In the matter of an arbitration between

BARBADOS

and

THE REPUBLIC OF TRINIDAD AND TOBAGO

Before:

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

PROCEEDINGS - DAY FOUR
ATTENDANCES

Barbados was represented by:

Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General and Minister of Home Affairs, Agent for Barbados
Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham & Watkins
Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
Professor Michael Reisman, Counsel and Advocate
Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus Deringer, Paris
Sir Henry Forde QC, Counsel and Advocate
Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins
Mr Adrian Cummins QC, Counsel
Dr David Berry, Counsel
Ms Megan Addis, Counsel, Latham & Watkins
Ms Teresa Marshall, Permanent Secretary, Foreign Affairs
Mr Edwin Pollard, High Commissioner for Barbados in London
Mr Anthony Wiltshire, Minister/Counsellor at the Barbados High Commission, London
Mr Francois Jackman, Senior Foreign Services Officer
Mr Tyronne Brathwaite, Foreign Services Officer
Mr Christopher Parker, Fisheries Biologist, Fisheries Division
Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations, BARNUFO
Mr Anderson Kinch
Mr Oscar Price, Information Technology Support, Latham & Watkins
Ms Philippa Wilson, Information Technology Support, Latham & Watkins
Mr Dick Gent, UK Hydrographic Office
Dr Robin Cleverly, UK Hydrographic Office
Ms Michelle Pratley, Assistant, Latham & Watkins
Ms Claudina Vranken, Assistant, Latham & Watkins
The Republic of Trinidad and Tobago was represented by:

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

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell
THE PRESIDENT: Good morning. Now we proceed with Professor Crawford's argument.

MR WORDSWORTH: The Tribunal is not so fortunate, Mr President.

THE PRESIDENT: Thank you, Mr Wordsworth, it is a pleasure to hear you. I am glad that you are resuming.

MR WORDSWORTH: You will recall, Mr President, members of the Tribunal, that yesterday evening we were looking at a 1962 thesis by a lady called Annette Bair as to which Barbados had extracted just three pages and put those three pages into its Reply. Those three pages are under the chapter "Extraordinary Activities". Yet Barbados had omitted to put before you the relevant chapter or the relevant parts of the thesis, particularly a chapter called "The Traditional Fisheries".

I just want to take you to one more short extract from the Bair thesis, which is at tab 47, page 55. With a bit of luck this will be open in front of you now. Just as we are running through the Judges’ folder, just to draw your attention, this is a passage which is relevant to Barbados' catastrophic consequences claim. You will see half way down the page there that Annette Bair says, "At present one cannot yet isolate a true fishing village in Barbados. Fishing is still a too insecure occupation to encourage large numbers of men to make it their sole means of livelihood. Furthermore, it is doubtful whether a sizeable community could be supported by fishing alone. I just draw your attention to that to make the point that in 1962, at least, the flying fish fishery was not of such immense economic importance to Barbados.

Moving on in the Judges’ folder to tab 48, at tab 48 there is a report by Bannerot and Harding. This is a 1986 report. We have gone forward in time a quarter of a century. This is report 6 of Trinidad and Tobago's list of paragraph 59 of its Rejoinder. I draw your attention to the abstract which is on the first page of this tab, particularly starting from the second sentence.

"Barbadian commercial fishermen used sail boats until the
mid 1950s when they converted to diesel-powered vessels. Flying fish boats remained relatively small, less than 40 feet in length and made exclusive one-day trips to fishing grounds within 40 miles of Barbados until the late 1970s". That is the position, until the late 1970s, Barbados' flying fish fishing vessels never get more than 40 miles from the coast of Barbados. As you can see from that graphic, that is still way off the area that Barbados now claims to the south of the median line.

Just continuing on with this extract from the abstract, "At this time 36 to 60 foot vessels designed to stay at sea for up to ten days began fishing the south Eastern Caribbean from a base in Barbados. Most of the geographic expansion was southwards to the north equatorial current waters between Tobago and Grenada". There you have it. There is the expansion from the late 1970s to the area that Barbados now claims was being fished for centuries.

Over the page, just to make the point good, we have highlighted a passage under the heading "Recent history for Barbados flying fish fishery". There Bannerot and Harding explain how from the 1800s through the mid 1850s Barbadian fishermen prosecuted the fishery using 18 to 20 foot wooden sail boats." These are of course are the sail boats that only ever sail three to four miles from the coast. Certainly never considerably further or anything like the distance of 58 nautical miles.

Over the page again, Bannerot and Harding explain how as of 1986 - so this is subsequent to the arrival of the so-called ice boats, there are now two distinct fleets operating in Barbados. The one, day boats, locally called fetters, and long-range vessels or ice boats. Fetters, of which there are approximately 500, often fish two to five miles off shore ranging as far as 40 miles out during the day of fishing. There is the 40 mile figure again. You will see two thirds of the way down the page, they continue to describe the new long-range fishery. That is describing the ice boats. Bannerot and Harding writing in
1986.

Then in the next tab if the judges' folder, tab 49, we have Wayne Hunte and Hazel Oxenford writing about the economics of boat size in the Barbados fishery, an esoteric subject. Again this is not an exhibit put before you by Barbados any more than the previous exhibit was put before you by Barbados. Again it is odd that Barbados should not put this before you because it is by two of their experts Hunte and Oxenford, so there can be no question as to their credibility. At the bottom of the page Hunte and Oxenford recite really the history of the development of the Barbadian flying fish fishing fleet, and if I can ask you to turn over the page to a couple of passages. At the top of the page they describe the day boats of the 1970s and these are the day boats which fished out to 40 miles from Barbados, and then they describe the arrival of the ice boats. "Between 1978 and 1980 two long range vessels, ice boats, of eight ton capacity were introduced into the Barbados pelagic fleet and by 1984 there were 34 in operation. 59 ice boats are currently fishing and 75 are registered for the 1986-7 fishing season". So once the ice boats arrived in the late 1970s there is a complete explosion and the ice boats essentially take over the fleet.

A little further down on the page you will see the highlighted passage, one third of the way down. "These ice boats employ the same fishing techniques for catching large pelagic and flying fish. It is the day boats that often fish 24 hours a day and fish further afield, primarily in the triangle between Tobago, Grenada and Barbados," So these are the boats, this is the fleet that Barbados is relying on, introduced in the very late 1970s. This is the fleet that is the basis of the so called traditional artisanal flying fish fishery. They continue: "the current change from day boats to ice boats represents the second major structural transitional undergone by the Barbados pelagic fleet", the first major transition being the transition from sail to motor boats
in the early 1950s. "The gradual increase in landings in 
the pelagic fishery which accompanied the gradual increase 
in average day boat size in the 1970s and the sudden 
increase in landings accompanying the introduction of ice 
boats is shown in figure 2. There is no need to take you 
to figure 2, but I would like you to look at the next 
passage, because it really describes what is happening. 
Most countries in the Eastern Caribbean are presently 
expanding or intend to expand their oceanic pelagic 
fishing fleets primarily by increasing fleet size, but 
also by changing boat type. Thus, the fisheries are 
moving from small scale artisanal towards large-scale 
commercial operations with considerably more capital being 
invested in the fleets than in the past. Large scale 
commercial fisheries catch more fish but they do so at a 
price. Compared to small scale artisanal fisheries, they 
employ far fewer fishermen, the capital cost of each job 
on the fishing vessel is far greater, considerably more 
fuel is consumed overall and considerably fewer fish are 
harvested per tonne of fuel consume.

What Barbados is asking you to do is not at all to 
protect the traditional flying fish fishery, which fished 
at the very maximum within 40 nautical miles of Barbados' 
coast, it is asking you to protect the very recent – i.e. 
late 1970s, post 1980s – introduction of an ice boat fleet 
involved in large scale commercial operations.

10.15

It is worth just turning over the page. We have put 
in another extract of Hunte and Oxenford. Half way down, 
just to draw your attention, Hunte and Oxenford are 
writing in 1989, I believe, and are actually drawing 
attention to whether this is a good thing. They say, 
"Given the above, it may be unwise to continue expanding 
the Barbados ice boat fleet at the current rates". They 
are thinking of this from the economic point of view as 
well as an environmental point of view. They are 
questioning whether this very, very rapid expansion is a 
good thing at all.
If I could ask you to turn over to tab 50 in the Judges’ folder, this is a report by Mr Willoughby. This is Mr Willoughby of the Fisheries Division, Ministry of Agriculture, Food and Fisheries of Barbados. This is Mr Willoughby writing in 1992 on the flying fish fishery of Barbados. Again, this is in our list in our Rejoinder, it is report number nine. It is yet another important report by an official of the Barbadian Ministry of Agriculture that has not been put in evidence by Barbados.

If I could ask you to turn over the page, you see it is making precisely the same basic points in the highlighted passages. He is describing day boats that were introduced in the 1950s. Then he describes ice boats. A new type of fishing vessel that was introduced into the fleet in the late 1970s, of the same basic design as the day boats, but longer and more powerful. Then under the heading "Fishing area and land sites", he says, "Day boats fish for flying fish mainly off the west and southwest coast of the island between eight and 46 kilometres from the shore". Obviously, that is less than 40 miles, that is probably up to about 30 miles from the shore. Ice boats tend to fish further afield as far as 300 kilometres from the shores". Again, the basic point, prior to the late 1970s it is just day boats, it is just fishing up to about 30-40 nautical miles from Barbados. Subsequent to the 1970s, late 1970s I should say, the ice boats arrive and suddenly Barbadians are fishing in the area that they now claim.

I would ask you to look at one more document that makes precisely these points. This is a report by Christopher Parker (tab 51 of the Judges’ folder). You will see at the top that he is of the Ministry of Agriculture and Rural Development, Fisheries Division, Barbados. His report is entitled, "Developments in flying fish fisheries off Barbados". Again, it is a key document. Bizarrely a key document that Barbados has not exhibited to its Memorial or Reply. This is an interesting document because it is more recent. It is 2001. This is, as it
were, relatively hot off the press. It was made two or three years before the commencement of this litigation.

Section 2, at the bottom of this page, "flying fish fishery and historical evolution". This is the definitive history of Barbadian flying fish fishery as set out by somebody from Barbados' own Fisheries Division. Turning the pages, you see half down on the next page, page 2, "Gear technology development". Page 3, "Fleet development". Now he deals in the highlighted passage with the situation in the first half of the 20th century.

"The vessels used in the flying fish fishery during the first half of the century were small open sail boats". Then he sets out what the size of those vessels were.

Then a little bit further down, "The boats carried no ice on board to preserve the catch as the time between taking the fish on board and returning to shore to sell them was limited. The difficulty in manoeuvring and the comparatively slow speed of the vessels together effectively narrowed the fishing range to approximately four to five miles from the shore.

So that is the situation in the first half of the 20th century, it is also the situation in the 19th century, it is also the situation in the 18th century as far as concerns any traditional artisanal flying fish fishing.

Over the page on page 4 of the extract Mr Parker then runs through the development of the fleet, and in the first highlighted passage you see the vessels as they were in the 1950s and 1960s, and it mentions that the motorised pelagic fishing hulls of the 1950s through to the early 1960s were appreciably larger than the sail boat hulls ranging from between 22-30 foot. He says at the bottom "In addition the potential fishing range of even lowest powered vessels was extended to about 12 miles from shore", so we get 12 miles from shore in the 1950s and 1960s.

In the 1970s, which is the next paragraph that we have highlighted, he says boat size and engine power
increased over the following years. In the 1970s 80 to 1080 HP engines became common, allowing the further extension of the fishing range to 40 miles from shore, but these vessels generally fished within 30 nautical miles from the shore.

Just to notice there, the reference supporting this reference to 30 nautical miles from shore is an FAO document of 1982 and I will take you to it shortly, obviously a very important document. Again not put in evidence by Barbados.

Then further down on this page, the last paragraph, "The most recent significant development in the Barbadian pelagic fishing fleet is the introduction of on-board ice holds. These boats, commonly referred to as ice boats," and in the very last sentence on the page "It was not until 1978 that the first truly commercial ice boat entered the fleet".

Then over the page to page 5, the first paragraph, it is worth bringing your attention to the final sentence on that first paragraph, "The perceived economic advantages of ice boats over day boats ushered in a predictable switching from day boats to ice boats in the pelagic fishing fleet that has been occurring from the late 1970s to the present". So ice boats essentially take over from the late 1970s, early 1980s. So having reviewed this evidence we submit that the position could not be stronger, that the evidence could not be stronger, there was no fishing by Barbadians off Tobago prior to the late 1970s. Barbadian fishermen had no means of getting to ranges from 58 to 147 nautical miles from Barbados until the very late 1970s. They had no means of storing fish on board until the introduction of the ice boats in the late 1970s. Since the late 1970s there has been an explosion in the number of ice boats, and according to Barbados' Memorial apparently there are now 190 ice boats, so from one or two at the end of the 1970s to 190. Hence the extraordinary pressure for Barbados to try and expand into an entirely new fishing area.
I mentioned the FAO report and I would like to take you to this as well, and at the moment we are only giving you a snap shot of the evidence. There is more in our written pleadings, but I am taking you to what I consider to be the most important, and this is the last document that makes this particular point, the FAO report of 1982. If you would turn to tab 52 of the bundle, this is an extremely lengthy report that we have put in in full in volume 2 to our Rejoinder. Over the page you will see the summary and conclusions, and I do not think there is any need to go into the summary and conclusions in huge detail but what they do is isolate the particular difficulties then facing Barbados in 1982, which were essentially under 1.3(iii) which are boats of unsuitable design and inadequacy of types and numbers of fishing. They say that since the 1960s there has been no progress towards the use of more appropriate gear and better fishing techniques, and overleaf you will see on page 2 of this summary they set out the main components of the project then under consideration, and you see under (ii) credit would be provided for fully equipped offshore fishing vessels, hence the modification of some of the day fishing boats to carry ice and engage in offshore fishing. We do not know what happened next. This is of course a document put in by Trinidad and Tobago so we do not know whether that credit arrived, and that assisted in the very rapid expansion of the ice boat fleet.

If I could ask you to turn over the page to the introduction, and the introduction of this report is very important because it emphasises what a well researched and serious report this is, and I am not suggesting one would expect anything else from an FAO report. But you see the genesis of the report set out in paragraph 2.1, the government of Barbados has requested assistance in financing the fisheries development project as part of the government programme to expand fish production and improve marketing. Then you see set out in the following passages how there were various site visits, how there were
particular meetings, and then I would like to draw your
attention to the final paragraph which we have highlighted
here which relates to the final meeting. This was the
final meeting of the FAO people essentially with the
Barbadian Ministry people.

"The final meeting held at the Ministry of
Agriculture, Food and Consumer Affairs was chaired by the
acting Minister and attended by the Permanent Secretary,
the Deputy Permanent Secretary, Ministry of Agriculture,
officials of the Ministry of Finance, the FAO
representative and a staff member of the IDB local
office". So it is a pretty senior gathering.

"Full agreement was reached on the mission's findings
and proposals." I stress "full agreement as reached on
the mission's findings". I am going to take you to those
findings in a moment, but the key point is that these are
not just the FAO's findings, this is what Barbados'
relevant Ministries agreed to.

Overleaf, the next extract is page 8 of this FAO
report and you will see at the bottom we have highlighted
reference to the three standard types of fishing boat
which are small dories, inshore day boats and offshore
vessels. Over the page, at page 9 of the report, it just
explains what these boats are in a little more detail, and
key to Barbados' claim, they set out the range of the
vessels. You will see dories, also locally known as
samousas, are too small to operate in open waters around
the island.

The next paragraph. "Inshore day boats varying in
sized from 6 to 12 metres operate in a zone not exceeding
30 nautical miles from shore with a crew of two and return
to base the same day". That is the day boat.

Then we have offshore vessels. These are the ice
boats which vary in length between 12 and 14 metres. They
take a crew of three and operate up to 160 miles from
shore where they have access to densely-populated fishing
areas. They stay out at sea for several days". Then I
have just highlighted another passage towards the end of
this page. "Since these vessels were introduced only recently little experience exists as to the feasibility of fishing during the off season".

The next page in this tab of the Judges’ folder is from Annex II of the FAO report. I say that it is a lengthy report, it is. It is page 6 of Annex II. There the FAO sets out the description of the fishing area. "The inshore fishing boats operate in four areas, north east, south east, south west and north west, at a distance of five to 30 miles from shore for pelagic fishing, flying fish, dolphin, king fish, tuna, shark and bull fish, and the offshore vessels operate in deep seas in three areas, within an area of a 60 mile radius surrounding Barbados, an area of 120 mile radius south west between Grenada and Tobago and then another area of 60 to 120 miles near St Lucia, Martinique and Dominica." Again, the point is made as clear as day that the day boats had limited range and still have a limited range, they never get anywhere near the 58 nautical mile mark. The ice boats, very recently introduced, do go beyond 58 nautical miles and, just to make the point on recent introduction good, over the page, page 7 of Annex II, offshore vessels, these are the ice boats. "These vessels have only been in operation for about one year and boat owners have been keeping records of daily landings and catch rates". So as of 1982 so far as concerned the FAO the vessels had only just come into operation. That is not just as concerns the FAO, because I have highlighted at the beginning the relevant Barbadian Ministries have proved the contents of this report.

10.30

Put simply there were no offshore vessels before the late 1970s, as the FAO mission and the Barbadian Ministry of Agriculture and other Barbadian officials all acknowledge.

Trinidad and Tobago says the Barbadian claim to traditional artisanal fishing off Tobago is a fiction. It is a fiction.

Barbados’ evidence to the contrary, we heard a fair
amount about the oral tradition at the beginning of the week and it is true that there are 15 or 16 witness statements from fishermen from Barbados who are telling fisherman's tales. I have put a couple of examples into the Judges' folder. If I could ask you to turn to tab 53, the affidavit of Joseph Knight, paragraph 6 of the affidavit, just to give you a flavour of the evidence that has been put before you. "I fish off the coast of Barbados, but not for very much of the year because the fish off Barbados is not plentiful. I do most of my fishing off the coast of Tobago to the north east and west. At certain times of the year the fishing in Tobago is very plentiful. I have been fishing there all of my life. As far as I know from stories I hear from fisherfolk, this has always been the way for Barbadian fisherfolk". So hearsay, stories, not strong evidence.

Over the page, there is an affidavit of Dennis Robinson. Paragraph 3 of this affidavit, this is tab 54 of the Judges’ folder, "I fish off the north of Tobago, mainly around February, March and June. People tend to fish off Tobago in November, December and January. There are people who just go down there at that time. Nowhere else, because they say that the fish run is better there. People have fished off Tobago since before I was born and those born before me talk about it, so before they were born too. You see lots of other Barbadian boats when you are fishing down there."

We submit that this sort of evidence is utterly worthless. It is multiple hearsay. It is obviously entirely uncorroborated. In fact, it is flatly contradicted by a wealth of documents that Trinidad and Tobago have put before this Tribunal. We say without any hesitation that all these affidavits, all this oral tradition should be dismissed and, further, rejected.

Another tiny piece of evidence that Sir Henry referred us to late on Monday was the fact that Barbadians taught Tobagonians how to catch and to gut fish in the early 1960s. Well, what is true is that two Barbadians
came over to live in Tobago - to live in Tobago - in 1962
and, certainly, as they lived in Tobago and had married
local Tobagonian women, they continued to fish and they
did introduce certain Barbadian fishing techniques. The
question that obviously springs to mind is "So what!" Two
Barbadians came to live in Tobago and fished off Tobago.
That has nothing to do with a traditional artisanal
fishery off Tobago from Barbados.

Mr President, I would like to shift slightly to
another issue that Barbados raises, which is the
definition of traditional artisanal fishing. This is a
mild attempt, I think, to shift the goal posts by
Barbados. It goes absolutely nowhere, because, of course,
whatever the fishing is it is very, very recent. It is
not traditional. But they tried to persuade the tribunal
that it is nonetheless in some form artisanal. In its
Reply, Barbados referred to but did not exhibit in actual
fact a 1995 FAO report on Eritrea and in the margin one
asks, "Well, it is a bit odd to be referring to a 1995
report on Eritrea but not referring to and exhibiting a
1982 FAO report on the Barbados fishery". They also
referred to the Honduras-United Kingdom Treaty of 4th
December 2001 and also the Australia-Papua New Guinea
Treaty of 18th December 1978. We have put an extract of
this in the Judges’ folder at tab 57 just for you to see
on page 2 at tab 57 the definition of traditional fishing
that Barbados is relying on. It is a third of the way
down. "Traditional fishing means the taking by
traditional inhabitants for their own or their dependants' consumption or for use in the course of other traditional activities of the living natural resources of the sea, seabed, estuaries and coastal tide areas, including dugong and turtle". How on earth could that definition assist Barbados in its case? It comes nowhere near meeting that definition. It is engaged in large scale commercial operations, not the taking by traditional inhabitants for their own or their dependants' consumption or for use in other traditional activities certain species of fish."
Barbados also relies on the Yemen-Eritrea award, which makes the point that the term "artisanal fishing" does not exclude the possibility of improvements in power and techniques, as long as the fishing does not become large scale or industrial. But the ice boat fishing of Barbados has expanded to the point where it is shifting towards a large scale commercial operation. Therefore, we say, that, if there is a definition in there that has to be met, it is met in this case.

Barbados' last attempt under this head, really, is to say, that, well, Trinidad and Tobago has admitted that there was traditional fishing in this area off Tobago. Of course, that is not so. I would just take you briefly to the two documents that are relied on by Sir Henry to show this admission by Barbados. Please would you look, first, at tab 58 of the bundle. This has gone in, I think, in the wrong order. If I could ask you to turn to the second page here. This is a speech of the Trinidad and Tobago Minister of External Affairs at the time of the signature of the 1990 Fishing Agreement. The passage that Sir Henry took you to is highlighted three quarters down the page, referring to the "new scenario" - i.e. put in place - the result of Trinidad and Tobago's 1986 Archipelagic Waters and Exclusive Economic Zone Act 1986 making its claim to the EEZ. "This new scenario meant that those fishermen of Barbados who used to fish in waters adjacent to the territorial sea of Trinidad and Tobago found that they were no longer fishing in the high seas but in the EEZ of Trinidad and Tobago." Well, we ask why is that an admission of anything? It is a statement of fact. Of course, it is true as of 1986 Barbadian fishermen did used to fish in this area, because in 1986 we know that commercial ice boats had been introduced and had been fishing in this area for approximately six years. He is simply making a statement of fact.

Overleaf, the second document that is relied on by Barbados in this respect is a 2002 report by Elizabeth Mohammed and Christine Chan A Shing of the Trinidad
Fisheries Division. "The preliminary reconstruction of fishery catches and fishing effort 1908 to 2002". This is all about Trinidad and Tobago. It is not about Barbados at all. Nonetheless, Barbados seeks to make a great deal of the extract on the second page which we have highlighted where we see the authors have said, "Traditionally boats from Barbados have fished in the EEZ of Trinidad and Tobago primarily for flying fish and associated large pelagics". Basically, Barbados says, "Ha, ha, gotcha!" because the words "traditionally" is used. The word "traditionally" really adds nothing whatsoever. This is a very short passage under the heading "Barbados' semi-industrial ice boat fleet". This is the semi-industrial ice boat fleet that we know only arrived on the scene in the very late 1970s and it is true that, if you look back from the perspective of 2002, this commercial ice boat fleet has been operating for about 20 years. So it may have seemed appropriate to use the word "traditionally", but nothing more is to be inferred from that.

Mr President, so much for Barbados' semi-industrial ice boat fleet. I would like to move on now, albeit somewhat briefly, to Barbados' second core fact. The second core fact is the fact under heading "Catastrophe" - i.e. catastrophic consequences to Barbadian fishermen if you do not extend Barbados' EEZ to extend to the area covered on your screen.

There are three points to be made about the catastrophic argument. The first point is that the question of impacts is quite separate from the question of whether there was traditionally artisanal fishing. Barbados cannot use allegations as to impact besides the clear fact that there was no traditional artisanal flying fish fishing in this area. The Tribunal in this case is concerned, to use the words of Hunte and Oxenford - I stress again that these are Barbados' own experts in this action ...
MR WORDSWORTH: Of course. The Tribunal is concerned in this case - to use the words of Hunte and Oxenford - with large scale commercial operations by Barbadian fishermen that date from at most 25 years ago.

The second point. The question of the maritime boundary is quite separate from the question of access to fishing waters. The Tribunal must always recall that it was Barbados not Trinidad and Tobago that brought the negotiations on a fishing agreement to an end. The alleged dire consequences that Barbados puts before this Tribunal are entirely of its own making. To make that point good, I refer first to the Cabinet note that we have put into evidence. This is a Cabinet note of 17th February 2004 - just for the record, this is tab 29 of volume 5. I do not think that there is any need for the Tribunal to go to this now, because it is already familiar with the document. At paragraph 5, the Cabinet note records as follows, "The Prime Minister" - this is Prime Minister Manning of Trinidad and Tobago - "the Prime Minister emphasised that it was the view of Port-of-Spain that the issue of access by Barbados boats to the fishery resources of Trinidad and Tobago was eminently solvable".

So Prime Minister Manning's position, as of 16th February, is that there is no problem here. Ms Marshall for Barbados confirmed on Monday in her cross-examination that something to this effect was indeed conveyed. The reference for that is transcript day one, page 63, line 16. There is no doubt at all that this was Trinidad and Tobago's position as of 16th February.

I think that it is worth going to two other documents which are in volume 3 of Trinidad and Tobago's Counter Memorial. I would ask the Tribunal to turn these up to make good the point that this is a purely self-induced catastrophe. It is not a catastrophe, but, if it were anything, it is entirely self-induced. Go to tab 86. This is the Ministry of Foreign Affairs of Trinidad and Tobago writing to Barbados the day after the 16th February 2004 meeting. In spite of the fact that Barbados has just
purported to seize this Tribunal with this case, Trinidad and Tobago is writing to Barbados. I pick up from the second paragraph, "The Ministry of Foreign Affairs has the further honour to inform the Ministry of Foreign Affairs and Foreign Trade of Barbados that in keeping with the decision reached at the aforementioned meeting a Trinidad and Tobago delegation will be travelling to Barbados on Wednesday, February 18th to initiate discussions during the period February 19 to 20 2004 for an interim fishing agreement pending the conclusion of a new fishing agreement between the two states. The Minister also wishes to advice the Ministry of Foreign Affairs and Foreign Trade of Barbados that the Trinidad and Tobago delegation will be comprised as follows". So they are saying "let's get on right away to agree an interim agreement pending the conclusion of a new fishing agreement, they set out their delegation. Over the page they even set out the dates of departure. So they are ready to come. They are going to come.

10.45 You see Barbados' response to this at tab 87. "The Ministry of Foreign Trade of Barbados presents its compliments to the Ministry of Foreign Affairs of Trinidad and Tobago and has the honour to refer to the latter's note 305 dated February 17 2004 proposing a meeting during the period Thursday February 19 to Friday February 20th to discuss matters related to the previous bilateral negotiations on a fisheries agreement". It then refers to the fact that Barbados is purported to commence these proceedings, and then the final paragraph of key importance:

"By virtue of the initiation of the dispute settlement proceedings the Ministry of Foreign Affairs of Trinidad and Tobago is requested to note that all prior negotiations on maritime boundary delimitations and fisheries are now deemed to have been suspended".

So who has brought the progress towards the agreement of a new fisheries agreement to a drastic halt? it is Barbados. If there were to be any catastrophe, if there
were to be any impact at all this is because Barbados has
elected not to pursue negotiations with Trinidad and
Tobago.

As to the actual facts of the catastrophe there will
be no catastrophe. In its Memorial Barbados submitted FAO
figures that showed the contribution of all fisheries to
Barbados GDP which is about $12m, which is around 0.6 per
cent of its GDP. It does not seem so very substantial,
and that is all its fisheries. The figures for flying
fishing are evidently much lower and the figure for flying
fish catches from the area now claimed by Barbados, which
is the only relevant figure, would be lower still. But no
attempt has been made to put those figures before you
which is astonishing because if there were a real
catastrophe the first thing a claimant would do would be
to isolate the actual damage and not trouble with the
statements of fishermen saying this is all very difficult
for us; it would say here is our analysis, this is the
damage that will be caused to us, by means of an expert or
other report. No such evidence is before you.

As to the evidence of Barbados' fishermen we were
criticised for being dismissive in our Rejoinder. You
were taken to paragraph 90(2) of our Rejoinder and you
were read the first half of what we said. We said "The
claimant's best evidence of the contemporary importance of
the flying fishery are the witness statements of the
Barbadian fishermen exhibited to Barbados' Memorial, and
the President of the Barbados National Union of Fisherfolk
Organisations cannot be taken seriously". We absolutely
stand by that, and it is worth putting before you why we
made that statement. It was not just a statement that was
made from thin air. We said the evidence for the catching
of flying fish off Tobago prior to the late 1970s is
either mistaken or false and must be rejected. It is not
to be supposed that their evidence on the importance of
the industry as to which they would have the same interest
to exaggerate is any more credible. So we are making a
submission to you that these are not reliable witnesses,
and we continue in that submission.

We are criticised nonetheless for not calling these witnesses for cross-examination. Why would we call them?

If Barbados is serious about their evidence they could have presented them to you. There is no onus at all on us to call them for cross-examination. We submit that their evidence is flatly contradicted by the wealth of documentation, some of which I have taken you to.

Even, leaving these points to one side, if we reflect back to I think it was Tuesday morning when we were played the DVD and we saw the snippets of what the Barbadian fishermen were saying they were not saying this is an economic catastrophe. It was said it was going to be very hard on the fishermen. It was said, and this is a marvellous turn of phrase, it will be a little strenuous on a lot of people. Well, maybe, but that is not redolent of a catastrophe, and of course what would be a little strenuous on a lot of people; a refusal by Barbados to engage in fishery negotiations with Trinidad and Tobago. Nothing else.

I move on to the third of the so-called core facts, and this is the alleged non-exploitation by Tobago of the flying fish fishery. Of course this is also a resource which is of great importance to Tobago fishermen. Barbados has sought to play this down, and I would like you to turn back to the judges' folder now because we have included two of the pieces of evidence that Barbados is relying on. Tab 60 is a report of 2000 from Trinidad and Tobago. If you go to the passage highlighted in yellow on the third page, the final page, of this tab. This is Mr Fietta who referred you to the passage, "At the present time about 95 per cent of the vessels in the industry are pirogues of less than nine metres powered by outboard motors and involved in day fishing. The other five per cent range from nine to 12 metres, with a capability of carrying ice and spending three to five days at sea". The first point to note there of course is that this shows that Tobago does have ice boats which are fishing in this
area. But more important than that is to look at what is being said by the FAO in context. For this I would ask you to turn back one page, under state of the industry: "The inshore artisanal fishery resources are considered to be very heavily fished to the point of being over-exploited on the offshore resources although under-exploited by national vessels are under some threat from illegal fishing". That is how the FAO puts it.

Moving down to the bottom of the page, Economic role of the fishing industry; "Although it has not been fully quantified the fishing industry plays a most important role in the economy of the country through direct and indirect employment and the support of ancillary industries in sails ... marine engines and accessories and their maintenance, in addition to providing food especially for coastal and rural communities, fish processing facilities employ those individuals who are trained in the area of fish handling processing and preservation". So on the one hand the inshore area is over fished by Tobagonians and on the other hand the industry is of obvious significance to Tobago.

Under development prospects on the second page the FAO report continues. "The artisanal inshore fisheries sector is considered to be over fished thereby placing the resources under some threat. Development would therefore be focused on the resource offshore and in the exclusive economic zone, especially for pelagics and deep sea species." What the FAO is doing is encouraging Trinidad and Tobago to develop their fleet to fish in the area that is now suddenly being claimed by Barbados.

Barbados is putting before you the quite bizarre idea that Trinidad and Tobago should suffer and that its fleet expansion as recommended by the FAO should be curtailed because in actual fact Tobago’s fishing fleet is more truly artisanal. Because at the moment it is not over expanded, Barbados says it should expand no further; we, because we have got off the staring blocks slightly earlier with our ice boats, should be the only ones
allowed to fish this resource. That makes no sense at all.

I turn you to tab 61, a document relied on by Barbados on the flying fishery of Trinidad and Tobago, and I just draw your attention to the first sentence of the abstract, "The flying fish fishery of Trinidad and Tobago is of significant commercial importance accounting for about 83 per cent of the pelagic landings on beaches of the leeward side of Trinidad and Tobago from November to July". I stress the words "of significant commercial importance".

In the next tab of the judges' folder, tab 62, we have put in a report by Dr Potts of Tobago, 'An Economic and Social Assessment of the Flying Fish Fishery of Trinidad and Tobago', and really I just draw your attention to these two highlighted passages, the first the oceanic pelagic fishery has historically been the most important commercial fishery of national importance in Trinidad and Tobago. The flying fish fishery accounts for about 70-90 per cent of the total weight of pelagic landings at beaches on the leeward side of Tobago. Then halfway down the page all coastal communities around the island depend greatly on the fishing fleet and their activates for daily sustenance. So how can it be said that the flying fish fishery is of no important for Tobago. Clearly, that is wrong.

11.00

Mr President, as far as concerns the three core facts that have been put before you by Barbados, that is essentially all we have to say. I would like to make a few brief points on the issue of recognition by Barbados of the rights of Trinidad and Tobago in this area. Of course, that recognition is in the context of the fact that traditionally Barbados never fished there, so it is not surprising at all that one sees multiple instances of recognition by Barbados of the extent of Trinidad and Tobago's EEZ in this area. A most obvious instance of that recognition is the 1990 Fishing Agreement to which I
took you yesterday. I do not propose to take you to that
again. I would merely remind you that that is to be found
at tab 18 of this folder and of course it is one of our
exhibits to the Counter Memorial. Volume 2.1, tab 7.

I also took you yesterday to a press release issued
by Barbados' Ministry of Agriculture, Food and Fisheries
of 1992 advising Barbadian fishermen not to go beyond the
median line, because that was the point at which Barbados' 
waters ended. That is at tab 19 of the Judges' folder and
it is also volume 2, tab 6 to our Rejoinder.

I will just take you to a couple more documents which
concern the issue of arrest. There is only one document
relied on by Barbados as a protest against arrests by
Trinidad and Tobago of vessels fishing in the so-called
traditional artisanal fishery area. This is at tab 66 of
the Judges’ folder. This is in response to certain
arrests that took place in early April 1994. The one
document that Barbados has found is as follows. "The High
Commissioner of Barbados presents its compliments to the
Ministry of Foreign Affairs of the Republic of Trinidad
and Tobago and has the honour to refer to reports of the
forfeiture of two Barbadian owned fishing boats by the
authorities of Trinidad and Tobago. The High Commission
wishes to express its concern at the severity of this
measure and wishes to open dialogue as a matter of urgency
with a view to resolving this and other related issues."
In the meantime they ask for a full report of the arrests.
That is not a protest against an arrest. That is
expressing concern about the potential forfeiture of
vessels as a result of their fishing illegally.

If I can ask you to turn back in the Judges’ folder -
I apologise - this is tab 64 - this tells us what happened
next, because it is a report on a meeting between the
Ministry of Foreign Affairs of Trinidad and Tobago and Mr
Frank De Silva of the High Commission of Barbados. You
will see at paragraph 2 in the highlighted passages, after
exchanging pleasantries, "The High Commissioner then
proceeded to state that the purpose of this visit was to
mediate with a view to securing the release of the four Barbadian fishing boats which had been arrested". He added that, "while the majority of Barbadians agree that the fishermen were properly fined, there was concern in the context of the friendly relations between the two countries about the forfeiture of the boats". Picking up at paragraph 3, "The High Commissioner conceded that it was legally permissible for the boats to be forfeited, though his Government hoped that in the context of the Manning Initiative and in the spirit of closer collaboration, the boats would be released".

So far from being a form of a protest, in fact this is an open acceptance that Trinidad and Tobago had every right to arrest Barbadian vessels fishing illegally in its EEZ. It had every right to require the forfeiture of such vessels as a penal remedy. Simply, Barbados was saying as a matter of friendly relations we would request you not to exercise your rights.

As to the frequency of the arrests, Barbados has said time and again that they are only sporadic, not so. I am sorry, "episodic and needlessly provocative" was how Professor Reisman referred to these arrests. If I could ask you to turn over to tab 65, this is a letter, as you can see, from the Prime Minister of Barbados dated 22nd January 2003 and on the second page he says expressly, "I am very much aware that there appears to have been in the past a pattern of arrest and detention of Barbadian fisherfolk by the Trinidad and Tobago authorities at the start of the fishing season". We say that it is not episodic, it is not sporadic, it is a pattern of arrest and detention. You can take that from Prime Minister Arthur himself.

THE PRESIDENT: Sir Arthur would like to ask a question at this point, please.

SIR ARTHUR WATTS: Mr Wordsworth, it is a very small question of fact. The document at tab 64, the report of the meeting, does not say by whom it was prepared. I do not mean as a person, I simply mean was it prepared by the Barbadian
side or by someone on the Trinidad and Tobago side?

MR WORDSWORTH: I believe it was prepared by someone on the Trinidad and Tobago side. This is a document put into evidence by Trinidad and Tobago by way of a response to the single protest document that was put in evidence by Barbados in its Memorial.

SIR ARTHUR WATTS: Thank you very much.

MR WORDSWORTH: I should say that we put that document at 64 in our Counter Memorial and Barbados has not complained about the description of events in its Rejoinder or before you on Monday or Tuesday.

At tab 67 I just wanted to take you to one more document. This is just expressing how Prime Minister Arthur of Barbados saw matters. This is a speech that he gave in December 1999. Really, it just shows how even in public it has been no stage suggested by Prime Minister Arthur that the arrests that were being carried out were illegal so far as concerned the position of Barbados.

Barbados' position was that the arrests were inconsistent with both friendly relations and a concept that it introduced of free access. Really, Prime Minister Arthur saw matters as a quid pro quo. He says, "We have had to witness the arrest of Barbadian fishermen for fishing illegally in Trinidadian waters." It seems to be accepted that they are fishing illegally. There is no question about that. "These fishermen are expected on release to return to Barbados and to purchase Trinidadian goods sold in Barbados which enjoy the free access to the Barbadian market afforded by our regional economic arrangements. The same logic that says that Barbados should open its market to Trinidadian goods is a spirit of a commitment to regional goods. It is the same logic to say that a Barbadian fisherman should be afforded access to Trinidadian waters without fear nor the thought of arrest". Really, his position is that for broad political reasons Barbados should be allowed to fish in waters that are without any doubt Trinidadian waters. There is no suggestion that these are Barbadian waters. There is no
suggestion that the right of arrest is not being
legitimately exercised by Trinidad and Tobago.

Mr President, I am drawing very close to the end of
my remarks. I would just like to make some very brief
comments about the subject of hydrocarbons and really to
make the point that the same issue of recognition so far
as concerns this sector now claimed by Barbados is to be
found when it comes to hydrocarbons, as well as when it
comes to fisheries.

I would like you to turn to tab 68 of the Judges’
folder, although again I think the letter may be out of
order and apologies for that. There you see a letter of
28th May 1998 from the Permanent Secretary of Finance in
Barbados to the Permanent Secretary of Trinidad and
Tobago’s Ministry of Energy and Energy Industries, where a
respectful request is made for approval from the Ministry
of Energy and Energy Industries of the Republic of
Trinidad and Tobago to acquire approximately 250
kilometres of regional two-dimensional seismic data".
Then it goes to explain the purpose of explaining the
data. At the end of the second paragraph you see that it
says "A base map showing the lines located is included for
your information". Obviously, one wonders what the base
map shows, because where precisely is permission being
asked for to shoot these seismic lines. No actual base
map was included with this letter. There is a small and
esoteric issue as to what was included with this letter.
The base map that was eventually sent to Trinidad and
Tobago is to be found at tab 69. This is a map sent by
fax from Conoco. This shows where the seismic lines were
to be drawn and you can see two seismic lines which are
clearly in the area now claimed by Barbados as its own.

For what it is worth, the map that Barbados says was
included with the letter of 28th May 1998 is at tab 70 and
I just draw your attention to that very briefly. It
certainly was not a map received by Trinidad and Tobago.
We do not see how that could possibly be the map sent with
the letter requesting permission to do a seismic survey
because it does not show where the lines to be drawn are
and it does not show any seismic survey of any kind.

Finally, on the question of the issue of
hydrocarbons, Mr Volterra sought to make something of the
fact that Barbados had protested against Trinidad and
Tobago's development of its hydrocarbon resources in this
part of the Western sector since 2003, although blocks
were being offered for tender by Trinidad and Tobago in
1996 and subsequently since then. It may be that in 2003
Barbados' legal advisors belatedly thought that something
should be done, some protest should be lodged, but it is
absolutely of no relevance at all to this case.

Mr President, members of the Tribunal, I come to my
conclusion which is that putting issues of abuse of
process to one side any party can make any extravagant
claim however weak, but in the face of all this
documentary evidence most of which emanates from Barbados' own departments, in the face of the FAO report of 1982,
pursuant to which members of Barbados' Government agreed a report that showed there was no fishing anything like as far as 57 nautical miles from Barbados prior to around 1980, in the face of the 1990 Fishing Agreement and the other instances of recognition, even if this claim is not abusive, it is a claim that does not even rise to the level of smoke and mirrors and it is a claim that must be rejected on the facts.

As to the first so-called core fact, there was no
traditional artisanal fishing off Tobago. So the whole of Barbados' Western sector claim falls away. For what it is worth, so far as core concerns, the second so-called core fact is that there is no evidence of any imminent catastrophe and, so far as there are any imminent impacts, these are entirely self-induced by Barbados. So far as concerns the third so-called core fact, the flying fish fishery is a resource that is very important and is exploited by Tobago's fishermen. The idea of the expansion of their development should be curtailed because Barbados developed an ice boat fleet first is a bizarre
one and it should be rejected.

Mr President, as to the merits of Barbados' Western sector claim when it comes to the law, Professor Greenwood is champing at the bit, but I do note that it is now 11.15, I have run on a little bit.

THE PRESIDENT: Professor Orrego would like to put a question before you sit down.

11.15

PROFESSOR ORREGO: Thank you. This is generally addressed to the delegation of Trinidad and Tobago, not necessarily to answer now, and eventually this might also benefit from a comment by the delegation from Barbados. It concerns the situation of utilisation of living resources under Article 62 of the Law of the Sea Convention. There, as you know, the coastal state shall determine its capacity to harvest the living resources of the exclusive economic zone. In so doing it has to take into account various things, among them the question whether as it says in paragraph 3, the need to minimise economic dislocation in states whose nationals have habitually fished in the zone etc.

My question is first factual. Has Trinidad and Tobago at any point after the enactment of the EEZ legislation determined or established the capacity to harvest the living resources; and if so have all these factors, including the need to minimise economic dislocation, been attended to; and if this has not been done whether this is considered likely to be done any time in the future.

This not only refers to the area around Tobago it could well be in relation to the whole area of Trinidad and Tobago, and I assume that there could also be some interest of other states in fishing areas south or west of Trinidad because of the vicinities of other coasts. I do not know which are the facts but it might be interesting to bring them into the discussion. We could also benefit from some comment from Barbados in respect particularly whether there would be in this context some difference between what you have all discussed as being
traditional fishing rights and what the Convention refers
to in this context, habitually fished in the zone,
traditionally versus habitually, whatever that means in
the light of the views of the parties.

THE PRESIDENT: Thank you so much.

MR WORDSWORTH: Thank you very much for the question. You
will appreciate that it is not the sort of question that
one should attempt to answer straightaway, and with your
leave we will take our time in responding.

That concludes my remarks on the factual aspects of
the Western sector claim, so it may be, Mr President, you
would wish to call the coffee break now, or you would like
to hear the beginning of Professor Greenwood's
intervention.

THE PRESIDENT: Thank you so much, Mr Wordsworth. We will
adjourn until 25 to 12.

(Short adjournment)

THE PRESIDENT: Professor Greenwood, please.

PROFESSOR GREENWOOD: Thank you very much, Mr President.

Mr President, before I turn to the substance of my speech
might I just make two preliminary remarks. The first is
to say rather mundanely that you have a new judges' folder
in front of you containing documents from the second day,
to some of which I will be referring in the course of my
speech.

The second thing is to mark the fact that it being a
maritime Tribunal today is the 200th anniversary of the
battle of Trafalgar, a great naval victory of course off
the coast of Spain, but what is perhaps less well
remembered is that before defeating the French and Spanish
Fleets Admiral Nelson had of course sailed all the way to
Barbados and Tobago and then back to Europe, because at
one stage he thought the French were planning to attack
the British territories in the West Indies; so there is a
particular connection with the facts of this case.

Mr President, my purpose is to look at the legal
aspects of Barbados' claim in the Western sector, my
learned friend Mr Wordsworth having taken you through the
evidential basis, or rather the lack of an evidential basis for that claim. But at the outset it is useful I would suggest to get a sense of perspective by asking what exactly is it that is claimed by Barbados.

If one looks at the putative median line and then looks at exactly what Barbados is asking the Tribunal to give it, approximately 86 per cent of the exclusive economic zone and Continental Shelf that would be generated by the island of Tobago as opposed to the island of Trinidad. In effect this is a claim which really is predatory, the term used by Professor Crawford in opening. It virtually discounts the very existence of the island of Tobago for the purposes of generating maritime spaces.

But, Mr President, Tobago is not an enclave, like the Channel islands in the Channel Continental Shelf case. It is not an island with no population, just a group of scientists running a research station, like the island of Jan Mayen. It is home to 54,000 people with their own fisherfolk, their own economic problems, and a gross domestic product per head significantly lower than that of Barbados. Yet Barbados is asking the Tribunal to strip that island of any resources at all in that huge area of EEZ and continental shelf to the west, the north west, the north and the north east of the island, leaving only the area to the south east where there are few fish and where sailing conditions are dangerous at the best of times.

Mr President, it is not just the fishing that would go under Barbados' proposal, it is everything else as well. Let me remind the Tribunal, if I may, of what the learned Attorney General of Barbados said in opening for her country on the very first day of this hearing. The extract is at tab 3 in the Judges’ folder. I must apologise for the fact that because of some changes I have made to the order in which I am going to take points, I am going to have to go in a rather more varied way through the first ten tabs than I had originally intended. Ms Mottley said the following, "Let me state clearly that
while this aspect of fisheries is crucial to a part of our population, the matter which is of paramount significance and importance to us as a nation is the exploitation of other resources which the maritime boundaries. Indeed, I refer specifically to the issue of hydrocarbon resources. Our interests lie equally and perhaps even more so in relation to the access and the planning of our economic development on that basis". It is not only the flying fish that will not be available to Tobago becoming instead a resource of Barbados, the gas fields that lie to the west of the island of Tobago, as soon as those fields extend beyond the 12-mile territorial sea, the rights to those will be Barbados' rights rather than those of Trinidad and Tobago. The potential hydrocarbon resources lying mainly to the north and north east of Tobago would become part of the resources of Barbados. It is in maritime terms, Mr President, one of the great land grabs of modern history that you are being asked to perform on Barbados' behalf.

As regards those gas and other hydrocarbon resources, it is important to keep in mind, we say, that they are continental shelf resources and that the continental shelf in this area has been part of the continental shelf of Trinidad and Tobago for some decades now. It is 36 years since Trinidad and Tobago passed its Continental Shelf Act and even if it had not passed legislation on the subject the continental shelf of course is something which is part of the sovereign territory of the state even without a claim being made by the coastal state. Those continental shelf rights would quite simply be overridden. Trinidad and Tobago would be dispossessed of rights which it had never been suggested until the last couple of years were anybody else's. There has not been a murmur from Barbados until the early years of the new millennium when this claim was already clearly en projet in Barbados. It was not until then that there was even a murmur from Barbados that rights to hydrocarbons, gas, other continental shelf resources in that area were anybody's other than Trinidad
and Tobago's.

I said that Trinidad and Tobago would be dispossessed of these rights. That was certainly what we thought when we read the pleadings filed by Barbados, but we began to wonder, when we listened to my learned friend Professor Reisman on day two - the relevant extracts from his speech appear at tab 1 of today's Judges' folder - and the first passage to which I would like to take you is at page 18.

In challenging our thesis that Barbados was seeking exclusive rights, Professor Reisman said this, "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". Mr President, we had, I confess, some difficulty understanding that proposition.

Continental shelf rights are exclusive. The Law of the Sea Treaty Article 77, paragraph 2 says so in terms. Exclusive economic zone rights are, as the term "exclusive economic zone" suggests, also generally exclusive. Was Professor Reisman suggesting that Barbados was changing its claim and seeking something rather different from the single maritime boundary that it had claimed hitherto?

But, if we were uncertain about this, the uncertainty was then compounded half an hour later when Mr Volterra was on his feet. He said this - and it appears at page 29 of the transcript at tab 2 of the Judges' folder - "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".
Mr President, I have kept this map up on the screen just to remind the Tribunal which line he is talking about. It is not the putative median line. He is talking about the line that divides the light-blue territorial sea around Tobago from the pink area - the beak on the predatory bird.

How does one reconcile these two apparently conflicting statements? Are counsel for Barbados running two different and competing cases in this modern era of choice? Or is it really a case of them playing good cop and bad cop with the Tribunal? There we have, on the one hand, Professor Reisman saying, "Sit down, have a cup of tea and a cigarette, gave me something that will make me look good" and there is Mr Volterra standing there threateningly with his night stick playing the bad cop? Which is it? Well, it seems, we say, that in reality there are three different claims lurking in Barbados' pleadings, if one takes the totality of the written as well as the oral arguments. There is the original claim, first variant, EEZ, a traditional claim based on a single maritime boundary, Barbados gets everything to the north, sovereign rights under the EEZ, the shelf rights under the continental shelf regime and to everything to the north of the adjusted median line. One might be forgiven, Mr President, if one were a Tobagonian for wondering whether one could describe what is proposed in the Western sector as an adjusted median line at all. Quite some considerable adjustment. There is a rather delicious irony, we say, in the fact that in the one sector involved in this case where you really do have two coastlines facing each other across an area of sea, where, in the words of Mr Paulsson, the median line is not only the starting point, it is also the normal finishing point, but it is in precisely this area that the median line gets thrown out of the window by Barbados, as the claimant. It is not interested in the median line at all. What it wants is everything, right down to the continental shelf, right down to the territorial waters limit around the
island of Tobago.

That is the first claim. Then there is new variant
EEZ as proposed by Professor Reisman. Still it would
appear sovereign rights, he was quite clear about that,
but somehow not exclusive and somehow not overriding the
existing rights of Trinidad and Tobago; a single maritime
boundary that is not really single any longer and,
perhaps, is not even a boundary. It was unexplained quite
what that meant and, frankly, a great deal of explanation
would be needed. Then there is the third claim, Mr
President, this is the claim that dare not speak its name.

It is a claim not to a single maritime boundary, not to
shelf and EEZ rights in this area at all, it is a claim to
access to fishing resources there. It is a claim that
dare not speak its name and, indeed, has been expressly
disavowed by Barbados in its Reply. It was very clear
about this. Barbados was not claiming access to fishing
rights in Trinidad and Tobago's waters. It was claiming
that those waters belonged to Barbados. But then, on the
very first morning of the hearings this week, we heard Sir
Elihu first floating the idea, very, very carefully, very
subtly, that you did have jurisdiction to give an access
right. And then it is developed again, first by Professor
Reisman, who actually talks about it twice, once under
jurisdiction and once when he came back to the issue
substantively, and by Mr Volterra.

This is an extraordinary claim. What Barbados is
saying is that we are not claiming access, but you have
jurisdiction to give us that access. And, although we are
not asking you to do so, we might actually be quite happy
if you felt inclined to give us what we are not quite
asking for.

Some centuries ago the population of the Scilly
Islands used to live very largely off looting shipwrecks
and indeed murdering the surviving sailors very often, and
it is said that the Vicar of the Scilly Islands in the
parish church would say a prayer that went "Oh Lord, we do
not ask that you should wreck a ship, only that if it is
your will to wreck a ship you should do so off the coast
of the Scilly Isles that the poor islanders may have
sustenance therefrom". That is Barbados' third claim.

"We do not ask that you should give us equidistance,
but you could to it this way, if you felt so inclined".

There is no jurisdiction to do that, but we will come
back to that in a moment.

Those are the three different variants of the claim
that are set out by Barbados, but the basis for all three
of them is the same, and that is clear enough. It is
fishing rights and only fishing which is the basis of the
claim to depart from the median line in the Western
sector.

There has been no historical consistent claim to
those waters, there are no effectivités south of that line
on which Barbados can rely. In fact quite the contrary.
As we saw in Mr Wordsworth's presentation in the very
opening round of the maritime boundary negotiations
Barbados' delegation were quite emphatic that there were
no special circumstances justifying a departure from the
median line. Sir Harold St John the head of their
delegation, said that twice, or at least he is recorded
twice as having said it in the joint report. I will take
you back to this in a moment. Ms Marshall was very clear
and very candid in her evidence on this point. She was
quite emphatic that this was an official position of
Barbados when those negotiations opened in 2000.

Ms Mottley in opening the case on the first day, tab
4 of your bundle, beginning at line 8. "It is in pursuit
of these perfectly legitimate goals that Barbados has
licensed the entire area of its exclusive economic zone.
What licences has Barbados given south of the median line?
We look forward to some information about that in the
second round, because we have not had it so far. The
reality is that Barbados' licence, what it regards as its
EEZ further north, but that it has licensed anything in
the south. So there is no historical claim to these
waters and to the Shelf. No, it is fish and fish only.
That has been made clear in Barbados' pleadings. It was originally put rather more broadly. In 2001 in the third round of the Maritime Boundary Negotiations, Barbados is reported as having said that there were "a significant number of geographical, geomorphological, historical and socio-economic factors, including relevant coastal ratios, exploration, fisheries, surveillance and search and rescue which would cause a shifting in Barbados' favour to the south of the provisional median line". Not any more, Mr President, all of that has gone. It is historic fishing rights and nothing else on which Barbados relies.

In fact the other factors that it cited in that passage in the third joint report are either irrelevant - search and rescue for example - or they work in Trinidad and Tobago's favour - exploration only done by Trinidad and Tobago. Coastal ratios in favour of Trinidad and Tobago with a longer coast line.

But Barbados has pinned its claim entirely to its argument that there are historical fishing rights and nothing else, and it follows that on its own terms Barbados' claim to an adjustment has to fail unless Barbados can prove the three core facts that are set out in its pleadings and that Mr Wordsworth has taken you through yesterday afternoon and this morning. There is no question about this, the burden of proof is quite clearly on Barbados. This is a fact relied on by Barbados, and under Article 11 paragraph 1 of the Tribunal's rules of procedure it is for Barbados to prove the facts on which it relies. The reality of course, as Mr Wordsworth has shown you, is that the three core facts are truly three core fictions in Barbados' claim.

What I want to show is that even if Barbados could prove the facts on which it has to rely, the case still fails as a matter of law. Quite simply whatever rights Barbados' artisanal fisherfolk might have had to fish these waters simply cannot translate into a variation of the single maritime boundary, which would deprive Tobago of virtually its entire EEZ and Continental Shelf.
There is another consideration as well, Mr President, and again Professor Reisman is the person who set this out so clearly at tab 1 pages 18-19 of the judges' folder. At the bottom of page 18, beginning at line 31 he said this. "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." Only because of that supposed refusal by Trinidad and Tobago to accommodate the Barbadian fishermen. Then over the page, beginning at line 2: "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" -- incidentally, Mr President, there has never been any acknowledgment to that effect -- "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 artisan fisherfolk created." Neither grounds nor need to insist on an adjustment of the median line. It could not be clearer, Mr President. And again it turns on an assertion of fact which it is for Barbados to prove.

If you find that Barbados has failed to prove to your satisfaction that Trinidad and Tobago has unreasonably refused access to these waters for Barbadian fishermen, irrespective of anything else the Barbadian claim to an
adjustment of the median line fails, and it fails on the very terms that Professor Reisman set out.

Not surprisingly Professor Crawford in opening our case yesterday referred to this as the theory of the median delimitation. It might more accurately be referred to as punitive delimitation. You have not given us what we wanted in negotiations so you should be punished by having the area taken away from you. There is no suggestion that the area might not have been yours in the first place.

In my submissions this morning I want first of all to refer briefly to the historical position and just draw some of the legal consequences from the factual material that Mr Wordsworth has taken you to. Then I want to concentrate on the law relating to the original variant EEZ, the claim pleaded in Barbados' written arguments. Then to look at the new variant argument put forward by Professor Reisman; and finally to say a brief word or two about the unspoken claim to a right of access from this Tribunal as opposed to an adjustment of the median line.

Let me begin with the historical position. We have to start here with the Continental Shelf, the older regime very much in place and asserted in the claim by Trinidad and Tobago in its Continental Shelf act of 1969 which you will find in the volume of national legislation that is attached to the Counter Memorial by Trinidad and Tobago. That Continental Shelf in the area south of the median line and around the island of Tobago can only have appertained to Trinidad and Tobago. There could not have been any question about that. It was by far and away the closest state. It was the only state that carried out any relevant Continental Shelf activities in that area between 1969 and the early years of the present millennium. Up to the beginning of Barbados' claim. Barbados has never sought to challenge that those resources were Trinidad and Tobago's, it was part of the Trinidad and Tobago Continental Shelf. Moreover Barbados' own legislation which comes along in 1978, when Barbados declares its EEZ,
Barbados' own legislation contains in section 3 of the Barbados Maritime Jurisdiction Act a default to the median line in the absence of an agreement between the parties.

Sir Elihu in opening for Barbados on Monday said that the way we had put forward the picture of Barbados' claim was prejudicial because, after all, it overlooked the fact that the median line was merely a default mechanism, that it would be possible for the median line to be varied by agreement between the parties. In other words, Barbados might not get everything that was shown as appertaining to it.

Then, if you look at tab 6 of the bundle, have a look at what Mr Volterra said also on day one, beginning at line 8, "Barbados' domestic legislation asserts a clear and consistent claim to sovereignty to the north of the median line. Its Maritime Boundaries and Jurisdiction Act of 1979 provides that in the absence of any agreed EEZ boundaries with its maritime neighbours, the outer limit of Barbados' exercise of sovereign rights and jurisdiction in relation to an EEZ is the median line. This Act can be found at tab 43 of your Judges' folder. This three-decades old piece of legislation is clearly incompatible with Trinidad and Tobago's claim to the north of the median line". Put that together with Sir Elihu's comments and what you get is this. It is possible that we, Barbados, might get more than a median line, but we cannot get less because our legislation protects against us being given anything less. Any agreement with the neighbouring states could only be, it would seem, to Barbados' advantage not to its disadvantage. It is rather like the advice given by a father to his son, when the son is about to take his wedding vows, "Remember that all that stuff about endowing with worldly goods", he says, "really means this. What's yours is mine, what's mine is my own". That is the essence of what Barbados is saying in its treatment of its maritime legislation.

I may say that, having rebuked us for having had the temerity to seek to interpret Barbados' 1978 Act, counsel
for Barbados had no difficulty whatever in interpreting
for us Trinidad and Tobago's legislation of 1986. They
not only interpreted it, they interpreted it wrongly. The
Trinidad and Tobago legislation claims everything out to
200 nautical miles, save that where that overlaps with
another state's claim the boundary is to be effected by
agreement, but the claim is made to everything out to 200
miles from the relevant coastal points.

Did the population of the exclusive economic zone
alter anything? We say that it did not. Certainly,
Barbados did not believe that that altered the position
that had existed since the continental shelf regime
entered into international law, which for these purposes
one can take as being some time in the 1950s, some time
before the independence of either of the two states. As
we saw, in the first round of the maritime boundary
negotiations, Barbados is quite clear, first of all, that
there are no special circumstances justifying a departure
from the median line. Barbados seeks to explain that away
by saying that all that Sir Harold St John meant was that
there were no special circumstances as suggested by
Trinidad and Tobago. Therefore, there was nothing that
might vary the line to the north. They were not saying
that there was not something that might vary the line to
the south. If that is the case, it is rather surprising
that Sir Harold St John did not mention the special
circumstances to the south. Sir Harold St John was, after
all, a former Prime Minister of Barbados, a distinguished
elder statesman and, as I understand it, the proud
representative in the Barbados Parliament of a fishing
constituency. He knew what he was talking about as
regards fisheries. Moreover, Ms Marshall was quite clear
to point out — and her evidence is at tab 7 and tab 8, but
I will not take you to it, I will just read, if I may, the
relevant passage — "What we had was something that
reflected our position and what Trinidad provided was one
that reflected their position. The only thing that we did
was to make sure that what was reflected on their side was
not misleading and they did the same with ours. In essence, we were more concerned in getting our comments correct". If the Barbadian delegation had thought that there was a Barbadian claim to those waters or to the shelf, south of the provisional median line, you can be confident that they would have thought about that at the first round and they would have said so. In fact, they said nothing of the kind. They said the opposite. Indeed, they confirmed in that joint round the median line was the line respected by fishermen. I put that quotation directly to Ms Marshall and she accepted that, yes, that was the official position of Barbados. You can see her acceptance of that point at tab 8 in the Judges’ folder. That is consistent with the 1990 Agreement, the negotiations for a fisheries access regime, everything that happened in the 1980s and the 1990s and into the early years of the new millennium, all the dealings between the parties, as Mr Wordsworth showed you, were posited on the assumption that what was at stake was access for Barbadian fishermen to Trinidad and Tobago’s waters. That has now been confirmed for them by Professor Reisman. He said that, if that access had been granted, there would be no grounds for departure from the median line. That is the position that Barbados has put to this Tribunal and it cannot now resile from it.

One other comment I would make briefly about the fisheries negotiations before I move on from the historical position is this. Mr Volterra devoted an entire speech to the subject of estoppel to show that Barbados was not estopped from advancing its claim in the Western sector. When we compiled our Rejoinder, we said on three separate occasions that we were not advancing an argument based on estoppel. I was actually rather worried that we were repeating ourselves too much on this point. I need not have been concerned. Saying it three times clearly was not enough. We are not advancing an estoppel claim. Let us deal with the arguments that we are advancing, which is not one based on estoppel, it is one
based on the simple historical fact that until 2003 Barbados never advanced a claim of its own to this area, that it always dealt on the basis that what it was after was access for its fishermen to our waters and that it now puts its claim for an adjustment exclusively on that denial of a right of access: a punitive delimitation.

Let us turn from that to the original claim that is being advanced by Barbados in this case. This is a difficult claim for Barbados, to put it mildly. We will assume for the purposes of my submissions the facts are in their favour. In fact, as you have seen today, the facts are very much against them.

The first element in the claim, the first building brick or perhaps the first card that goes into the edifice would be a better way of putting it, is that before the arrival on the scene of the notion of an exclusive economic zone some time in the 1970s/early 1980s, before that time Barbadian fishermen had a right to fish in what was then the high seas off the island of Tobago. Well, the answer to that is, yes, of course, they had, although if one analyses what is meant by the term "right", in Helvetian terms, what we are actually talking about here is a liberty. They were free to fish there without any claim being made against them because the high seas are res communis. I was free to fish in those waters as well at that time, though I chose not to do so, had not the means even if I had the will. Of course, obviously, the liberty to fish in an area of high seas is a non-exclusive liberty. You are free to fish there but the very nature of that freedom means that you cannot restrict anybody else from fishing there either. Of course, it only applied to resources in the water column. Those fishing liberties did not affect in any way sovereign rights over the resources in the seabed and the subsoil, the substance of the continental shelf regime.

Then it is suggested that with the creation of the EEZ, the status of these waters is altered, the coastal state acquires sovereign rights therein – clear enough
from Article 56 of the Law of the Sea Treaty — and that nevertheless the non-exclusive liberty to fish in the high seas is somehow or other converted into sovereign rights for the national state of those fishermen to have that EEZ for itself in place of the coastal state that is closest to it and, what is more, also to extinguish or rather to appropriate to itself all the rights in respect of the continental shelf.

To make good that case, Barbados has got to establish four things. First, that the liberty to fish in the high seas survived and is turned into a right against the coastal state, because previously the liberty to fish in the high seas is not a right against anyone in particular. Secondly, that this non-exclusive right vested in individuals is somehow converted into a sovereign right for a state. Thirdly, that that right then trumps all other considerations so as to exclude the sovereign rights of the coastal state, not only in the water column but also in the shelf. Thus, leading to the fourth proposition, that a single maritime boundary located miles away, miles away, from where, in Mr Paulsson's words, is the presumptive final point of a boundary between two opposite states is somehow justified.

12.15

As to the first of these propositions, the survival of these rights into the era of the Law of the Sea Convention, it is surprising, to say the least, to find no mention of this in the Law of the Sea Convention. This was, after all, something that was happening all over the world as areas of the high seas became the exclusive economic zones of coastal states. Moreover, it is not really a question of the survival of a right at all. That is a way that Barbados chooses to put its case for obvious forensic reasons. It is really a matter of the conversion of a liberty ergo omnes to fish in the res communis into a specific claimed right against a particular coastal state to be given access to its waters. As for the second proposition how this non-exclusive right vested in the
individual comes to be converted into a sovereign right
for another state, for that Barbados relies very heavily
indeed on the article, described as seminal by Professor
Reisman, of Sir Gerald Fitzmaurice. Anything written by
Sir Gerald Fitzmaurice is obviously entitled to the
greatest respect, though it is important to set what he
wrote in the perspective of the time that he was writing.
The article was written in the early 1950s and it was
written against the background of a very particular case,
the case of the Anglo-Norwegian Fisheries, which was of
course very much in Sir Gerald's mind as he was one of the
counsel representing the United Kingdom, the state whose
arguments were unsuccessful in the Anglo-Norwegian
Fisheries case. And much of this article, not
surprisingly, bears a very close resemblance to the
argument which did not convince the International Court of
Justice in that case. Moreover, he was not writing in the
era of the exclusive economic zone, he was barely writing
in the era of the continental shelf. That was by no means
a universally-accepted concept at the time that the
article was written. But let us have a look at what he
said. The passage on which Barbados particularly relies
is as follows: "if the fishing vessels of a given country
have been accustomed from time immemorial" - "time
immemorial", you note, not six years earlier - "or over a
long period to fish in a certain area on the basis of the
area being high seas common to all, it may be said that
their country has through them, although they are private
vessels having no specific authority, acquired a vested
interest that the fisheries of that area should remain
available to its fishing vessels, of course on a non-
exclusive basis. So that, if another country asserts a
claim to that area as territorial waters, which is found
to be valid or comes to be recognised, this can only be
subject to the acquired rights of the fishery in question,
which must continue to be recognised.

That passage is very skilfully put together. It is
about non-exclusive rights of access that have to be
recognised when a status of a particular area of water changes. It is not about generation of sovereign rights for a state to claim those waters for itself. That is an entirely different matter. Barbados deliberately fudges this by accusing us of saying these non-exclusive vested rights cannot be relevant; why, because we are in an inter-state arbitration and they are rights that pertain to individuals. That is not the issue. The issue is not so much whether the rights are capable of pertaining to a state, the question is whether they give sovereign rights. Obviously the rights of the individual will not be sovereign rights because individuals do not possess sovereign rights. The question is whether a right for the individual of access to fisheries can be converted into a right for the state to acquire sovereignty or the sovereign rights under the Continental Shelf and exclusive zone regimes to the area of waters and seabed in question.

Mr Gerald Fitzmaurice did not think that they could, because in another passage, a few pages before the one relied on by Barbados but not mentioned by Barbados, he said this. He referred to the "well established rule of international law according to which state rights can only be acquired through the acts of persons in the service of the state or authorised to act on its behalf". He then added that that rule was of chief importance in regard to claims to sovereignty over territory or waters. But he added "it has long been well settled that the hunting, whaling, guano collecting, exploring and other similar activities of private individuals acting on their own, however numerous and extensive, do not per se confer on their state a title to sovereignty over the areas concerned". He was of course writing in the era when only the territorial sea was at issue, but the same remarks could surely be applied to the sovereign rights which a coastal state has in the exclusive economic zone or the Continental Shelf. Barbados simply cannot make the jump from non-exclusive rights of access to fishing resources to sovereign rights over the Continental Shelf.
The point is taken against us that Barbados is not claiming an exclusive right here, but how can that possibly be? Barbados on its original claim is arguing for a single maritime boundary, valid for the shelf as well as for the zone, but Article 77 paragraph 2 of the Law of the Sea Treaty says that Continental Shelf rights are exclusive in the sense that if the coastal state does not exploit the resources nobody else may exploit them without its consent.

Barbados' original claim, however much it may be trying to backtrack from it now, is a claim that converts a non-exclusive liberty in the High Seas into exclusive sovereign rights to Barbados over an area of waters that on its own arguments would naturally pertain to Trinidad and Tobago.

The third step which has to be taken, and is one that Barbados says as little about as possible, is that not only do these rights for its fishermen give it the exclusive economic zone, but they also trump any prior Continental Shelf rights. How can that be? Where does the idea come from that a right of access to fishing in the EEZ can somehow convert what was previously one state's Continental Shelf into the Continental Shelf of another? That is the critical question that Barbados has got to deal with. In order to do so it relies very heavily on a line of cases in the international court of justice and in various chamber court arbitration rulings, but it relies mainly on one of them and that is the decision in the Jan Mayen case. It is worth just looking to see what exactly is the difference between Jan Mayen and this case.

If you take volume 2 of the Trinidad and Tobago authorities this is the only case in which fisheries have been a factor that led explicitly to an adjustment of the median line. The other two cases relied upon by Barbados, the Gulf of Maine and Eritrea-Yemen, the Tribunals there decided that an adjustment of the boundary was not warranted on fishing grounds, although in Eritrea/Yemen,
where of course the Tribunal had a jurisdiction quite
different from the jurisdiction of a part 15 UNCLOS
Tribunal, in Eritrea/Yemen the Tribunal did award access
rights, did lay down a regime of access or a framework of
such a regime. But it is Jan Mayen that is the one case
where a Tribunal actually had to do what Barbados is
asking this Tribunal to do, and what were the conditions
in which it did it.

If you turn to page 46 of the judgment you will see
the essence of it. At paragraph 14, "The total population
of Greenland is about 55,000, of whom about six per cent
live in East Greenland", in other words Greenland had a
population roughly the same number as that of Tobago.
"The fisheries sector in Greenland employs about one-
quarter of the labour force and accounts for approximately
80 per cent of total export earnings. The sea area with
which the court is concerned comprises an important
fishing ground for summer capelin, the only fish which is
commercially exploited in the area. Jan Mayen has no
settled population. It is inhabited solely by technical
and other staff, some 25 in all. Norwegian activities in
the area between Jan Mayen and Greenland have including
whaling, sealing and fishing for capelin and other
species. These activities are carried out by vessels
based in mainland Norway, not in Jan Mayen".

Straightaway there are two obvious distinctions here.
Jan Mayen is uninhabited, maybe large but it has no
population at all. It has a transient group of scientists
who pass through it to staff a research station but no
population. That is not Tobago, that is not the situation
here. Secondly Greenland is almost wholly dependent on
fishing, 80 per cent of its total export earnings. The
total export earnings that flying fish contribute to
Barbados is a minuscule proportion of that.

Look at some of the other factors Jan Mayen is not a
small island, but relative to Greenland it is tiny. In
terms of coastal ratio the coastal ratio is massively in
favour of Greenland, by a factor of some 9 to 1.
Moreover, Norway and Denmark did what Barbados has not done, as Mr Wordsworth showed you, which is to produce detailed evidence about fish catches in the area, which led the international court in this case to a very careful partition of the area between the median line and the 200 mile limit to the claim that Greenland could make.

It did not by any means award all of the area in question to Denmark, and it certainly did not do to Jan Mayen, uninhabited though it was, what Barbados is proposing to do to the island of Tobago and its 55,000 inhabitants. The two cases are simply not on all fours. They are nowhere near one another. So although in an extreme case like this there might be a legal basis for deciding that the median line boundary should be adjusted to take account of fisheries, there is no warrant whatever for applying that to a claim that has no statistical basis whatsoever in terms of data about catches.

With an inhabited island on each side, with substantial populations on both islands, and where the coastal ratio which so favoured Greenland in the Jan Mayen case, works in Tobago's favour rather than that of Barbados.

12.30

Professor Brownlie on the first day asked a question of Barbados about whether in Jan Mayen reliance was placed on traditional artisanal fishing, and Barbados has not yet answered that question, it is clearly intending to do in the second round. But let me say that our understanding is that that was not what was in issue in Jan Mayen. Jan Mayen could not have concerned traditional artisanal fishing because the fishing was too remote and in too inhospitable an area. It was commercial fishing that was at issue there. My learned friends on Barbados' side will doubtless take against me the argument that if you can vary a boundary for commercial fishing surely you should be able to do it for traditional artisanal fishing where the arguments are stronger. The answer to that is quite simply that Jan Mayen provides no warrant for that
whatsoever in the quite different factual setting of the case here.

The second point I would like to come back to, although we plan to give a detailed answer to Professor Orrego Vicuna's question this afternoon about Article 62—we are going to have to put together a proper answer to the question of fact—there is also a brief issue of law in relation to Article 62 of the Law of the Sea Treaty, and it is worth noticing that in its Reply Barbados explicitly disavows the application of Article 62 here. It is not what they are interested in, a share of the surplus. They maintain that their claim is altogether more fundamental than that. So the claimant in this case has not relied on that provision.

Of the other cases that my learned friends rely upon, Eritrea-Yemen whatever some of the dicta might suggest comes nowhere near providing a jurisprudential basis for the claim they are advancing. The arbitral Tribunal there did not vary the boundary line to take account of fisheries. I want to come back in a minute to what it did do.

Likewise the Gulf of Maine case, no variation, and the emphasis that only where there were catastrophic consequences for a population would fisheries provide a justifiable ground for departing from the normal boundary line. Qatar/Bahrain, Tunisia/Libya to the extent that they dealt with this, rejecting the argument that fishing rights had any effect on the boundary.

And lastly Cameroon/Nigeria, though what is at issue there is oil activity rather than fishing, rejecting the notion that far more extensive oil activities in that case would have an effect that was itself much less than the effect intended for here by Barbados.

Mr President, there are just a couple of other points I would like to deal with in conclusion. First of all Professor Reisman tried to bolster his case by reference to human rights, and Barbados had trailed its coat on this in is Reply as well. What human right is he referring to?
It was never specified. There was a reference to how human rights were implicated here but which provision of which Convention and which rule of customary human rights law? never specified, it was just a general unexplained assertion. He did say that both countries were parties to the Pact of San Jose and that he would come back to that later. Rather wisely he did not. Trinidad and Tobago is not a party to the Pact of San Jose. It issued a letter of denunciation in the summer of 1998 which took effect 12 months later. It is not bound by that treaty and it has not been for six years. An unspecified unparticularised reference to human rights in general, we say, does not add anything whatever to the case being put forward by Barbados. In any event, even if there were a human right at issue here, how does that translate into a claim of title to territory, sovereign rights to maritime spaces? That is a leap which is not made in Barbados' argument. It is unexplained. Nor is there any explanation offered of what other relevant considerations might be dealt with. They are simply thrown out of the window: proximity, proportionality, the non-fish resources of the area in question, the history of exploitation of those non-fishing resources, the history of dealings between the parties. None of that, it seems, counts for anything at all even to support the median line boundary which Barbados has always said is the starting point and normally the finishing point between opposite coasts.

Let me turn then to the new variant argument of Professor Reisman. There is no explanation whatever as to how this might work. There is no suggestion for a moment about how a state might claim a single maritime boundary on the basis of a non-exclusive regime which did not trump the existing continental shelf rights. It may be that a case can be put together like that, but the second round of oral argument is where it is going to have to come. It is a very late stage in an arbitration to try to invent an argument of that kind and unparticularised it simply does not work.
Professor Reisman makes clear that whether we are talking about the original argument or its new variant, it turns on the refusal of Trinidad and Tobago to grant access to fishing resources. What refusal is Barbados referring to? Is it the refusal constituted by negotiating the 1990 Agreement with Barbados? Is it the offer to renew that Agreement when it expired, an offer that Barbados declined to accept? Is it the years of painstaking negotiation around a new text in which, on Barbados own evidence, considerable progress had been made and only days before negotiations were broken off and these proceedings commenced, the Prime Minister of Trinidad and Tobago was saying that we can get an agreement in place before the resolution of the maritime boundary dispute. We should not make a fishing agreement wait on the settlement of the maritime boundary? Where is the refusal to allow the humble fisherfolk to eke out their modest living in that? It simply does not exist. This is not just punitive delimitation that Barbados is relying on. It is pre-emptive punitive delimitation. We do not think that we are going to get what we want, so, in anticipation that we are not going to get it, we are going to launch a strike now and take the EEZ and continental shelf for ourselves.

The reality, Mr President, is that Barbados' case on the Western sector is coming apart in its hands. It has completely failed to prove the facts which it has itself said are the bedrock of its case and without which that case cannot succeed. It has failed to show that Trinidad and Tobago has refused to accommodate its fishermen. It has failed to make its case on the law to show that a single maritime boundary's course can be distorted in the grotesque way suggested here by reliance on non-exclusive fishing rights. That is why there is now this desperate retreat to the argument that dare not speak its name, to the plea that, well, even if you cannot give us any territory, at least give us an access right. Mr Wordsworth has shown that that is not something over which
this Tribunal has jurisdiction. Barbados could not have brought a claim for access to fisheries under part 15 of UNCLOS. If it cannot bring a case on that basis, then it cannot slip it in by the back door or the back window by claiming title. It would be absurd if the way around the jurisdictional barrier to jurisdiction over a purely fisheries claim was to say that we will make an extravagant and unsupported claim to title and then fall back on rights of access as our fallback position at the oral hearing.

A bag of oranges, as Professor Crawford said, does not contain an apple, it does not even contain a lemon which might, perhaps, have been a more appropriate analogy.

Moreover, Mr President, there is not a word of guidance from Barbados about what regime of access you might be being asked to give. This is something on which a Tribunal is entitled to get guidance from a party, a party that is asking for something, even if it is asking for it behind its hand and in a surreptitious way, ought at least to set out the contours that that access regime would take. There is real danger, and in my submission what has happened after the Eritrea-Yemen award is a demonstration of that danger, in an access regime which does not have a regulatory framework built into it. We came close to agreement with Barbados about such a regulatory framework. Before you they have said nothing about the details that concerned them in those negotiations at all. Not a single word.

Mr President, we would ask you to dismiss Barbados' claim in respect of the Western sector in its entirety. A proper boundary line in the Caribbean in the Western sector is the median line. That is the beginning and end of the matter. I will close my submissions at that point, if I may, and ask you to call on Professor Crawford who will take the rest of our time before the luncheon adjournment.

THE PRESIDENT: Thank you so much, Professor Greenwood.
Professor Crawford, please.

PROFESSOR CRAWFORD: This is the first of three presentations on behalf of Trinidad and Tobago in relation to the Atlantic sector and the issues of delimitation which arise in that sector not the assumption that the Tribunal has jurisdiction.

I shall first of all deal with delimitation of the exclusive economic zone, that is the zone of overlapping potential entitlement to the EEZ. Professor Greenwood will then return to deal with the question of the relationship in principle between the continental shelf and the exclusive economic zone. I shall come back for our final presentation to deal with the issues of delimitation in the area beyond 200 nautical miles from the baseline of Trinidad and Tobago. In that way we will deal with the whole of the submission.

Mr President, members of the Tribunal, it is a day for apologies and I apologise that the tabs are in slightly the wrong order. I will give you tab numbers but my second speech tabs are in the first place and the first ones are in the second place. These things happen, I am afraid, under these circumstances.

As I said, in this presentation I am going to deal with the question of delimitation and of the exclusive economic zone in the Eastern or Atlantic sector, the area of overlapping potential entitlement generated by the coastal parties in this sector. You can see the area of overlapping potential entitlement on the screen now. Moreover in order to be as responsive to Barbados' argument as I can, in the first part of this presentation I am going to deal with the issue of delimitation in this sector exclusively on a bilateral basis without reference to regional considerations, though I will come to the regional considerations thereafter.

Mr President, it seems to us in the light of the discussion that has occurred and in the light of the earlier case law, that the methodology of a delimitation tribunal dealing with the EEZ or, for that matter,
continental shelf, is essentially the same. In fact, the methodology was laid down as so much of the law of outer maritime zones was laid down first to the continental shelf and then adopted for the economic zone.

You start with an equidistance line as a beginning point. You consider whether there are any relevant circumstances which might warrant an adjustment to that equidistance line. If there are such circumstances, then the third step is that you consider how the median line should be adjusted or, hypothetically, you might consider the adoption of a completely new method of delimitation of the sort that was done in the Gulf of Maine case, although that seems to be less popular these days.

Finally, you would check the outcome to ensure that it is not disproportionate.

There is, however, a prior issue, because that particular process now reasonably well established may become unnecessary if a party is estopped from bringing a claim or is held to have recognised a particular area appertaining to the other state. There is no need for you to engage in a de novo process of delimitation if the parties through an agreement or through something which is tantamount to an agreement or has the same effect as an agreement or is a substitute for an agreement, have settled the question. Of course, articles 74 and 83 emphasise agreement. There are various ways in which states can agree.

Barbados argues that we have agreed to the equidistance line in the Atlantic sector and that the issues of delimitation are therefore moot. Not because there is any express agreement, clearly there is not, unlike what we say is the effect of the 1991 Agreement is in respect of fisheries in the Caribbean zone, but because of a series of acts which in Barbados' submission amount to an estoppel. The word "recognition" was not used, but it might have been used and indeed it might have been better had it been used. Mr Greenwood continually does better than I and so I suppose I have caught the habit!
A preliminary point to make is that arguments based on estoppel or recognition of a variety of kinds have been made in more or less every continental shelf case since the North Sea Continental Shelf cases themselves. It was made there. And in virtually every case since — I have not found one where they were not made — and they have uniformly failed. The nearest that anyone got, I suppose, is Tunisia-Libya, but even then it was not a case which was based upon estoppel as such. It was a case where conduct was taken into account.

These arguments have been very popular for counsel but very unpopular for Tribunals. We have letters by middle-ranking American officials. We have had all sorts of things. But they have all gone down, if I may say so, like lead balloon.

The reason for that is not just that the evidence has been bad. Actually, in the case that I am going to take you to, the strongest case, Cameroon-Nigeria, the evidence was pretty good. It is because of the character of the maritime zones that we are dealing with and, in particular, the character of the continental shelf. Many of the cases have been continental shelf cases. There are important legal differences between maritime zones and the sovereign rights that states have to them and issues of title to land territory. I am not saying that the law of the sea exists in a separate compartment of its own but, nonetheless, there are forms of ipso jure attribution of maritime territory to states which do not have any exact analogy at all in the field of land boundaries. The reason for that is in the customary law origins of continental shelves.

There were two alternative ways in which the continental shelf doctrine could have gone in its origin and, indeed, those two ways of approaching it were respectfully championed by the United States through the Truman Proclamation and by the United Kingdom in some of its early thinking about rights to the seabed beyond the
territorial sea. The United Kingdom in its early stages tended to prefer methods based upon occupation, by analogy from the pearl fishers of Ceylon, I think, and occupation is much more like the sort of concept that you have in land territory. The Truman Proclamation avoided that concept entirely and, of course, the Truman Proclamation was at the origin of the customary law of the continental shelf and in this respect, although the exclusive economic zone is in practice dependent upon proclamation, nonetheless, it has gone the same way. The core idea of the Truman Proclamation is that every coastal state has necessarily by operation of law and without any action on its, behalf without any need for claim, certainly without any need for occupation, a continental shelf to the outer edge of the continental shelf area as recognised at the time. In other words, the Truman Proclamation was based on the idea of the equality of coastal states in terms of potential entitlements to continental shelf, whether those coastal states were Trucial States with no indigenous oil capacity at all or the United States of America. That doctrine has been adopted.

The result is that under the Truman Proclamation the capacity to come in and take resources and so on were made subordinate to the rights of the coastal state in relation to the resources. That made it very difficult for the doctrines of recognition or acquiescence to operate, because they are operating against the background of an already existing legally presumed entitlement.

Against that background, it is possible to consider the Barbados arguments on estoppel, but before I do and given that explanation as to why arguments like estoppel have characteristically failed, I want to refer to a diplomatic note of Trinidad and Tobago dated 27th March 1992, which is in volume 3 of the Counter Memorial, tab 15. I am sorry it is not in the Judges’ folder. It refers to the activities of Barbadian fishing vessels and it says that the Ministry of Foreign Affairs of the Republic of Trinidad and Tobago - it is a third party note
- has the honour to inform the Ministry of Foreign Affairs if Barbados that the Government of Trinidad and Tobago does not recognise the equidistance method of delimitation and consequently rejects its applicability, save by express agreement to a maritime boundary delimitation between Trinidad and Tobago and Barbados in respect of the delimitation of marine and sub-marine areas that lie between the two states in the Caribbean Ocean and Atlantic Ocean. Already you see the two sectors are present. One might say even prescient.

By that note, Barbados was put on notice that Trinidad and Tobago did not accept that the equidistance line was the boundary. Obviously both states have maritime entitlements. This made it so much more difficult for subsequent action by Trinidad and Tobago to be construed as any form of recognition or holding out or representation which would have involved an abandonment of the position so clearly stated at the level of a third party note.

It is not, of course, the only protest on the record, it is not the only statement of Trinidad and Tobago's position, it is, to be fair, we think the earliest. Thereafter it became so much more difficult for acts by Trinidad and Tobago or, more particularly since we are not really talking about acts, we are talking about absence of action or alleged absence of action, to constitute any form of recognition, representation or an estoppel.

Mr Volterra relied on a series of acts which he said, taken individually or collectively, added up to an estoppel against us. For example, he referred to seismic activity and he showed the map which showed a degree of seismic activity of an unspecified character. The map that he showed is a compilation. It is not clear when those seismic shots were run or by whom or under what auspices. They do not constitute a systematic programme, unlike, for example, the quite detailed seismic shoots that have been carried out on the north west coast or off the north west coast of Barbados which clearly do
constitute a systematic activity. If one was able to go to the records which underlie that seismic activity, one would, I imagine, find that it did have a systematic activity. There was isolated seismic activity to the north of the equidistance line in the Atlantic sector. Anyone who is used to looking at seismic maps will say that, yes, there was some seismic activity, but not very much. There was, as Mr Volterra said, some legislation, in particular the Barbados Act of 1978 of which we have heard such a lot. There was patrolling. An affidavit by a Barbados naval commander was produced in which there was evidence of patrolling up and down or generally in the region. There was a zone of co-operation and there was the granting of several concessions, none of them, of course, before 1992 and none of them confined to the area or anything like the area which is the subject of this dispute.

I will come back to each of those activities in a moment, but I draw your attention to the Trinidad and Tobago diplomatic note of 8th June 2001, which is annex 46 of volume 3 of the Counter Memorial, which repeats the earlier position taken by Trinidad and Tobago in the note of 1992. These are representative, they are not exhaustive. There are others in the file. It says that until the exact location of the Trinidad and Tobago/Barbados maritime boundary in the Atlantic Ocean east of Trinidad and Tobago and south east of Barbados is agreed on, Trinidad and Tobago cannot acquiesce in any authorised by Barbados of exploration or exploitation of the natural resources of the area that is the subject of overlapping claims to maritime jurisdiction. It goes on to say that Trinidad and Tobago does not recognise the validity of certain concessions granted since 1992. There were two of them, in fact. They are both of a fairly broad area. Apart from possibly miscellaneous seismic activity, no actual drilling was done in the area which is the subject of Trinidad and Tobago's claim in these proceedings. That is, incidentally, quite unlike the
situation in the west, where Barbados claims areas which have been the subject of established licences which are the subject of actual exploitation.

It was known that there was a dispute over the maritime boundary. It was known after 1992 that Trinidad and Tobago did not accept the equidistance line. It was known once discussion started that there was a claim resulting from the projection of the coast of Trinidad and Tobago in a north easterly direction. Yet it is said that we have somehow recognised the equidistance line in this sector or that we are estopped from challenging it.

On seismic activity, I would draw your attention to the discussion of seismic activity in the Aegean Sea case, which is tab 8, volume 1 of the bundle of authorities. I will not take you to it in detail, but the relevant paragraph of the provisional measures judgment in the Aegean Sea case is paragraph 30. It is page 10. The court said, as one of its major reasons for not granting provisional measures in respect of seismic activity carried out by Turkey in areas known to be claimed by Greece, that "whereas the continued seismic exploration activities undertaken by Turkey are all of the transitory character just described and do not involve the establishment of installations on or above the seabed of the continental shelf and whereas no suggestion has been made that Turkey has embarked on any operations involving the actual appropriation or other use of the natural resources of the areas of the continental shelf which are in dispute". On that basis, it was held that there was no irreparable harm.

That of course at this stage of the proceedings was provisional measures. It was not merits. Nonetheless, that is the character of seismic activities of a transitory character. It does give information and I suppose on a strict view it could give information which may be of benefit to a potential exploiter, but it is transitory. In this case it was carried out in waters some distance away. It might conceivably and as part of a
programme call for a protest but as part of occasional scientific or other voyages it would go unnoticed in the waters of which Mr Paulsson spoke so eloquently the other day.

As to the legislation, the legislation has a sort of protean character, in particular the exclusive economic zone legislation has a protean character. For some purposes, it establishes what appears to be a line, for other purposes it does not. Looking at that, it is a fairly standard piece of legislation. It carries no particular implication for any area. States do not establish rights merely by passing legislation. Whatever rights they may establish by doing specific things in particular locations, the same is true of the zone of co-operation. Of course, the zone of co-operation treaty was concluded way after the critical date, in the sense of the notification to Barbados by Trinidad and Tobago that it did not accept the positions that were being taken. In any event there is absolutely no indication of any co-operation or such co-operation as occurred in offices in capitals and not on the area in question.

We would say that in all of these cases the activity is transitory, occasional, relating to areas which are much broader than the areas in dispute here and not such as would, in any event, give rise to recognition or estoppel. But, in any event, and however the case may be with that primary argument, the law now on the question of the relevance of conduct in respect of maritime delimitation is clear and categorical, laid down by the court, if I can say so on a personal view, against me in the Cameroon-Nigeria case, and, in the light of the court's finding in that case, the Barbados claim to estoppel or recognition collapses entirely.

Mr President, members of the Tribunal, before we all collapse entirely as a result of want of lunch, this will be a convenient moment to break.

THE PRESIDENT: Thank you so much, Professor Crawford. We will resume at three o'clock.
THE PRESIDENT: Professor Crawford, will you please resume?

PROFESSOR CRAWFORD: Sir. There is one housekeeping matter in response to the question by Professor Orrego. We need to get some data from Trinidad and Tobago to provide a response, particularly in relation to third state fisheries. In order to give Barbados the opportunity to comment on the question, if it is convenient to the Attorney General and to the Tribunal, we will provide a written answer on Monday morning and that will mean that they will have some time to look at it and say anything that they want to say.

MR ORREGO: Thank you.

PROFESSOR CRAWFORD: I am dealing with the preclusionary argument of Barbados that Trinidad and Tobago is estopped from making any claim north of the equidistance line because of its failure to protest or inaction in the face of a miscellaneous range of activities. As I demonstrated before lunch, the activities do not amount to much, they were pretty transitory, they did not, for example, involve anything beyond seismic activity of a transient and uncoordinated character. They certainly did not involve serious exploration.

We turn now to a case which did involve serious exploration over a period of more than 30 years. That is the Nigeria-Cameroon case. The decision itself, which is familiar to some members of the tribunal, is in volume 2 of our authorities at tab 26, I should say it is familiar to all members of the Tribunal but in different respects.

This is a graphic which was produced as part of the pleadings in that case which showed in different colours the actual oil wells and pipelines which had been drilled south of the Bokassi Peninsula, which was of course also in dispute in the case. Purple are the Cameroon installations; green the Nigerian installations and blue are Equatorial Guinea installations. Equatorial Guinea intervened in the proceedings. I used to practise with my
children getting them to draw a line which kept all the
colours separate and I can assure you that they are very
good at doing it, but it did not take them long. It was
pretty obvious that the parties were proceeding on the
basis of, to put it at its lowest, a modus vivendi, which
made the indications in Tunisia-Libya pale into
insignificance. This oil practice went back to the
fifties. Many of these installations were inter-visible;
even in wet weather of which there was quite a lot in the
region, you could still see them, so there was any amount
of notice. What did the court say in response to the
Nigerian argument that this, in effect established the
boundary through practice. The court said at paragraph
304 of the judgment at page 141 (tab 26, volume 2, page
141) and I will just read the crucial sentence, 'Oil
concessions and oil wells are not in themselves to be
considered as relevant circumstances justifying the
adjustment or shifting of the provisional delimitation
line. Only if they are based on express or tacit
agreement between the parties may they be taken into
account'. If this was not a tacit agreement, then a
fortiori what we see in the Atlantic sector does not even
remotely approach it.

Mr President, members of the Tribunal, my Francophone
friends, notable I suppose before this Tribunal by their
absence, profess completely to be baffled by the doctrine
of estoppel which they regard as an unnecessary Anglo-
Saxon intrusion of an infectious character into the pure
body of international law, but I have to say that
sometimes I share their concern. Here we have an
allegation of estoppel which, first of all, contradicts a
clear position on the record taken by Trinidad and Tobago,
which, secondly, takes the form of inactivity or failure
to act in circumstances many of which required no action,
in a situation where there is absolutely not the slightest
evidence of any acting on this inactivity in reliance upon
the assumed representation. I think with respect there is
every indication that Barbados would have done what it did
irrespective of any particular incidents. And which there is not the slightest evidence of any detriment. In those cases where the international court has said there is a doctrine of estoppel in international law, it has laid down the classic requirements. None of them is present here. There is a tendency for advocates - and I criticise no one of course - when they cannot find an agreement to say that, well, there must be an estoppel. The conditions for an estoppel are actually tougher than the conditions for an agreement because an estoppel lacks, by definition, the essential element of actual consent. The essential element of actual consent was missing here and the idea that it can be substituted for by a series of miscellaneous events of a nondescript character but mostly involving omissions is, with respect, fantastic.

Mr President, I move from the entertaining but irrelevant subject of estoppel, although we will come back to it later on in another context, the context of the outer continental shelf, to look at the relevant area, the coastlines, the circumstances which, in our submission, do justify an adjustment of the equidistance line initially drawn.

I discussed yesterday the basic concept of the relevant area, the area within which the delimitation is to occur and here it is obvious that it is the area of potential overlapping claims, the EEZ claims. This is the area where Sir Elihu on Monday said was the area we should choose and we have already agreed with him. You can see it there as the hatched green area on the screen.

Taking the Atlantic sector as we have defined it, and excluding territorial sea and archipelagic waters, equidistance line divides that relevant area in a ratio of 58 to 42. That is percentages. Obviously, it is slightly an approximate figure but that is near enough. The equidistance line gives Barbados in the Atlantic sector not much short of 60 per cent of the relevant area for EEZ purposes. This of course without looking at the areas beyond which are EEZ of Barbados and which are not in
dispute as EEZ in these proceedings. Well, that is a number. By itself it is not dispositive, but it is an indication. Let us look at some of these.

We have the coastal length debate. The great debate on coastal length has now raged for three and a half days and you will be pleased to know that I propose to show you the coastal lengths and to make some observations, but not to redefine the concept in any detail. We have established the coasts radiate, they do not simply look in one direction at some level of generalisation. We have established that the relevant coasts are the coasts which look on to the area to be delimited and contribute to the potential overlapping claims; and we have established that although a coast is relevant if there is a base point on it, the mere existence of a base point is not a necessary requirement for a relevant coast given the peculiarities, the minute peculiarities of geography which make one point a base point and another not.

Let us look at the ways in which it is possible to measure the lengths of the relevant coasts and I will start with Mr Paulsson - it is always a good idea to start with Mr Paulsson because one knows that one is on safe ground.

Mr Paulsson was prepared to accept that applying the vector theory, that is to say looking at the east facing projections of the three islands, the ratio was 3.6 to 1. He did of course dispute the relevance of the coastline of Trinidad and we answered that showing that in fact the coastline of Trinidad, ignoring the little projection at the top, actually faces directly on to the equidistance line. But there we have a ratio of 3.6 to 1.

Another possibility is to take the relevant coastlines, the east facing coastlines, along the coast in some level of simplification but the actual configuration, and measure those, and we get a ratio of 8.9 to 1 if we do that. I note of course that the north east facing coastline of Barbados is not regarded as relevant for this purpose, because it looks away from the area to be
delimited. It does indeed, Mr Paulsson; if you stood in
the middle of that coastline you would be looking in the
wrong direction.

Now we have the vectors of the coastlines which
actually face the boundary. You can see them there and
the ratio there is 6 to 1; we are simply taking the
eastward projection of the coastlines that face the
boundary and you can notice that in doing this we have
ignored the whole of the south east facing coastline of
Tobago, notwithstanding that if you stood on the southeast
facing coastline of Tobago you would be looking directly
at the notional median line, notwithstanding that the tri-
point or whatever it is - and it is probably not a tri-
point on Barbados' theory - but the point where our
maritime zones end according to Barbados is actually south
of the southernmost point of Tobago. Nonetheless, this is
a rather conservative measurement. The other thing we do
is to ignore the promontory, the tip of the hat, if you
like, on the north east coast of Trinidad. There is no
reason why it should be ignored. The fact that it reaches
an apex rather than being square should not make any
difference. But nonetheless we have taken that
conservatively and at a ratio of 6:1. There are other
figures one can take, for example, one can look at
archipelagic baselines, as we did in the pleadings, but I
will not bore you with the details.

3.15

Taking there range of possibilities of different ways
of measuring coastal ratios, the east facing coastlines of
Trinidad and Tobago range from Mr Paulsson's figure of
3.6:1 up to nearly 9:1, looking at the actual length of
costlines, which is, one might say, almost the orthodox
way of doing it. The ratio is in the single figures, but
that is not uncommon. It is some way between 3.6 and 9.

If you look at the disparity in coastal lengths that
have made a difference in the earlier cases, you find that
they fall into that range. Obviously, there are a few
that are lower, the Gulf of Maine was the famous figure
of, I think, 1.38 or it may have been 1.32, when some
adjustment was made. It was certainly a much smaller
figure. Jan Mayen was a little larger, something of the
order of 9:1. But those sorts of figures are regarded as
giving rise to a situation where there is disparity in
coastal lengths. There is obviously disparity in coastal
lengths in this case.

There are four reasons why, in our submission, the
east facing coast line of Trinidad needs to be taken into
account and calls for an adjustment of the equidistance
line. They are first that there is an unobstructed
coastal frontage looking directly on to the area to be
delimited which is cut out from the 200 nautical miles
line. The second is, as we have seen, the coastline is
substantially longer. Let us take the conservative figure
of 6:1. It is substantially longer than that of Barbados
which looks on the area to be delimited. The third is
that that substantially longer coastline is cut off from
any possibility, according to Barbados, of outer
continental shelf or of indeed the full extent of the
exclusive economic zone. The fourth is, by way of
summary, the result of these factors is inequitable to a
state which has a substantial facade in the region
concerned. Coming back to the map just showing Barbados,
Trinidad and Tobago and the coastline, although there is
no continuous coastline from Barbados, Trinidad and Tobago
and Venezuela, nonetheless Trinidad and Tobago are caught
in the middle in a concave situation in exactly the same
way that Germany was caught in the middle, except that
these are islands. But should that make a difference? In
particular, when the entity in the middle in the concave
situation is a substantially bigger island than the
outlier, to use Professor Reisman's word, that is
Barbados. Or to put the question another way, is Barbados
by reason of the combination of its somewhat more easterly
location in the situation in which the other states,
bigger in this case though we are, lie somewhat behind it,
is it to have such a vast proportion of the available
maritime space? And the answer we submit in the light of these factors is no.

So far I have looked at the situation only in the context of Trinidad and Tobago versus Barbados. Let us look now at the regional situation more broadly. You can see it here. It is true, and the point was made by Barbados in their first round, that there are islands lying behind the Lesser Antilles, for example, which are even more blocked than we are. That is true, in the same way as the west facing coastline of Cameroon was blocked by Biyoka and there comes a point when one can do nothing about the blockage. But you will notice that each of those states has a significant west facing projection. There are again some differences – that is another concave situation – and there are some states that are more favourably placed than others because of the situation of offshore islands and so on. But, nonetheless, these are states which face in both directions and have at least some significant capacity to generate maritime areas in both directions. That is not true of Trinidad and Tobago. Trinidad and Tobago is jammed up against the South American continent. It looks north towards its immediate neighbours. It looks north east towards Barbados and its only unobstructed facade is the easterly facade which Barbados says is completely irrelevant in these proceedings. It is the obvious thing that you see when you look at Trinidad and Tobago and, indeed, if you could, like Superman, look at it from the west African continent, that is what you would see.

Professor Reisman the other day engaged in a lengthy criticism of the principle that one should look at the regional implications, in particular that one should look at the delimitations reached in the region to see whether they gave guidance as to what might be done in a situation where there is a state, a small island state, acting in this significant blocking capacity. He was particularly critical of the Guinea Bissau case which he said, as a jurisprudential outlier, should be given no credit. Of
course, Guinea-Guinea Bissau was not an outlier, although there are things that one might say about it. Because the basic point was made, as I said yesterday, in the dispositive of North Sea Continental Shelf case itself, paragraph 101D(3), "Although the formulation was slightly different, the effects, actual or prospective, of any other continental shelf delimitations between adjacent states in the same region"; those were the court's words in 1969. One of the differences between that formulation and the formulation adopted by the Tribunal in the Guinea-Guinea Bissau case is the Tribunal's reference to prospective continental shelf delimitations, delimitations that might be reached in future. Professor Reisman made the point, and it is a fair point, that why should two states deny themselves bilaterally a situation which is equitable as between them just on the hypothesis that other states may behave in a certain way. That is a reasonable proposition and the formulation in the North Sea Continental Shelf case is not subject to the same criticism.

But what we have here, with respect, are two existing delimitations. We are not engaged in a hypothesis as to, for example, the Dominica-France delimitation or as to the Trinidad and Tobago-Venezuela delimitation. We know the situation in broad terms as to the states which lie behind Trinidad and Tobago and Barbados, those states have not made overtures in the direction of the nightmare scenario which was shown to you the other day in which Barbados stands like this, with states zooming by in different colours and presumably at different speeds. But that nightmare scenario is a figment of Barbados' imagination. None of those states have made proposals of that kind and there would be no basis for them to do so. But two groups of states, two on each side of Barbados, have actually agreed definitive delimitations which take into account the situation and which both of them adjust the equidistance line in a significant respect. For you simply to adopt the equidistance line in this situation
would be, in effect, to tell those groups of states that
they were crazy to make "concessions" - I use the word in
inverted commas, it is the sort of word we have been
getting from the other side - to their neighbours in the
interests of giving them some access to maritime
resources. It is perfectly clear with the Trinidad and
Tobago-Venezuela line; it is perfectly clear with the
France-Dominica line. We say that it gives you guidance.
It does not of course determine what you are to do,
because no one says that the regional implications test,
whether it comes from North Sea Continental Shelf or
Guinea-Guinea Bissau, determines the delimitation, but it
gives you guidance as to what states negotiating carefully
in their own its over time have thought to be equitable,
and we say is equitable here.

In fact, three agreements have been mentioned because
we mentioned France, Dominica, Trinidad and Tobago and
Venezuela. Barbados has mentioned St Lucia-Martinique, so
I should say something about that as well. Yesterday I
analysed Trinidad and Tobago and Venezuela in some detail.
I am not going to repeat what I said then. I defended it
against the charge that it was unlawful. I defended it
against the charge that it took land territory or maritime
territory away from other states and we can leave that
statement as it stands. But let me have a look now at the
France-Dominica boundary. This is a case where after
several rounds of negotiations, I think in the end there
were four, France, on behalf of Guadeloupe and Martinique
and Dominica agreed a boundary which diverged very
significantly from equidistance, in the interests of
getting Dominica out to the 200 mile line. The red line
that you can see is the actual agreed boundary, and you
can see that it is closed at the Eastern end.

I will come back to that closure when I talk about
the Outer Continental Shelf in my second speech this
afternoon because Barbados relies on that little line,
though it is not particularly enthusiastic about the
agreement for other purposes.
You can see the dashed line that is the equidistance line and you can see that Dominica would have been very significantly shelf locked and zone locked if equidistance had been adopted. Instead it got a projection out to the 200 mile line not indeed unlike the projection in the St Pierre and Miquelon case, though in a different situation.

We provided in the additional materials, and on my day of apologies I apologise this time for not giving you the document before, we did not know it existed. But fortunately the filing system of the Department of Foreign Affairs in Trinidad and Tobago may run slow but it does run exceeding fine and they did in the end discover the only, so far as we can find, existing detailed account of the travaux of the Dominica/France agreement which is written by Dundas in this 1991 publication negotiating maritime boundary agreements, a guide to small states. We have put the relevant pages in your judges' folder and you can read them for yourself.

France accepted at the very beginning of the negotiations that the principle of equitable delimitation had to be applied and that equidistance would be unjust to Dominica. There was then a series of arguments about how the adjustment was to be made, but in the end as Dundas points out, France expressly agreed on the need for a Corridor for Dominica out to 200 miles. There was then some discussion about whether that corridor should be projected further and I will return to that later on. You can read the travaux for yourself, they are quite illuminating and they show precisely the action of responsible governments faced with a situation in which because of the presence of Barbados as the Eastern outer in this group of islands everyone else is squeezed.

I should simply mention that in the article by Colson on delimitation of outer Continental Shelf to which I will come back in my next speech, there is a brief but perfectly good natured discussion of the Trinidad and Tobago-Venezuela agreement at page 95 adding to the literature on that agreement.
Barbados relies on the St Lucia/Martinique boundary somewhat to the west here, and you can see that boundary and where Barbados is, as a situation in which equidistance was applied in the region without any need for variation, and it is true that that line is a very slightly simplified equidistance line.

Professor Reisman relied on it in effect for the proposition that the equidistance line was drawn between the opposite coasts of two islands, so it was an example of a regional treaty which did not make adjustments for the location of Barbados. It was further an example of a regional agreement which was between opposite coasts even though it spread out on both sides.

The paragraph from the relevant article in Charney and Alexander from which Professor Reisman read a little, the article as a whole being in your binder, I should read the whole paragraph. It says that the boundary line is applied between the opposite coasts of two islands "of comparable shape, size and geomorphology, situation along the same angle axis in a north/south direction and barely 17 nautical miles apart. But no islands, reefs or rocks provoking special circumstances and no lopsided straight baseline constructions. Consequently the ensuing equidistance line embodies and reflects the sense of equity. Its prolongation eastward and westwards thus develops a relationship of double frontage adjacency and reflects the same equity." In other words the author of that article treated this as a case, as he described it, as double frontage adjacency at the two ends of the line which proceeds through the gap between the two arms.

3.20 The author of the report is Mr Nweihed, and I am sure that I cannot pronounce his name any better than Mr Volterra can.

He also wrote a report on the Dominica/France boundary in which he said along the same lines, "In the first place the French island of Marie-Galante is situated between Guadeloupe and Dominica in a relationship of
oppositeness, but it extends further eastwards than the latter. Dominica's coastline on the Atlantic is generally convexed, but in the delimitation with Guadeloupe, due to the convexities of Marie-Galante on one side and Martinique on the other, the relationship turns into adjacency as the boundary advances to the Atlantic ocean. Again, the notion of adjacency. Coasts which start out as opposite turn into something else as lines advance, which is precisely the situation we say applies here.

Accordingly the regional dimension in these circumstances powerfully reinforces the case for an adjustment of the line, a case made on a bilateral basis, because the equidistance line divides the area in a way that cuts off the substantial east facing coastal frontage of Trinidad and Tobago, because that frontage is of the order of some way between 3.6 and 8:1 longer than the coast of Barbados and because the overall result is disproportionate and inequitable. It has been found to be inequitable in a similar situation in the immediate vicinity again for the similar reason that we believe you should make that threshold finding here.

Having got to that point, it is of course the case, and the reader of maritime boundary delimitations will be struck by the extent to which the court or the tribunal engages in preliminaries of all sorts, rejecting arguments of estoppel, dealing with issues about relevant coasts, and then they come to the adjustment. The Jan Mayen case is a conspicuous example of this but there are many others. The adjustment is often made relatively briefly. Of course, the grounds for making this adjustment do not necessarily dictate the adjustment that is made. We do not for one moment suggest, for example, that you take a proportionality range here and simply apply it so as to divide up the area. We are criticised for that, but that is a misunderstanding of what we do. You get to the stage where an adjustment has to be made, an adjustment which is reasonable in the circumstances and the question is to find a criterion for doing so.
The first issue in this case is where the turning point should be. Obviously, if there is an adjustment, the adjustment has to start in a certain place. I have already dealt with this in response to one of the few blind spots in Mr Paulsson's presentation the other day in which he forgot our twice repeated explanation of Point A, but we will show it to you again. Point A is not, of course, the dividing line between the Eastern or Atlantic and the Western or Caribbean sector. It is the last point on the equidistance line which is determined by a base point on the south west facing coast of Barbados. Thereafter the line is determined by points further to the east which look on to the area to be delimited. It is one of these issues, of course, like the sorites paradox, a line has to be drawn, a point comes where precisely it comes is a question of appreciation. The Anglo-French arbitration had that problem. You cannot say precisely the spirit goes now or that it goes in another moment. That is a very bad quotation from Donne, but I am sure that the actual passage will spring to your mind. There is a point in time when you are clearly passed the situation of relative oppositeness and where you are in a lateral position. We say that Point A is a defensible place for that. We have a reason for it. It contrasts strikingly with the total absence of any reason for Point D.

Moreover, Point A is just to the north of the location of the 12 mile territorial sea of Tobago and well, well to the south of the equivalent place of Barbados. It leaves Barbados' eastwards facing coastal projection completely unobstructed for as far as the coast of West Africa. We will see how far along that coastline we get in terms of the Annex II Commission. Point A, we submit, is an appropriate turning point having regard to the geography of the region.

The question now is how much deviation to make. Again, we have provided an explanation for that in our Counter Memorial, which again Barbados has chosen to
misunderstand and to parody. Essentially the east facing coastal frontage of Trinidad and Tobago, which we described as a vector, a vector being the direction of a particular region taken by reference to a certain angle. We took that and we measured along the 200 nautical mile line from the tri-point, which you can see. This means that the corridor, the salida, that was agreed between Trinidad and Tobago and Venezuela is taken against us. We have not simply transferred the burden of that agreement on to Barbados. We have accounted for it in the length and it is not the total length of our coastline, it is the length of the vector since we are adjusting in order to create a presence on the maritime boundary in the east. It creates what we submit is a modest presence. In particular, it is compared with the enormous areas still left to Barbados. We do not suggest, and it can never be suggested that any judge who has taken part in any maritime boundary case I think will believe, whether by reference to the weather in the Hague or in any other part of the world, that there are different ways of doing things. We do not suggest that this is necessarily the unique way of dealing with the problem. We have analysed the problem and it calls for an adjustment. We have proposed a method of dealing with the adjustment and we have given reasons for it. It is for the tribunal to assess the balance for itself, evidently, in the context and reach its own conclusion as to what would be appropriate, but it cannot be said that there were not reasons given, whereas in relation to the adjustment proposed by Barbados no reasons at all were given.

The final issue is the assessment of the proportionality of the adjustment. I said earlier that the equidistance line divided the Eastern sector in the ratio of 58:42, approximately. With the adjustment the division is essentially 50:50. In other words, it splits the difference. There are many examples in maritime boundary situations where an equality is equity approach has been taken. I have to say that we only discovered it
was 50:50 after we worked out what the vector was. The idea of the vector was a concept taken from the St Pierre and Miquelon case, with the idea of a corridor, of course applied in this geographic situation which goes out to the 200 nautical mile line. It turned out that taking the north side axis of Trinidad and Tobago and expressing that as a vector produced a result which was essentially a 50:50 split of the total area of overlapping EEZ claims. That is an accident. It was obviously going to make an adjustment of some sort from the status quo ante and equality is equity as I have said. The Tribunal may find its own methods of doing equity in the circumstances, but it cannot be said that this line is inequitable on the face of it. It gives us a reducing corridor out to 200 miles. It leaves Barbados with vast sways of maritime boundary, subject only of course to the eventual delimitation with France in relation to its northern territories. We can get a sense of what that is likely to be from the agreement already reached.

Finally, I should deal with Professor Lauterpacht's point in his opening speech about what he suggested was our failure to deal with the little stretch between our Point A and their Point D. He said that our paragraph 2 rejected the Barbados claim line in its entirety, and that is true. He said that that left the little area A to D, as it were, unattached, a vacant line, just as Mr Volterra thought that the area south of our claim line, so far as EEZ was concerned beyond 200 nautical miles, was also vacant, which it is not. But, of course, what we have done is to take Point A as a point whose location is determined in the way that I have explained and to extend the line west and east in the manner set out in our submissions. The whole of the boundary is delimited in that way out to the 200 nautical mile line. I will deal in my next speech with the question of what you do then. The virtue of this is that we do not start with the tri-point. The Tribunal does not have to determine the tri-point and that is appropriate. Barbados which makes great
play with the rights of third states talks all the time about tri-points with third states. In our case the line starting at a point on the equidistance line which is indisputably a point on the boundary between these two states involving no other party, then extends in opposite directions until it reaches the maritime zone applicable to the state in question or the outer edge of the exclusive economic zone as the case may be, leaving the question of further delimitation for further discussion. That is an appropriate method, from a technical point of view, of describing the boundary. To start at an appropriate point on the equidistance line which is on any view a pertinent to the two states and then to direct the line in the opposite direction in the way that the Tribunal determines is appropriate, and that is what is done in our submission. There is no gap, but I have to say that counsel for Barbados were looking for gaps.

Mr President, members of the Tribunal, that concludes this part of my submission, I will return after you have been refreshed and revived by Professor Greenwood in order to describe the issues of the outer continental shelf.

THE PRESIDENT: Thank you, Professor Crawford. Professor Greenwood.

PROFESSOR GREENWOOD: Mr President, I think that the Tribunal will actually be refreshed and reinvigorated by coffee, which I suggest follows my presentation. Please regard what I have to say on the relationship between a continental shelf and the exclusive economic zone as being the equivalent of the commercial break between the two halves of a serious film.

What I want to do is to look briefly at a particular legal issue that is relevant to one sector of Trinidad and Tobago's claim. There is a sector in which Trinidad and Tobago claims an extended continental shelf in an area which is more than 200 miles from the coast of Trinidad and Tobago, but within 200 nautical miles of the coast of Barbados.

Let me be quite clear what it is we are saying about
that sector. We are saying that Trinidad and Tobago has continental shelf rights there, but we accept that Barbados has exclusive economic zone rights. In one part of his presentation, Mr Volterra said that both parties were claiming single maritime boundaries throughout. Mr Volterra of course is entirely at liberty to tell the Tribunal what his claim is, but he cannot speak with authority, I am afraid, about what our claim is. This is an area in which the single maritime boundary is not what we are contending for. We are contending for a split, an area where the continental shelf pertains to Trinidad and Tobago but the exclusive economic zone pertains to Barbados.

Barbados says that that is not possible and this is an area where there is a conflict about the law between the two parties that can be isolated and treated as self-contained. Trinidad and Tobago's position is this. We say, first of all, the shelf and the exclusive economic zone are two separate juridical concepts, separate and distinct. The continental shelf being, of course, the older of the two concepts with the exclusive economic zone regime having been grafted on to it some three decades after the continental shelf had become an established part of international law.

Secondly, moving from that, we say that because they are separate and distinct it is possible that in a particular area, the continental shelf will pertain to one state but the exclusive economic zone to another. That could happen in at least two different situations. It could happen within 200 nautical miles of both states' territories, if, instead of there being a single maritime boundary between them, there were different boundaries for the continental shelf and the exclusive economic zone. That is something that has happened on a number of occasions and we say it is perfectly possible as a matter of law. It can also happen in an area such as the one we are dealing with in this case where a state's extended continental shelf runs under the exclusive economic zone.
of a neighbouring state.

Thirdly, Mr President, we say that the creation of the exclusive economic zone regime does not operate to curtail the extent of the continental shelf. Those are our three core propositions on this point.

3.45

Barbados' response can be summed up in two propositions. First of all, Barbados maintains that the right of the coastal state to an exclusive economic zone out to 200 nautical miles is an absolute right, which can be limited only by the existence of the exclusive economic zone of another state, and that to the extent that there is a conflict in a particular area the exclusive economic zone regime prevails over the continental shelf, or at least prevails over a claim to an extended continental shelf.

In essence what Barbados says and details this in its Reply, is that there cannot be an extended continental shelf of state A in an area where there is the exclusive economic zone of state B. The fact that a particular area falls within the exclusive economic zone of one state will as a matter of law prevent it from being part of the continental shelf of another.

Let us look a little more closely at what the continental shelf and the exclusive economic zone regimes entail. So far as the continental shelf is concerned we can start with the North Sea Continental Shelf case, which talked about the continental shelf regime in these terms.

The most fundamental of all the rules of law relating to the continental shelf enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, namely that the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exists ipso facto and ab initio by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea bed and exploiting its natural resources.
"In short there is here an inherent right. In order to exercise it no special legal process has to be gone through. Nor have any special legal acts to be performed. Its existence can be declared and many states have done this, but does not need to be constituted. Furthermore, the right does not depend upon its being exercised. To echo the language of the Geneva Convention it is exclusive in the sense that if the coastal state does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no-one else may do so without its express consent.

Mr President, although that was of course referring to the continental shelf regime as embodied in the 1958 Convention, the Court was also quite clear that the basic contours of that regime existed as a matter of customary international law, and those basic contours are five. These are sovereign rights, that they are automatic or inherent; they belong to the state whether it claims them or not; but they are exclusive, even if you do not claim your continental shelf rights expressly no other state may explore or exploit the resources in that shelf without your consent. The continental shelf rights are a prolongation of land territory, they are the extension of the sovereignty of the state from its land territory out to the seabed adjacent to that territory, and that is of course the language used in the Truman Proclamation in 1948. And the fifth feature is that the extent of the continental shelf under this regime is not limited to 200 nautical miles from the coast. It was indeed the geographical phenomenon in the way in which it was incorporated into customary international law. The 200 nautical mile limit which has become so important was grafted on as an additional source of rights, means for states that could not establish a continental shelf in the ordinary geographical sense to acquire right of the seabed and subsoil they would not otherwise have.

That was the legal regime that existed under the 1958 Convention for the states parties to it and under
customary international law prior to the Law of the Sea Convention.

So far what I have said seems to me to be common ground between the parties. Then in the 1970s there is grafted on top of that concept of the continental shelf the new legal concept of the exclusive economic zone. One might argue about the exact date on which that concept enters customary international law, it does not terribly matter. Barbados had claimed an exclusive economic zone by legislation in 1978, Trinidad and Tobago would not wish to dispute that particular date for these purposes.

What effect did the grafting of the EEZ on top of the continental shelf have on the existence, exercise and definition of the continental shelf rights? We say that the starting point in that enquiry is helpfully provided by Professor Reisman, though inadvertently so, because Professor Reisman told the Tribunal that there is a presumption in international law that a new legal regime will not entail the extinction of existing legal rights.

In relation to the context in which he made that remark, which I dealt with this morning, we would take issue with his application of it, but the precise principle is correct. And the principle is of particular importance in relation to the topic that I am addressing now. The creation of the exclusive economic zone must be presumed not to detract from existing continental shelf rights of states, for these are sovereign rights, they are rights of particular importance and of a very different character from the rights which Professor Reisman was addressing. That presumption which we can take as a starting point is reflected, we say, in Article 56 paragraph 3 of the Law of the Sea Treaty. The rights set out in this Article with respect to the seabed and subsoil shall be exercised in accordance with Part 6. In other words in accordance with the provisions in the Law of the Sea Treaty dealing with the continental shelf rights.

Mr President, that provision in Article 56.3 is only necessary on the assumption that in a particular area the
rights under the exclusive economic zone regime and the rights under the continental shelf regime can belong to two different states. If that cannot happen then Article 56.3 is unnecessary. Article 56.3 is in our submission a very clear indication that the exclusive economic zone does not prevail over continental shelf rights; quite the reverse. It was intended to take effect subject to the existing rights under the continental shelf regime.

My learned friends, counsel for Barbados, dispute that interpretation, and in particular they make great play of the fact that Article 56 paragraph 3 talks about in accordance with the provisions of Article 6 rather than subject to those provisions. I want to come back to that in a moment.

It is noticeable that one commentator who has looked at this issue, Professor Malcolm Evans, in an article in the 1993 British Year Book, comes to the conclusion that the better view is that the effect of Article 56.3 is that it assures the primacy, as he puts it, of the shelf regime over the EEZ as regards rights to the seabed and the subsoil.

A number of points in relation to that. Of course the point is made by Barbados that a single maritime boundary is highly desirable and has become the norm in international practice. It is highly desirable, it is frequently the practice of states. But nothing in the Law of the Sea Convention requires states to conclude an agreement on a single maritime boundary. There is no rule of international law that says that the boundary between the shelf of two states and the boundary between the zone of two states must follow the same line at all points. And in our Counter Memorial and our Rejoinder we gave a number of illustrations from state practice where two states had agreed upon different boundary lines. Moreover, the possibility of there being different boundary lines is expressly recognised by the international court in its decision in the Jan Mayen case where it rejected the proposition that the boundary
between the shelf and the zone necessarily had to follow the same course. It held that the boundary lines in that particular case did follow the same course, but not that they had to do so, and in that respect I would draw your attention in passing to the report of the Conciliation Commission in the earlier Jan Mayen matter between Iceland and Norway. The Conciliation Commission there did indeed propose a different line for fisheries resources from the line for the continental shelf.

So it is not imperative that the two have to follow the same course. That is also a factor that shows that the exclusive economic zone has not as it were swallowed up the continental shelf in the area within 200 nautical miles of the coast.

One might think that that proposition was self-evident; if those who had drafted the Law of the Sea Convention had intended that the continental shelf regime which had existed for several decades was going to be absorbed into the exclusive economic zone those chose a jolly odd set of words to give expression to that. The way in which the provisions of Part 5 are Part 6 of the Convention are set out is itself contrary and strongly contrary to the suggestion that the zone somehow swallows up the Shelf.

But if there is any doubt about the matter it is we say resolved by the decision of the international court in the Libya/Malta case where the Court expressly denied that the concept of the continental shelf had been absorbed by that of the exclusive economic zone, and went on to say "although the institutions of the continental shelf and the exclusive economic zone are different and distinct the rights which the exclusive economic zone entails over the seabed of the zone are defined by reference to the regime laid down for the continental shelf".

Mr President, it is true that neither Libya/Malta nor any of the other cases was dealing with the situation that we have here, where one state claims continental shelf rights over a particular area beyond 200 miles from its
shores and another state claims that it has exclusive economic zone rights, and because it has exclusive economic zone rights over that area it also has continental shelf rights of the area.

4.00

In a situation of that kind Barbados maintains amongst other things that the exclusive economic zone regime must prevail. That is the only part of Barbados' argument I am dealing with here. I quite accept that they also have arguments in relation to where the continental shelf boundary would be drawn in any event, but one part of their case is this is a sector within 200 miles of our coast and outside the 200 mile limit of Trinidad and Tobago, therefore it must be our exclusive economic zone, and we accept that. And if it must be our exclusive economic zone, Barbados goes on to say, then for that reason alone it cannot be the Continental Shelf of Trinidad and Tobago. It is that second limb in the reasoning that we say is faulty, and there are several reasons why we say it simply cannot be right.

The first is, that as Professor Crawford has made clear, it amounts to reinstating a rigid adherence to equidistance as the basis for delimitation of the continental shelf, which is precisely what was rejected in the North Sea Continental Shelf case and rejected in relation to the type of concave coastline that one has here, albeit that in North Sea Continental Shelf case there was no prospect of an extended continental shelf and one was dealing with a concave continuous land mass rather than a series of islands arranged in a concave pattern leading into a continuous land mass.

The basic principle is the same. What they say on that side of the room is never mind the North Sea Continental Shelf case, when you get to a situation like this you are back to rigid equidistance as a matter of law and you cannot depart from it in any circumstances.

Secondly we say that Barbados' argument amounts to turning Article 56 of the Law of the Sea Convention on its
head. Instead of exclusive economic zone rights in the seabed and subsoil having to be exercised in accordance with continental shelf rights, which is what the Article says, continental shelf rights would only be able to exist at all where there were exclusive economic zone rights with which they were compatible. That is an extraordinary 180 degree turn in the proper meaning of that provision.

To try and support it Barbados makes two points. First of all it says "in accordance with" is not the same thing as "subject to". That is a fascinating proposition. Suppose that one had a statement in a treaty or for that matter in a statute that said that particular conduct had to be in accordance with law. Does that mean that it could be in accordance with law but not subject to the law? It simply does not make sense linguistically or logically. Barbados' interpretation of Article 56.3 renders the formula in that provision essentially meaningless.

They also make the point that Article 56.3 is about the exercise of rights, not their existence, but that is precisely our point, Mr President. We say that under Article 56 it is possible for rights in the seabed and subsoil to exist under both regimes, and to vest in two separate states, but it accords priority to one set of those rights, rights under the continental shelf regime, as Mr Evans points out in his 1993 article.

The third reason why Barbados' interpretation cannot be correct in our submission is that it would involve a deprivation of prior rights, it would involve precisely what Professor Reisman said there was a strong presumption against, because continental shelf rights have existed, whether claimed or not, for several decades before the arrival on the scene of the exclusive economic zone. Moreover continental shelf rights were not confined to 200 nautical miles from the shore of the coastal state to which they adhered. Therefore immediately prior to the EEZ becoming part of customary international law it would have been perfectly possible for state A to have had
continental shelf sovereign rights over an area of the continental shelf at let us say 230 nautical miles from its coast, but still 200 nautical miles from the coast of state B, its neighbour.

On Barbados' reasoning, once the exclusive economic zone becomes part of customary international law state B acquires not sovereign rights over that area but the capacity for sovereign rights over that area, because, unlike the shelf rights under the exclusive economic zone, they do have to be claimed. They come into existence only on the declaration by the coastal state. That would mean that, once the exclusive economic zone regime became part of international law, State A's existing continental shelf rights either are abrogated at once by the mere potential for State B to claim exclusive economic zone rights in the same area, or they become subject to some kind of right of override on the part of State B, which can be exercised at will when it chooses to proclaim its EEZ. Of course, Professor Reisman is going to tell you in the second round that Greenwood is presuming what he has to presume. He is assuming that the continental shelf rights there pertain to Trinidad and Tobago in the first place, but that is what this arbitration is all about. Up to a point that is right and that is precisely the issue that Professor Crawford is addressing. But Barbados cannot get away from the fact that one limb of its argument is that the creation of the exclusive economic zone and its declaration by Barbados in the 1978 Act automatically ensures that Trinidad and Tobago cannot have continental shelf rights beyond that 200 nautical miles point from the coast of Trinidad and Tobago. We say that that is contrary to principle for various reasons that I have set out.

One last comment before I conclude. It is well established that, if there is a single maritime boundary, then it is much easier to deal with rights in the seabed and subsoil. There is no question about that. That is why single maritime boundaries have been popular. But the
fact that it is easier to do it this way does not mean
that it is impossible to do it in any other form. For
many years before the exclusive economic zone came into
existence you had rights in the water column which were
res communis, which could be exercised by anyone because
the water column was classified as high seas. Yet below
that you had the continental shelf rights pertaining to
the coastal state. It is the very essence of the Truman
Proclamation. If we claim rights to the seabed, this does
not affect the water column. That might have been a bit
messy, but it worked perfectly well. For the same reason
with the guidance provided by article 56.3, we say that
the coincidence of exclusive economic zone rights in State
A and continental shelf rights in State B is capable of
working. That, we say, is precisely what you have in this
part of the Atlantic sector.

Mr President, that concludes the submissions I wanted
to make on this short and discrete point. I wonder
whether this would be a convenient moment to stop for
coffee.

THE PRESIDENT: Yes.

PROFESSOR LOWE: Just to make sure that I have understood the
position, if it were the case that the EEZ at one stage
overlaps the continental shelf at another, which state
would have the sovereign right to license the exploitation
of the resources of the seabed in the area of overlap?

PROFESSOR GREENWOOD: To the extent that that is regulated by
the continental shelf regime, it would be the state that
had the continental shelf rights in that area, not the
state that had the exclusive economic zone rights. That,
in our submission, is the natural consequence of article
56, paragraph 3.

PROFESSOR LOWE: The fact that the EEZ provision also gives
sovereign rights over the natural resources of the bed of
the EEZ is displaced by the existence of the continental
shelf rights.

PROFESSOR GREENWOOD: It is not displaced, Mr President, rather
the exercise of the rights of the EEZ in respect of the
seabed and subsoil must in accordance with the provisions of the continental shelf regime. If the continental shelf regime vests in sovereign rights in a different state and it is only in that case that article 56.3 is important, then it would be the continental shelf regime which prevails and not the EEZ.

PROFESSOR LOWE: Thank you.

THE PRESIDENT: We will stand adjourned until 4.25.

(Short Adjournment)

THE PRESIDENT: Professor Crawford, please.

PROFESSOR CRAWFORD: Mr President, members of the Tribunal, in this final presentation I will deal with the Trinidad and Tobago claim to a continental shelf to the outer edge of the continental margin. Barbados has produced an array of arguments against this claim. You have no jurisdiction over it. It is inadmissible because there was no exchange of views. It interferes with the rights of the Annex II Commission to determine the outer edge of the continental shelf in accordance with Article 76. It creates intolerable conflict between the rights of the water column state and those of the shelf state. It is unprecedented. It is subversive. It will result in cartographic fantasies even more extensive than those we have so far had. That is the array of arguments that stands between this Tribunal and the weekend.

Before turning to this array of arguments, there are two observations of fact to make and three observations about the character of the continental shelf under modern international law.

First of all, as to fact. The parties agree that in the relevant area there is an outer continental shelf of approximately the dimensions shown. It is not surprising so relatively close to a major continent with very substantial rivers that you would get an outer continental shelf of a sedimentary kind such as this. Similar features exist in the Gulf of Guinea where there was a very similar river system. It is intuitively plausible that there is outer continental shelf and both parties
have depicted it in broadly the same way.

4.30

The second matter of fact concerns the point which Mr Volterra made at considerable length in his presentation about Barbados' preparations for a presentation to the Annex II Commission. This is a new form of effectivité, but this case continues to bring up new things. He asserts, on the basis of what evidence is entirely unclear, that Trinidad and Tobago is making no such preparations and that this means that Trinidad and Tobago is already resigned to not having an outer continental shelf. Indeed, I think that he actually added this to his list of cases of estoppel. In fact, Trinidad and Tobago has been preparing its case, I am instructed, for the Annex II Commission, training seasons have been undertaken, an initial desktop study of the prospects have been carried out by a German scientist and former member of the commission, Professor Hymes, whose calculated lines are those that you can see on figure 7.4 of Trinidad and Tobago Counter Memorial. The outer lines with the various denominations shown in the table were based upon work that he did.

MR VOLTERRA: Mr President, I do not want to interrupt my learned friend's presentation, but I wonder if he could show us where in the pleadings of this arbitration the evidence that he has just read into the record or asserted into the record is to be found.

PROFESSOR CRAWFORD: The lines are shown on the map.

MR VOLTERRA: I was referring to the continental shelf study...

PROFESSOR CRAWFORD: Mr Volterra has made an assertion against us in relation to questions of work on the Annex II Commission. As a state, we are entitled to know what we are doing in relation to preparation and I tell you that. If the Commission wants to disregard it, you are welcome to do so.

MR VOLTERRA: Mr President, I ask to be shown where I made an assertion that Trinidad and Tobago had not undertaken any of these things rather than the fact that there is no
evidence of any of these things.

PROFESSOR CRAWFORD: An estoppel cannot be based on the absence of evidence. It has to be based on an existing fact. If all you say is that we have not produced evidence, then I accept that we have not produced evidence. That cannot be the basis for an estoppel. Consequences are sought to be drawn against us on the basis of something that we were not required to prove for the purposes of these proceedings and have not sought to do so.

MR VOLTERRA: Mr President, I must insist on the point. I made a statement that there was no evidence of any activity in relation to the CLCS that had been submitted by Trinidad and Tobago. Professor Crawford has now said that I made an assertion that there had been none, but, leaving that aside, he seeks to introduce by way of his oral presentation something as evidence which has not been submitted in this arbitration proceeding, in response to observations made by Barbados well in time for Trinidad to have submitted any evidence prior to the close of the written rounds of this proceeding. That is highly improper.

THE PRESIDENT: Mr Volterra, you will have your chance to argue next week. I suggest that we let Professor Crawford continue.

PROFESSOR CRAWFORD: In any event, let us assume for the sake of argument, and, in deference to Mr Volterra, Trinidad and Tobago is behindhand with its preparations to the Annex II Commission, let us assume that, I will not tell you that that is not the case because the weekend is approaching. Even if that is so, no consequence is to be drawn against us. I have to say that my impression, as a matter of impression, is that many states are behindhand. But to say that a state which is behindhand in its preparation to meet a deadline in 2009 has thereby acquiesced in the loss of rights, if that is what Mr Volterra said, and no doubt he can correct himself next week, is a new doctrine of international law to add to Professor Reisman's remedial delimitation theory. We can call it anticipatory
I turn to make three observations about the institution of the continental shelf. You will have noticed that Barbados uses the phrase "extended continental shelf" to describe the area which both parties agree lies more than 200 nautical miles from their coastlines. We have used the phrase "outer continental shelf" which is also used by Mr Colson in his American Journal of International Law article which is one of the relatively few useful items in the literature on the outer continental shelf in 97 American Journal at page 91. The Convention, in fact, does not use either term. For example, annex 2, article 3 has the phrase "the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles", which is absolutely accurate, but a bit of a mouthful. It does not really matter which we use. What is clear is that the Convention refers to a single institution of the continental shelf which may or may not extend beyond 200 nautical miles. It extends to the outer limits of the continental shelf as they are defined, whether those outer limits happen to fall at 10 miles, 50 miles, 250 miles or whatever.

Although from time to time one catches traces of a contrary assumption in Barbados' argument, there are not two continental shelves, outer and inner, intended and extended, so to speak, there is only one. Just as there are not two continental shelf doctrines, one old and one new, there is not the old continental shelf of 1958 and the new continental shelf of 1982. The continental shelf is a profoundly customary institution. Indeed, I would say that it is one of the distinctive new customary law institutions of the post-1945 period. It is of course expressed in the various conventions but we have seen curiously that those parts of the conventions of 1958, and we may find eventually of 1982, which are out of line with the custom give way to the custom. The custom prevails in this situation over time. The relationship between custom
and treaty is a more complex matter than is sometimes believed. For example, in 1969 the court endorsed those aspects of the 1958 Fourth Convention as custom which were reflected in the customary practice of states starting with the Truman Proclamation and rejected those which were not. Above all, the presumption of equal distance. Article 83's renvoi to international law, as referred to in article 38 of the statute of the International Court of Justice saw states, no doubt conveniently, accepting this reality rather than seeking to override it and, more generally, the 1982 Convention does not seek to override the existing customary institution of the continental shelf as it expresses any particularises it. It adds to the body of law, it does not, we submit, detract from it.

In principle, therefore, continental shelf states now have what they had from the beginning of the development of the doctrine with the Truman Proclamation and, one might add, the Gulf of Paria Treaty.

Barbados has referred to Lord Asquith's overall somewhat curious decision in the Abu Dhabi case, with the general principles of law which would occur to someone of Lord Asquith's kind of the time, with limits knowledge of the location. That may be unfair. One does not explain about the decision but some of the expressions of it now strike one as dated. He had doubts about when the continental shelf became customary, but, in fact, the International Court referred right back to the Truman Proclamation and no one denies that in the early fifties, with the work of the International Law Commission and in other ways, the customary law of the continental shelf became fairly firmly entrenched. Hence, Professor Greenwood's argument about its prior character.

To summarise, the continental shelf of the Truman Proclamation always had in it, so to speak, to become what it has become. The 1982 Convention defines the outer limit of the continental shelf, a definition previously singularly lacking, and creates a mechanism for determining their extent. It does not constitute the body
of rights which go to make up the continental shelf pertinent, as the court said in 1969, ipso jure to the coastal state without need for proclamation, without need for occupation, without need for activity. And does so out to the outer limits of the continental shelf without reference to a 200 nautical miles line.

That is my first observation about the continental shelf.

My second observation is that there has been from the Truman Proclamation onwards a significant legal difference between the regime of the continental shelf and the regime of the water column. There still is. The continental shelf is a zone of exclusive rights, by definition. The EEZ, despite its title, is a distinct and overlying legal regime, a specific legal regime, to use the language of the Convention, language which is protean but very carefully calculated. No state has an obligation to determine the sustainable yield of the continental shelf. A wise state might leave the oil in the ground for 100 years on the basis that then it will be rich beyond the images of Cereuses.

The focus on part four of the EEZ, to pick up the gist of the question asked by Professor Lowe before the break is on living natural resources. It is true, and it might be thought to be an example of sloppy legal craftsmanship that there is an overlap between them, but the gist of the EEZ was always on living natural resources. It also has the effect for those states which have no shelf or whose shelf stops within 200 nautical miles of extending shelf rights out to 200 nautical miles as part of the continental shelf. What it does not do and what in light of what I have previously said about the character of the continental shelf, it would have had to do, expressis verbis, for it to be done is override the continental shelf. That is what it does not do.

We can talk about the meaning of article 56. It is plainly not an attempt to treat the exclusive economic zone as having any form of priority. Of course, as
between states parties to the treaty, it could have been given priority. It was not.

Part 5 of the Convention on the Continental Shelf is concerned above all with hydrocarbons and minerals, the stuff of the shelf, you might call it. It is true that there are minor areas of overlap. I am told that there is such a thing as the Mexican jumping crab and that there is some uncertainty about whether it fell within the regime of the continental shelf. There are things like marine worms. Perhaps we have to determine the total allowable catch of marine worms. But, broadly speaking, the gist of the two institutions is distinct.

I move from my observations to questions of jurisdiction. Barbados says that you have no jurisdiction over the Trinidad and Tobago outer continental shelf claim for four reasons. It says that the claim is a new one, which was not put forward until the eleventh hour. It says that there has never been an exchange of views on it. It says that to decide it involves deciding on the right of a third party, the international community, as well as infringing on the jurisdiction of the Annex II Commission. It says that Trinidad and Tobago can have no rights outside 200 nautical miles from its own coast and within 200 nautical miles of Barbados' coast because Barbados' rights trump.

The fourth argument is not an argument of jurisdiction, it is not an argument of admissibility, it is an argument of merits. It may be that you decide and, if you do it will be for the first time that anyone has decided, that that argument prevails. That will be an argument on the merits. It will not be an argument of inadmissibility. But let me deal with the first three arguments which do go to jurisdiction or admissibility.

First of all jurisdiction. The first point to make here is that Barbados had notice that we claimed a line out to the outer edge of the continental shelf. There are a number of indications of this. The first of course was
the 1990 Convention with Venezuela, which is explicitly such a line in relation to that boundary, explicitly, and I took you to the relevant provision the other day. Why would we claim less in relation to our northern boundary.

The second is the discussions that occurred during the negotiations, and I refer in particular to the joint report of the first round of the negotiations on the maritime boundary, annex volume 2, part 1 tab 1 at page 6; and the relevant passage reads:

"Trinidad and Tobago is looking at a single all purpose delimitation line for the seabed and subsoil in the adjacent waters. Trinidad and Tobago", it goes on, "is not looking to stop at 200 nautical miles but to extend its seabed jurisdiction up to the maximum limit of 350 nautical miles or 100 nautical miles from the 2,500 metre isobath which is subject to approval by the Commission on the Limits of the Continental Shelf". That is the first round and it could not be clearer.

Trinidad and Tobago never resiled from this position which it repeated in later rounds. For example there was a controversy during the fifth round. Barbados sought to get Trinidad and Tobago to withdraw its claim to the outer continental shelf. Trinidad and Tobago did not confirm that it would withdraw. The joint report states (Barbados Reply volume 3 appendix 35 page 567) "Barbados expressed its hope that Trinidad and Tobago could respond to this question at the next round". So the position was that Trinidad and Tobago made it crystal clear at the fist round that it was seeking in relation to Barbados precisely what it had agreed in relation to Venezuela, and despite being pressured by Barbados it never withdrew that claim.

I should say that even if we had not made the claim it would still have been within the scope of the claim submitted to arbitration - not as a counterclaim because one does not make counterclaims to maritime boundaries, but simply because it was part of the dispute about where the boundary was. It is within the scope of the existing
dispute and Barbados knew it.

I turn to the question of admissibility. I am going to say for the purposes of argument, though I believe it is only partly true, that there was no full exchange of views on our outer continental shelf claim during the negotiations. Let us accept that for the sake of argument. Of course they were known about because we had already made it clear at the beginning of the negotiations that we had such a claim. It is true, and Barbados makes a lot of it, that the claim line we initially put forward did not extend to the outer continental shelf. But that did not involve any withdrawal, we were pressed to say that it did and we declined to do so. There were some discussions and they are summarised in the pleadings and you can read the discussions for yourself in the agreed form or in tedious detail as you see fit.

Even if there had been no fuller exchange of views on the outer continental shelf claim this claim is admissible for several reasons. First of all as I have already said Article 283 is one of the conditions that has to be met by the state which commences the proceedings. We did not commence the proceedings. Once the proceedings are commenced the whole of the dispute as described in the application is within the jurisdiction of the Tribunal provided that the pre conditions have been met by the state which has the burden of meeting them by reason of assuming the burden of commencing the proceedings. Article 283 is quite clear that it applies to that situation and that situation only.

The second reason which is supplementary is that in any event, even if there had been an onus on us to ensure that there had been an exchange of views before bringing this claim forward as respondent in reply to the Barbados claim, Barbados could not argue that there had been no exchange of views because it cut off the negotiations. We were perfectly willing to go on with the negotiations; it cut them off and it takes the consequences of having done so. For those reasons the claim is admissible.
I move to the question of the relationship between your jurisdiction and of the Annex II Commission. Barbados says that the Annex II Commission is the authority body in these respects and it has the quite remarkable power through making the recommendation to create a situation of an outer continental shelf line, which is opposable ergo omnis, a very remarkable phenomenon which goes beyond the normal authority of judicatory bodies by reason of Article 76 in Annex II. But of course the Annex II Commission's mandate is categorically clear; it is to delimit the outer edge of the continental shelf, it is to work out precisely where applying the formulas of the Convention the outer shelf is to be located. It is delimiting the domain of states as against the domain of the deep seabed. It is not dealing with delimitation inter se, and that is categorically clear from Article 76 paragraph 10, which says the provisions of this Article are without prejudice to the question of delimitation of the continental shelf between states with opposite or adjacent coasts. That delimitation question is separate from and the provisions of this Article dealing with the Commission are without prejudice to the issue of delimitation.

I refer also to Annex II Article 9; the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between states with opposite or adjacent coasts. The Commission cannot determine for itself, because if it could do so it would have to delimit laterally inter se. The Commission cannot determine for itself which is the coastal state in respect of a particular segment of outer continental shelf, but it may well matter as Colson points out. It can matter quite a lot depending on the configuration, which is the relevant coastal state. The Commission say to the states you sort that out for yourself and do it first, and as Colson points out at 93-94 of his article the Commission's rules actually allow for this to happen, for example by allowing delays while it is worked out. The Commission's
rules actually say "Competence with respect to matters which may arise in connection with the establishment of the limits inter se of the continental shelf rests with states". That is a summary of rule 46 in annex 1 of the rules of procedure of the Commission.

It is true, and Barbados relies upon the decision of the Court of Arbitration in the St Pierre and Miquelon case which stopped the mushroom stalk at 200 miles, and you can see the delimitation that it made. The Tribunal did this by saying that any decision by this court recognising or rejecting any rights of the parties over a continental shelf beyond 200 nautical miles would constitute a pronouncement involving a delimitation not between the parties but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international seabed area that has been declared to be the common heritage of mankind, and it stopped there. But it expressly left open the question whether and what would happen after that point. That is paragraph 78-79 of the decision. You can see now why that is plainly wrong. The end of the mushroom stalk is within 149 nautical miles of Sable island which is part of Canada, part of the Province of Nova Scotia; and the blue arc is the Canadian exclusive economic zone. The end of the mushroom stalk is well within the Canadian Continental Shelf, and the Annex II Commission has no jurisdiction over that area, its jurisdiction is limited to cases where the shelf extends 200 miles beyond the coast. The question of delimitation would have to be completed as between France and Canada before the continental shelf could perform its function. Until then it would not know with respect to the relevant arc which the coastal state was and having regard to the formulas it has to apply it needs to know. The point is, as Colson said, that when you get to the 200 mile line you may be 200 miles from one state but more or less than 200 miles from another state, and that is indeed the case between Canada and the United States resulting from the
Gulf of Maine decision, the point where the boundary stops in the Gulf of Maine case is closer to Canada than it is to the United States.

This gives rise to discussions. There is an ongoing discussion - and I hope Mr Volterra will forgive me but I understand that there is an ongoing discussion between Canada and France as to what is to happen next. I do not know but it would not surprise me if at some point there is an ongoing discussion between the United States and Canada as to what is to happen with the end of the boundary which is 188 miles from the nearest point on the Canadian coast and 200 miles from the nearest point on the United States coast. These issues are going to arise and the idea that the 1982 Convention imposes a single solution to all of them by virtue of the generalised regime and a tacit provision is, with respect, unacceptable. If the parties to the 1982 Convention wanted to solve the problem, they could have. If they had wanted to create a single all-embracing institution, a new institution which would override the existing corpus of customary international law, of course, inter partes, they could have done it - and they did not. Whatever meaning you might give to article 56, that is clear. There will be discussion next week about what meaning to give, but the meaning that you cannot give is these provisions on the Exclusive Economic Zone override rights that states would otherwise have over the continental shelf.

With great respect to it, the St Pierre and Miquelon Tribunal ducked the issue. They put it in the "to hard" basket. I am sure that this Tribunal will see that there is a substantive legal problem to be addressed.

The only Tribunal which has actually delimited as between two adjacent territorial entities beyond 200 nautical miles in this way is the Newfoundland and Nova Scotia Tribunal. You will see the delimitation from the award of the Tribunal there. The blue line is the approximate location of the 200 nautical miles line. You will notice that the Tribunal's boundary just goes past
the end of the mushroom stalk, but that is a different story. We will not talk about it now.

What is perhaps interesting is the relationship of that line with the claims of the parties which we can see very briefly, but, in any event, that line shows the depiction which was not in dispute between the parties as to the outer edge of the Canadian continental shelf and the Tribunal delimited the line by an arrow. Of course, the outer edge for Annex II purposes will be beyond that without going so far. Our submission is that that is the correct way to do it. This Tribunal cannot and should not determine the outer edge of the continental shelf any more than you can determine the tri-point.

The conclusion, therefore, is that you can determine the boundary inter se between these two states beyond 200 nautical miles of the coasts of either of them, without impinging on the task of the Annex II Commission. Indeed, you will be facilitating that task because it cannot be performed until the commission knows which is the coastal state in respect of the relevant area.

I imagine the Tribunal may be slightly concerned that we have provided only limited information as to the geomorphology of the outer edge of the continental shelf and I think less information than the Nova Scotia and Newfoundland Tribunal had, and it may, therefore, be appropriate in the context of drawing a line to indicate that it is entirely without prejudice, the question of the location of the outer edge, and to have the line fall some way short of where it might be. That is precisely what the parties did in the 1990 Agreement with an appropriate proviso for the extension of the line in the event that further particularisation was achieved, a solution which has been adopted in some of the other bilateral delimitations of outer continental shelf that have been concluded. I should say that those treaties as of 2003 are very helpfully reviewed by Colson.

I turn to the merits of the outer continental shelf claim of Trinidad and Tobago. Here, of course, we have to
distinguish what I am going to call the intermediary zone and the zone of pure continental shelf. There is an area where Barbados has exclusive economic zone rights by reason of its distance from the coast. The area is less than 200 nautical miles from Barbados and it, therefore, has the rights under part 4 of the Treaty. Nonetheless, we say that that area was, and from the inauguration of the principle of the continental shelf always has been, the continental shelf of Trinidad and Tobago or one to which Trinidad and Tobago had a valid claim. Those claims have to be delimited both laterally and in terms of the distinction between the water column and the seabed. It is, if you like, a sort of strata title and strata title delimitation is a perfectly conceivable idea. Barbados seems to think that you can only draw lines in one direction, but there are many situations in which different states have rights over the same bit of territory. But what? Actually, Barbados does not take that position. Barbados wants to have rights, at least behind the hand, as Professor Greenwood put it, over our territory in terms of the access rights that it is claiming. It wants access rights over our territory if you will not give it more. Those are rights which would be rights in relation to a territory of another which used to be a perfectly respected chapter in the old international law books. It has tended to disappear but the institution has not disappeared. Just because we tend to think of states as normally territorially delimited in the vertical plain does not mean that they are always so.

Rights can exist and be adjusted as between two states in relation to the same area of the globe. It is a mistake to think that just because a general institution is created by a multilateral treaty that that institution overrides and displaces all particular rights and obligations that relate to particular pieces of territory. That was the proposition for which Professor Reisman contended the other day. That proposition I think is correct as a matter of general law. What was incorrect
was the idea that you could acquire such a right by virtue of an asserted breach of an obligation of a state previously having it. That is to say the territory could change hands because of a breach of an obligation. A very curious idea, as well, of course, as all the factual underpinnings which were necessary in order to get to that situation.

But its basic proposition that rights could survive a transition of regimes and still be valid is plainly correct. It is what conservative legal systems do. In that respect, international law is a conservative legal system.

Our primary submission then is that the continental shelf is the prior institution and that nothing in the 1982 Convention takes away our existing vested rights over the continental shelf existing prior to the proclamations of the EEZ of both parties. Sir Elihu tried to bridge the gap by postulating an earlier customary exclusive economic zone but these parties proclaimed their exclusive economic zone and acted on the basis of those proclamations. That continental shelf existed prior to the entry into force of UNCLOS. Nothing in UNCLOS overrides it. It still exists.

Barbados argues that the France-Dominica agreement of 1987 shows that there can be no rights beyond 200 nautical miles. It is interesting that Barbados likes regional implications when they suit it. It is only the unfavourable regional implications that they do not like. But it points to the fact, which is true, of course, and which we depicted when we showed you the delimitations in the region in our Counter Memorial, something the applicant had singularly failed to do, it is true that the parties closed the 200 mile corridor of Dominica and that the area beyond it is French continental shelf. France goes around the corridor at the end of the both sides.

It is also true, and you will see this in the account given by Dundas, which I referred to earlier, that Dominica proposed to keep going beyond 200 nautical miles and was told by Monsieur Gilbert Guillaume, as he then
was, "You can't do that". Well, when you are told by
Monsieur Gilbert Guillaume that you cannot do something,
it tends to be true and the claim was dropped promptly.
From this event, Barbados draws the inference that it was
accepted that the end of 200 miles was the end of any
possibility of rights of Dominica. Well, you can read the
travaux for yourself, but it seems to us that what
Dominica was referring to was the possibility that it
would get further high-seas rights beyond 200 miles in a
situation in which someone held them. France said, "Don't
be silly, this is where you stop". There is no mention in
the travaux of outer continental shelf and there is no
indication that at the time these discussions were
occurring anyone had the bright idea that Mr Parsons has
now had that there might be outer continental shelf out so
far.

In its additional materials Barbados produced a
report by Mr Parsons, we accept that he is a qualified
expert and the report is interesting, it argues not that
there is any sedimentary continental shelf, sedimentary
thickness being the first of the alternative criteria for
determination of the existence of a continental shelf, but
the tectonic activity in this area has created a form of a
crust, which counts as outer continental shelf within the
meaning of the Convention. These are five of the
transverse sections of the seabed which are in the Parsons
report and you can see the location of each of them on the
coloured graphic on the map.

For our purposes, we do not propose to debate this.
It seems to us entirely debatable and it is an open
question. It is not one that this Tribunal needs to
decide. We would note that the Parsons report was
evidently prepared in haste. It is a desktop study. Mr
Parsons, whose qualifications we fully accept, notes that
there was not time to look at the sedimentary thickness
issue which would need to be done in a proper study.

I would note that the depths of which the outer
continental shelf, if that is what it is, exists in this
area are way beyond anything that is currently exploitable. I am told that the deepest currently functioning oil installation is 3,000 metres in the Gulf of Mexico. We are dealing with water here which is much deeper than that for present purposes. It is non exploitable. Whether it could contain hydrocarbons is a very interesting question to do with the science of plate tectonics which I do not propose to enter into. What I think is quite clear is that just as we had no notice of the Parsons report until September, the parties to the Dominica-France agreement some 20 years ago certainly had no idea that this was a possibility. There is no indication in the travaux of the agreement that the line stopped because of some a priori rule of international law that you cannot go within 200 nautical miles of another state. It stopped because no one thought that there would be any further that Dominica could properly go. And that is the end of it.

It is unclear what the Commission will do, but we are not dealing in the practical world of actual resources and we can leave that aspect of the Dominica-France agreement to look after itself.

Barbados tries to defeat our claim in the intermediate zone by a series of catastrophe scenarios. You will have noticed already that there are sharp distinctions in Barbados' legal theories between what happens at one end of the line and what happens at the other. The doctrine of equidistance is much more displaceable at one end of the line than the other. The principle of estoppel seems to apply variably. It applies very well in the Atlantic, but in the Caribbean it does not apply so well. It is an interesting feature of, as it were, the differential aspect of legal rules in relation to different situations.

Well, these extreme scenarios should be taken with a degree of scepticism. It is true that one can dream up problems that could theoretically arise when sitting exam questions for one's students. The reality is that the EEZ
is about the living natural resources of the 200 mile zone. The continental shelf is about hydrocarbons and we do not have to worry too much about andalific* worms.

Moreover, the suggestion that this claim is wholly unprecedented is untrue. We set out in our pleadings examples where different continental shelf boundary lines were drawn or different regimes were agreed for the continental shelf as compared with the exclusive economic zone. Of course, Barbados will say that these were special agreements and, therefore, deflected or departed from the general rule, but that is circular. The general rule is postulated and you need to look to see whether there are situations in which states after negotiation depart from the principle of a single maritime boundary. The answer is that there are such situations and one can see why. For example, as between the United Kingdom and the Faroes, you had an acknowledgement by the United Kingdom that the Faroes was exceptionally dependent upon fisheries, but the United Kingdom took the view, not unreasonably, that that acknowledgement should not have automatic results in relation to continental shelf delimitation and the agreement, therefore, makes special provision. These situations are infinitely variable in different parts of the world. The idea of Barbados that you take a part 4 doctrine of the exclusive economic zone and impose it as a template on the variety of situations in the world is, with respect, not credible, nor is it the way that international law actually works. International law is an adjustment between general propositions and principles and the particularities of particular situations. We say that this is just another example where such an adjustment is required.

We referred to the Torres Strait Treaty between Australia and Papua New Guinea, to the Australia-Indonesia Treaty of 1997, not yet in force, to the United Kingdom-Faroes Island Agreement, which provides for different continental shelf and fisheries boundaries and a special area of joint jurisdiction. That agreement was concluded
in 1999. The details of these agreements are in paragraphs 280 to 282 of our Counter Memorial.

The situation I mentioned arising as between the United Kingdom and the Faroe Islands was also replicated in somewhat different circumstances as between Norway and Iceland in the decision or the report of the conciliation commission on the continental shelf area between Iceland and Jan Mayen of 1981. Quite enough situations have occurred, the Gulf of Maine and the examples that I have given to show that this is a practical problem. It is not a one-off situation which simply affects what has been presented as an absurd and eccentric claim by Trinidad and Tobago. It is rather a result of geographical particularities which can be replicated in different ways in different parts of the world and which this Tribunal, I say so with anticipation, should address rather than deflecting.

I come back to the question of delimitation of the outer continental shelf as between Trinidad and Tobago and Barbados after I have dealt with the area of pure continental shelf.

The principle of the natural prolongation of the continental shelf applies under international law general and under the Convention to the outer edge of the continental margin as it is now defined. There is no reason why equity changes at 200 miles. The 200 mile line has never been part of the continental shelf doctrine and it is not now. The result is that when we reach the 200 mile line from Barbados, we are then in an area in which there are high seas, the water column is high seas, the seabed is continental shelf and we have a straightforward question of delimitation.

If Barbados is right Trinidad and Tobago is excluded from that area. The area is at present of uncertain value in terms of resources, who knows, but we are talking about a delimitation that will last for centuries. We are talking about access to resources which may in the future with what technological developments who knows be of
immense value to the coastal states, and it is that opportunity, the equality of that opportunity, which Trinidad and Tobago seeks.

How do you draw the line beyond 200 miles from Trinidad and Tobago? Colson has done a very useful review of the agreement so far reached. He makes the point that there are not many of them. There has only been the one decision which was the decision of a domestic Tribunal, though with international law as its applicable law, but it may be helpful if I read the relevant passage from Colson, tab 41 in your folder, page 96. You know Mr Colson and his expertise in this field, and what he says on a subject like this should be taken seriously. In summary he says "several aspects of the limits of state practice stand out. First the coastal states concerned establish these bilateral boundaries on the assumption that the area in question was theirs to delimit as outer continental shelf without reference to the Commission" - that is the Annex II Commission. "Second these outer continental shelf boundaries generally began as demarcations between opposite coasts although in some case as the boundaries extend seawards the coasts of the neighbouring countries assume a posture of adjacency", so we are pleased to see that Mr Colson is not taken in by the Barbados theory that 200 miles away or so you are still between opposite coasts. "Third, whatever methodology the state employed to delimit the 200 nautical mile portion of the boundary was extended and thus applied to the delimitation of the outer continental shelf."

Referring to the seven treaties of which this article is a review he says: "There is no change in methodology in any of these boundaries. (4) While geological and geomorphologic factors pertaining to Article 46 criteria were clearly employed to determine the final point on some of these boundaries there is no evidence that such considerations figured in the delimitation of the maritime boundary itself.

"This limited state practice probably has no
particular legal relevance for future delimitations at the outer continental shelf between neighbouring states. Nonetheless as discussed below it suggests that states are mindful of the application of well known principles and methods in this context, but with an eye to the criteria of Article 76 in some circumstances."

I read the last paragraph because, if I may say so with respect our opponents, as Mr Wordsworth has shown you, have sometimes left off passages that are perhaps not as helpful as earlier passages from the same source. I give you the entire relevant text.

In the present case, and I should say the Newfoundland/Nova Scotia boundary simply continued on the same azimuth beyond the 200 mile line in the same way, so there is no counter example in every case where outer continental shelf has been delimited between adjacent states or states which are by now in a situation of lateral boundaries, it has been done simply by the extension of the boundary, and one would be surprised if it were otherwise, there being no new equity suddenly popping up at 200 nautical miles.

It follows that the Trinidad and Tobago claim for an azimuth of 88 degrees on the grounds I explained to you earlier today in our view should be extended beyond 200 miles from the Trinidad and Tobago baseline through the intermediate zone on the same azimuth and out to the outer edge of the continental shelf, measured or shown conservatively with an arrow leaving to the Annex II Commission its eventual task as contemplated by the Convention.

There is no reason to think here any more than there was in the Newfoundland/Nova Scotia case that the boundary so extended is inequitable to either party. It will have the result when the Venezuela-Trinidad and Tobago boundary is completed of leaving to Trinidad and Tobago a modest fraction of the putative outer continental shelf. It still leaves to Barbados a very substantial fraction, but it means that each of the coastal states enjoys the
possibility of that future opportunity which with respect to this Tribunal should not decline. Accordingly that is our claim line. It is, as Mr Volterra admitted, an optically simple line. I hope as we have presented it, it is a simple line as well. Of course you can dance around it, but if you are going to dance around I hope you do so elegantly with a fan like Sir Elihu.

Mr President, members of the Tribunal, that closes the first round submissions for Trinidad and Tobago.

THE PRESIDENT: Thank you so much, Professor Crawford. May I note that the Tribunal would be appreciative if the hydrographers of the parties would meet with the hydrographer of the Tribunal Mr Gray on Monday. He arrives on Sunday. We have the impression that the hydrographers of the parties may not both be here all of next week, but we understand they will be here on Monday and perhaps Tuesday, and it might be useful if the three could meet together to discuss technical aspects of a possible delimitation. Mr Gray has certain questions in mind that I think he might usefully discuss with his fellow hydrographers.

Apart from that the Tribunal has canvassed a number of possible questions that it might put to the parties, and most of them it has put aside at least for the moment. It would be grateful for any information the parties can provide as follows, and in asking these questions on this particular segment of the exchanges we have had it should stress that the Tribunal has formed no view on any of the issues of the case.

The Tribunal would be grateful for any information the parties can provide in relation to:

(a) the locations at which Barbados flying fish vessels were apprehended by Trinidad and Tobago since 1970;

(b) the area north of the median line where flying fish are normally to be found before and after their migrations to waters south of the median line;

(c) The area south of the median line where during
the appropriate seasons there are typically large concentrations of flying fish; and

(d) The areas south of the median line where Barbadian fisherfolk have since 1970 made most of their catches of flying fish.

Mr Ratliff will email this text to you shortly, so you need not trouble to have recorded as I read it.

In the light of the further exchanges next week the Tribunal may wish to pose some further questions.

I think then we can stand adjourned this evening and we will meet on Monday morning for the second round and we look forward to hearing our colleagues from Barbados.

Thank you so much.

(Adjourned till Monday next at 10 a.m.)