running and maintaining their boats and
30 fishing gear would not even be covered by their
31 drastically reduced income for much of the year. The
32 same would be true of many in associated employment.
33 All these people would be forced to look for alternative
34 means of earning a living, even though for many fishing
35 is all they know. But the simple fact is that there are
36 no obvious alternative sources of employment for the
37 people in the communities concerned or on the island as
38 a whole.

1 Small economies such as ours are peculiarly
2 susceptible to employment rigidities, and with around 10
3 per cent of the working population of Barbados currently
4 unemployed this percentage would be bound to grow as a
5 result of any loss of access to the fishery off Tobago.

6 [In December 2004 the average unemployment rate in
7 Barbados was 9.8 per cent of the total workforce.
8 Central Bank of Barbados, Economic Press Release, Review
9 of the Economy for the First Three Months of 2005, at
10 pp. 1, 3. (Reply of Barbados, Vol. 3, Appendix 57, at
11 pp. 707, 709]

12 Records do exist of the value and amount of the
13 fish caught and landed in Barbados as a whole, but of
14 course those records do not identify the precise
15 location where the fish were caught, whether off the
16 coast of Barbados or Tobago. Indeed until Trinidad and
17 Tobago began arresting Barbadian fishermen in the
18 traditional fishing ground off Tobago in 1989, Barbadian
19 fisherfolk had no reason to plot their positions in
20 relation to the median line between Barbados and Tobago.

21 However, it is established as a fact that 80 per cent
22 of the value of the annual Barbadian fish catch is
23 composed of flying fish and their dolphin fish
24 predators. It is also established that throughout much
25 of the season, from around November to February and June
26 to July, when those fish are scarce around Barbados,
27 Barbadian fisherfolk travel in significant numbers down
28 to the traditional fishing grounds off Tobago to catch
29 them. So the fundamental importance of the traditional
30 fishery off Tobago to the Barbadian fishing communities
31 and to Barbados as a whole is completely self evident.

32 The contemporary importance of the traditional
33 fishery off Tobago is confirmed by the affidavit and
34 video evidence of the Barbadian fisherfolk and their
35 representatives. As many of the fisherfolk say in their
36 affidavits before the Tribunal, during large periods of
37 the fishing season the fisherfolk are dependent upon the
38 fisheries off Tobago to maintain themselves, their

1 families and the fishing communities of Barbados.

2 Mr President, these sentiments are echoed by Angela
3 Watson, the President of the Barbados National Union of
4 Fisherfolk Organisations, who I am glad to say is here
5 with us, and available if she is needed in any way; and
6 who has stated that the fisherfolk of Barbados could not
7 survive and provide for their families without continued
8 access to the fishery off Tobago.

9 The contemporary importance of the traditional
10 fishery is confirmed also by the results of the survey
11 of fisherfolk conducted earlier this year to which I
12 referred earlier. Crew members from 31 iceboats
13 representing approximately one-sixth of the entire ice
14 boat fleet were interviewed during the survey. More
15 than 80 per cent of them said that they fish near Tobago
16 during those periods when the fish are scarce off
17 Barbados; and perhaps most tellingly of all, the
18 contemporary importance to Barbados of the traditional
19 fishery off Tobago is confirmed by the fact that,
20 notwithstanding the risk of arrest, imprisonment and
21 prosecution by the authorities of Trinidad and Tobago,
22 Barbadian fisherfolk continue to fish in large numbers
23 in the traditional fishing ground. Indeed they have
24 continued to do so consistently since Trinidad and
25 Tobago recommenced sporadic arrests in 1994. The reason
26 for this is obvious; as the uncontradicted affidavits
27 of the Barbadian fisherfolk make clear, there is no
28 alternative, because at certain times of the year when
29 the flying fish and associated species are plentiful off
30 Tobago, fishing for these species is not viable in
31 Barbados; indeed Angela Watson has stated that the
32 fisherfolk must continue fishing off Tobago because, as
33 she says, they must in order to survive and barely
34 survive. It is inevitable that any loss of access to
35 the traditional fishing grounds off Tobago would entail
36 catastrophic repercussions for the fishing communities
37 of Barbados. Hundreds, possibly thousands of those who
38 depend on fishing year round for their livelihoods will

1 find themselves without any prospect of income for
2 substantial parts of the year, resulting in widespread
3 unemployment and poverty, particularly in some of the
4 communities that I have highlighted earlier.

5 What is more, loss of access to the traditional
6 fishing grounds off Tobago would also entail very
7 serious repercussions for the social and cultural
8 identity of Barbados. Reduced flying fish catches would
9 strike at the very heart of the nation, the land of the
10 flying fish. The traditional national diet of
11 affordable fresh fish would disappear for the vast
12 majority of the population for substantial parts of the
13 year, something which has never happened before in the
14 history of our island, and a significant sector of
15 traditional Barbadian society which has formed an
16 integral part of the fabric of the island for centuries
17 would be threatened with economic ruin and ultimately
18 possible disappearance.

19 For all these reasons, Mr President, and members of
20 the Tribunal, Barbados asks that the Tribunal adjust the
21 provisional median line to the south in the manner
22 indicated in paragraphs 141-145 of Barbados' Memorial so
23 as to ensure that Barbadians are secured continued
24 access on an equitable basis to their traditional
25 fishing ground off Tobago.

26 Mr President and members of the Tribunal, I thank
27 you for your patience. Mr Fietta will tomorrow address
28 you further with your leave on some ancillary aspects of
29 the contemporary Barbadian fishery off Tobago. He will
30 then move on to address Barbados' third core factual
31 submission, namely that the fisherfolk of Tobago do not
32 fish in the area claimed by Barbados. I thank you, Mr
33 President.

34 THE PRESIDENT: Thank you so much, Sir Henry. I think then
35 we shall adjourn for the evening and resume tomorrow at
36 10 a.m. Good night.

37 **(Adjourned till tomorrow morning at 10 o'clock)**