International Dispute Resolution Centre
Fleet Street
London, England

Tuesday, 18th 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

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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 TWO

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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, Paris
Sir Henry Forde QC, Counsel and Advocate
Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins
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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
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Mr Christopher Parker, Fisheries Biologist, Fisheries Division
Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations, BARNUFO
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The Republic of Trinidad and Tobago was represented by:

Senator the Hon John Jeremie, Attorney-General, Agent
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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

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June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

THE PRESIDENT: Good morning. Will it be Mr Fietta who begins this morning?

MR FIETTA: That is right.

THE PRESIDENT: Please.

MR FIETTA: Mr President, members of the Tribunal, good morning. I am greatly honoured to appear before this distinguished Tribunal on behalf of Barbados in this historic arbitration. It falls to me to complete Barbados' factual submissions in relation to the Barbadian traditional artisanal fishery off the north west, north and north east coasts of Tobago. As the Tribunal will recall, it is Barbados' case that the fishery upon which Barbados' fishing communities are dependent throughout most of the fishing season constitutes a special circumstance requiring adjustment of the provisional median line. The area of adjustment required is illustrated in each of Barbados' written pleadings and is reproduced here on a map that appears at tab 53 of your Judges' folder. The Tribunal will also recall that, as Professor Reisman explained yesterday in his introduction to Barbados' submissions on the traditional artisanal fishery, Barbados' case rests upon three core factual submissions. Each of these three submissions stands independent of the other. They are shown once more, for ease of reference, on the slide before you.

They are: first Barbadian fisherfolk have been fishing off the island of Tobago for centuries; second, Barbadian fishing communities, which form a substantial part of the working population of the island's small economy, are dependent upon fishing in the area claimed off Tobago, particularly for flying fish; and, third, the fisherfolk of Trinidad and Tobago do not fish in the area claimed by Barbados and are, thus, in no way dependent upon it for their livelihoods.

10.15

Mr President, yesterday afternoon Sir Henry Forde described the historical and contemporary importance to Barbados of its maritime fisheries and, in particular, the

flying fish fishery. He then gave a detailed account of Barbados' case in relation to the first two of these core submissions. He outlined how the historical record clearly demonstrates that Barbadian fishermen were already fishing off Tobago as early as the first half of the 18th century. He explained that Barbadians continued to fish off Tobago throughout the period of British colonial rule that extended from 1814 until the independence of both Trinidad and Tobago and then Barbados in the 1960s. Indeed, Sir Henry highlighted that, by the early 20th century, Barbadian fishermen were sailing schooners to the coast of Brazil to fish in areas that were more than six times further away from Barbados than the traditional fishery off Tobago. Perhaps, most significantly of all, he described in a way that perhaps only a Barbadian statesman who has represented fisherfolk constituents for 32 years in Parliament could describe, the catastrophic repercussions that any loss of access to the traditional fishery off Tobago would entail for Barbados' fishing community, as well as for the social and cultural identity of the island known for centuries as "the land of the flying fish".

Mr President, members of the Tribunal, this morning I shall briefly focus on some specific aspects of the contemporary Barbadian fishery off Tobago, building upon Sir Henry Forde's presentation. I shall then move on to address Barbados' third core factual submission.

The first specific aspect of the contemporary Barbadian fishery off Tobago is its self-evidently artisanal nature. The fishery has been artisanal since Colonial times, when much of it was constituted by the slave population of Barbados pre-emancipation and by the librated black population of Barbados following emancipation in 1838.

Today the fishery of Tobago, like Barbados' maritime fisheries generally, remains focused upon local small scale enterprises within the Barbadian fishing communities. the Government of Barbados has been an

active supporter of the fishery, encouraging collaboration by the promotion and support of local fishing organisations.

The fisheries are operated by about 190 small boats, crewed by two to three fisherfolk, known locally as ice boats due to the fact that they carry an ice hold for easy storage of the catch.

Many of these boats are simply converted day boats. The size and ice hold capacity of these vessels varies, though very few are longer than 40 feet or capable of transporting more than five tons of fish plus ice. The vessel shown here in an image that appears at tab 73 of your folder is one of the larger ice boats in the fleet. This image is a freeze frame from the DVD video on Barbados' fishery off Tobago which was submitted with Barbados' Memorial and which is included in your judges' folder at tab 74.

The vast majority of Barbadian ice boats are wooden hulled, though some have fibreglass hulls. The method that the ice boats use for catching flying fish is the same traditional method used by the day boats. Schools of flying fish are attracted to the boat by a process called "chumming", whereby wicker chum baskets and floating bundles of dried sugar cane blades are released overboard to act as fish attraction devices. As the fish accumulate they are caught easily.

The recent half century has witnesses three significant developments in the boats and gear used to catch flying fish. The first was the introduction of gill nets in the 1950s. The second was motorisation of the schooner fleet shortly afterwards following Hurricane Janet around the same time. And the third was the widespread installation of ice holds in the 1970s.

Nevertheless the Barbadian fishery off Tobago remains an artisanal one, indeed it is illustrative to compare and contrast that fishery with the industrial deep ocean fishery operated by Taiwanese boats out of Port-of-Spain in Trinidad. That fishery is operated by a Taiwanese

owned company called National Fisheries Company (1995) Limited. The scale of that fishery is demonstrated by a letter from that company to the Permanent Secretary of the Ministry of Agriculture, Land and Marine Resources for Trinidad and Tobago dated 20th September 1999. This appears at tab 75 of your judges' folder.

That letter enclosed a list of vessels utilising the port in Trinidad at the time. As of September 1999, it would appear from this list that at least 48 vessels were operating out of Trinidad. There is some dispute between the parties as to the precise characteristics of the vessels concerned, but even Trinidad and Tobago accepts that approximately half of the Taiwanese vessels are between 50 and 70 metres, or between 164 and 229 feet, in length and have a fishing hold capacity of between 100 and 200 tonnes. [Rejoinder of Trinidad and Tobago, para. 90, footnote 134]

This compares with the total fish catch of the entire Barbadian artisanal fleet of approximately 2,500 tonnes per year for all species and an average catch of flying fish in Barbados of between 1,500 and 2,000 tonnes per year. [Memorial of Barbados, Vol. 3, Appendix 60 at p. 729] In other words, each of the giant vessels operating out of Port-of-Spain is capable of landing almost 10 per cent of the entire annual Barbadian fish catch for all boats each time it returns to Trinidad.

In the Eritrea-Yemen case, the arbitral tribunal indicated at paragraph 106 of its award in the second stage of the proceedings that artisanal fishing is to be contrasted, as a matter of law, with industrial fishing. This slide appears at tab 76 in your Judges' folder. To group the small Barbadian ice boats with the enormous Taiwanese vessels operating out of Trinidad for the purpose of this legal distinction would be patently absurd. Nevertheless, Trinidad and Tobago attempts to do so at paragraph 341 of its Counter Memorial, apparently on the basis that the Barbadian boats now operate with rudimentary cold-storage facilities on board. Barbados

submits that such a feature of technological improvement cannot suddenly transform a fishery that is so obviously of an artisanal character into the large scale or industrial fishery described by the tribunal in the Eritrea-Yemen case.

A second specific aspect of the Barbadian traditional fishery off Tobago is its seasonal nature. Sir Henry Forde has already noted that as early as 1722 the season for fishing for flying fish was recorded as going off at the autumnal equinox. The precise seasons today vary from year to year depending on the movement of the flying fish, but Barbadian fisherfolk will generally go to the waters off Tobago to fish around the months of November to February and June to July. That this is the case is confirmed by the affidavits of the fisherfolk and their representatives. [See for example, affidavit of Emmerson Pinder (Memorial of Barbados, Vol. 4, Appendix 86, at p. 832); affidavit of Stanton Thomas (Memorial of Barbados, Vol. 4, Appendix 90, at p. 960); affidavit of Angela Watson (Memorial of Barbados, Vol. 4, Appendix 91, at p. 963)] It is explained also by the fisherfolk who appear in the D.V.D. video on Barbados' maritime fishing that was submitted with Barbados' Memorial. We are now going to show you a short clip which shows what the fisherfolk say about the seasonal importance of the traditional fishery off Tobago.

(**Video shown)**

Mr President, the consequences of any loss of the traditional fishery off Tobago have been described vividly and in detail by Sir Henry Forde, but this is what the fisherfolk themselves had to say about the likely consequences.

(**Video shown**)

It is noticeable, Mr President, that Trinidad and Tobago has said very little in rebuttal to Barbados' case on the contemporary importance of the Barbadian fishery off Tobago. Essentially, its response appears to be to accuse Barbados of exaggerating that importance and to

observe dismissively that, notwithstanding all the unchallenged evidence of Barbados, there would be no catastrophe if Barbadians were to be prevented by the Tribunal's delimitation from being able to fish in their traditional fishing grounds.

Trinidad and Tobago's approach was demonstrated most recently by the fact that it dedicated only two paragraphs of its Rejoinder to this essential aspect of Barbados' case. In doing so, it restricted itself to four points on the contemporary aspects of Barbados' fishery of Tobago. The first point appears at paragraph 89 of the Rejoinder, where Trinidad and Tobago asserts that Barbados drastically increased its fishing capacity in the 1980s and 1990s. But that assertion is quite simply incorrect. Trinidad and Tobago confuses increased capacity with increased efficiency in the artisanal fleet. Barbados would not deny the installation of ice holds on some Barbadian vessels has improved fishing efficiency over the period to which Trinidad and Tobago refers. But virtually every artisanal fishery in the world has benefited from modest improvements in efficiency over the past 20 to 30 years.

At paragraph 90 of its Rejoinder, Trinidad and Tobago then goes on to make three more points on the contemporary aspects of Barbados' fishery off Tobago.

The first of these is that Barbados confuses the importance to it of its fishery generally, and the specific importance of the flying fish fishery. The simple answer to this assertion is that Barbados does not do this at all in its written pleadings. But, in any event, Barbados trusts that the submission presented yesterday by Sir Henry Forde made abundantly clear the specific importance that must be attached to the flying fish fishery. As has been demonstrated, that fishery provides a greater volume of the Barbadian catch than all the other fisheries combined. It has a unique social and cultural importance in Barbados and it is vital to so many in the Barbadian fishing communities.

The second point made by Trinidad and Tobago at paragraph 90 of its Rejoinder is the following. "The claim that the best evidence of the contemporary importance of flying fish fishery is the witness statements of the Barbadian fishermen cannot be taken seriously". Aside from pointing out the rather contemptuous nature of this evaluation of the evidence that has been submitted by 15 Barbadian fisherfolk, Barbados would simply make two observations. First, it is hardly as if the witness evidence in this case of the fisherfolk stands alone. Rather the evidence of the contemporary importance of the flying fish fishery to Barbados and, more importantly, of the fishery off Tobago is overwhelming.

10.30

Barbados' second observation is that Trinidad and Tobago has submitted virtually nothing to rebut the substance of that evidence. For example, Trinidad and Tobago has submitted no witness evidence to counter the evidence of the Barbadian fisherfolk. Nor has it submitted any other material that casts doubt on the critical importance of the fishery to Barbados. And, despite questioning the credibility of the fisherfolk's evidence, Trinidad and Tobago has not called a single one of those witnesses for the purposes of cross-examination.

The third point made by Trinidad and Tobago at paragraph 90 of its Rejoinder does not concern the contemporary aspects of the Barbadian fishery off Tobago at all. Rather it concerns the details of the Taiwanese vessels that fish out of Trinidad. I have already addressed this issue as part of my description of the artisanal nature of the Barbadian fishery off Tobago.

But let us not be distracted by these marginal issues. The contemporary importance to Barbados of its traditional artisanal fishery off Tobago has been demonstrated clearly by the evidence submitted by Barbados and by the presentation that has been given by Sir Henry Forde.

Mr President, members of the Tribunal, I shall now move on to address Barbados' third core factual submission in connection with its special circumstance.

It is that the fisherfolk of Trinidad and Tobago do not fish in the area claimed by Barbados to the south of the median line and are in no way dependent on it for their livelihoods. A critical fact for the purpose of the Tribunal's analysis of Barbados' special circumstance, we would submit, is that it is only Barbadians that fish in significant numbers in the traditional artisanal fishery to the south of the median line. Trinidadians do not fish around Tobago at all. Tobagonians do fish around Tobago, but the vast majority fish from small pirogues or small boats that remain close to the shore within the 12-mile limit. That this is the case is confirmed by the FAO's year 2000 fishery country profile for Trinidad and Tobago. This appears at tab 77 of your Judges' folder. The FAO's paper indicates in a section describing the Tobagonian fishing fleet that about 95 per cent of the vessels in the fleet are small boats or pirogues of less than nine metres length overall. In this slide, "LOA" refers to length overall. They are powered by outboard motors and involved in day fishing. The very limited reach of the Tobagonian fisherfolk is confirmed also by the affidavits of many of the Barbadian fisherfolk and by the affidavit of Angela Watson, President of Barbados' National Union of Fisherfolk Organisations. It is again worthy of note that Trinidad and Tobago has produced no witness evidence from its fisherfolk to refute this fact, nor to challenge the statements of Barbados' witnesses to the effect that Barbadian and Tobagonian fisherfolk fish in different places and have always enjoyed a good relationship, partly for that very reason.

Finally, the fact that the fisherfolk of Tobago fish almost exclusively close to shore is confirmed by the statements made by Trinidad and Tobago officials themselves as recently as 2003 during one of the negotiating sessions between Barbados and Trinidad and

Tobago, to which I shall refer in a moment.

There are at least four reasons that explain why the fisherfolk of Tobago remain close to shore. First, as Sir Henry Forde has already mentioned with reference to the writings of a Tobagonian historian David Niddrie, Tobagonians do not have any significant ocean going history or culture. Niddrie writes in a passages that appears at tab 78 of your judges' folder "deep sea fishing boats are not part of the Tobago scene. Men will venture out a short distance from the shore and use a line to catch quality fish, but they will not lose sight of land. What must be accepted is that Tobagonians differ from their Barbadian and Grenadine neighbours in not being oriented to the sea". The words of a Tobagonian historian.

Second, the Tobagonian fisherfolk are constrained by the short range and limited seaworthiness of their small vessels.

Third, there is no incentive for the fisherfolk of Tobago to voyage more than 12 miles from shore, since the fish that are in highest demand in Tobago are reef fish, which are found in abundance close to land. [Affidavit of Angela Watson. (Memorial of Barbados, Vol. 4, Appendix 91, at p. 964)] Those flying fish that are fished by Tobagonians either for the very limited local market or more likely for export to Barbados, are largely caught close to the shore. Indeed, Sir Henry Forde has already described how the people of Tobago did not fish for flying fish at all until the 1960s, when visiting Barbadian fishermen trained the locals in traditional Barbadian methods for catching and boning flying fish.

Given the persistent low demand for flying fish in Trinidad and Tobago there is simply no prospect of Tobagonian fishermen in the foreseeable future being able to sell flying fish in significant volumes at home. So they are likely to continue concentrating on fishing for the reef fish found in the inshore fishery within 12 miles of the shore.

Trinidad and Tobago has dedicated only three paragraphs in an appendix to its Counter Memorial, and one short paragraph of its Rejoinder to describing the extent of fishing activities out of Tobago. Nevertheless it has sought to argue in these proceedings that Tobagonians fish up to 30 miles off shore, still only about half way to the median line at its closest point. But these claims lack credibility. Both the FAO and Trinidad and Tobago itself have very recently referred to the fisherfolk of Tobago as fishing almost exclusively within the 12 mile limit. For example, during the round of fisheries negotiations held between the parties in March 2003 the officials of Trinidad and Tobago proposed that any fishing agreement should not extend within 12 miles of the Tobagonian shoreline. [Joint report of negotiations between Barbados and Trinidad and Tobago, 24 to 25 March 2003. (Reply of Barbados, Vol. 3, Appendix 29, at p. 397)] This proposal was intended to protect the Tobagonian fishery close to shore, because, as the officials put it, it would prevent any difficulty or competition for resources between the fisherfolk of Tobago and those of Barbados. Barbados was entirely content with this proposal of Trinidad and Tobago since Barbadian fisherfolk do not fish within 12 miles of Tobago. Indeed such an arrangement formed an integral part of the 1990 fishing agreement between the parties in the form of the so-called "closed area" under that agreement that prevented Barbadian fisherfolk from fishing within 12 miles of the shore.

Thus the adjusted median line proposed by Barbados in this arbitration would be entirely consistent with current fishing practices and would ensure equitable access to the fishing grounds off Tobago, both for the fisherfolk of Barbados and for the fisherfolk of Tobago. That line reflects the natural equilibrium that exists between the fisherfolk of the two islands; in stark contrast to the Trinidad and Tobago claim line, the unadjusted median line, in the area round Tobago. Indeed, as Sir Henry Forde described in detail yesterday any delimitation that

failed to take account of the artisanal fishing activities of Barbadians off Tobago would entail catastrophic repercussions for Barbados and its fishing communities, restricting access to a resource that has always been at the very heart of the economic, social and cultural make-up of the nation, the land of the flying fish.

Mr President, members of the Tribunal, with your permission I will now hand over to Professor Reisman, who will address you on the legal basis of Barbados' case for adjustment of the median line to the south. Thank you.

THE PRESIDENT: Thank you, Mr Fietta. Professor Reisman.

PROFESSOR REISMAN: Thank you, Mr President. Mr President, members of the Tribunal, in a boundary delimitation case between coastally opposite states the accepted international methodology is to draw a provisional median line and then to determine whether the existence of a special circumstance warrants the adjustment of that line. Sir Henry yesterday and Mr Fietta this morning have demonstrated the dependence of Barbados upon access to waters in which its artisanal fishermen have traditionally fished and the consequences for them and for the Barbadian economy if those waters were to be closed. My task is to explain how the long-term practices and dependencies of Barbadian artisanal fisherfolk are recognised by international law as non-exclusive rights, how the denial of those rights has created in their case a special circumstance and the remedies which international tribunals have applied for this species of special circumstance.

Contemporary international law recognises and protects the non-exclusive rights, particularly where, as here, they accrue to individuals who are members of functional and inter-generational groups and not solely to the state of their nationality. The traditional artisanal fishing practices of Barbadian nationals over an extended period created a non-exclusive right that vests in both Barbados and its nationals as individuals and that is the special circumstance that calls for an adjustment to the

provisional line. Because Trinidad and Tobago continues to deny or mis-perceive the right claimed by Barbados, I would like to begin by clarifying its nature and scope.

Non-exclusive rights, unlike exclusive rights, arise by virtue of the use or exploitation of a resource or territory by individuals who need not be acting on behalf of a state. To quote Sir Gerald Fitzmaurice, "Whereas claims to exclusive rights founded on the acts of individuals can only be maintained if the individuals were authorised either in advance or ex post facto by the adoption and ratification of the acts, such would not appear to be the case where all that is involved is a claim to possess and to be entitled to continue to enjoy rights of a non-exclusive character." [Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", (1953) 30 BYIL 51, 181] That, Mr President, is precisely the case here. For all that is involved is a claim by Barbados and its nationals to be entitled to continue to enjoy non-exclusive access to waters off the coast of Tobago where Barbadian nationals have traditionally practised artisanal fishing. In its Rejoinder, Trinidad and Tobago concedes that such a non-exclusive use of waters which were formally res communis, part of the high seas, can give rise to rights under international law. [Rejoinder of Trinidad and Tobago, para. 121] But it continues to dispute their relevance, first by denying that non-exclusive rights accrue to the state as well as to its nationals, and then by mischaracterising Barbados' claim as one of an exclusive right.

With your permission, I would like to address each of these assertions in turn. As to the first point, Trinidad and Tobago argues in its Rejoinder that "non-exclusive rights to fish in the EEZ of another state are not sovereign rights and it is only sovereign rights which are in issue in the present proceedings". [Rejoinder of Trinidad and Tobago, para. 139]

10.45

With respect, this assertion is doubly mistaken. Non-exclusive rights accrue to both the sovereign and its nationals as individuals and, while our proceedings certainly implicate the rights of sovereigns, contemporary international law no longer disregards the human rights consequences for individuals of claims by states. After hearing Sir Henry and Mr Fietta, I cannot see how anyone in this chamber can fail to see the human rights stakes in this case.

It is all the more remarkable and anachronistic to hear Trinidad and Tobago assert dismissively in its Rejoinder that "the law of human rights is entirely beside the point as that has nothing to do with the attribution of sovereign rights between two or more states with rival claims". Under modern international law, the potential wholesale deprivation of the essential economic resources on which thousands of Barbadians rely for their subsistence and welfare is surely not beside the point.

Barbados and Trinidad and Tobago are parties to the pact of San Jose, the Inter-American Human Rights Convention of which more will be said later.

But let me return to Trinidad and Tobago's first contention that non-exclusive rights do not accrue to sovereign states. The passage from Sir Gerald's classic article in the British Yearbook which Trinidad and Tobago and Barbados alike cite as authority makes clear that non-exclusive rights, while required by virtue of the conduct of individuals which need not be authorised in advance or ratified ex post by a sovereign, nonetheless accrue to the sovereign. With specific reference to the example of non-exclusive fishing rights, Sir Gerald explains that, where national vessels of a state have been accustomed for an extended period to fish in an area formerly res communis "their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available" albeit on a non-exclusive basis. Non-

exclusive rights, as Barbados has maintained from the outset, differ from exclusive rights in that they vest in both the sovereign and its nationals as individuals. Again, this means that contemporary international human rights law is emphatically not beside the point. Both sovereign and individual rights are at issue in this arbitration.

Artisanal fishing rights, as Barbados demonstrated in its Reply, enjoy a strong foundation in state practice. I would respectfully draw your attention to paragraphs 118 to 121 and especially footnote 161 of our Memorial and to paragraphs 408 to 410 and especially note 550 of our Reply. Of course this material is in the folders (tabs 80 and 81). Briefly, as the Eritrea-Yemen tribunal explained, artisanal fishing denotes traditional fishing practices of a national, ethnic or cultural group by contrast to large scale industrial fishing. [Eritrea/Yemen (Second Stage: Maritime Delimitation), 119 ILR 417, para. 106] Because artisanal fishing rights vest in individuals as individuals and not only as subjects of a sovereign state, international law, even before the advent of modern international human rights law, had provided for the survival of the rights notwithstanding the re-characterisation of maritime zones. That, after all, is the unambiguous meaning of the passage from Fitzmaurice which he supports with both general principles of law and an analysis of the Anglo-Norwegian Fisheries judgment that where non-exclusive fishing rights exist another state can only acquire sovereign title to waters formerly res communis "subject to the acquired rights of fishery in question which must continue to be respected". What international law required in 1953 when Sir Gerald wrote those words is equally, if not more, imperative today. It is beyond cavil that individuals not only states now enjoy rights that contemporary international law protects. I would respectfully refer the Tribunal to paragraph 414 of our Reply, which quotes from Eritrea-Yemen and its recognition of this principle with reference to

traditional artisanal fishing rights. Of course, copies are in your folder (tab 82).

Indeed, because these rights vest in individuals as a species of property upon which, moreover, many rely for their subsistence and welfare, it would be contrary to well-established principles of international human rights law to permit one state to violate them or to allow two states to join together to destroy or negotiate them out of existence without regard for the dramatic impact that this would have on Barbadians who, as Sir Henry and Mr Fietta have just shown, constitute a significant percentage of the workforce of Barbados. Trinidad and Tobago remarkably devotes a single sentence to the international human rights implications outlined in Barbados' pleadings, anachronistically declaring them "beside the point" simply because this is an inter-state dispute. [Rejoinder of Trinidad and Tobago, para. 139] By the way, even were it correct to dismiss individual and particularly human rights as irrelevant to a dispute between sovereigns, the non-exclusive artisanal fishing rights at issue here also vest in Barbados as a sovereign. Artisanal fishing rights, while acquired by individuals who may act without prior or ex post authorization of a state, nonetheless accrue to both those individuals and to the state of their nationality, the latter, that is, the state often being the only entity in international law with the jus standi to protect those rights.

As I mentioned earlier Trinidad and Tobago's Rejoinder also mischaracterises Barbados' claim with respect to these rights. Repeatedly Trinidad and Tobago says that despite the non-exclusive character of artisanal fishing rights Barbados is in fact claiming exclusive rights to the relevant maritime zones. Paragraph 124 of the Rejoinder for example accuses Barbados of "extending Fitzmaurice's thesis about non-exclusive rights into a claim to exclusive rights", and paragraph 125 refers to a claim that Barbados does not make, that "when the waters in question acquire the status of EEZ and cease to be res

communis", which I would note parenthetically is the question we are addressing and not a fact, "the artisanal fishing rights of Barbados overrode the pre-existing sovereign rights of Trinidad and Tobago over the Continental Shelf". In the first place the waters in question all parties agree were formerly part of the high seas, not within the sovereignty of Trinidad and Tobago. But, with respect, Trinidad and Tobago's assertions here reveal a more fundamental misapprehension of Barbados' claim.

Barbados does not now and never has asserted an exclusive right based on the traditional artisanal fishing practices of its nationals, nor certainly does it claim that this right overrides or takes precedence over other putative sovereign interests. It is only because Trinidad and Tobago refuses to accommodate this non-exclusive right by recognising a regime of access for some 600 Barbadian nationals to continue to fish in the maritime zones at issue that a special circumstance arises that requires an adjustment to the provisional median line in favour of Barbados.

What Barbados said with reference to the scope of this Tribunal's jurisdiction is equally critical to an appreciation of its substantive claim. Had Trinidad and Tobago simply acknowledged the rights of Barbadian fisherfolk to continue to eke out their humble livelihoods on their modest boats in these waters in the same way that Trinidad and Tobago acknowledges they have done, unimpeded by Trinidad and Tobago until recently, for generations, rather than impeding them with the unsustainable claim that such rudimentary artisanal fishing is industrial and poses a threat to conservation, Barbados would have neither grounds nor need to insist on an adjustment of the median line so as to enclose the waters in question in Barbados' EEZ. But states, like individuals, must live with the consequences of their actions. Trinidad and Tobago must live with the special circumstance that its own refusal to accommodate a valid and modest claim of

artisanal fisherfolk created.

Mr President, in a moment I will explain how international tribunals faced with comparable claims have ensured that traditional artisanal fishing rights will continue to be protected and respected, but I must pause here to emphasise another equally crucial point. Trinidad and Tobago continues to insist that whatever the status of Barbados' artisanal fishing rights in the past, its declaration of an exclusive economic zone in 1986, followed by the entry into force of the Convention in 1994 simply terminated those rights. Mr President, the Convention neither expressly nor implicitly terminates or purports to terminate traditional artisanal fishing rights that pre-existed its entry into force.

The Convention contains no provision that can be construed to terminate critical economic rights by implication. In the first place as a general principle, international law strongly disfavours the termination of rights by implication, and a fortiori indispensable economic rights that receive reinforced protection under international human rights law. Article 62 of the Convention, which Trinidad and Tobago simultaneously describes as "not before the Tribunal" and yet is implicitly terminating the non-exclusive rights of Barbados and its nationals [Counter Memorial of Trinidad and Tobago, para. 214], says nothing about traditional artisanal fishing rights. It deals only with circumstances in which a coastal state finds itself unable to "harvest the entire allowable catch", and instructs states as to how to allocate the surplus of their living resources.

Trinidad and Tobago nevertheless reverts to Article 62 in a misleading effort to characterise Barbados' claim as one that would necessarily require "the sacrifice of sovereign rights over the EEZ". Again the right at issue, a non-exclusive right to fish in regions where Barbadians had traditionally engaged in artisanal fishing, does not by definition require the sacrifice of sovereign rights.

It is only because Trinidad and Tobago has adamantly refused to permit access to the waters in question for the limited purpose of protecting this non-exclusive right of a small number of artisanal fisherfolk that its asserted sovereignty must now give way, but in any event the Convention's text to the extent it implicitly addresses non-exclusive artisanal fishing rights clearly favours their survival. Let me explain.

Article 293, paragraph 1 establishes as a default rule that principles of general and customary law apply to the extent "not incompatible" with the Convention. A paramount general principle of international law, the inter temporal principle, requires, to quote Jennings and Watts' Oppenheim, that a treaty be interpreted "in the light of general rules of international law in force at the time of its conclusion". [Oppenheim's International Law (Jennings and Watts, eds, 9th ed. 1992), 1281] Because the Convention is silent on the issue Article 293 paragraph 1 requires that it be construed to respect pre-existing rights, including especially non-exclusive rights indispensable to the economic welfare of thousands of individuals. That alone should suffice to refute any assertion that the Convention can be construed to terminate these rights by implication; but as we emphasised in the Reply, in so far as the Convention alludes to traditional or historic fishing rights which resemble but should not be equated with non-exclusive artisanal fishing rights, it strongly favours their survival.

10.00

May I refer the Tribunal to paragraphs 401 to 406 of our Reply and in particular to the commentary of Professor Attard quoted in paragraph 404. Copies are in your files (tab 86). Were there any doubt remaining, the Eritrea/Yemen Tribunal's recent award puts it to rest. That tribunal recognised that, "by its very nature", a regime of traditional artisanal fishing is "not qualified by the maritime zones specified under the United Nations

Convention on the Law of the Sea". [Eritrea/Yemen (Second Stage: Maritime Delimitation), 119 ILR 417, para. 109] May I repeat, Mr President, "not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea".

Mr President and members of the Tribunal, as I said earlier, public international law recognises two ways in which a maritime boundary delimitation tribunal may guarantee the protection of artisanal fishing rights, either by establishing a regime of access to ensure that artisanal fisherfolk may continue to exercise their rights in the relevant area or by recognising those rights as a special circumstance and therefore adjusting the provisional line to accommodate them. Regrettably, Trinidad and Tobago's refusal to consider a negotiated regime of access pushes the Tribunal towards the latter approach. In so far as that approach infringes on Trinidad and Tobago's claim to sovereignty over the maritime zones in question, that is a plight entirely of its own making.

At least since North Sea Continental Shelf, [North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands), ICJ Reports 1969, p. 50, para. 93] international tribunals have recognised that access to fisheries can constitute a special circumstance in the application of the equidistance special circumstance rule governing maritime boundary delimitation between opposite states. I would refer the Tribunal to paragraphs 134 and 135 of our Memorial, which include the International Court's decision by a Chamber in the Gulf of Maine and by the Plenary Court in Jan Mayen, the arbitral awards in Eritrea-Yemen and in St Pierre and Miquelon, as well as treatises by highly-qualified publicists.

Whenever a putative maritime boundary delimitation implicates access to essential fisheries, the relevant question, as the Court said in Jan Mayen, is "whether any shifting or adjustment of the median line, as fishery zone

boundary, is required to ensure equitable access to the fishery resources for the vulnerable fishing communities concerned". [Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway) ICJ Reports, 1993, p. 38, para. 75] Mr President, I interposed a verb "is" to make that read as a sentence, but, as you see by referring to the original text, no distortion was introduced. In St Pierre and Miquelon, the tribunal said that "having decided upon the delimitation in accordance with the geographical factors, the Court still has an obligation to assure itself that the solution reached is not radically inequitable" – here it is quoting Gulf of Maine – meaning "likely to entail catastrophic repercussions for the livelihood and economic well being of the population of the parties concerned". The Tribunal will recall that in Gulf of Maine, where, as here, areas of the high seas had formerly been open to the fishermen of two states, one of which made greater use of the resources than the other, [Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), ICJ Reports 1984, p. 341, para. 235] the Court acknowledged as a "legitimate scruple" which could in certain circumstances justify an adjustment to the provisional median line, the concern that "the overall result even though achieved through application of equitable criteria and the use of appropriate methods for giving them concrete effect should unexpectedly be revealed as radically inequitable, that is to say as likely to entail catastrophic repercussions for the livelihood and economic well being of the population of the countries concerned." [Ibid, para. 237]

The Chamber's ultimate determination of the maritime boundary obviated this concern. It said "There is no reason to fear that any such danger will arise in the present case on account of the Chamber's choice of delimitation line or more especially the course of its third and final segment".

So the Chamber did not have to explore further the

potential international implications in such circumstances, but the Chamber plainly recognised that access to fisheries can at times constitute a special circumstance justifying an adjustment to the provisional median line. Then the Plenary Court confirmed this principle in Jan Mayen, where it characterised Gulf of Maine as a case in which it potentially had to "consider whether any shifting or adjustment of the median line, as fishery zone boundary, would be required to ensure equitable access to the capelin and fishery resources for the vulnerable fishing communities concerned". [Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway) ICJ Reports, 1993, p. 38, para. 75] In Jan Mayen, where the Court did find it necessary to resolve the conflicting overlapping claims of Denmark and Norway to certain fisheries, it took account of this special circumstance and in order to ensure Denmark "equitable access to the capelin stock" determined that the median line should be "adjusted or shifted eastwards". [Ibid, para. 76]. Because Trinidad and Tobago continues to deny the clear principle applied in Jan Mayen or at least purports to limit its application to the supposedly distinguishable facts in that case, I would respectfully draw the Tribunal's attention to several features of that judgment.

First, while Trinidad and Tobago characterises Jan Mayen as a "wholly exceptional case limited to its facts", the Court's judgment contains no hint of such limitation. Far from it. As I noted earlier, the Jan Mayen Court characterised the relevant question as "whether any shifting or adjustment of the median line as fishery zone boundary, is required to ensure equitable access to fishery resources for the vulnerable fishing communities concerned". Far from suggesting that Jan Mayen posed a unique extraordinary circumstance Jan Mayen actually represents a softening of the catastrophic repercussions test suggested by the Chamber in Gulf of Maine. Jan Mayen, in other words, lowered the threshold for

adjustment to the maritime boundary based on the special circumstance of access to essential fisheries from circumstances where the failure to adjust the provisional boundary would entail "catastrophic repercussions for the livelihood and economic well being of the population" to the softer standard of "ensuring equitable access to [I would add relevant fishery resources] for the vulnerable fishing communities concerned".

Judge Schwebel, who participated in Gulf of Maine, Jan Mayen and Eritrea-Yemen, indicated in a separate opinion in Jan Mayen that he did not concur in the boundary adjustment in the absence of a showing of "catastrophic repercussions required by Gulf of Maine". But Judge Schwebel joined the unanimous decision in Eritrea-Yemen, which had re-framed the test of a line, that could be inequitable were it to "produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals". According to Eritrea-Yemen, then, the necessary effect has been focused more narrowly on either "a catastrophic or inequitable effect on the fishing activity of its nationals" or "detrimental effects on fishing communities and economic dislocation of its nationals". This is a more subtle and inflected test. It is of course our submission that the evidence which has been adduced in our submissions and presented orally yesterday and today entitles Barbados to a boundary adjustment on either the more stringent or the more nuanced test. Hence, the unremarkable fact that only in Jan Mayen did the Court find it necessary to adjust the provisional median line on this basis does not, we submit, imply that the principle implied in Jan Mayen is limited to the facts of that case. Ordinarily, it is true, access to essential fishing regions can be adequately guaranteed by a regime of limited access obviating the need for an adjustment of the provisional line. That is because ordinarily states can negotiate in good faith a mutually-acceptable solution of

this sort. Trinidad and Tobago's refusal to accommodate the legitimate non-exclusive rights of Barbados' artisanal fisherfolk creates circumstances comparable to those in Jan Mayen, that is where failure to adjust the boundary will entirely deny equitable access to the relevant fishery resources for the vulnerable fishing communities concerned.

As Sir Henry showed you yesterday, Barbados' reliance on access to the fisheries off the coast of Tobago, the longstanding artisanal fishing practices of hundreds of its citizens upon which further thousands in the economy critically rely, renders Barbadian fisherfolk a vulnerable fishing community and brings this case squarely within the rule applied in Jan Mayen. In both Eritrea-Yemen, which I will return to in greater detail shortly, and St Pierre and Miquelon, the tribunals did not need to resort to the Jan Mayen rule because alternative arrangements adequately protected the fishing rights at issue. In Eritrea-Yemen an award that included a regime of access for the exercise of traditional artisanal fishing rights; in St Pierre and Miquelon an agreement whereby each state gave "access to the nationals of the other in the fishing zones under its jurisdiction on the basis of full reciprocity." [Case Concerning Delimitation of Maritime Areas Between Canada and the French Republic (St Pierre & Miquelon), Court of Arbitration, 10 June 1992, 95 ILR 645, para. 85]

Since Trinidad and Tobago's fishermen only fish its territorial waters, as Mr Fietta has just demonstrated, while Barbadian fisherfolk fish in the areas beyond Trinidad and Tobago's territorial seas, Barbados' proposal is especially equitable in terms of adjusting the maritime boundary to give effect to the special circumstances of fishing for fisherfolk of both of the countries.

Third, whereas Jan Mayen involved overlapping claims by two states, each of which used the fishery resources in question, the case for an adjustment is even more compelling here where one state's reliance on continued access to the relevant fisheries far outweighs the modest

uses of the other and, moreover, rather than an area of overlapping claims the Tribunal in this case must determine equitable access to a maritime regime that was formally res communis and in which Barbados' artisanal fisherfolk, but not Trinidad and Tobago's, fished.

Finally, even applying the more stringent catastrophic repercussions test in Gulf of Maine, Barbados' claim should prevail. In its Rejoinder, Trinidad and Tobago characterises this assertion as "fanciful and unsupported by the evidence". [Rejoinder of Trinidad and Tobago, para. 142]

Mr President and members of the Tribunal, I submit that that statement's falsity is now clear in the light of Sir Henry's presentation and the presentation by Mr Fietta this morning.

Under either the Jan Mayen or the Gulf of Maine standard an adjustment in favour of Barbados to protect the traditional artisanal fishing rights of its nationals would be appropriate and, indeed, warranted by international law in the absence of an alternative arrangement to guarantee these crucial economic facts.

Mr President, this brings me to the Eritrea-Yemen arbitration, an award which some members of this Tribunal and persons in this Chamber know very well. As I noted earlier, tribunals faced with comparable conflicts over access to fisheries in the context of a boundary delimitation have two legal options at their disposal: either adjust the provisional maritime boundary to ensure equitable access for the vulnerable population, as in Jan Mayen, or establish a regime of non-exclusive access to guarantee that population its right to continue to exercise fishing rights in the newly-classified maritime zone, as in Eritrea-Yemen. Barbados has not expressly advanced a claim to a non-exclusive access regime, as in Eritrea-Yemen, though it was a compromise that it had sought and tabled during negotiations. The reason is, as we noted in our jurisdictional pleadings, in view of the arrest and other harassment of its fishermen by Trinidad

and Tobago, even during the negotiations, Barbados has reason to doubt Trinidad and Tobago's good faith in this regard. The Tribunal should appreciate that an award that includes a regime of non-exclusive access rights would be fully within its jurisdiction and competence. The Eritrea Tribunal, which included several judges and two former presidents of the ICJ, confronted comparable claims to non-exclusive fishing rights in the context of competing territorial claims to sovereignty over certain islands in the Red Sea and maritime delimitations between Eritrea and Yemen. The Tribunal found it appropriate in that context to preserve "certain aspects of a res communis" and consequently "to ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men". [Eritrea/Yemen Arbitration (First Stage: Territorial Sovereignty and Scope of Dispute), 9 October 1998, para. 126, 128 (Permanent Court of Arbitration 1998), (2001) 40 ILM 900, at pp. 920-921]

11.15 Again, it is important to recognise that the Eritrea/Yemen Tribunal expressly rejected any assertion that the entry into force of the Convention on the Law of the Sea had terminated the pre-existing, albeit non-exclusive, artisanal fishing rights. [Eritrea/Yemen (Second Stage: Maritime Delimitation), 119 ILR 417, para. 107] On the contrary, the Tribunal made clear that those rights must survive the reclassification of maritime zones by UNCLOS and endeavoured to arrive by an equitable means to guarantee their continuing exercise. Trinidad and Tobago appears to concede in its Rejoinder that a comparable regime of non-exclusive access could be appropriate.

Parenthetically I would note that, having rejected the Tribunal's authority to adjust the median line to accommodate the relevant circumstance of the artisanal fishing rights, Trinidad and Tobago is virtually compelled

to acknowledge the propriety of the regime of access. Otherwise it is left in the legally untenable position of denying that this Tribunal has any means at all at its disposal to protect economically indispensable fishing rights in the course of a maritime delimitation. No international tribunal, neither the Plenary International Court in the Jan Mayen or the Chamber in Gulf of Maine, nor the arbitral Tribunals in St Pierre and Miquelon and Eritrea/Yemen, none has ever suggested that it lacked the jurisdiction, power or competence to protect such vital fishing rights by some means. It would we believe be remarkable and unprecedented for this Tribunal now to find that it lacks the same powers. Absent an adjustment to the median line, the vested rights of Barbados and its fisherfolk must be protected by other means. Such an award would be neither ultra vires the Tribunal's competence nor ultra petita, for it falls squarely within the scope of Barbados' claim.

Mr President, members of the Tribunal, this concludes Barbados' presentation with respect to the special circumstance requiring an adjustment of the provisional median line. My colleague Mr Volterra would continue but perhaps the Tribunal might like to use this as a moment for the coffee break.

THE PRESIDENT: Thank you so much, Professor Reisman. We will have our coffee break for 15 minutes.

MR BROWNLIE: Professor Reisman, before we rise, I just wanted to have one point considered by your delegation, so I am asking a question through the Honourable Attorney General of your delegation. You do not have to answer the question as it were immediately. The question is, is it the case that, in the Jan Mayen case, which you considered very extensively, either of the parties relied upon the doctrine of traditional fishing rights? That is my question. If you would clarify whether it is the view of the delegation of Barbados that either party in the Jan Mayen relied upon the doctrine of traditional fishing rights. Thank you.

PROFESSOR REISMAN: Thank you very much, Professor Brownlie, for the question. The delegation will respond to you.

THE PRESIDENT: Thank you. We will resume at 25 to 12.

(Short adjournment)

11.40

THE PRESIDENT: Ladies and gentlemen, there was an enquiry as to whether the Tribunal would be agreeable to stopping this morning at 12.30 and resuming at 2.30, and we are agreeable. Mr Volterra.

MR VOLTERRA: Thank you, Mr President. I have cannot promise that it will be exactly at 12.30, but I appreciate the flexibility on the Tribunal's part.

Mr President, I have the honour today to present Barbados' submission addressing the reality that underlies Trinidad and Tobago's claim line. Barbados and Trinidad and Tobago have asked the Tribunal to delimit a single all purpose boundary between their respective maritime territories. In relation to the lines proposed by both states, the proposing party thus claims maritime territory for itself on one side of the line and, because the claims are expressed as single all purpose boundaries, the proposing party also claims to exclude the other party from that same side of the line. And so Barbados is claiming for itself maritime territory to the north of a single all-purpose boundary line that it has proposed. As part of that claim Barbados has also therefore claimed that Trinidad and Tobago can enjoy no sovereign rights or jurisdiction to the north of that line. For its part Trinidad and Tobago is claiming for itself maritime territory to the south of the single all purpose boundary line that it has proposed and, as part of that claim, Trinidad and Tobago has also therefore claimed that Barbados can enjoy no sovereign rights or jurisdiction to the south of that line.

In its Rejoinder Trinidad and Tobago describes its line as "simple", and also "graphically a straightforward one". At the same time Trinidad and Tobago implies that

Barbados' claim is complex. In Barbados' submission the reverse is true.

The Tribunal will have appreciated from Sir Elihu's presentation yesterday the simplicity of Barbados' claim. By way of contrast Trinidad and Tobago's claim is anything but straightforward, despite being superficially simple. You have it on the screen before you now. Trinidad and Tobago's claim line starts at the tri-point with St Vincent and the Grenadines. It initially follows the median line until it deviates dramatically to the north at an arbitrary location that Trinidad and Tobago calls point A and then proceeds eastward following an azimuth of 88 degrees. By choosing an arbitrary starting point and drawing a line in a straight direction one may appear to present a simple claim, but nothing could be further from the truth in the present instance. What underlies Trinidad and Tobago's proposed delimitation line, in particular its superficially anodyne 88 degree azimuth, is a confused tangle of overlapping maritime zones, covert boundaries, novel legal propositions and unarticulated yet aggressively asserted ambitions to territory.

11.45

Trinidad and Tobago's claim encompasses a bewildering multiplicity of maritime claims to different maritime areas. If endorsed by this Tribunal, it would result in a jigsaw puzzle delimitation between parties that would create half a dozen maritime zones using eight delimitation lines. As Sir Elihu described yesterday, Trinidad and Tobago's legal arguments in this arbitration shift like the desert sands. Thus, in one pleading Trinidad asserts that in international law coasts are relevant only in relation to the area onto which they project frontally. When Barbados exposes Trinidad's case as fatally flawed on that assertion, Trinidad changes its argument, indirectly and without acknowledgement, to an assertion that coasts somehow radiate like fans.

To date Trinidad and Tobago has chosen not to discuss

the details of its unprecedented claims to the north of the median line. It prefers to focus only on the fact that it is made up of one straight line. That will not be good enough for the Tribunal. Trinidad and Tobago's claim calls for close examination.

Mr President, members of the Tribunal, I am going to go through a series of slides. They will appear on the screens in front of you. Copies of certain of these slides, the principal points along the way in my discussion, appear at tabs 94 to 101 of the Judges' folder for Day 2.

Trinidad and Tobago's first claim is in relation to the delimitation of the parties' overlapping EEZs. You see it on the screen before you. This is the first segment of Trinidad and Tobago's delimitation line. It runs from point one, which is the tri-point of St Vincent and the Grenadines, Barbados and Trinidad and Tobago, to Trinidad and Tobago's random Point A, which is along the parties' median line.

Trinidad and Tobago claims the entirety of the area below the median line as its EEZ, save for the maritime territory that it has conceded to Venezuela. That is shown in the shaded area below the median line.

The next segment of Trinidad and Tobago's claim line then runs from its Point A, along the azimuth of 88 degrees, to Point 2 on the map. You see it on the screen in front of you. That is the first segment of the azimuth. Point 2, of course, is the intersection of the azimuth with Trinidad and Tobago's 200 nautical mile arc.

Trinidad and Tobago claims as its EEZ the maritime area to the south of this segment of its claim line, and it is shaded in the map before you. However, Trinidad and Tobago claims for itself only the area to the north of the line that results from the 1990 Agreement with Venezuela. Therefore, although this is not shown or addressed directly in Trinidad and Tobago's pleadings, the boundary line of this part of Trinidad and Tobago's EEZ claim in fact runs from Point 2 on the 88 degree azimuth, southward

along Trinidad and Tobago's 200 nautical mile arc to Point 6, which is the intersection of Trinidad and Tobago's 200 nautical mile arc with the Trinidad and Tobago-Venezuela Agreement line, then back to the median line at Point 7, Point 7 being the intersection of the Trinidad and Tobago-Venezuela line with the parties' median line. This leaves an area of overlapping Barbados and Trinidad and Tobago EEZ entitlement to the south that Barbados claims for itself and from which Trinidad and Tobago claims Barbados is excluded: that white area to the south of the 1990 line.

Trinidad and Tobago's second claim relates to maritime space in an area that is agreed by both parties to be beyond Trinidad and Tobago's 200 nautical mile arc but within Barbados' 200 nautical mile EEZ limit. This maritime space lies to the south of the next segment of Trinidad and Tobago's 88 degree azimuth. That segment runs from Point 2 to Point 3 on the map in front of you. Point 2 is the intersection of the azimuth with Trinidad and Tobago's 200 nautical mile arc. Point 3 is the intersection of the azimuth with Barbados' 200 nautical mile limit. The area shaded now on your map is the area claimed here by Trinidad and Tobago for itself.

This is possibly the most bewildering part of Trinidad and Tobago's claim. It is perhaps no coincidence that it is the one for which Trinidad has chosen to provide the least explanation. Trinidad and Tobago cannot claim the area as its EEZ, because it lies more than 200 nautical miles from its coast. Trinidad and Tobago thus only claims sovereign rights there over the seabed and subsoil as part of its purported extended continental shelf entitlement. Trinidad and Tobago implies that its proposed delimitation line contemplates a division of the sovereign rights in this particular area between it and Barbados, with Barbados enjoying rights over the water column. However, Mr President, members of the Tribunal, as I noted at the beginning of my presentation, the parties are agreed that the Tribunal is to determine the

course of a single all-purpose maritime boundary. That necessarily means that Barbados would be precluded from exercising any sovereign rights or jurisdiction to the south of Trinidad and Tobago's claim line. That is, in this section to the south of the azimuth that runs between Point 2 and Point 3, including this piece of Trinidad and Tobago's jigsaw puzzle.

It thus follows that Trinidad and Tobago's claim line would exclude Barbados from an area of maritime territory that would otherwise be Barbados' EEZ. Because Trinidad and Tobago can only claim the seabed and subsoil here, the result would be a curious legal vacuum created in relation to the water column. It is unclear what would be the legal result under UNCLOS of this novel proposition. Perhaps Trinidad and Tobago contemplates that the high seas regime would enter to fill the void for the water column. If so, this would result in the anomalous situation whereby maritime territory within a single state's exclusive EEZ limit was subject nonetheless to the regime of high seas.

This result squarely contradicts the hierarchy of legal norms within UNCLOS, something that my colleague, Professor Reisman, will discuss in great detail in Barbados' final submission today.

In any event, turning back to Trinidad and Tobago's claim line, Trinidad and Tobago has again failed to show the full boundary line demarcating its actual claims. In relation to the section before you on the screen, the actual boundary line runs southward from Point 3 along Barbados' 200 nautical mile EEZ limit to Point 5 on the map. Point 5 is the intersection of Barbados' 200 nautical mile limit with the Trinidad-Venezuela Agreement line. Then south westward along that line to Point 6 on the map, which is the intersection of the Trinidad-Venezuela Agreement line with Trinidad and Tobago's 200 nautical mile arc. Then northwards along that arc to Point 2 on the map. But, of course, Trinidad does not address any of these additional boundary lines in its

pleadings.

The next segment of Trinidad and Tobago's 88 degree azimuth, its proposed delimitation line, constitutes the northern boundary of its third claim. This third claim constitutes an attempt by Trinidad and Tobago to use the present proceedings to secure for itself an extended continental shelf in the area immediately abutting Barbados' EEZ limit. You can see the area shaded in on your screen right now. The delimitation line relating to this part of Trinidad's claim runs along the azimuth of 88 degrees between Point 3 and Point 4, with obviously the extension of the azimuth continuing to the edge of the continental shelf extension entitlement. It then follows the line described in the Venezuela-Trinidad Agreement and its extension south westward to Point 5, which is the intersection of the Trinidad-Venezuela Agreement line with the 200 nautical mile line of Barbados' EEZ. Then northward along that line to the limit of its intersection with the azimuth.

The complications arising from Trinidad and Tobago's claims do not end there. Trinidad and Tobago, as I said, does not claim territory to the south of the 1990 Trinidad-Venezuela Agreement line for itself. Thus, superficially at least, its claim seeks only to drive a wedge through Barbados' maritime territory to the south and east of the 1990 Venezuela-Trinidad line. The wedge created by Trinidad and Tobago's claims would leave part of Barbados 's EEZ and extended continental shelf separated to the south of what Trinidad and Tobago claims for itself, along with the Barbados-Guyana EEZ Co-operation Zone.

Barbados claims those areas as part of its maritime territory, but Trinidad and Tobago necessarily claims that Barbados is excluded from all of those areas by virtue of its single all-purpose boundary running along the 88 degree azimuth. The map currently before you shows the maritime area bounded in the south by the median lines between Barbados and Trinidad and Tobago and Barbados and

Guyana and to the north by Trinidad and Tobago's proposed single all-purpose boundary line. Mr President, members of the Tribunal, this is the area from which Barbados would be excluded by Trinidad and Tobago should its claim be accepted.

It is not only Barbados that would be deprived of its territory, of course, pursuant to Trinidad and Tobago's proposal. Were the Tribunal to endorse directly or indirectly the 1990 Trinidad-Venezuela Agreement and the line that it produced, the implications for Guyana are obvious.

This analysis of Trinidad and Tobago's claim was laid out openly in Barbados' Reply. It invited a reasoned response from Trinidad and Tobago to explain the disorder that underlies its deceptively simple claim line and to acknowledge the legal confusion that infects its many segments of claim. That Trinidad and Tobago's Rejoinder fails to respond other than in two respects. The first is a grudging apology hidden at the bottom of footnote 228 on page 72 of its Rejoinder. That can be found at tab 102 of the Judges' folder from today. That apology disingenuously states "the co-existence of zone and shelf rights is not an invention of Trinidad and Tobago, it is a function of the co-existence of the relevant parts of the 1982 Convention".

Trinidad and Tobago's postulation of the co-existence of rights between different states on one side of a single all-purpose maritime boundary has yet to be explained. That apology certainly does not do it. Instead Trinidad and Tobago has chosen to tell the Tribunal that, well, yes, its claim might result in a complex mire of zones and boundaries but Trinidad and Tobago does not have to address this chaotic result, because it is the inevitable consequence under UNCLOS if the Tribunal draws a line as Trinidad and Tobago would have it. In other words, first you do what Trinidad and Tobago wants and then the legal principles sort out the consequences. Most international lawyers would surely agree that the law works in precisely

the opposite way. In Trinidad and Tobago's submissions the Tribunal encounters not a claim based on a considered international law theory, but a claim in desperate search for anything looking like a legal theory to support it. As has been exposed over the last two days, no sooner has Barbados exposed Trinidad and Tobago's legal arguments as false, then Trinidad and Tobago reaches for yet another one.

Consider Trinidad and Tobago's very pleadings. Barbados exposed in its Reply the bewildering disarray generated by Trinidad and Tobago's proposed line and analysed it much as I have gone through with you in the maps on your screens just now. Trinidad and Tobago failed to respond with the two exceptions as I noted, the first was the grudging apology I just described. The second response I will turn to now.

It was a material change in Trinidad and Tobago's argument but it was one that Trinidad chose not to bring to the attention of the Tribunal. So let us look at it now. This is map 7.4 of Trinidad and Tobago's Counter Memorial. It can be found at tab 103 of the Judges' folder. May I suggest that you might want to have that map to hand. It is tab 103 and map 7.4 of Trinidad and Tobago's Counter Memorial. As you can see, it depicts the area of EEZ entitlement and the areas of potential extended continental shelf entitlement. The EEZ area is shaded in the dark blue and the ECS area is hashed. The tribunal will note that the area in the middle of the map to the south of the 1990 Trinidad-Venezuela line, but to the north of the Barbados-Trinidad median line and the Barbados-Guyana median line and within Barbados' 200 nautical mile EEZ limit is shaded in that dark blue. I have selected this map 7.4 by way of example but it is no accident. Every single relevant map in the Counter Memorial shows the same thing as between EEZ and continental shelf extension entitlement.

12.00

The Tribunal can conclude from this that at the time

it wrote its Counter Memorial Trinidad and Tobago considered that this area, that is the area within Barbados' 200 nautical mile arc and south of the 1990 line, was EEZ and not ECS. That is certainly what it shows. That is certainly what they assert by way of this map.

However, Barbados subsequently analysed the implications of Trinidad and Tobago's proposed single all purpose boundary line in its Reply that followed the Counter Memorial. Barbados demonstrated the various defects that would result from Trinidad and Tobago's proposed line. Rather than address Barbados' arguments in a responsible fashion Trinidad and Tobago tried to conceal some of the defects so as to fudge the problem.

I direct the Tribunal's attention back to the box in the middle of the EEZ at the centre of map 7.4. This area is now zoomed in on the screen in front of you and it is just a zoom in of that central area I have been discussing on Trinidad and Tobago's map 7.4. No one could have an EEZ to the north east half of that box except Barbados. You see the dotted line of Trinidad and Tobago's arc that comes from the top of that highlighted section down to join the western boundary of the Barbados Guyana Co-operation Zone. Trinidad and Tobago's 200 mile arc would stop it short. So too Guyana and Venezuela's 200 nautical mile limits stop short of that area. Thus, if it is EEZ, the territory can only belong to Barbados. Trinidad and Tobago's recognition that this area is EEZ and thus Barbados' is irreconcilable with Trinidad and Tobago's single all purpose boundary.

This might just have been an accident, but let me show you now what Trinidad and Tobago did when it realised that it was confronted with this problem. This is map 5.1 of the Rejoinder of Trinidad and Tobago. It can be found at tab 104 of the judges' folder. Look at what Trinidad and Tobago has done, realising its error which was expressed in the Reply, Trinidad and Tobago altered the areas in its map that describe EEZ and ECS. You can look

on the screen in front of you and see what they have done. In effect, Trinidad and Tobago retracted this apparently unintended recognition of Barbados' sovereign rights and jurisdiction and the implicit admission of the failure of its proposed boundary line.

Because Trinidad and Tobago's proposed single all purpose boundary line could not co-exist with the Barbadian EEZ in that area below the 1990 line, Trinidad and Tobago simply changed its maps without telling the Tribunal or Barbados. All the relevant maps in the Rejoinder follow this same retraction.

On the screen I have put the highlights of the relevant area of the two sets of maps. The top are the maps that come from the Rejoinder and the bottom the maps that come from the Counter Memorial. A graphic showing of this juxtaposition that is on your screen can be found at tab 105 of your folder for future reference. I invite the Tribunal to compare the two sets of maps.

Trinidad and Tobago did not bring this to your or our attention. It did not seek to describe this deliberate alteration as a typographical or technical error, or an oversight in the Counter Memorial maps; it did not describe what it did at all. Instead Trinidad and Tobago attempted to make the change unnoticed. This can only serve to reinforce the inevitable conclusion.

I have not pointed this out to the Tribunal in order to assert that Trinidad and Tobago is somehow bound or estopped by these maps in its pleadings; not at all, and that is not Barbados' case. Rather, the Tribunal is entitled to consider this visual retraction as confirmation of the manner in which Trinidad and Tobago has approached its maritime delimitation claim. The Tribunal is entitled to conclude that Trinidad and Tobago has not approached its claim by way of a careful studied construction of a legally coherent delimitation line based on a projection seaward from the land, every step and implication of every zone measured carefully against the law. To do so would be to have done what Barbados did in

its Reply and what I have just done for you. Instead, it appears that Trinidad and Tobago has decided what territory it wants and then just drawn an arbitrary line around it. Or perhaps, Mr President, a little bit more than what it actually wants, hoping that it will get something by way of compromise.

If one follows orthodox methodology from the coast out to the extended continental shelf, analyzing carefully each step according to international law, Trinidad and Tobago's proposed delimitation line looks about as comfortable as a cat in a bath tub. That Trinidad and Tobago appears not to have arrived at this realisation until its Rejoinder speaks volumes.

Trinidad and Tobago's justification for its proposed line, as Sir Elihu pointed out and as I mentioned at the beginning of my pleadings, has changed from pleading to pleading as Trinidad and Tobago lurches from one internally inconsistent rationalisation to another in reaction to Barbados pointing out the flaws in its retrospective legal argument. The Tribunal will no doubt recall the elegant undulation of the visual depiction that Sir Elihu used to show Trinidad and Tobago's radiating coast theory. Sir Eli and I almost had a falling out over that image. I thought that it looked like the waving of a fan. Sir Eli thought that it reminded him of the shimmying of a belly dancer. He obviously leads a more exciting life than I do.

I confess, Mr President, that I am looking forward to my colleague Mr Paulsson's presentation, which will follow mine presumably after lunch, because Sir Eli and I agreed that Mr Paulsson would have the final word on whether it was a fan or a belly dancer. In any event may I suggest when you listen to him you keep a mind to Sir Eli's graphic.

Trinidad and Tobago's pleadings appear to suggest, and appear to suggest seriously, that the Tribunal should adopt Trinidad and Tobago's approach by first deciding to give Trinidad and Tobago maritime territory to the north

of the median line and then try to rationalise it under UNCLOS by proceeding backwards from the single all purpose boundary line back to the land. All of this is sadly reminiscent of that famous quotation of Groucho Marx "Those are my principles and if you don't like them, well, I have others for you". Barbados submits that the Tribunal should treat these disposable arguments for what they are.

Below the surface, part of what Trinidad and Tobago is asking the Tribunal to do is to take from Barbados maritime territory that is located both to the north of the median line and to the south east of the 1990 agreement line, the agreement between Trinidad and Tobago and Venezuela. That is another result of Trinidad and Tobago's claim being expressed as a single all purpose boundary line along the 88 degree azimuth. There is thus a dispute between the parties in relation to all of the maritime territory that Barbados claims, and from which Trinidad and Tobago seeks to exclude Barbados.

In the Rejoinder, Trinidad and Tobago describes its claim and chides Barbados for not having given an explanation for what Barbados considers to be the true purpose of Trinidad and Tobago's claim line. Frankly Barbados finds it difficult to believe that Trinidad and Tobago has really failed to understand what was plainly stated in Barbados' pleadings, not to mention during the rounds of bilateral negotiations. But for the avoidance of doubt let me summarise.

Barbados submits that Trinidad and Tobago's claim line is, inter alia, a cover for Trinidad and Tobago attempting to impose Trinidad and Tobago and Venezuela's agreement on Barbados; to compel Barbados to contribute, to use Trinidad and Tobago's term, its maritime territory to Venezuela's self proclaimed Salida Al Atlantico; to force Barbados to compensate Trinidad and Tobago for Trinidad and Tobago having ceded part of its potential maritime territory claims to Venezuela; to have the Tribunal endorse all of the above in a legally binding or

at least practically binding way; to take away Barbados' possibly only prospective hydrocarbon zone in which Barbados has been engaging in oil exploration activities for the past three decades; and to establish a confused patch work of five different and sometimes overlapping maritime zones that have yet to be explained to the north of the median line using a number of explicit and concealed boundary lines.

All of these and more have been described in plain language in Barbados' written pleadings. I have summarised them on the screen and they can be found at tab 106 of the Judges' folders. I shall only give a brief overview of them now.

Trinidad and Tobago's problem in relation to its maritime boundary delimitation with Barbados is the compact that it reached with Venezuela in 1990. Under international law and Article 3 of that very 1990 agreement, it is not opposable to Barbados or any other third country. Yet Trinidad and Tobago seeks to rely on it and the line produced as the foundation of its claim. The 1990 treaty between Trinidad and Venezuela is not part of this arbitration. It is not subject to the jurisdiction of the Tribunal and certainly the jurisdiction of the Tribunal cannot be limited by the existence of the line produced by that agreement.

The following observations I make about it therefore are made only to emphasise the irrelevance and invalidity of that agreement with respect to third states.

In 1990 Trinidad and Tobago and Venezuela agreed to partition as between themselves certain maritime territory. The Trinidad/Venezuela agreement line that demonstrates their ambitions included maritime territory beyond 200 nautical miles from their coasts. Not only that, they agreed to appropriate to themselves a maritime area that lies not only beyond 200 nautical miles from their coasts but within 200 nautical miles of both Barbados and Guyana's coasts. The Trinidad/Venezuela agreement disregarded entirely the existence of Barbados

and Guyana in a geographical, political and legal sense. It purported to apportion to Trinidad and Venezuela maritime territory that was subject to the legitimate sovereign rights and jurisdiction of Barbados and Guyana. To the north of the Barbados-Guyana and Barbados-Trinidad median lines, the Trinidad Venezuela agreement represents a purported concession, and "concession" is the terminology used by Trinidad and Tobago, by Trinidad to Venezuela of maritime territory that belongs to Barbados. To the south and east Trinidad and Tobago is seeking nothing less than the Tribunal's assistance in accomplishing its and Venezuela's ambition to acquire the maritime territory of Barbados and Guyana. If Venezuela's ambitions to the south and east of the 1990 line are only modest compared to Trinidad and Tobago's ambitions to the north as expressed in this arbitration, the implications for Barbados' maritime territory and Guyana's land and maritime territory are clear.

To the north of the median lines between Barbados and Guyana and Barbados and Trinidad, Trinidad and Tobago is constrained by the well established general principle of law of nemo dat quod non habet. Trinidad was clearly not competent to concede this territory to Venezuela.

In its Rejoinder at paragraph 196, Trinidad and Tobago refers to an article by Nweihed. I am going to call him Nweihed and I apologise for it because I am sure he would not pronounce it that way. He wrote a commentary in volume 1 of Charney and Alexander on the 1990 Trinidad Venezuela agreement. A copy of the article is located for you at tab 107 of your judges' folder. The quotation relied upon by Trinidad and Tobago in its pleading refers to the 1990 line as being a search for equity that avoided addressing the thorny territorial issues facing Guyana and Venezuela.

12.15

Trinidad and Tobago seeks to rely on the article by Nweihed to show that independent observers considered that Trinidad's concession northward from its median lines to

Venezuela was reasonable. What Trinidad and Tobago fails to note is that the supposedly reasonable concession was made by Trinidad to Venezuela in relation to territory that falls on Barbados' side of the Trinidad-Barbados median line. In his article, Nweihed at no point considers the implications for Barbados of the 1990 Venezuela Trinidad agreement.

Nweihed's article focuses its analysis of the political, strategic, historical and legal considerations of the 1990 agreement entirely on the implications of the 1990 line for Guyana. At no point did this analysis refer to Barbados. The only passing reference to Barbados in the article is one single technical note that refers to the outer turning point of the 1990 line as being more than 200 nautical miles from Barbados. That was a technical observation and contained no editorial comment or evaluation.

Nweihed concluded that the Agreement was an adroit way for Trinidad and Tobago to avoid the claims between Venezuela and Guyana. Mr President, members of the Tribunal, it does not follow from this that Nweihed considered that it was a reasonable or equitable thing for Trinidad and Tobago to do what it did in so far as Barbados' entitlement was concerned. The author says no such thing. It is clear that it was never in his contemplation. Trinidad and Tobago has merely taken a quotation from the article out of context.

The truth is that the current Government of Trinidad and Tobago knows full well that its claims in this arbitration to the north of the median line are untenable. It has been handed a fait accompli and has apparently decided that to take the initiative to revisit the Venezuelan pact would be so embarrassing politically or impossible economically that it is willing to absorb the legal embarrassment in which it finds itself. It is interesting to contrast Trinidad and Tobago's current statements about the line produced by its 1990 Agreement with the statements made by Trinidad and Tobago's current

Prime Minister back in 1990. The agent of Barbados referred to these briefly in her opening remarks. At the time of the signing of the Trinidad-Venezuela Agreement, the current Prime Minister of Trinidad and Tobago, Patrick Manning, was the leader of the Opposition. He described the 1990 Agreement and its purported concession as maritime colonialism. He publicly castigated the pact. He unambiguously called it a "very dangerous course of action". Referring to the idea of Trinidad and Tobago agreeing to Venezuela's maritime ambitions, Prime Minister Manning emphatically denied that the territory was Trinidad and Tobago's gift to give. He publicly declared on the record, and this is at tab 108 of your judge's folder, "there are other countries involved, Barbados and Guyana, and Trinidad and Tobago could not unilaterally take any decisions that would lead to granting to Venezuela its request into the Atlantic Ocean". Prime Minister Manning was correct. Trinidad and Tobago has no right to give away to Venezuela what did not belong to it, namely, and as far as we are concerned in this arbitration, the territory of Barbados.

Nor does Trinidad and Tobago have the right to take for itself the territory of Barbados.

The map before you on the screen now is found at tab 6 of Barbados' supplementary materials and this is the largest size version of that map. I took you to it in some detail yesterday. You will recall that it is at tab 48 of the Judges' folder of day one. I will in a few moments ask you to take that map out, so you may wish to prepare yourself for that. As I said, it is the same map to which I took you yesterday. It is the map that was publicly exhibited and given to the press by Prime Minister Manning, as he now is, in 1990 when he was denouncing the Agreement. It was a leak. It shows the area of Trinidad and Tobago's maritime territory that Trinidad and Tobago conceded to Venezuela. That area is the dark shading on the map. It lies to the west of the Trinidad and Tobago-Guyana-Barbados tri-point and median

lines. As I noted yesterday, all of the various proposed delimitation lines on that map during the history of the negotiations between the parties, as well as the shading of what was conceded or what they thought they were conceding until the last minute, stops at the limit of Trinidad and Tobago's maritime territory which is depicted in the median lines between Barbados and Trinidad and Tobago.

It is not only the principle of nemo dat quod non habet that applies here. The Trinidad-Venezuela Agreement was a pact between two states to violate the legal rights of third states. The current Government of Trinidad and Tobago is well aware of the illegal effect intended by the Trinidad-Venezuela Agreement on Barbados and Guyana. I ask you not to put the map away yet.

Again, I just want to take you to one more quote from the current Prime Minister of Trinidad and Tobago, made in 1990. It is on your screen now and it is also at tab 109. He said that "the signing by the Prime Minister of Trinidad and Tobago on a Venezuelan map done in Spanish and the tabling in the Parliament of Trinidad and Tobago of this map, which clearly identifies Guyanese territory as Venezuelan territory articulates a new and startling position for Trinidad and Tobago in this matter." Given this, there is little wonder that the 1990 Agreement has had a corrosive effect on Trinidad's relationships with its CARICOM neighbours. In its written pleadings, Trinidad and Tobago seeks to play down the reactions of Barbados and Guyana and other states, not just to this 1990 Agreement but also to Trinidad's recent attempts (starting in 2003) to have it become effective against them.

The Tribunal heard yesterday Teresa Marshall's evidence in person of the confrontation that occurred between Prime Minister Manning of Trinidad currently and the rest of the CARICOM heads of Government led by Barbados and Guyana at the Abuja Commonwealth Conference in December 2003. You heard how he was confronted. You

heard how he then agreed to submit the 1990 Agreement to the Trinidad Cabinet for it to reconsider Trinidad's support for the agreement. You heard how the Trinidad and Tobago Cabinet subsequently reconfirmed Trinidad and Tobago's commitment to the Agreement and how Prime Minister Manning of Trinidad told Prime Minister Arthur of Barbados that Trinidad considered itself bound by that Agreement as a matter of law and that, no matter how Trinidad and Tobago might wish it were otherwise, it cannot voluntarily act to contradict it.

But the current Prime Minister knows the prejudice caused to its neighbours by the 1990 Agreement. In 1990 he stated that by entering into that Agreement Trinidad had "prejudiced Barbados and has given tacit approval to Venezuela's claim to approximately one third of Guyana's territory".

In its pleadings Trinidad and Tobago has asserted that there is nothing in the 1990 Agreement or the line that it produced that prejudiced Guyana's maritime or land territory interests. But the evidence before this Tribunal contradicts this assertion.

I would like to direct your attention back again to the 1990 Trinidadian map of the history of its negotiations with Venezuela. As I said, I talked to you yesterday about a number of the lines on the map. Now I would like you please to look at the map and find the median line described between Venezuela and Guyana. Not surprisingly, you can see it clearly marked. It is the dotted line running up perpendicularly from the land boundary between Venezuela and Guyana. On one side is written Venezuela and on the other side is written Guyana. I apologise to the tribunal because I have no doubt that yesterday when you were looking at this map you already noticed the two lines on this map that also run out from the coast of South America. Of course, these two lines lie to the east of the Venezuela-Guyana land boundary and median line. At the seaward end, these lines join at various critical points along the 1990 line as

perpendiculars to the coast. The Tribunal will no doubt recognise the similarity between this aspect of the 1990 Trinidadian map and map 7 from Barbados' Reply, which is entitled "Map 7 showing the relationship between Trinidad-Venezuela Agreement line and Venezuela's land claims against Guyana". A copy of that map, map 7, can be found in your Judges' folder for today at tab 111. I will ask you to leave that map up for the moment. You can see what was happening in those lines. The Venezuela-Guyana maritime boundary clearly is shown on this map and it comes from the termination point of the land boundary. What happens if the land boundary were somehow shifted a little bit to the east? Well, you can see the dark line immediately to the east of that median line. That is what would happen if Venezuela were able to shift the line to the east. It would lead to a perpendicular median line that went up and joined the 1990 line just around where the 1990 line jigs to the north. It is not difficult to conclude from this that this line was made to jig to the north at that particular junction deliberately with this shift in land boundary contemplated. Similarly you will see the dotted line a little bit further east. That comes at another critical juncture in what Venezuela and Trinidad and Tobago thought they were conceding or not conceding.

Map 7, which is tab 111 of your Judges' folder from today, is merely an extrapolation of this process that this Trinidadian map confirms was undertaken by the two parties at a certain point in their negotiations with each other: how to match up their maritime ambitions with Venezuela's land ambitions in relation to Guyana. It certainly fits easier as part of a jigsaw puzzle than the jigsaw puzzle that falls to the south of Trinidad's 88 degree azimuth.

UNCLOS does not allow Trinidad and Tobago to extend its territory as it now claims, nor to, in effect, do so by way of conceding territory to a third state. Throughout the bilateral negotiations with Barbados,

Trinidad and Tobago expressly recognised to Barbados that it was not bound by the Trinidad-Venezuela Agreement. As the records of the negotiations attest, particularly the recordings to which Trinidad takes such great objection, Trinidad nonetheless tried to get Barbados to acquiesce in both the Trinidad-Venezuela Agreement and its illegal effects. Barbados refused to do this. Indeed, it was this central aspect of the dispute between the parties that apparently caused Prime Minister Manning to declare to the Prime Minister of Barbados in February 2004 that the boundary dispute between those two countries was intractable and that Trinidad and Tobago was not prepared to negotiate further on it.

In this arbitration Trinidad has acknowledged again that the Trinidad-Venezuela Agreement is not binding on Barbados and that, in effect, it can have no part in this delimitation. However, Trinidad and Tobago insinuates that Barbados somehow has a moral obligation to join Trinidad and Tobago in conceding its territory to Venezuela. It is in this manner that Trinidad and Tobago seeks to introduce the Agreement through the back door as an instrument for dispossessing Barbados, including under the rubric of purported regional circumstances, as my colleague Professor Reisman will speak to this afternoon.

Trinidad and Tobago brazenly admits that the foundation of its claim is to seek endorsement from the Tribunal of its attempt to give part of Barbados' maritime territory to Venezuela. Thus, in explaining its claim at paragraph 257 of its Counter Memorial, Trinidad and Tobago concludes as follows. I put this up on your screen. It is also found at tab 112 of the today's folder. Trinidad and Tobago explains "in this way [following its claim line] the contribution made by Trinidad and Tobago to the salida al Atlantico of the east facing mainland coast of Venezuela is maintained". The placement of Trinidad and Tobago's proposed single all-purpose boundary means that Trinidad and Tobago claims that Barbados is excluded from exercising sovereign rights and jurisdiction over the

maritime territory that Barbados claims to the south of that line, as I mentioned at the outset of my remarks. Thus, the parties are clearly in dispute over this maritime territory. Barbados claims it as its own, and as part of the Barbados-Guyana Co-operation Zone, and Trinidad and Tobago claims that it is entitled to exclude Barbados from that area and to concede it to Venezuela in part.

Trinidad and Tobago cannot rely on the 1990 Agreement explicitly or implicitly to prevent the Tribunal from delimiting the parties' boundary up to the tri-point with Guyana. The 1990 agreement stands in marked contrast to the Barbados Guyana EEZ Co-operation Zone Treaty. The Co-operation Zone, shown in highlight on your screen, does not appropriate the maritime territory of any third state. It is consistent with UNCLOS in all respects. The entire area of the Co-operation Zone falls beyond the 200 nautical mile arcs of any third state, but within the 200 nautical mile arcs of Barbados and Guyana. As a result the only states with rights to the territory under customary international law and UNCLOS within the Co-operation Zone are those two neighbouring states; and indeed the maps produced by Trinidad and Tobago in its Counter Memorial would be consistent with that view.

Barbados and Guyana, as the only states with territorial rights in the area concerned, were fully entitled to enter into the EEZ Co-operation Zone Treaty as part of their lawful exercise of sovereign rights and jurisdiction. Barbados' Agent has already outlined to the Tribunal a number of the actions taken by Barbados with its neighbour to implement the treaty. The EEZ Co-operation Zone Treaty, as she emphasised, and the activities undertaken according to its terms, reflect a co-operative effort by two neighbouring CARICOM countries to exercise joint jurisdiction peacefully in an area of maritime space that is beyond the jurisdiction of any third state.

Mr President, this brings me to the conclusion of my

intervention, with not much time to spare. But suffice to say it is Barbados' submission that the manner of Trinidad and Tobago's defence and covert promotion of its 1990 agreement in this arbitration reveals its position very clearly. In its Rejoinder, Trinidad and Tobago stated, in relation to its attempt to appropriate territory by the 1990 agreement (tab 113) "as to the appropriation of maritime territory Trinidad and Tobago made what was in its view a reasonable settlement in respect of EEZ and Continental Shelf claims".

Barbados does not doubt that Trinidad and Tobago was well pleased with whatever benefits it achieved from entering into this pact with Venezuela. It may well have been reasonable for Trinidad and Tobago to concede part of its own maritime territory to Venezuela. That is not something on which Barbados will comment. It may be that the Trinidad-Venezuela agreement represents a legal concession by Trinidad and Tobago in so far as it relates to its territory to the south of the median line with Barbados. It was legally intolerable and indeed intolerable in every way for Trinidad and Tobago to purport to concede part of Barbados' territory. And Barbados made this position known to Trinidad and Tobago, including from the outset of the bilateral negotiations between them. Given the undisputed fact that the Trinidad-Venezuela agreement is not opposable to Barbados and cannot in any way affect the rights of Barbados, the Tribunal should disregard Trinidad and Tobago's overt and covert reliance upon the agreement in its entirety when coming to delimit the maritime boundary in the present case.

To conclude, Trinidad and Tobago's claim attempts to extend its boundary well beyond both its legal and geographical limits. Its claims extend beyond its 200 mile arc, bypassing through Barbados' EEZ and into the high seas beyond, and in so doing Trinidad and Tobago would create a jigsaw puzzle of bewildering maritime zones that it has yet to explain. It would have the effect,

inter alia, of cutting off Barbados from its EEZ and creating a novel regime of extended continental shelf and high seas within a single state's EEZ. It would result apparently in an area of joint sovereignty and jurisdiction, yet to the south of a single all purpose boundary line.

Trinidad and Tobago, to Barbados' greatest concern, would curtail Barbados' ability to proclaim the potential extended continental shelf rights that it has from the edge of its EEZ, and would curtail its EEZ to the north of the median line in the area in dispute, to which Barbados is entitled by geography and international law.

Trinidad and Tobago has attempted to hide its claims behind a seemingly simple single all purpose boundary line. When that proposed boundary is examined closely, it is revealed as confused, complicated and ultimately unworkable.

I thank the Tribunal for its attention. Mr President, may I suggest, with the indulgence that has been kindly shown by the Tribunal and our colleagues from Trinidad and Tobago, that we might break early for lunch and after that may I suggest that you call upon Mr Paulsson to make Barbados' next presentation.

THE PRESIDENT: Thank you so much, Mr Volterra. The Tribunal will now adjourn and meet again at 2.35.

(Adjourned for a short time)

THE PRESIDENT: Mr Paulsson.

MR PAULSSON: Thank you very much. I am grateful for the privilege of addressing your Tribunal on behalf of Barbados. Yesterday, my Professor, Michael Reisman, found a way to explain to you that he was showing his respect for the Tribunal by addressing you from a seated position. I hope that I am being respectful in standing at attention before you today, which only shows that respect can be demonstrated in a number of ways and, perhaps, we have not exhausted the possibilities. I recall from my childhood having observed a legal system in West Africa where the supplicant was expected, indeed required, to

address the Tribunal in his oral submissions entirely from a kneeling position. This method should not be dismissed out of hand. It has certain advantages, not so much as a matter of respect – I can promise you that respect for the decision maker in Loffa County in the North Western corner of Liberia in the 1950s was a foregone conclusion – but as a matter of highly-pragmatic and effective incentive to brevity. I shall keep this in mind, Mr President, as I deal with four series of propositions which make Trinidad and Tobago's proposed line a legal impossibility.

First, the jurisprudence is clear and consistent to the effect that equidistance is the primary method of delimitation and this is as true as between adjacent coasts as it is between opposite coasts. Therefore, nothing of legal significance would follow from Trinidad and Tobago's energetic attempts to classify and re-arrange geography. In any event, it is a geographical fact that Barbados and Trinidad and Tobago are opposite. They are not adjacent, they are not contiguous or "in a position of adjacency" as our opponents would suggest. No legal gloss can refashion geography. Geography is given. Geography controls.

Secondly, any pretension that the coastal length of the sole island of Trinidad is relevant in this delimitation is belied by the fact that the island of Trinidad does not contribute any base points to the delimitation line. This means that the coast of the island of Trinidad produces no entitlement opposable to Barbados. That is the end of the matter.

Thirdly, when one considers the actual lengths of the parties' relevant coast lines, those relevant ones are those that are in frontal opposition. The ratio is 2.6 to 1 in Barbados' favour. You will have seen this map in our legal submissions and it appears again in your Judges' folder at tab 114.

Now, if we were for an instant and for arguments sake to adopt Trinidad and Tobago's logic and, thus, compare the distance between the extreme northern point and the

extreme southern point of each of the three islands without pausing one instant to worry about which coasts are relevant, the ratio produced is around three and a half to one. Nowhere near the extreme disproportions present in the Libya-Malta and Jan Mayen cases.

Fourthly, and finally, Trinidad and Tobago's reliance on the concept of cut-off is misplaced. It is predicated on the argument that Trinidad and Tobago ought to have "unobstructed access to the ocean to the south of Barbados". But this is simply to ignore Barbados' competing entitlement to that area and, therefore, simply to ignore Barbados' existence altogether.

I shall deal with each of these topics, if it pleases the Tribunal, in turn. None of them, you may be pleased to hear me say, requires extended development. To save time I will omit routine cross-references and ask that they be inserted into the transcript. We live in the age of transparency and, if it is of interest to our opponents, they may have my speaking notes to check.

Opposition and adjacency. Let me start by recalling the case of our opponents. In its most succinct form it is to be found in paragraph 6 of the Trinidad and Tobago Rejoinder: "There is no justification in the eastern sector for treating the two coastlines as opposite, and thus producing a manifestly inequitable result." Forgive me, but this is so important that I will read it again. "There is no justification in the eastern sector for treating the two coastlines as opposite, and thus producing a manifestly inequitable result."

The emphasis on "thus" is mine, but the word "thus" is crucial to Trinidad and Tobago's argument. Its contention is that treating the two coastlines as opposite somehow automatically produces a manifestly inequitable result. That is a naked assertion. A few words should suffice to expose it as wishful thinking.

The law and the jurisprudence on the delimitation of opposite coasts is settled. The median line is the starting point and the presumptive final point because it

divides equally the area under delimitation. To treat two sovereign states equally is to treat them equitably as both customary law and UNCLOS Articles 74 and 83 require. [North Sea Continental Shelf, para. 57; Gulf of Maine, para. 193; Eritrea/Yemen, para. 131] It is this commonplace of maritime delimitation that Trinidad and Tobago now seeks to rebut. The median line in the eastern sector, Trinidad and Tobago says, would lead to this manifestly inequitable result. But the law of maritime delimitation is not satisfied by bald assertions that the result achieved by a median line is inequitable; it must be shown that a special circumstance exists which makes the normally applicable median line so.

Trinidad and Tobago is unable to point to any such special circumstance other than to say that if one were to treat its coast and that of Barbados as opposite, which of course they are, then that would of itself lead to inequity.

2.45 You will have noted in this connection, in the written pleadings, Trinidad and Tobago's frequent use of the expression "Atlantic sector". One surmises that Trinidad and Tobago has optimistically lifted this expression from the UK/French Continental Shelf decision of 1977. [54 ILR 6] That decision established a Continental Shelf boundary in what France insisted on describing as two sectors, the Channel sector and the Atlantic sector. France defined the Channel sector as the one "where the coasts of the two states are opposite" and the Atlantic sector as one "where the coasts of the two states are no longer opposite each other". In its decision the Court of Arbitration avoided France's terms and instead spoke neutrally of the area under consideration which was (I quote the Court this time) "immediately to the westward of the Channel". Trinidad and Tobago has opted for France's expression "Atlantic sector" perhaps in the hope of sharing France's good fortune in pushing its boundary northward. France persuaded the Court to state that although the

equidistance principle was convenient, it was more appropriate to make an equitable adjustment when one is faced with what France called a lateral boundary between two adjustment states. And the Court did adjust the equidistance line in favour of France.

Trinidad and Tobago would have you leap to the conclusion that international law therefore accepts that two states may in various places be either adjacent or opposite. Allow me to say "not so fast!"

First of all, the Court's operative expression was "lateral boundary". It never said that the UK and France were in any region "adjacent states". Indeed, the Court was at pains to counter any such notion, and I tell you it did so explicitly.

I wish to take you to one or two specific passages from the decision but they will be easier to understand if we first consider the concrete geographic problem facing that Arbitration Court.

Consider the area to the west. Out in the Atlantic, as the Court said in paragraph 233, the areas to be delimited "lie off rather than between the coasts of the two countries". Who could disagree? But France was quite unhappy about the prospect of the lateral line to be drawn into this area off the coasts, if this was to be done on the basis of a pure median line. The reason for France's unhappiness was very simple: the small English Scilly Isles project more than twice as far westward into the Atlantic than their French counterpart, the small island of Ushant: 31 nautical miles to 14 nautical miles. As a result, if you imagine the line between the Scillys and Ushant as the base of a triangle pointing downward to the south west, the mere fact that there is more water between the Scillys and Cornwall has the result of causing the triangle to pivot. The downward vector of the triangle automatically shifts in the UK's favour.

Now it gets really bad from France's point of view, because the agreed arbitration areas extended to a point, the 1,000 metre isobath, located 180 or 160 nautical miles

from the islands, depending on which one you chose as your starting point. The effect of pivoting the triangle was greatly magnified as the vector was drawn out – leading to the French loss, if we should call it that, of a very considerable area due to the happenstance that the Scillys are 15 nautical miles further out to sea than Ushant.

And so the Court agreed with France that it was appropriate to make an equitable adjustment in its favour on the footing that "the Scilly effect", if I may call it that, produced an inequitable distortion.

Now, by this decision did the Court do anything or say anything which assists Trinidad and Tobago in its present ambitious claim? Before I answer the question let me say that having reviewed the geography we can more easily digest the explicit language of the decision. Trinidad and Tobago would have you believe that France won this particular argument because it convinced the Court to treat the two states as adjacent, once you get into the Atlantic area. But the decision itself is in flat contradiction with this assertion. On the screen you will now see paragraph 242. Further extracts from the case are in your Judges' folder at 122, if you prefer that, but here you see an extract from paragraph 242. I ask you first just to concentrate on the first sentence. Here the Court is saying that, if the distinction were legally important, the Court would be inclined to treat this Atlantic region as one where the two states had a relationship of opposition rather than one of adjacency. That is the undisputable meaning of the references to the corresponding paragraphs, one and two, of article 6 of the 1958 Convention. That destroys Trinidad and Tobago's thesis.

The Arbitration Court went on to say in this very paragraph (242), "to fix the precise legal classification of the Atlantic region appears to this Court to be of little importance ... What is important is that ... the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf region

and to the great distances seaward that the shelf extends from those coasts".

Mr President, this is not difficult to understand and I submit it greatly illuminates an interesting earlier passage in the judgment, in paragraph 239, where the Court compares opposite and adjacent coasts and the relative danger of distortion by geometrical effects of the equidistance principle. Kindly look at the last two sentences of this paragraph 239 where you read: "In the case of adjacent states it is the lateral geographical relation of the two coasts, when combined with a large extension of the Continental Shelf seawards from those coasts, which makes individual geographical features on either coast more prone to render the geometrical effects of applying the equidistance principle inequitable than in the case of opposite states. The greater risk in these cases that the equidistance method may produce an inequitable delimitation thus also results not from the legal designation of the situation as one of adjacent states but from its actual geographical character as one involving laterally related coasts".

I do not believe I have to say very much. All that seems necessary to point out is the obvious. If Trinidad and Tobago thinks it can convince anyone that France won an adjustment on the basis that the Court found the two states to shift from being opposite to being adjacent, Trinidad and Tobago seems to be in fairly serious trouble.

Without intending to sound rude I would suggest that Trinidad and Tobago has invented a series of abstractions and tried to use them to make buckets, but buckets made of abstractions tend not to hold water and this one surely does not.

Let me illustrate. Since we are in the realm of abstractions let us imagine the relationship of two states which are conveniently (something you never see in our world) identical in mass and geometry. These two states are opposite. Even Trinidad and Tobago would surely not deny it. But now we alter the abstraction and double the

size of these two identical states so as to give them a greater sideways frontage. These, Trinidad and Tobago would say, are adjacent. Let us double them again, and we are opposite once more, given the greater vertical frontage. Double again and Trinidad and Tobago would tell you that they are adjacent. This, we submit, is getting Trinidad and Tobago absolutely nowhere. The objection is evident. All of these figures depict an unvarying relationship of opposite coasts.

Mr President, either two houses are across the street from each other or they are next door to each other; it does not matter if you look at them from the manhole cover in the middle of the street or from the post box down by the corner. Of course the house across the street could be dismantled and rebuilt next door, but the islands we are talking about do not surreptitiously prowl about at night. When the sun rises on the Windwards I think we can confidently expect every morning that Trinidad and Tobago and Barbados remain exactly where we left them last night. These are our two states. (Judges' folder, tab 124)

The first thing we can observe is that there is nothing like the Scilly Islands, there is nothing like the island of Ushant, no special relevant circumstances of a geographic nature. That is enough, I submit, to cause us to put aside the UK/French decision of 1977 which has no bearing on our case.

As to the two other decisions from which Trinidad and Tobago borrows, and this time it borrows mere dicta rather than any actual holdings, these are equally unavailing in its attempt to re-arrange geography. Let me deal with these two cases in rather shorter order if I may.

First Trinidad and Tobago relies on the Gulf of Maine decision, in its Counter Memorial in paragraph 178. In that case a Chamber of the ICJ drew a perpendicular to the closing line of the Gulf of Maine to delimit the area "outside and over against the Gulf". [Gulf of Maine, para. 224] Barbados does not take exception to the Chamber's decision. Drawing a closing line along the

mouth of the Gulf formed by territories belonging to two states is the only way to delimit areas off the Gulf. But Barbados and Trinidad and Tobago do not form a gulf, and so nothing in the Gulf of Maine decision has any direct pertinence to the present geographical realities. Rather, Gulf of Maine and Trinidad and Tobago's reliance on Gulf of Maine, is interesting in two other respects.

First, to demonstrate its thesis of adjacency Trinidad and Tobago posits "that the westerly coasts of Tobago and Barbados constitute a continuous coastline joining up somewhere in the Caribbean, a tropical version of the Gulf of Maine". On this basis Trinidad and Tobago draws a closing line across their easterly coasts, Rejoinder paragraph 184. But this hypothesis does not advance Trinidad and Tobago's position. As you will have seen, Barbados for the exercise of it, has drawn an imaginary closing line connecting the islands of Barbados and Tobago so as to form an imaginary single island. (Judges' folder, tab 126) If you draw an equidistance line across the imaginary closing line, you will see that it runs to the south, not the north, of the actual medial line between the two states.

Second, perhaps even more interesting, is something which is not to be found in the text of the decision. In Gulf of Maine, Canada's primary case was as follows. Here is a quotation from the Canadian pleading which appear in the commentary by Jan Schneider, one of the counsel to Canada in that case, and her note on the Gulf of Maine which appeared in the American Journal of International Law, Volume 79, page 539. This is from page 555. "Where a maritime zone is defined by distance, in Canada's view the seaward extension of the zone must be thought of in terms of a radial extension from the coast with equal treatment for all states and their various coasts". The Tribunal will recall that this is precisely the position advanced by Trinidad and Tobago in its Rejoinder, paragraph 185: coasts "radiate" (paragraph 185). This argument is not even mentioned in the Gulf of Maine

judgment.

3.00 Secondly, reliance is placed by Trinidad and Tobago on the Qatar/Bahrain case. It is true that the Court there referred, on the one hand, to the southern part of the delimitation area where "the coasts of the parties are opposite to each other" and, on the other hand, to the northern part "where the coasts of the two states are rather comparable to adjacent coasts". Paragraph 169 and 170 of the judgment. This indeed is sketch map 2 from the judgment. (Judges' folder, tab 128)

Trinidad quotes the ICJ and announces the quotation by the words "the Court distinguished between the southern area and the area further north in the Gulf". But then Trinidad and Tobago utterly fails to show how the Court distinguished between these two areas in its judgment. In truth it did not. In both areas an equidistance line obtained and in both cases it was incidentally adjusted to take account of specific traditional special features, such as low-tide elevations and islands. (Paras. 244 et seq.)

Before leaving this topic, Barbados wishes to make it clear that its position is not that the "relevant coasts" involved in a delimitation – we turn to this concept in a moment as I have announced – cannot be opposite in part and adjacent in part. Of course they can be – if their configuration varies vis-a-vis each other and vis-a-vis the area to be delimited. For example, in paragraph 216 of the Gulf of Maine judgment the ICJ Chamber noted that the adjacency of the coasts of Maine and Nova Scotia, the first segment of the delimitation nearest to the back of the Gulf of Maine, gave way to a "quasi-parallelism" of coasts in the second segment of the delimitation further in the body of the Gulf. But Trinidad and Tobago's position today is something radically different. It does not involve changing geographical relationships. Trinidad and Tobago contends that the very same coasts may be viewed as opposite from one vantage point, the Caribbean

sector, and as contiguous from another vantage point, the Atlantic sector. There is no precedent for dual treatment of this kind of the same coasts. Nor can there be when, as in our case, the coastal configuration does not change.

To conclude, the inequity asserted by Trinidad and Tobago is in no way borne out by the special relationship of the parties' relevant coasts. These coasts are always opposite to each other.

I now move with your permission to the concept of relevant coasts.

If we consider the archipelagic baseline of Trinidad and Tobago, we can perceive no projection whatsoever into the relevant area, because that line results in a frontage which faces obliquely away from the area. (Judges' folder, tab 129) You see in the light blue section the EEZs that could overlap and the area which is created by the projection of the archipelagic baseline. How can this projection be relevant?

Trinidad and Tobago itself in its Counter Memorial paragraph 197 is careful to describe this frontage as "coasts which face more or less to the east". Well, Mr President, make that "less." Barbados' map 9 illustrated the fallacy of Trinidad and Tobago's position. The Tribunal may recall that Barbados' map 10, perhaps somewhat cheekily, showed that the only way for Trinidad and Tobago to make this argument good would be to ask for permission to swing Trinidad and Tobago into a new position. And when the Trinidadian pendulum starts to swing, there is apparently no stopping it. What you see before you now (Judges' folder, tab 131) is only the migration of Trinidad and Tobago's land mass necessary to claim that Trinidad and Tobago fronts – i.e. faces on to – the median line. To support the radical further adjustment which Trinidad and Tobago proposes, Trinidad and Tobago would have to be moved much further out to sea, as depicted by Barbados' map 11, which you have in the Judges' Folder, tab 132.

The answer to this observation in Trinidad and

Tobago's Rejoinder was to steer off and adopt a radically different approach. Now you are told that one must focus on physical coasts, because the land must dominate the sea – and Barbados has violated this principle by giving prominence to the archipelagic baseline. This is rather the pot calling the kettle black. After all, Trinidad and Tobago and no one else argued that its coastal front should be taken as represented by its eastern archipelagic baseline. I refer you to Trinidad and Tobago's Counter Memorial, for example at paragraph 200. But let us not quibble. Everyone is entitled to see a new light and to adopt a new position. Trinidad and Tobago's newly-found faith in actual coasts rather than abstract lines manifests itself in a concept of radiating coasts. I will resist Mr Volterra's invitation to transform myself into the judge of dancing contests, but I will agree with him that Sir Elihu's fan dance was elegant indeed and you surely will remember it. I will not now repeat what I mentioned a few minutes ago on Canada's reliance on this faux ami in the Gulf of Maine case and the fact that the ICJ Chamber did not even dignify it with a reference in its judgment.

Let me simply highlight Trinidad and Tobago's purpose in advancing the concept of radiating coasts. This can be simply stated. Above all, Trinidad and Tobago wants you to focus away from the coasts that are relevant: that front, abut, face onto the area to be delimited. It wants you to focus on what Trinidad and Tobago calls (its their word, Rejoinder paragraph 150(5)) generally eastern facing coastline consisting primarily of the coast of the island of Trinidad. Trinidad and Tobago's reasons are, of course, transparent. But Barbados submits that they find no expression in the law and they cannot find any expression in the law because they are unprincipled. Trinidad and Tobago's submission is summed up as follows, and I am quoting, "There is a distinction in the jurisprudence between the base points which are used in the construction of a line and the coastal frontage which

is relevant to the delimitation as a whole". (Counter Memorial paragraph 186)

The falsehood of this proposition is clearly shown by both the Jan Mayen and Libya-Malta cases. (Reply, paras. 298-299) A boundary delimits competing seaward projections of territorial sovereignty titles: these titles must find expression in a base point. In addition it is difficult to reconcile Trinidad and Tobago's proposition with its professed desire to adhere to the rule that "one starts from coasts, not lines unsupported .... by coasts". (Rejoinder, para. 203)

By contrast Barbados' position is the orthodox position, simple and uncontroversial. A coast that does not produce base points is irrelevant to delimitation. As the International Court of Justice said in Qatar/Bahrain, paragraph 178, a "relevant coast" is one that produces a base point. The Court was of course only following its own established case law, and notably the judgment in Jan Mayen where the relevant coasts were identified as those on which base lines were located, paragraphs 65 and 67 of that decision.

This does not mean that a coast which is not a relevant coast, and therefore produces no base points, has no entitlement to maritime zones. Of course it does. But such maritime zones will not be opposable to the other state participating in that delimitation because they do not "look on to the area to be delimited", and for this reason do not "generate entitlements overlapping" with those of the other state participating in that delimitation. This is language used in the Rejoinder, paragraph 186. These coasts are therefore irrelevant to the delimitation, although they may well be relevant to a delimitation with other states. Which states? Those whose coasts they <u>do</u> face.

Simply put, Trinidad and Tobago confuses entitlement with delimitation. Practically, its so-called eastern facing coastline faces, if anyone, Venezuela, Guyana and Surinam. This coastline is not Barbados' or the

Tribunal's concern in these proceedings; and Trinidad and Tobago's radiating entitlement thesis cannot alter this.

The discussion on relevant coasts places in context Trinidad and Tobago's ultimate argument in these proceedings. That is that the median line must be shifted eastwards with point A as a pivot to account for Trinidad and Tobago's superior coastal length as a matter of proportionality. So we get to that subject.

Proportionality and disproportionality.

The first point to mention here is that both Parties agree on the two rules. One, the purpose of maritime delimitation is not "to divide up an undivided whole or to share out resources on ex aequo ad bono basis". (Counter Memorial para. 150) Two, proportionality is not a positive method of delimitation – indeed it is not a method at all, and does not produce lines. (Counter Memorial paras. 170–171)

It follows from these two cardinal rules that proportionality is subordinate to entitlement. It is not a rule of international law, but only a potential instrument of equitable adjustment as one of several possible auxiliary factors. As the President has had the occasion to remark in the Libya–Malta case, the equitable adjustment that may be called for on account of proportionality cannot be a direct mathematical function of the relevant coastal lengths. (ICJ Reports 1985 at 182–184)

The Tribunal will recall that in its Counter Memorial Trinidad and Tobago's fig 7.3 relied on a north/south vector – strictly north/south – to demonstrate a disparity of coastal lengths and a need for adjustment of the median line. (Counter Memorial paragraph 239). In its Reply Barbados simply noted (a) that a vector is not a coast and (b) that the direction of the vector constructed by Trinidad and Tobago distinctly deviated from the actual direction of its coastline. This you will find in the Reply, paragraphs 304–307. In one sentence: the vector was the coastline and Trinidad and Tobago's case required,

but that Trinidad and Tobago plainly does not have.

Trinidad and Tobago's Fig 7.3 seems to be, how shall I put it, a bit bashful about showing the impact that its author intended to have. We have faithfully adopted Trinidad and Tobago's vector in this illustration (Judges' Folder tab 135) which is more forthright in showing that impact. As you can see, what is being compared is on the one hand a true coast and on the other hand something which is neither a physical coast nor even an archipelagic baseline. It is but the figment of a creative imagination bereft of any articulated or even conceivable principle.

3.15

The Tribunal will also recall that Trinidad and Tobago appears in its Rejoinder to have resiled from reliance on the vector, so I do not propose to take your time with this abandoned suggestion. But I must note that Trinidad and Tobago maintains its claim, even though the vector that underlies it appears to have drifted out to sea, and out of this case.

If we are to focus on the physical coasts, as Trinidad and Tobago professes to invite us to do, so be it, but if the land dominates the sea, (North Sea Continental Shelf paragraph 96) we should be consistent, and if this is our approach we should not engage in the absurdity of drawing lines on the heaving surface of the sea. There are three significant physical costs: obviously Trinidad, Tobago, Barbados. And there is one relevant issue. Is there a disproportion, to follow the Trinidad and Tobago thesis, in their eastward frontages such as to merit some form of equitable adjustment? Then the question becomes: what is the north to south reach, counting only the physical reality of these three islands as lands? You have seen this (Judges' Folder, tab 136) before, as I commenced my remarks, and I remind you the ratio is about one to three and a half, precisely 3.6.

If we compare this ratio to the coastal length disparities that jurisprudence has considered as relevant for the purposes of adjustments, we find in the Libya-

Malta case that Libya's relevant coast was eight times longer than Malta's. (That disproportion was relevant not of itself, but because Malta appeared as a relatively small feature in a semi enclosed sea, particular circumstances to that particular case. (paragraph 73))

In the Jan Mayen case the Greenland coast was more than nine times longer than Jan Mayen, (Reply, paras. 292-294) And out of an abundance of caution, I must reiterate that in each of these two cases the relevant coasts where respective lengths were compared did produce base points for purposes of delimitation.

A median line produces equal division of overlapping entitlements, and equality is equity. A ratio of three and a half to one does not come remotely close to qualify as a disproportion, even if one accepted, which Barbados of course does not, that one should begin to consider this kind of fanciful re-engineering. But the re-engineering is inherent in Trinidad and Tobago's case. Let me briefly outline the two main reasons that make it inadmissible.

First, the radical adjustment of the median line that Trinidad and Tobago proposes under the cloak of proportionality comes perilously close to asking for a "just and equitable share" of maritime space. Trinidad and Tobago proposes to use proportionality as a sword rather than as a shield. I need not remind this Tribunal how that argument fared in the North Sea Continental Shelf cases (paragraph 20; and Reply, paragraph 282, note 381). But remember Germany's contention that what is fair and just is a direct function or proportion of a state's "coastal front" or "facade". (Germany's Memorial, ICJ Pleadings volume I at 77) The ICJ dismissed that contention in no uncertain terms and relegated "the element of a reasonable degree of proportionality" to the level of a "final factor" in assessing the equitable character of a delimitation arrived at by other means.

Secondly, and this again follows directly from the North Sea cases, the relevant final factor is not proportionality as such but disproportionality or, as the

ICJ Chamber said in the Gulf of Maine case, a "substantial disproportion of lengths". (paragraph 185)

I have already explained and do not propose to repeat why the Parties' coasts bear out no such manifest disproportion. The conclusion is the same as we have seen whether one counts the lengths of relevant or irrelevant coasts (and Trinidad and Tobago accepts that only properly relevant coasts should enter into consideration. Rejoinder, paragraph 181; of course, there is a difference of view as to what is relevant).

The only way, therefore, for Trinidad and Tobago's argument to succeed is to persuade you to treat coastal lengths as a trump card. I want a larger share of the sea, Trinidad and Tobago says, because Trinidad's coast is longer than Barbados'. But, again, proportionality is not a positive delimitation method, nor is it a source of entitlement to maritime zones. Although Trinidad and Tobago professes to accept these elementary principles, it has retreated to a claim for the "establish[ment of] approximate proportionality". Therefore, its proposed delimitation line is at variance with the very principles that it professes to adhere to.

That is what I have to say about Trinidad and Tobago's proportionality thesis.

But allow me now to say a few words about something which actually does not seem to be a proper topic at all, namely Trinidad and Tobago's amazing Point A. We may just have to admit that we lack a conceptual framework to discuss this ipse dixit. It seems to be an unexplained, unjustified mechanism, which just happens to achieve the effect Trinidad and Tobago has decided to ask for. Since this effect is said to be warranted by a concern for proportionality, perhaps this is as good a place as any to deal with it. The members of the Tribunal, I am sure, Mr President, will have pondered the mysteries of Trinidad and Tobago's Point A. We first had Trinidad and Tobago explaining that it and Barbados are opposite in waters which Trinidad and Tobago chooses to designate as

Caribbean and adjacent in the Atlantic waters. These two geographical abstractions are likely to come as news to mariners who see only waves stretching to the horizon. After all, there are no Straits of Gibraltar there as we pass from one sea to the other. But Trinidad and Tobago has told us that we should imagine a line in the water conveniently drawn from Barbados to Trinidad and Tobago, to the west the Caribbean, to the east the Atlantic. (Judges' folder tab 136)

And now the plot thickens. Since the Atlantic ambience is apparently one of adjacency where equidistance apparently must be corrected to suit Trinidad and Tobago, we would expect to perceive the burgeoning effect of this correction as soon as we cross into the Atlantic, but that is not Trinidad and Tobago's claim line. Trinidad and Tobago's line does not begin to veer until we get to this curious Point A.

In its attempt to understand what Trinidad and Tobago was saying, Barbados naturally expressed its bewilderment. Trinidad and Tobago then answered that, when you actually stand on the north-south line, which supposedly separates the Atlantic and the Caribbean, you cannot yet become properly aware of the change of relationship. Apparently, the feeling of adjacency must grow on you. You must get out to sea a bit before it really hits you and you realise that what you thought was opposite is really side by side and it is at that point suddenly the boundary must be given a sharp kick in the flank. If that is Trinidad and Tobago's answer, so be it, but, even if we humour Trinidad and Tobago, the obvious question remains. How do we go on to alight on Point A in particular? Is it justified by some rule of law or by some convention universally accepted by hydrographers? Is Point A in truth not wholly arbitrary?

Incidentally, or not so incidentally, what would happen if we conducted what the Americans call a reality check? The objective of this check would be to verify whether there is some intuitively compelling reason why

the two states must be viewed as adjacent from the perspective of this Point A. You now see Barbados' map 24 (Judges' folder tab 137) which shows that at Point A the angle is over 90 degrees. That is to say beyond the right angle which intuitively should be the ultimate separation between the categories of "adjacent" and "opposite". If you wish to see something that could more plausibly be termed adjacent, look to the upper left corner and the St Lucia/Martinique/Barbados tri-point. From here, St Lucia and Martinique appear in a tight 18.2 degree angle, what one supposes should be an overwhelmingly more verisimilitudinous manifestation of adjacency. (I apologise for the eight-syllable word). I need only ask you to observe that there is no peculiar adjustment to the agreed St Lucia/Martinique border on account of adjacency. Before our friends on the other side rush off to check their Charney and Alexander, may I save them the trouble and prepare them for some bad news. Charney and Alexander, you see, consider the case of St Lucia and Martinique - and explicitly describe them as an opposite coast delimitation. The reference is International Maritime Boundaries, Volume 1, page 594. Barbados has no idea what justification for Point A Trinidad and Tobago will finally seek to give later this week. Trinidad and Tobago certainly did not come up with a theory to fit its desires in its written pleadings. Perhaps by now it will have contrived something, we shall see. All I can say is that I am very happy that it is not my job to do so.

Finally, cut-off and non-encroachment. Faced with the problems that I have just outlined, Trinidad and Tobago's claim to a proportional share of maritime expanses is advanced in yet another way. In the Rejoinder we are told that the "principle" of non-encroachment "qualifies equidistance" (para. 189) and that this principle "enjoins ... as far as possible ... zone lock[ing]" (para. 188). Here is how Trinidad and Tobago understands non-encroachment. I quote from paragraph 189 and I tell you right away that the emphasis is in the

original. "What the principle reflects is a concern that coastlines of roughly equal or greater length not be shut out from access to maritime areas". Barbados asks to which maritime area? Trinidad and Tobago responds at paragraph 191 of its Rejoinder, and by figure 5.3, which you see in Judges' Folder item 138. Trinidad and Tobago's response, "the maritime areas to which Trinidad and Tobago could lay claim if Barbados were not in the way". But this, Mr President, is to turn the question on its head. In Libya-Malta the ICJ described non-encroachment in a continental shelf context as "no more than the negative expression of the positive rule that the coastal state enjoys sovereignty rights over the continental shelf off its coasts to the full extent authorised by international law in the relevant circumstances". (Paragraph 46 of that decision.)

I will quote the greatest advocate in American history, Daniel Webster, not his most famous case, which is not reported in the ordinary way, because his debate with the devil is reported in more poetic collections, but in the case of Dartmouth College, where he said, "It is a small college, but there are those that love it". Is Barbados' very existence and its competing entitlement to maritime zones not a relevant circumstance?

The ICJ continued in Libya-Malta to say this, "Equity does not seek to make equal what nature has made unequal and ... there can be no question of distributive justice". (Paragraph 46). Yet this is precisely what Trinidad and Tobago asks you to do here. It asserts that "questions of non-encroachment are to some extent matters of impression" and appeals to your "impressions" to persuade you to award it zones that lie no more than 200 nautical miles from the island of Trinidad and, moreover, are not fronted by that island. (Judges' Folder, tabs 139 and 140).

3.30 Summing up on this point, Trinidad and Tobago proceeds on the premise that it has a potential but absolute extended continental shelf entitlement, and this

is the basis of its cut-off theory today. In our Reply, paragraphs 233 to 241, we discussed in some detail why this is logically absurd. Barbados' entitlement to maritime zones and continental shelf is competing and overlapping with that of Trinidad and Tobago. The only way that Barbados' entitlement can be ignored, and the only way that Trinidad and Tobago's thesis of unobstructed access to the ocean could be vindicated, is by altogether ignoring Barbados' existence. But this cannot be and Trinidad and Tobago itself professes to acknowledge this in the Counter Memorial, referring to the "as much as possible" proviso in the North Sea cases. That is the profession, but what is the claim?

In truth, as Barbados' map 23 showed (Judges' Folder, tab 141) there is a welter of potential claims which would turn the Trinidadian vision into a nightmare.

Members of the Tribunal, the question of entitlement to maritime zones is wholly distinct from the role of equitable principles such as the principle of non-encroachment. Trinidad and Tobago proposes to use non-encroachment as a circumstance creating title to maritime zones. It is simply the subordinate principle to abate inequality. It cannot support or displace competing entitlements to maritime zones.

In the same way could Barbados – or Trinidad and Tobago – simply ignore the presence of Venezuela, Guyana and Surinam to the south east? Certainly not. The presence of those third states naturally constrains the claims of Barbados, and of Trinidad and Tobago, in that area. Barbados illustrated the constraints placed by third parties potential entitlements to the west and to the east in its map 8, which you will see before you and also under item 142 of the Judges' Folder.

This picture would require a thousand words, so I move on. Returning to jurisprudence for a moment, the Tribunal in the Guinea-Guinea Bissau case chose its words carefully when it stated that non-encroachment aimed to "ensure that, as far as possible" (here we have it again)

each State controls the maritime territories opposite its coasts and in their vicinity (paragraph 92). In other words, a potentially corrective consideration cannot be elevated to an entitlement to maritime zones, as Trinidad and Tobago's claim implies.

In our submission, Mr President, members of the Tribunal: to dismiss Trinidad and Tobago's imaginative utilisation of non-encroachment it is sufficient to describe it as I have just done. Neither the principle of natural prolongation nor the principle of distance afford to Trinidad and Tobago any maritime areas precluded by Barbados' claim line, as seen in Barbados map 22. (Judges' Folder, tab 193).

You can see that Barbados' line gives Trinidad and Tobago a continental shelf extending to 192 nautical miles from its baseline, or indeed 220 miles from the southern part of Trinidad. Thus, Trinidad and Tobago cannot say in any meaningful way that it is "zone locked" by Barbados' claim – except if one accepts the premise that Barbados should not have existed in the first place, or that the coast of the island of Trinidad radiates a maritime entitlement at a convenient angle of 40 degree – or perhaps you are asked to imagine both of these things.

These remarks, Mr President, bring me to the end of my presentation today. I have attempted to show that geography and law sap the foundations of Trinidad and Tobago's attempt to shift the median line in what it calls the "eastern sector" of the delimitation. No such shift is possible, no such shift is justified. As I have endeavoured to show (1) there is no justifiable or legally relevant distinction between the geography of the "Caribbean" and the "eastern" or "Atlantic" sectors; (2) the coastal length of the island of Trinidad, or of the Trinidad and Tobago archipelagic line, does not control the delimitation line in the way suggested by Trinidad and Tobago; (3) given the <u>actual</u> direction of Trinidad and Tobago's coastal frontage, no coastal lengths in this case call for any correction to the median line; and (4)

Barbados surely cannot be left out of the map in order to give to Trinidad and Tobago what it calls an "unobstructed access to the ocean."

Mr President, my time has expired and before I do I will leave you with Barbados' submission: the adjustment of the median line propounded by Trinidad and Tobago is wholly inappropriate in light of the geographical realities of this case.

With your permission I will inform you that the speaker to follow me is Professor Reisman. We are comfortable in terms of the scheduling and if you were to desire that this point would be convenient for a break we could arrange the infrastructure in a way as to suit him.

THE PRESIDENT: Thank you so much, Mr Paulsson. We will take a break for 15 minutes and resume at five minutes to four.

(Short Adjournment)

THE PRESIDENT: Professor Reisman.

PROFESSOR REISMAN: Thank you very much, Mr President.

Mr President, if it pleases the Tribunal, Barbados turns now to Trinidad and Tobago's regional implications theory. As Mr Volterra observed this morning, by means of the 1990 maritime boundary agreement with Venezuela, Trinidad and Tobago yielded altruistically, if you were to take it at its word, significant parts of the maritime space to which it was entitled under international law to its large and powerful continental neighbour. Mr Volterra has shown why that treaty can have no effect on the maritime delimitation task before you. The 1990 treaty, as a matter of general law, can have no effect on third parties and, indeed, it is not subject to the jurisdiction of the Tribunal. In this arbitration it may be helpful in understanding why Trinidad and Tobago is making the claim that it is making, but otherwise it is irrelevant.

Trinidad and Tobago concedes that the 1990 treaty is not binding on third states and is not part of this case, but that treaty is, in fact, the source of its dilemma and the predicate of much of Trinidad and Tobago's argument. For Trinidad and Tobago now seeks to compensate itself for

the maritime space it surrendered and to trump the pacta tertiis rule by a ruse. It is trying to use the 1990 treaty as if it were not the bilateral agreement which it is and, as such, without legal effect on third states, but as if it were a geographical fact which must be given effect in the delimitation of Barbados. Before we proceed to disentangle the threads of Trinidad and Tobago's argument let me state the obvious.

4.00

The 1990 treaty is not a fact of geography, it is a bilateral legal relationship whose problematic legitimacy was expressly recognised by Trinidad and Tobago's current Prime Minister. The treaty has no part in this case for manifest jurisdictional reasons and it cannot be applied prejudicially against Barbados because of equally manifest and fundamental international legal principles. But, Mr President, what may be confusing in this aspect of the case is that at the front door Trinidad and Tobago acknowledges that the treaty with Venezuela can have no effect on third states, while it tries to sneak that treaty in the back door. My colleagues have drawn attention to many examples of this effort of legal resurrection, but I will concentrate on the legal theory by which Trinidad and Tobago tries to accomplish the resurrection.

The device for circumventing the jurisdictional and substantive law problems invalidating the 1990 treaty and opposing it to Barbados is what Trinidad and Tobago calls the regional implication, which it purports to derive from the Guinea-Guinea Bissau award. Early in its Counter Memorial, Trinidad and Tobago explained its view of the relevance of Guinea-Guinea Bissau. Giving with one hand and taking with the other, Trinidad and Tobago said that "the present Tribunal's jurisdiction is of course limited to the two states which are parties to the present proceedings". But it immediately added that this "does not mean the Tribunal may not take account of the existence and potential maritime spaces appertaining to

other states in the region".

What this apparently innocent reference to "taking account" means only becomes clear considerably later in the Counter Memorial, where Trinidad and Tobago introduces a subsection entitled "Regional implications the Guinea-Guinea Bissau test". This section is comprised of a single paragraph, number 231, which you will find in your folders, and which is also set out on your screens. The critical passage which is highlighted is as follows. "By contrast, the two maritime boundary agreements actually concluded to the south and north of Barbados, to the south between Trinidad and Tobago and Venezuela, to the north between France and Dominica have departed from the equidistance line precisely in order to take into account the general configuration of east facing coastlines in the region and to give at least some expression to the projection of these coastlines to an uninterrupted if still conscripted EEZ and continental shelf".

With that, Mr President, the cat is out of the bag. The portentous heading "Regional Implications" boils down to nothing more than a circuitous proposal to this Tribunal to reject the maritime boundary to which Barbados is entitled under well-established international law by ignoring the now rich body of accepted international law on this subject and instead giving effect to the maritime boundary treaty between France and Dominica and, mirabile dictu, the very treaty between Venezuela and Trinidad and Tobago which according to its own terms, according to the repeated assurance of Trinidad and Tobago and according to international law, is not supposed to affect third parties. Regional implication is a code word to ignore customary international law and general state practice, the term in article 38 of the statute, which clearly sustains Barbados' claim and rejects Trinidad and Tobago's and to look only at two treaties as if they constituted international law.

We submit, first, that the alleged basis for the regional implication argument – the Guinea-Guinea Bissau

award – a decision with serious problems – is not authority for this argument. Second, as my colleagues have already shown, the 1990 agreement cannot be applied against Barbados or any third state and, third, that neither the France-Dominica nor any other regional maritime boundary agreement provides support for Trinidad and Tobago's effort to justify its own boundary proposals.

Let me begin, Mr President, if I may, with the arbitral award between Guinea and Guinea Bissau, its jurisdictional problems, its actual holdings and the additional propositions which Trinidad and Tobago tries to load on to it as part of its regional implication argument.

The Guinea-Guinea Bissau award was rendered in 1985 by Judges Mohammed Bedjaoui, Keba M'baye and Manfred Lachs presiding. It is in many ways a problematic award, a jurisprudential outlier, but, even if one were to ignore its problems and to take it at face value, it could not be applied to the entirely different geographical configuration in the case before you. Nor does its holdings support the regional implication proposition which Trinidad and Tobago ascribes to it.

Mr President, Guinea and Guinea Bissau are coastally adjacent states on the west coast of Africa, whose coastlines are approximately equal. As the two states were unable to agree upon the boundary for their respective territorial waters, EEZ and continental shelf, they submitted their difference to arbitration by special agreement. The agreement laid down that, if the Tribunal were to decide the Franco-Portuguese Convention of 1886 concluded by the then colonial powers to which Guinea and Guinea Bissau had succeeded did not establish the maritime boundary, the Tribunal was to determine "according to the relevant rules of international law" the course of the boundary between the territories of the respective states.

The Tribunal found that the 1886 Convention and the protocols and documents annexed to the treaty did not establish the boundaries for the EEZ and the continental

shelf, so the Tribunal turned to the task of identifying the principles of law for delimitation. Although the Tribunal insisted it was not acting in a discretionary manner, nor deciding ex aequo et bono, it opened its discussion by announcing that there were only a few basic legal principles, the factors and methods the Tribunal could consider were unrestricted, none of them was obligatory on the Tribunal, but they included the circumstances of each particular case and characteristics peculiar to the region and these factors included self-authorisation to consider "the coastlines of one or more neighbouring countries" and "the other delimitations already made or still to be made in the region". The Tribunal's methodology extended explicitly to making and applying assumptions about the maritime boundaries of other states which had not submitted to its jurisdiction. Consider the Tribunal's words "in order to for the delimitation between the two Guineas to be suitable for equitable integration into the existing delimitations of the West African region as well as into future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions, it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline".

Mr President, it is of course entirely proper for an international Tribunal to consider general state practice, which includes agreed boundary delimitations, but it is entirely improper to ignore general state practice and to look at only one or two selected delimitation agreements as if they alone constituted state practice. That highly-selected course of action can be particularly misleading because individual treaties may have been concluded on the basis of many factors extraneous to maritime boundary law, which is why our discipline insists on general practice, general trends to determine customary international law and will not accept a single agreement as making law for all.

Guinea-Guinea Bissau is also a perilous methodology because it contains its own poison pill, the supposed equitability of the Tribunal's decision. The essence of its validity according to the Tribunal depends forever on all the other non-consenting states, whose maritime boundaries the Tribunal had assumed, agreeing to or doing exactly what the Tribunal was assuming. If any state did not accept the boundaries which the Tribunal was making for it and no other state was under any legal obligation to do so, the Guinea-Guinea Bissau award would become retroactively inequitable. Yet the promise of what one might call consequential equitability served as the very legitimation of the Tribunal's decision. Thus the continuing validity of that decision was hostage to the ways that other states who could not be bound by that decision would make their own agreements. This is a problematic methodology which we submit should be distinguished on its facts and not applied in any other case for it poses real peril.

But even if one ignores the jurisdictional methodological problems in Guinea-Guinea Bissau and takes the case on its own terms, the award provides no support for the theory which Trinidad and Tobago is trying to propound. If prior cases are to have precedential value, they must be accepted as decisions about particular types of factual situations. Guinea-Guinea Bissau dealt with states in coastal adjacency, not the innovative and very strange concept of adjacency which Trinidad and Tobago has tried to develop and which Mr Paulsson has just dissected. The real adjacency: the plain and natural meaning of adjacency. Each successor state sitting next to the other cheek by jowl, as it were, on the coast of West Africa. Moreover, all the other states with which the Tribunal purported to concern itself are also coastally adjacent to either Guinea or Guinea Bissau. All of these states face frontally the open sea. No island state is located offshore. When the Guinea-Guinea Bissau Tribunal said "it is necessary to ensure that as far as possible each state

controls the maritime territories opposite its coasts and in their vicinity" it meant, as did the ICJ in the North Sea Continental Shelf, which Guinea-Guinea Bissau cited as part of its authority, that as far as possible none of these coastal adjacent states was to be cut off from the high seas by a State that was coastally adjacent to it – "as far as possible".

Neither the Tribunal nor the ICJ said it meant or could have been understood to mean that a coastally opposite state was not to cut off the state opposite to it. It would have been absurd for that is the very nature of coastal opposition. The other state, the coastally opposite state, would be denied its own maritime entitlement and, indeed, the very segment of Guinea-Guinea Bissau, its paragraph 93, which is quoted at length in the Counter Memorial at its paragraph 251, makes the assumption of true adjacency perfectly clear. Consider the critical sentence. The Tribunal says, "When in fact, as is the case here, if Sierra Leone is taken into consideration, there are three adjacent states along a concave coastline, the equidistant method has the other drawback of resulting in the middle country being enclaved by the other two and, thus, prevented from extending its maritime territory as far seaward as international law permits".

Mr President, it is difficult to understand how Trinidad and Tobago can follow this quotation with the words "similar considerations apply here", that is in the case before you. The considerations here are entirely different. West Africa is a case of adjacency, coastal adjacency. Our case is one of coastal opposition. When Guinea and Guinea-Bissau and North Sea Continental Shelf speak of avoiding as much as possible a cut-off effect, they are speaking of a cut-off by the maritime boundary of an adjacent state not an opposite state for which the term "cut-off" is an oxymoron. My colleague, Mr Paulsson, has already demonstrated the meretriciousness of this part of Trinidad and Tobago's claim.

The central holding in Guinea-Guinea Bissau is that it is necessary to ensure that as far as possible each state controls the maritime territories opposite its coasts and in their vicinity. This is a far cry from Trinidad and Tobago's claim that as an opposite state "in respect of coasts with unobstructed access out to the open ocean, the no cut-off principle applies". I am of course quoting Trinidad and Tobago. Indeed, Mr President, members of the Tribunal, it is incongruous for a state in coastal opposition with another which nonetheless receives a EEZ and continental shelf of some 193 nautical miles to characterise itself as "shelf locked and zone locked" as Trinidad and Tobago does in its Rejoinder at paragraph 155. Nor does Trinidad and Tobago, in citing Guinea-Guinea Bissau mention that, even in the application of its very expansive notion of its function, the Tribunal excluded precisely the type of treaty which the 1990 Trinidad and Tobago-Venezuela agreement constituted.

4.15 The Tribunal said "In its assessment the Tribunal could not take into consideration a delimitation which did not result from an equivalent act in accordance with international law." Mr President, members of the Tribunal, would even the Tribunal in Guinea Bissau, with its rather expanded notion of its function have taken account of the 1990 Trinidad and Tobago Venezuela agreement?

Trinidad and Tobago tries to bolster support for its regional theory by invoking the maritime boundary treaty between France and Dominica as purported evidence of a common regional practice, but it ignores the agreement between Martinique and St Lucia, which is similar to the relative coastal configuration of Barbados and Trinidad and Tobago. France/Dominica is indeed a good example of the danger of allowing the self-interested selection and generalisation which the regional implication theory invites. Charney and Alexander in their study call it "a very special case", "where the boundary between political

considerations and economic considerations becomes difficult to detect".

Mr President, we now know that the regional implication is a device to validate the Trinidad and Tobago/Venezuela treaty, which has no force with respect to Barbados, by tying it to one other maritime boundary agreement in the region and proposing that these two agreements constitute law for the region. Please consider the sleight of hand with respect to the choice of law here that is hidden in the so called regional implication. UNCLOS Article 293 prescribes the applicable law. With respect to other rules of international law, the Tribunal turns to Article 38 of the Statute. It is appropriate, as I have said, indeed mandatory for the Tribunal to examine general state practice, but that means all relevant state practice. Under the theory of regional implication, however, the vast body of state practice which confirms the median line special circumstance method is ignored and a new sub heading is slipped into Article 38.1, regional implication derived from the Trinidad and Tobago Venezuela treaty and one other selected treaty.

The theory of regional implication permits the party arguing it to pick and choose from regional practice, relying on agreements which it believes support its claim and ignoring those which do not. It ignores international law and produces a caricature of regional practice. Mr President, members of the Tribunal, there is no basis in international law for this.

Mr President, new theories on maritime boundary delimitation are invariably proposed by a litigant because the lex lata does not give it what it wants, while the new theory crafted for this purpose will. For the party proposing the new treaty of course it produces an "equitable result" for it, but will Trinidad and Tobago's regional implication actually accomplish equity for the other states of the region? If one were to take Trinidad and Tobago's regional implications seriously and replicate the lines of Dominica/France and Venezuela/Trinidad and

Tobago systematically Barbados would receive virtually no EEZ and continental shelf, as we show in chart 14 from our Reply. No continental shelf. Equitable for one party but inequitable for others.

The regional implication theory opens a Pandora's box of problems, some jurisdictional, some substantive. It departs from the discipline of Article 38(1)(b) of the Statute. It takes tribunals beyond their consensual jurisdiction and it makes the acceptability of their decisions hostage to the concurrence of non-parties who have no obligation to accept the decisions.

It would be mischievous in another sense as well, for it will encourage disputes about subjective conceptions of equity, just as international maritime boundary law had evolved to comparatively clear geographic considerations. Barbados submits that the regional implications theory should be rejected in both theory and in the practical consequences for which Trinidad and Tobago has produced it in this case.

Mr President, members of the Tribunal, I turn from the question of Trinidad and Tobago's theory of regional implication to the question of Trinidad and Tobago's claim to the extended continental shelf or ECS which is appurtenant to Barbados' EEZ and continental shelf but not to Trinidad and Tobago's. We have indicated earlier our view that the Tribunal may not treat a claim under UNCLOS for two reasons. First, Article 76 assigns this matter to other organs, as held in St Pierre and Miquelon, and second this Tribunal lacks jurisdiction because the matter was not raised as a legal claim in the negotiations. Nor could Barbados have anticipated the problem as Trinidad and Tobago never even raised the issue as far as we know by beginning the requisite investigation for submission of a request to the Commission on the Extended Continental Shelf. But wholly aside from issues of competence and jurisdiction, Trinidad and Tobago's claim here fails on its substance.

To appreciate how extraordinary Trinidad and Tobago's

claim is you have to see it. If you will observe map 1 from Barbados' Reply you will see a shaded area indicating the continental shelf out to its statutory limit under UNCLOS Article 76, a 200 mile arc from Barbados' baselines, 200 miles being of course the limit of an unobstructed EEZ, a 200 mile arc from Trinidad and Tobago's baselines, the median line between Barbados and Trinidad and Tobago, and in red Trinidad and Tobago's claim line, which departs from the median line at the arbitrarily selected point A and veers off into Barbados' EEZ instead of remaining faithful to the median line. This is in itself exorbitant and unprecedented, but to borrow from Dr Seuss' Cat in the Hat there is more, there is more. Trinidad and Tobago's claim continues through Barbados' EEZ and beyond it into the extended continental shelf through the EEZ of another state and into the extended continental shelf.

This is a claim that is unprecedented and on its very face preposterous, as Mr Volterra detailed this morning. It is a claim moreover with a great potential for mischief elsewhere were it to be accepted. Trinidad and Tobago tries to justify it by a rather mechanical though nonetheless intricate argument which we believe has a fatal flaw. To simplify matters let me summarise the argument in four steps, paraphrasing or quoting Trinidad and Tobago. First, the instituting of the continental shelf as a natural prolongation that automatically pertains to the coastal state developed and vested before the institution of EEZ, which came later and is now found in UNCLOS. (2) There is "no expression of any intention in the 1982 Convention to repeal or eliminate existing rights to the continental shelf." (3), and quoting again, "It is evident that the continental shelf measured to the outer edge of the continental margin and without reference to any 200 nautical mile limit is not absorbed by the EEZ measured out to the 200 nautical mile line. The two legal institutions, older and newer, co-exist". And finally, "Under the 1982 Convention the continental shelf remains a

distinct institution and EEZ rights are exercisable subject to valid claims to the outer continental shelf".

Many of the premises of this intricate theory are doubtful, as Sir Elihu observed yesterday, but the theory fails at the very outset because of a simple fact. The automatic entitlement of a state to its natural prolongation is not and cannot extend without regard to the claims of other states. The entitlement stops when it encounters the automatic ipso facto competing entitlement of an opposite state. So even if one accepts the first premise of Trinidad and Tobago's argument, its entitlement to shelf space stopped at the median line between it and Barbados the moment the institution of continental shelf crystallised, for it could not have crystallised for Trinidad and Tobago before it crystallised for Barbados. It pertains to each state lo ipso and ipso facto. Because it stopped at the median line Trinidad and Tobago ab initio could never extend to the ECS areas it covets. In fact Mr President, Trinidad and Tobago's argument really rests on two premises. First, that every coastal state qua coastal state has an automatic right to a share of the ECS whether it is contiguous with it or not, and whether or not another state is inconveniently opposite to it. Second, that the automatic right leaps over, slides under or somehow or other trumps the EEZ of another state that happens to be in the way.

Mr Volterra reviewed the maze of zones these premises lead us into. Nor are there precedents for this proposition; although Trinidad and Tobago refers to three treaties, none relates to the proposition it wishes to establish. Nor does Libya-Malta, which Trinidad and Tobago cites only to acknowledge immediately that "the Court was not concerned in Libya-Malta with the co-existence of continental shelf rights based on natural prolongation beyond 200 nautical miles from the coast of state A and the EEZ rights of state B". Nor do Jan Mayen or Qatar/Bahrain, the other cases which Trinidad and Tobago cites again only to acknowledge that they are not

in point, because they do not deal with anything remotely similar to its propositions.

Mr President, members of the Tribunal, there are no precedents for Trinidad and Tobago's proposition, and I will hazard to tell you why. This is the coast of West Africa and this is it with Trinidad and Tobago's theory. This is another stretch of West Africa's coast with Trinidad and Tobago's theory. If we could look at those again. Mr President, those are the consequences of Trinidad and Tobago's argument, a chaotic Balkanisation of the extended continental shelf with enclaved areas that have no contiguity to shelf or EEZ areas of the states to which they would pertain. The legal theory on which Trinidad and Tobago's ECS claim is based is a prescription for conflict, for environmental havoc and inefficient development.

Mr President, members of the Tribunal, at the dawn of the modern era of maritime boundary delimitation, Lord Asquith of Bishopstone, sitting as the sole arbitrator of the Abu Dhabi arbitration, perhaps not very far from the chambers in which we sit, concluded that as of the critical date in that case the doctrine of continental shelf had not yet entered into the codex of international law. But in an obiter dictum Lord Asquith observed that it should become international law because it was in the common interest that someone should control the shelf and "the contiguous coastal power seems the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control and the alternatives teem with disadvantages".

To our knowledge no one before Trinidad and Tobago in the case before you has proposed that international law should depart from that wise advice; nor we respectfully suggest should this distinguished Tribunal.

Mr President, members of the Tribunal, this concludes Barbados' initial presentation of its case. On behalf of my colleagues I would like to thank the Tribunal for its courtesy and attention.

THE PRESIDENT: Thank you so much, Professor Reisman. I wish to thank you and all of Barbados' team for the lucidity and cogency of your presentations which have been of extreme interest; and we look forward to hearing the presentations of Trinidad and Tobago, which we confidently believe will be no less lucid and cogent, and therefore present the Tribunal with the difficulty of making a decision.

I take it then that we should adjourn today. Clearly our colleagues from Trinidad and Tobago will not wish to launch themselves in the hour and a half that remain. We meet then on Thursday morning at 10 o'clock.

The Tribunal stands adjourned.

(Adjourned till 20th October 2005 at 10 a.m.)