

International Dispute Resolution Centre
Fleet Street
London, England

Friday, 21st October, 2005

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

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In the matter of an arbitration between

BARBADOS

and

THE REPUBLIC OF TRINIDAD AND TOBAGO

- - - - -

Before:

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

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PROCEEDINGS - DAY FOUR

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ATTENDANCES

Barbados was represented by:

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

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

Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
Professor Michael Reisman, Counsel and Advocate

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

Sir Henry Forde QC, Counsel and Advocate

Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins

Mr Adrian Cummins QC, Counsel

Dr David Berry, Counsel

Ms Megan Addis, Counsel, Latham & Watkins

Ms Teresa Marshall, Permanent Secretary, Foreign Affairs

Mr Edwin Pollard, High Commissioner for Barbados in London

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

Mr Francois Jackman, Senior Foreign Services Officer

Mr Tyronne Brathwaite, Foreign Services Officer

Mr Christopher Parker, Fisheries Biologist, Fisheries Division

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

Mr Anderson Kinch

Mr Oscar Price, Information Technology Support, Latham &
Watkins

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

Mr Dick Gent, UK Hydrographic Office

Dr Robin Cleverly, UK Hydrographic Office.

Ms Michelle Pratley, Assistant, Latham & Watkins

Ms Claudina Vranken, Assistant, Latham & Watkins

The Republic of Trinidad and Tobago was represented by:

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

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

1 THE PRESIDENT: Good morning. Now we proceed with Professor
2 Crawford's argument.

3 MR WORDSWORTH: The Tribunal is not so fortunate, Mr President.
4

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

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

16 I just want to take you to one more short extract
17 from the Bair thesis, which is at tab 47, page 55. With a
18 bit of luck this will be open in front of you now. Just
19 as we are running through the Judges' folder, just to draw
20 your attention, this is a passage which is relevant to
21 Barbados' catastrophic consequences claim. You will see
22 half way down the page there that Annette Bair says, "At
23 present one cannot yet isolate a true fishing village in
24 Barbados. Fishing is still a too insecure occupation to
25 encourage large numbers of men to make it their sole means
26 of livelihood. Furthermore, it is doubtful whether a
27 sizeable community could be supported by fishing alone. I
28 just draw your attention to that to make the point that in
29 1962, at least, the flying fish fishery was not of such
30 immense economic importance to Barbados.

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

38 "Barbadian commercial fishermen used sail boats until the

1 mid 1950s when they converted to diesel-powered vessels.
2 Flying fish boats remained relatively small, less than 40
3 feet in length and made exclusive one-day trips to fishing
4 grounds within 40 miles of Barbados until the late 1970s".

5 That is the position, until the late 1970s, Barbados'
6 flying fish fishing vessels never get more than 40 miles
7 from the coast of Barbados. As you can see from that
8 graphic, that is still way off the area that Barbados now
9 claims to the south of the median line.

10 Just continuing on with this extract from the
11 abstract, "At this time 36 to 60 foot vessels designed to
12 stay at sea for up to ten days began fishing the south
13 Eastern Caribbean from a base in Barbados. Most of the
14 geographic expansion was southwards to the north
15 equatorial current waters between Tobago and Grenada".
16 There you have it. There is the expansion from the late
17 1970s to the area that Barbados now claims was being
18 fished for centuries.

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

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

1 1986.

2 Then in the next tab if the judges' folder, tab 49,
3 we have Wayne Hunte and Hazel Oxenford writing about the
4 economics of boat size in the Barbados fishery, an
5 esoteric subject. Again this is not an exhibit put before
6 you by Barbados any more than the previous exhibit was put
7 before you by Barbados. Again it is odd that Barbados
8 should not put this before you because it is by two of
9 their experts Hunte and Oxenford, so there can be no
10 question as to their credibility. At the bottom of the
11 page Hunte and Oxenford recite really the history of the
12 development of the Barbadian flying fish fishing fleet,
13 and if I can ask you to turn over the page to a couple of
14 passages. At the top of the page they describe the day
15 boats of the 1970s and these are the day boats which
16 fished out to 40 miles from Barbados, and then they
17 describe the arrival of the ice boats. "Between 1978 and
18 1980 two long range vessels, ice boats, of eight ton
19 capacity were introduced into the Barbados pelagic fleet
20 and by 1984 there were 34 in operation. 59 ice boats are
21 currently fishing and 75 are registered for the 1986-7
22 fishing season". So once the ice boats arrived in the
23 late 1970s there is a complete explosion and the ice boats
24 essentially take over the fleet.

25 A little further down on the page you will see the
26 highlighted passage, one third of the way down. "These
27 ice boats employ the same fishing techniques for catching
28 large pelagic and flying fish. It is the day boats that
29 often fish 24 hours a day and fish further afield,
30 primarily in the triangle between Tobago, Grenada and
31 Barbados," So these are the boats, this is the fleet that
32 Barbados is relying on, introduced in the very late 1970s.

33 This is the fleet that is the basis of the so called
34 traditional artisanal flying fish fishery. They continue:
35 "the current change from day boats to ice boats
36 represents the second major structural transitional
37 undergone by the Barbados pelagic fleet", the first major
38 transition being the transition from sail to motor boats

1 in the early 1950s. "The gradual increase in landings in
2 the pelagic fishery which accompanied the gradual increase
3 in average day boat size in the 1970s and the sudden
4 increase in landings accompanying the introduction of ice
5 boats is shown in figure 2. There is no need to take you
6 to figure 2, but I would like you to look at the next
7 passage, because it really describes what is happening.
8 Most countries in the Eastern Caribbean are presently
9 expanding or intend to expand their oceanic pelagic
10 fishing fleets primarily by increasing fleet size, but
11 also by changing boat type. Thus, the fisheries are
12 moving from small scale artisanal towards large-scale
13 commercial operations with considerably more capital being
14 invested in the fleets than in the past. Large scale
15 commercial fisheries catch more fish but they do so at a
16 price. Compared to small scale artisanal fisheries, they
17 employ far fewer fishermen, the capital cost of each job
18 on the fishing vessel is far greater, considerably more
19 fuel is consumed overall and considerably fewer fish are
20 harvested per tonne of fuel consumed.

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

27 10.15

28 It is worth just turning over the page. We have put
29 in another extract of Hunte and Oxenford. Half way down,
30 just to draw your attention, Hunte and Oxenford are
31 writing in 1989, I believe, and are actually drawing
32 attention to whether this is a good thing. They say,
33 "Given the above, it may be unwise to continue expanding
34 the Barbados ice boat fleet at the current rates". They
35 are thinking of this from the economic point of view as
36 well as an environmental point of view. They are
37 questioning whether this very, very rapid expansion is a
38 good thing at all.

1 If I could ask you to turn over to tab 50 in the
2 Judges' folder, this is a report by Mr Willoughby. This
3 is Mr Willoughby of the Fisheries Division, Ministry of
4 Agriculture, Food and Fisheries of Barbados. This is Mr
5 Willoughby writing in 1992 on the flying fish fishery of
6 Barbados. Again, this is in our list in our Rejoinder, it
7 is report number nine. It is yet another important report
8 by an official of the Barbadian Ministry of Agriculture
9 that has not been put in evidence by Barbados.

10 If I could ask you to turn over the page, you see it
11 is making precisely the same basic points in the
12 highlighted passages. He is describing day boats that
13 were introduced in the 1950s. Then he describes ice
14 boats. A new type of fishing vessel that was introduced
15 into the fleet in the late 1970s, of the same basic design
16 as the day boats, but longer and more powerful. Then
17 under the heading "Fishing area and land sites", he says,
18 "Day boats fish for flying fish mainly off the west and
19 southwest coast of the island between eight and 46
20 kilometres from the shore". Obviously, that is less than
21 40 miles, that is probably up to about 30 miles from the
22 shore. Ice boats tend to fish further afield as far as
23 300 kilometres from the shores". Again, the basic point,
24 prior to the late 1970s it is just day boats, it is just
25 fishing up to about 30-40 nautical miles from Barbados.
26 Subsequent to the 1970s, late 1970s I should say, the ice
27 boats arrive and suddenly Barbadians are fishing in the
28 area that they now claim.

29 I would ask you to look at one more document that
30 makes precisely these points. This is a report by
31 Christopher Parker (tab 51 of the Judges' folder). You
32 will see at the top that he is of the Ministry of
33 Agriculture and Rural Development, Fisheries Division,
34 Barbados. His report is entitled, "Developments in flying
35 fish fishery off Barbados". Again, it is a key document.

36 Bizarrely a key document that Barbados has not exhibited
37 to its Memorial or Reply. This is an interesting document
38 because it is more recent. It is 2001. This is, as it

1 were, relatively hot off the press. It was made two or
2 three years before the commencement of this litigation.
3 Section 2, at the bottom of this page, "flying fish
4 fishery and historical evolution". This is the definitive
5 history of Barbadian flying fish fishery as set out by
6 somebody from Barbados' own Fisheries Division. Turning
7 the pages, you see half down on the next page, page 2,
8 "Gear technology development". Page 3, "Fleet
9 development". Now he deals in the highlighted passage
10 with the situation in the first half of the 20th century.

11 "The vessels used in the flying fish fishery during the
12 first half of the century were small open sail boats".
13 Then he sets out what the size of those vessels were.
14 Then a little bit further down, "The boats carried no ice
15 on board to preserve the catch as the time between taking
16 the fish on board and returning to shore to sell them was
17 limited. The difficulty in manoeuvring and the
18 comparatively slow speed of the vessels together
19 effectively narrowed the fishing range to approximately
20 four to five miles from the shore.

21 So that is the situation in the first half of the
22 20th century, it is also the situation in the 19th
23 century, it is also the situation in the 18th century as
24 far as concerns any traditional artisanal flying fish
25 fishing.

26 Over the page on page 4 of the extract Mr Parker then
27 runs through the development of the fleet, and in the
28 first highlighted passage you see the vessels as they were
29 in the 1950s and 1960s, and it mentions that the motorised
30 pelagic fishing hulls of the 1950s through to the early
31 1960s were appreciably larger than the sail boat hulls
32 ranging from between 22-30 foot. He says at the bottom "
33 In addition the potential fishing range of even lowest
34 powered vessels was extended to about 12 miles from
35 shore", so we get 12 miles from shore in the 1950s and
36 1960s.

37 In the 1970s, which is the next paragraph that we
38 have highlighted, he says boat size and engine power

1 increased over the following years. In the 1970s 80 to
2 1080 HP engines became common, allowing the further
3 extension of the fishing range to 40 miles from shore, but
4 these vessels generally fished within 30 nautical miles
5 from the shore.

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

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

18 Then over the page to page 5, the first paragraph, it
19 is worth bringing your attention to the final sentence on
20 that first paragraph, "The perceived economic advantages
21 of ice boats over day boats ushered in a predictable
22 switching from day boats to ice boats in the pelagic
23 fishing fleet that has been occurring from the late 1970s
24 to the present". So ice boats essentially take over from
25 the late 1970s, early 1980s. So having reviewed this
26 evidence we submit that the position could not be
27 stronger, that the evidence could not be stronger, there
28 was no fishing by Barbadians off Tobago prior to the late
29 1970s. Barbadian fishermen had no means of getting to
30 ranges from 58 to 147 nautical miles from Barbados until
31 the very late 1970s. They had no means of storing fish on
32 board until the introduction of the ice boats in the late
33 1970s. Since the late 1970s there has been an explosion
34 in the number of ice boats, and according to Barbados'
35 Memorial apparently there are now 190 ice boats, so from
36 one or two at the end of the 1970s to 190. Hence the
37 extraordinary pressure for Barbados to try and expand into
38 an entirely new fishing area.

1 I mentioned the FAO report and I would like to take
2 you to this as well, and at the moment we are only giving
3 you a snap shot of the evidence. There is more in our
4 written pleadings, but I am taking you to what I consider
5 to be the most important, and this is the last document
6 that makes this particular point, the FAO report of 1982.

7 If you would turn to tab 52 of the bundle, this is an
8 extremely lengthy report that we have put in in full in
9 volume 2 to our Rejoinder. Over the page you will see the
10 summary and conclusions, and I do not think there is any
11 need to go into the summary and conclusions in huge detail
12 but what they do is isolate the particular difficulties
13 then facing Barbados in 1982, which were essentially under
14 1.3(iii) which are boats of unsuitable design and
15 inadequacy of types and numbers of fishing. They say that
16 since the 1960s there has been no progress towards the use
17 of more appropriate gear and better fishing techniques,
18 and overleaf you will see on page 2 of this summary they
19 set out the main components of the project then under
20 consideration, and you see under (ii) credit would be
21 provided for fully equipped offshore fishing vessels,
22 hence the modification of some of the day fishing boats to
23 carry ice and engage in offshore fishing. We do not know
24 what happened next. This is of course a document put in
25 by Trinidad and Tobago so we do not know whether that
26 credit arrived, and that assisted in the very rapid
27 expansion of the ice boat fleet.

28 If I could ask you to turn over the page to the
29 introduction, and the introduction of this report is very
30 important because it emphasises what a well researched and
31 serious report this is, and I am not suggesting one would
32 expect anything else from an FAO report. But you see the
33 genesis of the report set out in paragraph 2.1, the
34 government of Barbados has requested assistance in
35 financing the fisheries development project as part of the
36 government programme to expand fish production and improve
37 marketing. Then you see set out in the following passages
38 how there were various site visits, how there were

1 particular meetings, and then I would like to draw your
2 attention to the final paragraph which we have highlighted
3 here which relates to the final meeting. This was the
4 final meeting of the FAO people essentially with the
5 Barbadian Ministry people.

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

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

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

29 The next paragraph. "Inshore day boats varying in
30 sized from 6 to 12 metres operate in a zone not exceeding
31 30 nautical miles from shore with a crew of two and return
32 to base the same day". That is the day boat.

33 Then we have offshore vessels. These are the ice
34 boats which vary in length between 12 and 14 metres. They
35 take a crew of three and operate up to 160 miles from
36 shore where they have access to densely-populated fishing
37 areas. They stay out at sea for several days". Then I
38 have just highlighted another passage towards the end of

1 this page. "Since these vessels were introduced only
2 recently little experience exists as to the feasibility of
3 fishing during the off season".

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

30 10.30

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

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

38 Barbados' evidence to the contrary, we heard a fair

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

17 Over the page, there is an affidavit of Dennis
18 Robinson. Paragraph 3 of this affidavit, this is tab 54
19 of the Judges' folder, "I fish off the north of Tobago,
20 mainly around February, March and June. People tend to
21 fish off Tobago in November, December and January. There
22 are people who just go down there at that time. Nowhere
23 else, because they say that the fish run is better there.

24 People have fished off Tobago since before I was born and
25 those born before me talk about it, so before they were
26 born too. You see lots of other Barbadian boats when you
27 are fishing down there."

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

35 Another tiny piece of evidence that Sir Henry
36 referred us to late on Monday was the fact that Barbadians
37 taught Tobagonians how to catch and to gut fish in the
38 early 1960s. Well, what is true is that two Barbadians

1 came over to live in Tobago - to live in Tobago - in 1962
2 and, certainly, as they lived in Tobago and had married
3 local Tobagonian women, they continued to fish and they
4 did introduce certain Barbadian fishing techniques. The
5 question that obviously springs to mind is "So what!" Two
6 Barbadians came to live in Tobago and fished off Tobago.
7 That has nothing to do with a traditional artisanal
8 fishery off Tobago from Barbados.

9 Mr President, I would like to shift slightly to
10 another issue that Barbados raises, which is the
11 definition of traditional artisanal fishing. This is a
12 mild attempt, I think, to shift the goal posts by
13 Barbados. It goes absolutely nowhere, because, of course,
14 whatever the fishing is it is very, very recent. It is
15 not traditional. But they tried to persuade the tribunal
16 that it is nonetheless in some form artisanal. In its
17 Reply, Barbados referred to but did not exhibit in actual
18 fact a 1995 FAO report on Eritrea and in the margin one
19 asks, "Well, it is a bit odd to be referring to a 1995
20 report on Eritrea but not referring to and exhibiting a
21 1982 FAO report on the Barbados fishery". They also
22 referred to the Honduras-United Kingdom Treaty of 4th
23 December 2001 and also the Australia-Papua New Guinea
24 Treaty of 18th December 1978. We have put an extract of
25 this in the Judges' folder at tab 57 just for you to see
26 on page 2 at tab 57 the definition of traditional fishing
27 that Barbados is relying on. It is a third of the way
28 down. "Traditional fishing means the taking by
29 traditional inhabitants for their own or their dependants'
30 consumption or for use in the course of other traditional
31 activities of the living natural resources of the sea,
32 seabed, estuaries and coastal tide areas, including dugong
33 and turtle". How on earth could that definition assist
34 Barbados in its case? It comes nowhere near meeting that
35 definition. It is engaged in large scale commercial
36 operations, not the taking by traditional inhabitants for
37 their own or their dependants' consumption or for use in
38 other traditional activities certain species of fish."

1 Barbados also relies on the Yemen-Eritrea award,
2 which makes the point that the term "artisanal fishing"
3 does not exclude the possibility of improvements in power
4 and techniques, as long as the fishing does not become
5 large scale or industrial. But the ice boat fishing of
6 Barbados has expanded to the point where it is shifting
7 towards a large scale commercial operation. Therefore, we
8 say, that, if there is a definition in there that has to
9 be met, it is met in this case.

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

36 Overleaf, the second document that is relied on by
37 Barbados in this respect is a 2002 report by Elizabeth
38 Mohammed and Christine Chan A Shing of the Trinidad

1 Fisheries Division. "The preliminary reconstruction of
2 fishery catches and fishing effort 1908 to 2002". This is
3 all about Trinidad and Tobago. It is not about Barbados
4 at all. Nonetheless, Barbados seeks to make a great deal
5 of the extract on the second page which we have
6 highlighted where we see the authors have said,
7 "Traditionally boats from Barbados have fished in the EEZ
8 of Trinidad and Tobago primarily for flying fish and
9 associated large pelagics". Basically, Barbados says,
10 "Ha, ha, gotcha!" because the words "traditionally" is
11 used. The word "traditionally" really adds nothing
12 whatsoever. This is a very short passage under the
13 heading "Barbados' semi-industrial ice boat fleet". This
14 is the semi-industrial ice boat fleet that we know only
15 arrived on the scene in the very late 1970s and it is true
16 that, if you look back from the perspective of 2002, this
17 commercial ice boat fleet has been operating for about 20
18 years. So it may have seemed appropriate to use the word
19 "traditionally", but nothing more is to be inferred from
20 that.

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

28 There are three points to be made about the
29 catastrophic argument. The first point is that the
30 question of impacts is quite separate from the question of
31 whether there was traditionally artisanal fishing.
32 Barbados cannot use allegations as to impact besides the
33 clear fact that there was no traditional artisanal flying
34 fish fishing in this area. The Tribunal in this case is
35 concerned, to use the words of Hunte and Oxenford - I
36 stress again that these are Barbados' own experts in this
37 action ...

38 THE PRESIDENT: Could you speak a little more loudly, please?

1 MR WORDSWORTH: Of course. The Tribunal is concerned in this
2 case - to use the words of Hunte and Oxenford - with large
3 scale commercial operations by Barbadian fishermen that
4 date from at most 25 years ago.

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

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

30 I think that it is worth going to two other documents
31 which are in volume 3 of Trinidad and Tobago's Counter
32 Memorial. I would ask the Tribunal to turn these up to
33 make good the point that this is a purely self-induced
34 catastrophe. It is not a catastrophe, but, if it were
35 anything, it is entirely self-induced. Go to tab 86.
36 This is the Ministry of Foreign Affairs of Trinidad and
37 Tobago writing to Barbados the day after the 16th February
38 2004 meeting. In spite of the fact that Barbados has just

1 purported to seize this Tribunal with this case, Trinidad
2 and Tobago is writing to Barbados. I pick up from the
3 second paragraph, "The Ministry of Foreign Affairs has the
4 further honour to inform the Ministry of Foreign Affairs
5 and Foreign Trade of Barbados that in keeping with the
6 decision reached at the aforementioned meeting a Trinidad
7 and Tobago delegation will be travelling to Barbados on
8 Wednesday, February 18th to initiate discussions during
9 the period February 19 to 20 2004 for an interim fishing
10 agreement pending the conclusion of a new fishing
11 agreement between the two states. The Minister also
12 wishes to advice the Ministry of Foreign Affairs and
13 Foreign Trade of Barbados that the Trinidad and Tobago
14 delegation will be comprised as follows". So they are
15 saying "let's get on right away to agree an interim
16 agreement pending the conclusion of a new fishing
17 agreement, they set out their delegation. Over the page
18 they even set out the dates of departure. So they are
19 ready to come. They are going to come.

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

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

36 So who has brought the progress towards the agreement
37 of a new fisheries agreement to a drastic halt? it is
38 Barbados. If there were to be any catastrophe, if there

1 were to be any impact at all this is because Barbados has
2 elected not to pursue negotiations with Trinidad and
3 Tobago.

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

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

1 and we continue in that submission.

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

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

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

21 I move on to the third of the so-called core facts,
22 and this is the alleged non-exploitation by Tobago of the
23 flying fish fishery. Of course this is also a resource
24 which is of great importance to Tobago fishermen.
25 Barbados has sought to play this down, and I would like
26 you to turn back to the judges' folder now because we have
27 included two of the pieces of evidence that Barbados is
28 relying on. Tab 60 is a report of 2000 from Trinidad and
29 Tobago. If you go to the passage highlighted in yellow on
30 the third page, the final page, of this tab. This is Mr
31 Fietta who referred you to the passage, "At the present
32 time about 95 per cent of the vessels in the industry are
33 pirogues of less than nine metres powered by outboard
34 motors and involved in day fishing. The other five per
35 cent range from nine to 12 metres, with a capability of
36 carrying ice and spending three to five days at sea". The
37 first point to note there of course is that this shows
38 that Tobago does have ice boats which are fishing in this

1 area. But more important than that is to look at what is
2 being said by the FAO in context. For this I would ask
3 you to turn back one page, under state of the industry.
4 "The inshore artisanal fishery resources are considered to
5 be very heavily fished to the point of being over-
6 exploited on the offshore resources although under
7 exploited by national vessels are under some threat from
8 illegal fishing". That is how the FAO puts it.

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

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

31 Barbados is putting before you the quite bizarre idea
32 that Trinidad and Tobago should suffer and that its fleet
33 expansion as recommended by the FAO should be curtailed
34 because in actual fact Tobago's fishing fleet is more
35 truly artisanal. Because at the moment it is not over
36 expanded, Barbados says it should expand no further; we,
37 because we have got off the starting blocks slightly
38 earlier with our ice boats, should be the only ones

1 allowed to fish this resource. That makes no sense at
2 all.

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

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

27 11.00

28 Mr President, as far as concerns the three core facts
29 that have been put before you by Barbados, that is
30 essentially all we have to say. I would like to make a
31 few brief points on the issue of recognition by Barbados
32 of the rights of Trinidad and Tobago in this area. Of
33 course, that recognition is in the context of the fact
34 that traditionally Barbados never fished there, so it is
35 not surprising at all that one sees multiple instances of
36 recognition by Barbados of the extent of Trinidad and
37 Tobago's EEZ in this area. A most obvious instance of
38 that recognition is the 1990 Fishing Agreement to which I

1 took you yesterday. I do not propose to take you to that
2 again. I would merely remind you that that is to be found
3 at tab 18 of this folder and of course it is one of our
4 exhibits to the Counter Memorial. Volume 2.1, tab 7.

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

11 I will just take you to a couple more documents which
12 concern the issue of arrest. There is only one document
13 relied on by Barbados as a protest against arrests by
14 Trinidad and Tobago of vessels fishing in the so-called
15 traditional artisanal fishery area. This is at tab 66 of
16 the Judges' folder. This is in response to certain
17 arrests that took place in early April 1994. The one
18 document that Barbados has found is as follows. "The High
19 Commissioner of Barbados presents its compliments to the
20 Ministry of Foreign Affairs of the Republic of Trinidad
21 and Tobago and has the honour to refer to reports of the
22 forfeiture of two Barbadian owned fishing boats by the
23 authorities of Trinidad and Tobago. The High Commission
24 wishes to express its concern at the severity of this
25 measure and wishes to open dialogue as a matter of urgency
26 with a view to resolving this and other related issues."
27 In the meantime they ask for a full report of the arrests.

28 That is not a protest against an arrest. That is
29 expressing concern about the potential forfeiture of
30 vessels as a result of their fishing illegally.

31 If I can ask you to turn back in the Judges' folder -
32 I apologise - this is tab 64 - this tells us what happened
33 next, because it is a report on a meeting between the
34 Ministry of Foreign Affairs of Trinidad and Tobago and Mr
35 Frank De Silva of the High Commission of Barbados. You
36 will see at paragraph 2 in the highlighted passages, after
37 exchanging pleasantries, "The High Commissioner then
38 proceeded to state that the purpose of this visit was to

1 mediate with a view to securing the release of the four
2 Barbadian fishing boats which had been arrested". He
3 added that, "while the majority of Barbadians agree that
4 the fishermen were properly fined, there was concern in
5 the context of the friendly relations between the two
6 countries about the forfeiture of the boats". Picking up
7 at paragraph 3, "The High Commissioner conceded that it
8 was legally permissible for the boats to be forfeited,
9 though his Government hoped that in the context of the
10 Manning Initiative and in the spirit of closer
11 collaboration, the boats would be released".

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

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

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

35 SIR ARTHUR WATTS: Mr Wordsworth, it is a very small question of
36 fact. The document at tab 64, the report of the meeting,
37 does not say by whom it was prepared. I do not mean as a
38 person, I simply mean was it prepared by the Barbadian

1 side or by someone on the Trinidad and Tobago side?

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

7 SIR ARTHUR WATTS: Thank you very much.

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

12 At tab 67 I just wanted to take you to one more
13 document. This is just expressing how Prime Minister
14 Arthur of Barbados saw matters. This is a speech that he
15 gave in December 1999. Really, it just shows how even in
16 public it has been no stage suggested by Prime Minister
17 Arthur that the arrests that were being carried out were
18 illegal so far as concerned the position of Barbados.
19 Barbados' position was that the arrests were inconsistent
20 with both friendly relations and a concept that it
21 introduced of free access. Really, Prime Minister Arthur
22 saw matters as a quid pro quo. He says, "We have had to
23 witness the arrest of Barbadian fishermen for fishing
24 illegally in Trinidadian waters." It seems to be accepted
25 that they are fishing illegally. There is no question
26 about that. "These fishermen are expected on release to
27 return to Barbados and to purchase Trinidadian goods sold
28 in Barbados which enjoy the free access to the Barbadian
29 market afforded by our regional economic arrangements.
30 The same logic that says that Barbados should open its
31 market to Trinidadian goods is a spirit of a commitment to
32 regional goods. It is the same logic to say that a
33 Barbadian fisherman should be afforded access to
34 Trinidadian waters without fear nor the thought of
35 arrest". Really, his position is that for broad political
36 reasons Barbados should be allowed to fish in waters that
37 are without any doubt Trinidadian waters. There is no
38 suggestion that these are Barbadian waters. There is no

1 suggestion that the right of arrest is not being
2 legitimately exercised by Trinidad and Tobago.

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

10 I would like you to turn to tab 68 of the Judges'
11 folder, although again I think the letter may be out of
12 order and apologies for that. There you see a letter of
13 28th May 1998 from the Permanent Secretary of Finance in
14 Barbados to the Permanent Secretary of Trinidad and
15 Tobago's Ministry of Energy and Energy Industries, where a
16 respectful request is made for approval from the Ministry
17 of Energy and Energy Industries of the Republic of
18 Trinidad and Tobago to acquire approximately 250
19 kilometres of regional two-dimensional seismic data".
20 Then it goes to explain the purpose of explaining the
21 data. At the end of the second paragraph you see that it
22 says "A base map showing the lines located is included for
23 your information". Obviously, one wonders what the base
24 map shows, because where precisely is permission being
25 asked for to shoot these seismic lines. No actual base
26 map was included with this letter. There is a small and
27 esoteric issue as to what was included with this letter.
28 The base map that was eventually sent to Trinidad and
29 Tobago is to be found at tab 69. This is a map sent by
30 fax from Conoco. This shows where the seismic lines were
31 to be drawn and you can see two seismic lines which are
32 clearly in the area now claimed by Barbados as its own.

33 For what it is worth, the map that Barbados says was
34 included with the letter of 28th May 1998 is at tab 70 and
35 I just draw your attention to that very briefly. It
36 certainly was not a map received by Trinidad and Tobago.
37 We do not see how that could possibly be the map sent with
38 the letter requesting permission to do a seismic survey

1 because it does not show where the lines to be drawn are
2 and it does not show any seismic survey of any kind.

3 Finally, on the question of the issue of
4 hydrocarbons, Mr Volterra sought to make something of the
5 fact that Barbados had protested against Trinidad and
6 Tobago's development of its hydrocarbon resources in this
7 part of the Western sector since 2003, although blocks
8 were being offered for tender by Trinidad and Tobago in
9 1996 and subsequently since then. It may be that in 2003
10 Barbados' legal advisors belatedly thought that something
11 should be done, some protest should be lodged, but it is
12 absolutely of no relevance at all to this case.

13 Mr President, members of the Tribunal, I come to my
14 conclusion which is that putting issues of abuse of
15 process to one side any party can make any extravagant
16 claim however weak, but in the face of all this
17 documentary evidence most of which emanates from Barbados'
18 own departments, in the face of the FAO report of 1982,
19 pursuant to which members of Barbados' Government agreed a
20 report that showed there was no fishing anything like as
21 far as 57 nautical miles from Barbados prior to around
22 1980, in the face of the 1990 Fishing Agreement and the
23 other instances of recognition, even if this claim is not
24 abusive, it is a claim that does not even rise to the
25 level of smoke and mirrors and it is a claim that must be
26 rejected on the facts.

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

1 one and it should be rejected.

2 Mr President, as to the merits of Barbados' Western
3 sector claim when it comes to the law, Professor Greenwood
4 is champing at the bit, but I do note that it is now
5 11.15, I have run on a little bit.

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

8 11.15

9 PROFESSOR ORREGO: Thank you. This is generally addressed to
10 the delegation of Trinidad and Tobago, not necessarily to
11 answer now, and eventually this might also benefit from a
12 comment by the delegation from Barbados. It concerns the
13 situation of utilisation of living resources under Article
14 62 of the Law of the Sea Convention. There, as you know,
15 the coastal state shall determine its capacity to harvest
16 the living resources of the exclusive economic zone. In
17 so doing it has to take into account various things, among
18 them the question whether as it says in paragraph 3, the
19 need to minimise economic dislocation in states whose
20 nationals have habitually fished in the zone etc.

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

29 This not only refers to the area around Tobago it
30 could well be in relation to the whole area of Trinidad
31 and Tobago, and I assume that there could also be some
32 interest of other states in fishing areas south or west of
33 Trinidad because of the vicinities of other coasts. I do
34 not know which are the facts but it might be interesting
35 to bring them into the discussion. We could also
36 benefit from some comment from Barbados in respect
37 particularly whether there would be in this context some
38 difference between what you have all discussed as being

1 traditional fishing rights and what the Convention refers
2 to in this context, habitually fished in the zone,
3 traditionally versus habitually, whatever that means in
4 the light of the views of the parties.

5 THE PRESIDENT: Thank you so much.

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

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

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

17 (Short adjournment)

18 THE PRESIDENT: Professor Greenwood, please.

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

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

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

36 Mr President, my purpose is to look at the legal
37 aspects of Barbados' claim in the Western sector, my
38 learned friend Mr Wordsworth having taken you through the

1 evidential basis, or rather the lack of an evidential
2 basis for that claim. But at the outset it is useful I
3 would suggest to get a sense of perspective by asking what
4 exactly is it that is claimed by Barbados.

5 If one looks at the putative median line and then
6 looks at exactly what Barbados is asking the Tribunal to
7 give it, approximately 86 per cent of the exclusive
8 economic zone and Continental Shelf that would be
9 generated by the island of Tobago as opposed to the island
10 of Trinidad. In effect this is a claim which really is
11 predatory, the term used by Professor Crawford in opening.

12 It virtually discounts the very existence of the island
13 of Tobago for the purposes of generating maritime spaces.

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

27 11.45

28 Mr President, it is not just the fishing that would
29 go under Barbados' proposal, it is everything else as
30 well. Let me remind the Tribunal, if I may, of what the
31 learned Attorney General of Barbados said in opening for
32 her country on the very first day of this hearing. The
33 extract is at tab 3 in the Judges' folder. I must
34 apologise for the fact that because of some changes I have
35 made to the order in which I am going to take points, I am
36 going to have to go in a rather more varied way through
37 the first ten tabs than I had originally intended. Ms
38 Mottley said the following, "Let me state clearly that

1 while this aspect of fisheries is crucial to a part of our
2 population, the matter which is of paramount significance
3 and importance to us as a nation is the exploitation of
4 other resources within the maritime boundaries. Indeed, I
5 refer specifically to the issue of hydrocarbon resources.

6 Our interests lie equally and perhaps even more so in
7 relation to the access and the planning of our economic
8 development on that basis". It is not only the flying
9 fish that will not be available to Tobago becoming instead
10 a resource of Barbados, the gas fields that lie to the
11 west of the island of Tobago, as soon as those fields
12 extend beyond the 12-mile territorial sea, the rights to
13 those will be Barbados' rights rather than those of
14 Trinidad and Tobago. The potential hydrocarbon resources
15 lying mainly to the north and north east of Tobago would
16 become part of the resources of Barbados. It is in
17 maritime terms, Mr President, one of the great land grabs
18 of modern history that you are being asked to perform on
19 Barbados' behalf.

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

1 and Tobago's.

2 I said that Trinidad and Tobago would be dispossessed
3 of these rights. That was certainly what we thought when
4 we read the pleadings filed by Barbados, but we began to
5 wonder, when we listened to my learned friend Professor
6 Reisman on day two - the relevant extracts from his speech
7 appear at tab 1 of today's Judges' folder - and the first
8 passage to which I would like to take you is at page 18.
9 In challenging our thesis that Barbados was seeking
10 exclusive rights, Professor Reisman said this, "Barbados
11 does not now and never has asserted an exclusive right
12 based on the traditional artisanal fishing practices of
13 its nationals. Nor certainly does it claim that this
14 right overrides or takes precedence over other putative
15 sovereign interests". Mr President, we had, I confess,
16 some difficulty understanding that proposition.
17 Continental shelf rights are exclusive. The Law of the
18 Sea Treaty Article 77, paragraph 2 says so in terms.
19 Exclusive economic zone rights are, as the term "exclusive
20 economic zone" suggests, also generally exclusive. Was
21 Professor Reisman suggesting that Barbados was changing
22 its claim and seeking something rather different from the
23 single maritime boundary that it had claimed hitherto?
24 But, if we were uncertain about this, the uncertainty was
25 then compounded half an hour later when Mr Volterra was on
26 his feet. He said this - and it appears at page 29 of the
27 transcript at tab 2 of the Judges' folder - "In relation
28 to the lines proposed by both states the proposing party
29 thus claims maritime territory for itself on one side of
30 the line and, because the claims are expressed as single
31 all-purpose boundaries, the proposing party also claims to
32 exclude the other party from that same side of the line.
33 And so Barbados is claiming for itself maritime territory
34 to the north of a single all-purpose boundary line that it
35 has proposed. As part of that claim, Barbados has also,
36 therefore, claimed that Trinidad and Tobago can enjoy no
37 sovereign rights or jurisdiction to the north of that
38 line".

1 Mr President, I have kept this map up on the screen
2 just to remind the Tribunal which line he is talking
3 about. It is not the putative median line. He is talking
4 about the line that divides the light-blue territorial sea
5 around Tobago from the pink area - the beak on the
6 predatory bird.

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

1 island of Tobago.

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

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

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

33 Some centuries ago the population of the Scilly
34 Islands used to live very largely off looting shipwrecks
35 and indeed murdering the surviving sailors very often, and
36 it is said that the Vicar of the Scilly Islands in the
37 parish church would say a prayer that went "Oh Lord, we do
38 not ask that you should wreck a ship, only that if it is

1 your will to wreck a ship you should do so off the coast
2 of the Scilly Isles that the poor islanders may have
3 sustenance therefrom". That is Barbados' third claim.

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

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

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

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

28 Ms Mottley in opening the case on the first day, tab
29 4 of your bundle, beginning at line 8. "It is in pursuit
30 of these perfectly legitimate goals that Barbados has
31 licensed the entire area of its exclusive economic zone.
32 What licences has Barbados given south of the median line?

33 We look forward to some information about that in the
34 second round, because we have not had it so far. The
35 reality is that Barbados' licence, what it regards as its
36 EEZ further north, but that it has licensed anything in
37 the south. So there is no historical claim to these
38 waters and to the Shelf. No, it is fish and fish only.

1 That has been made clear in Barbados' pleadings. It was
2 originally put rather more broadly. In 2001 in the third
3 round of the Maritime Boundary Negotiations, Barbados is
4 reported as having said that there were "a significant
5 number of geographical, geomorphological, historical and
6 socio-economic factors, including relevant coastal ratios,
7 exploration, fisheries, surveillance and search and rescue
8 which would cause a shifting in Barbados' favour to the
9 south of the provisional median line". Not any more, Mr
10 President, all of that has gone. It is historic fishing
11 rights and nothing else on which Barbados relies.

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

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

32 What I want to show is that even if Barbados could
33 prove the facts on which it has to rely, the case still
34 fails as a matter of law. Quite simply whatever rights
35 Barbados' artisanal fisherfolk might have had to fish
36 these waters simply cannot translate into a variation of
37 the single maritime boundary, which would deprive Tobago
38 of virtually its entire EEZ and Continental Shelf.

1 There is another consideration as well, Mr President,
2 and again Professor Reisman is the person who set this out
3 so clearly at tab 1 pages 18-19 of the judges' folder. At
4 the bottom of page 18, beginning at line 31 he said this.

5 "It is only because Trinidad and Tobago refuses to
6 accommodate this non-exclusive right by recognising a
7 regime of access for some 600 Barbadian nationals to
8 continue to fish in the maritime zones at issue that a
9 special circumstance arises that requires an adjustment to
10 the provisional median line in favour of Barbados." Only
11 because of that supposed refusal by Trinidad and Tobago to
12 accommodate the Barbadian fishermen. Then over the page,
13 beginning at line 2: "Had Trinidad and Tobago simply
14 acknowledged the rights of Barbadian fisherfolk to
15 continue to eke out their humble livelihoods on their
16 modest boats in these waters in the same way that Trinidad
17 and Tobago acknowledges they have done" -- incidentally,
18 Mr President, there has never been any acknowledgment to
19 that effect -- "unimpeded by Trinidad and Tobago until
20 recently for generations, rather than impeding them with
21 the unsustainable claim that such rudimentary artisanal
22 fishing is industrial and poses a threat to conservation,
23 Barbados would have neither grounds nor need to insist on
24 an adjustment of the median line so as to enclose the
25 waters in question in Barbados' EEZ. But states, like
26 individuals, must live with the consequences of their
27 actions. Trinidad and Tobago must live with the special
28 circumstance that its own refusal to accommodate a valid
29 and modest claim of artisan fisherfolk created." Neither
30 grounds nor need to insist on an adjustment of the median
31 line. It could not be clearer, Mr President. And again
32 it turns on an assertion of fact which it is for Barbados
33 to prove.

34 12.00

35 If you find that Barbados has failed to prove to your
36 satisfaction that Trinidad and Tobago has unreasonably
37 refused access to these waters for Barbadian fishermen,
38 irrespective of anything else the Barbadian claim to an

1 adjustment of the median line fails, and it fails on the
2 very terms that Professor Reisman set out.

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

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

21 Let me begin with the historical position. We have
22 to start here with the Continental Shelf, the older regime
23 very much in place and asserted in the claim by Trinidad
24 and Tobago in its Continental Shelf act of 1969 which you
25 will find in the volume of national legislation that is
26 attached to the Counter Memorial by Trinidad and Tobago.
27 That Continental Shelf in the area south of the median
28 line and around the island of Tobago can only have
29 appertained to Trinidad and Tobago. There could not have
30 been any question about that. It was by far and away the
31 closest state. It was the only state that carried out any
32 relevant Continental Shelf activities in that area between
33 1969 and the early years of the present millennium. Up to
34 the beginning of Barbados' claim. Barbados has never
35 sought to challenge that those resources were Trinidad and
36 Tobago's, it was part of the Trinidad and Tobago
37 Continental Shelf. Moreover Barbados' own legislation
38 which comes along in 1978, when Barbados declares its EEZ,

1 Barbados' own legislation contains in section 3 of the
2 Barbados Maritime Jurisdiction Act a default to the median
3 line in the absence of an agreement between the parties.

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

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

37 I may say that, having rebuked us for having had the
38 temerity to seek to interpret Barbados' 1978 Act, counsel

1 for Barbados had no difficulty whatever in interpreting
2 for us Trinidad and Tobago's legislation of 1986. They
3 not only interpreted it, they interpreted it wrongly. The
4 Trinidad and Tobago legislation claims everything out to
5 200 nautical miles, save that where that overlaps with
6 another state's claim the boundary is to be effected by
7 agreement, but the claim is made to everything out to 200
8 miles from the relevant coastal points.

9 Did the population of the exclusive economic zone
10 alter anything? We say that it did not. Certainly,
11 Barbados did not believe that that altered the position
12 that had existed since the continental shelf regime
13 entered into international law, which for these purposes
14 one can take as being some time in the 1950s, some time
15 before the independence of either of the two states. As
16 we saw, in the first round of the maritime boundary
17 negotiations, Barbados is quite clear, first of all, that
18 there are no special circumstances justifying a departure
19 from the median line. Barbados seeks to explain that away
20 by saying that all that Sir Harold St John meant was that
21 there were no special circumstances as suggested by
22 Trinidad and Tobago. Therefore, there was nothing that
23 might vary the line to the north. They were not saying
24 that there was not something that might vary the line to
25 the south. If that is the case, it is rather surprising
26 that Sir Harold St John did not mention the special
27 circumstances to the south. Sir Harold St John was, after
28 all, a former Prime Minister of Barbados, a distinguished
29 elder statesman and, as I understand it, the proud
30 representative in the Barbados Parliament of a fishing
31 constituency. He knew what he was talking about as
32 regards fisheries. Moreover, Ms Marshall was quite clear
33 to point out - and her evidence is at tab 7 and tab 8, but
34 I will not take you to it, I will just read, if I may, the
35 relevant passage - "What we had was something that
36 reflected our position and what Trinidad provided was one
37 that reflected their position. The only thing that we did
38 was to make sure that what was reflected on their side was

1 not misleading and they did the same with ours. In
2 essence, we were more concerned in getting our comments
3 correct". If the Barbadian delegation had thought that
4 there was a Barbadian claim to those waters or to the
5 shelf, south of the provisional median line, you can be
6 confident that they would have thought about that at the
7 first round and they would have said so. In fact, they
8 said nothing of the kind. They said the opposite.
9 Indeed, they confirmed in that joint round the median line
10 was the line respected by fishermen. I put that quotation
11 directly to Ms Marshall and she accepted that, yes, that
12 was the official position of Barbados. You can see her
13 acceptance of that point at tab 8 in the Judges' folder.
14 That is consistent with the 1990 Agreement, the
15 negotiations for a fisheries access regime, everything
16 that happened in the 1980s and the 1990s and into the
17 early years of the new millennium, all the dealings
18 between the parties, as Mr Wordsworth showed you, were
19 posited on the assumption that what was at stake was
20 access for Barbadian fishermen to Trinidad and Tobago's
21 waters. That has now been confirmed for them by Professor
22 Reisman. He said that, if that access had been granted,
23 there would be no grounds for departure from the median
24 line. That is the position that Barbados has put to this
25 Tribunal and it cannot now resile from it.

26 One other comment I would make briefly about the
27 fisheries negotiations before I move on from the
28 historical position is this. Mr Volterra devoted an
29 entire speech to the subject of estoppel to show that
30 Barbados was not estopped from advancing its claim in the
31 Western sector. When we compiled our Rejoinder, we said
32 on three separate occasions that we were not advancing an
33 argument based on estoppel. I was actually rather worried
34 that we were repeating ourselves too much on this point. I
35 need not have been concerned. Saying it three times
36 clearly was not enough. We are not advancing an estoppel
37 claim. Let us deal with the arguments that we are
38 advancing, which is not one based on estoppel, it is one

1 based on the simple historical fact that until 2003
2 Barbados never advanced a claim of its own to this area,
3 that it always dealt on the basis that what it was after
4 was access for its fishermen to our waters and that it now
5 puts its claim for an adjustment exclusively on that
6 denial of a right of access: a punitive delimitation.

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

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

36 Then it is suggested that with the creation of the
37 EEZ, the status of these waters is altered, the coastal
38 state acquires sovereign rights therein - clear enough

1 from Article 56 of the Law of the Sea Treaty - and that
2 nevertheless the non-exclusive liberty to fish in the high
3 seas is somehow or other converted into sovereign rights
4 for the national state of those fishermen to have that EEZ
5 for itself in place of the coastal state that is closest
6 to it and, what is more, also to extinguish or rather to
7 appropriate to itself all the rights in respect of the
8 continental shelf.

9 To make good that case, Barbados has got to establish
10 four things. First, that the liberty to fish in the high
11 seas survived and is turned into a right against the
12 coastal state, because previously the liberty to fish in
13 the high seas is not a right against anyone in particular.

14 Secondly, that this non-exclusive right vested in
15 individuals is somehow converted into a sovereign right
16 for a state. Thirdly, that that right then trumps all
17 other considerations so as to exclude the sovereign rights
18 of the coastal state, not only in the water column but
19 also in the shelf. Thus, leading to the fourth
20 proposition, that a single maritime boundary located miles
21 away, miles away, from where, in Mr Paulsson's words, is
22 the presumptive final point of a boundary between two
23 opposite states is somehow justified.

24 12.15

25 As to the first of these propositions, the survival
26 of these rights into the era of the Law of the Sea
27 Convention, it is surprising, to say the least, to find no
28 mention of this in the Law of the Sea Convention. This
29 was, after all, something that was happening all over the
30 world as areas of the high seas became the exclusive
31 economic zones of coastal states. Moreover, it is not
32 really a question of the survival of a right at all. That
33 is a way that Barbados chooses to put its case for obvious
34 forensic reasons. It is really a matter of the conversion
35 of a liberty ergo omnes to fish in the res communis into a
36 specific claimed right against a particular coastal state
37 to be given access to its waters. As for the second
38 proposition how this non-exclusive right vested in the

1 individual comes to be converted into a sovereign right
2 for another state, for that Barbados relies very heavily
3 indeed on the article, described as seminal by Professor
4 Reisman, of Sir Gerald Fitzmaurice. Anything written by
5 Sir Gerald Fitzmaurice is obviously entitled to the
6 greatest respect, though it is important to set what he
7 wrote in the perspective of the time that he was writing.

8 The article was written in the early 1950s and it was
9 written against the background of a very particular case,
10 the case of the Anglo-Norwegian Fisheries, which was of
11 course very much in Sir Gerald's mind as he was one of the
12 counsel representing the United Kingdom, the state whose
13 arguments were unsuccessful in the Anglo-Norwegian
14 Fisheries case. And much of this article, not
15 surprisingly, bears a very close resemblance to the
16 argument which did not convince the International Court of
17 Justice in that case. Moreover, he was not writing in the
18 era of the exclusive economic zone, he was barely writing
19 in the era of the continental shelf. That was by no means
20 a universally-accepted concept at the time that the
21 article was written. But let us have a look at what he
22 said. The passage on which Barbados particularly relies
23 is as follows: "if the fishing vessels of a given country
24 have been accustomed from time immemorial" - "time
25 immemorial", you note, not six years earlier - "or over a
26 long period to fish in a certain area on the basis of the
27 area being high seas common to all, it may be said that
28 their country has through them, although they are private
29 vessels having no specific authority, acquired a vested
30 interest that the fisheries of that area should remain
31 available to its fishing vessels, of course on a non-
32 exclusive basis. So that, if another country asserts a
33 claim to that area as territorial waters, which is found
34 to be valid or comes to be recognised, this can only be
35 subject to the acquired rights of the fishery in question,
36 which must continue to be recognised.

37 That passage is very skilfully put together. It is
38 about non-exclusive rights of access that have to be

1 recognised when a status of a particular area of water
2 changes. It is not about generation of sovereign rights
3 for a state to claim those waters for itself. That is an
4 entirely different matter. Barbados deliberately fudges
5 this by accusing us of saying these non-exclusive vested
6 rights cannot be relevant; why, because we are in an
7 inter-state arbitration and they are rights that pertain
8 to individuals. That is not the issue. The issue is not
9 so much whether the rights are capable of pertaining to a
10 state, the question is whether they give sovereign rights.

11 Obviously the rights of the individual will not be
12 sovereign rights because individuals do not possess
13 sovereign rights. The question is whether a right for
14 the individual of access to fisheries can be converted
15 into a right for the state to acquire sovereignty or the
16 sovereign rights under the Continental Shelf and exclusive
17 zone regimes to the area of waters and seabed in question.

18 Mr Gerald Fitzmaurice did not think that they could,
19 because in another passage, a few pages before the one
20 relied on by Barbados but not mentioned by Barbados, he
21 said this. He referred to the "well established rule of
22 international law according to which state rights can only
23 be acquired through the acts of persons in the service of
24 the state or authorised to act on its behalf". He then
25 added that that rule was of chief importance in regard to
26 claims to sovereignty over territory or waters. But he
27 added "it has long been well settled that the hunting,
28 whaling, guano collecting, exploring and other similar
29 activities of private individuals acting on their own,
30 however numerous and extensive, do not per se confer on
31 their state a title to sovereignty over the areas
32 concerned". He was of course writing in the era when only
33 the territorial sea was at issue, but the same remarks
34 could surely be applied to the sovereign rights which a
35 coastal state has in the exclusive economic zone or the
36 Continental Shelf. Barbados simply cannot make the jump
37 from non-exclusive rights of access to fishing resources
38 to sovereign rights over the Continental Shelf.

1 The point is taken against us that Barbados is not
2 claiming an exclusive right here, but how can that
3 possibly be? Barbados on its original claim is arguing
4 for a single maritime boundary, valid for the shelf as
5 well as for the zone, but Article 77 paragraph 2 of the
6 Law of the Sea Treaty says that Continental Shelf rights
7 are exclusive in the sense that if the coastal state does
8 not exploit the resources nobody else may exploit them
9 without its consent.

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

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

32 If you take volume 2 of the Trinidad and Tobago
33 authorities this is the only case in which fisheries have
34 been a factor that led explicitly to an adjustment of the
35 median line. The other two cases relied upon by Barbados,
36 the Gulf of Maine and Eritrea-Yemen, the Tribunals there
37 decided that an adjustment of the boundary was not
38 warranted on fishing grounds, although in Eritrea/Yemen,

1 where of course the Tribunal had a jurisdiction quite
2 different from the jurisdiction of a part 15 UNCLOS
3 Tribunal, in Eritrea/Yemen the Tribunal did award access
4 rights, did lay down a regime of access or a framework of
5 such a regime. But it is Jan Mayen that is the one case
6 where a Tribunal actually had to do what Barbados is
7 asking this Tribunal to do, and what were the conditions
8 in which it did it.

9 If you turn to page 46 of the judgment you will see
10 the essence of it. At paragraph 14, "The total population
11 of Greenland is about 55,000, of whom about six per cent
12 live in East Greenland", in other words Greenland had a
13 population roughly the same number as that of Tobago.
14 "The fisheries sector in Greenland employs about one-
15 quarter of the labour force and accounts for approximately
16 80 per cent of total export earnings. The sea area with
17 which the court is concerned comprises an important
18 fishing ground for summer capelin, the only fish which is
19 commercially exploited in the area. Jan Mayen has no
20 settled population. It is inhabited solely by technical
21 and other staff, some 25 in all. Norwegian activities in
22 the area between Jan Mayen and Greenland have including
23 whaling, sealing and fishing for capelin and other
24 species. These activities are carried out by vessels
25 based in mainland Norway, not in Jan Mayen".

26 Straightaway there are two obvious distinctions here.

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

35 Look at some of the other factors Jan Mayen is not a
36 small island, but relative to Greenland it is tiny. In
37 terms of coastal ratio the coastal ratio is massively in
38 favour of Greenland, by a factor of some 9 to 1.

1 Moreover, Norway and Denmark did what Barbados has not
2 done, as Mr Wordsworth showed you, which is to produce
3 detailed evidence about fish catches in the area, which
4 led the international court in this case to a very careful
5 partition of the area between the median line and the 200
6 mile limit to the claim that Greenland could make.

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

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

23 12.30

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

1 whatsoever in the quite different factual setting of the
2 case here.

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

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

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

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

34 Mr President, there are just a couple of other points
35 I would like to deal with in conclusion. First of all
36 Professor Reisman tried to bolster his case by reference
37 to human rights, and Barbados had trailed its coat on this
38 in its Reply as well. What human right is he referring to?

1 It was never specified. There was a reference to how
2 human rights were implicated here but which provision of
3 which Convention and which rule of customary human rights
4 law? never specified, it was just a general unexplained
5 assertion. He did say that both countries were parties
6 to the Pact of San Jose and that he would come back to
7 that later. Rather wisely he did not. Trinidad and
8 Tobago is not a party to the Pact of San Jose. It issued
9 a letter of denunciation in the summer of 1998 which took
10 effect 12 months later. It is not bound by that treaty
11 and it has not been for six years. An unspecified
12 unparticularised reference to human rights in general, we
13 say, does not add anything whatever to the case being put
14 forward by Barbados. In any event, even if there were a
15 human right at issue here, how does that translate into a
16 claim of title to territory, sovereign rights to maritime
17 spaces? That is a leap which is not made in Barbados'
18 argument. It is unexplained. Nor is there any
19 explanation offered of what other relevant considerations
20 might be dealt with. They are simply thrown out of the
21 window: proximity, proportionality, the non-fish resources
22 of the area in question, the history of exploitation of
23 those non-fishing resources, the history of dealings
24 between the parties. None of that, it seems, counts for
25 anything at all even to support the median line boundary
26 which Barbados has always said is the starting point and
27 normally the finishing point between opposite coasts.

28 Let me turn then to the new variant argument of
29 Professor Reisman. There is no explanation whatever as to
30 how this might work. There is no suggestion for a moment
31 about how a state might claim a single maritime boundary
32 on the basis of a non-exclusive regime which did not trump
33 the existing continental shelf rights. It may be that a
34 case can be put together like that, but the second round
35 of oral argument is where it is going to have to come. It
36 is a very late stage in an arbitration to try to invent an
37 argument of that kind and unparticularised it simply does
38 not work.

1 Professor Reisman makes clear that whether we are
2 talking about the original argument or its new variant, it
3 turns on the refusal of Trinidad and Tobago to grant
4 access to fishing resources. What refusal is Barbados
5 referring to? Is it the refusal constituted by
6 negotiating the 1990 Agreement with Barbados? Is it the
7 offer to renew that Agreement when it expired, an offer
8 that Barbados declined to accept? Is it the years of
9 painstaking negotiation around a new text in which, on
10 Barbados own evidence, considerable progress had been made
11 and only days before negotiations were broken off and
12 these proceedings commenced, the Prime Minister of
13 Trinidad and Tobago was saying that we can get an
14 agreement in place before the resolution of the maritime
15 boundary dispute. We should not make a fishing agreement
16 wait on the settlement of the maritime boundary? Where is
17 the refusal to allow the humble fisherfolk to eke out
18 their modest living in that? It simply does not exist.
19 This is not just punitive delimitation that Barbados is
20 relying on. It is pre-emptive punitive delimitation. We
21 do not think that we are going to get what we want, so, in
22 anticipation that we are not going to get it, we are going
23 to launch a strike now and take the EEZ and continental
24 shelf for ourselves.

25 The reality, Mr President, is that Barbados' case on
26 the Western sector is coming apart in its hands. It has
27 completely failed to prove the facts which it has itself
28 said are the bedrock of its case and without which that
29 case cannot succeed. It has failed to show that Trinidad
30 and Tobago has refused to accommodate its fishermen. It
31 has failed to make its case on the law to show that a
32 single maritime boundary's course can be distorted in the
33 grotesque way suggested here by reliance on non-exclusive
34 fishing rights. That is why there is now this desperate
35 retreat to the argument that dare not speak its name, to
36 the plea that, well, even if you cannot give us any
37 territory, at least give us an access right. Mr
38 Wordsworth has shown that that is not something over which

1 this Tribunal has jurisdiction. Barbados could not have
2 brought a claim for access to fisheries under part 15 of
3 UNCLOS. If it cannot bring a case on that basis, then it
4 cannot slip it in by the back door or the back window by
5 claiming title. It would be absurd if the way around the
6 jurisdictional barrier to jurisdiction over a purely
7 fisheries claim was to say that we will make an
8 extravagant and unsupported claim to title and then fall
9 back on rights of access as our fallback position at the
10 oral hearing.

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

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

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

38 THE PRESIDENT: Thank you so much, Professor Greenwood.

1 Professor Crawford, please.

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

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

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

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

35 Mr President, it seems to us in the light of the
36 discussion that has occurred and in the light of the
37 earlier case law, that the methodology of a delimitation
38 tribunal dealing with the EEZ or, for that matter,

1 continental shelf, is essentially the same. In fact, the
2 methodology was laid down as so much of the law of outer
3 maritime zones was laid down first to the continental
4 shelf and then adopted for the economic zone.

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

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

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

28 Barbados argues that we have agreed to the
29 equidistance line in the Atlantic sector and that the
30 issues of delimitation are therefore moot. Not because
31 there is any express agreement, clearly there is not,
32 unlike what we say is the effect of the 1991 Agreement is
33 in respect of fisheries in the Caribbean zone, but because
34 of a series of acts which in Barbados' submission amount
35 to an estoppel. The word "recognition" was not used, but
36 it might have been used and indeed it might have been
37 better had it been used. Mr Greenwood continually does
38 better than I and so I suppose I have caught the habit!

1 A preliminary point to make is that arguments based
2 on estoppel or recognition of a variety of kinds have been
3 made in more or less every continental shelf case since
4 the North Sea Continental Shelf cases themselves. It was
5 made there. And in virtually every case since - I have
6 not found one where they were not made - and they have
7 uniformly failed. The nearest that anyone got, I suppose,
8 is Tunisia-Libya, but even then it was not a case which
9 was based upon estoppel as such. It was a case where
10 conduct was taken into account.

11 12.45

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

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

33 There were two alternative ways in which the
34 continental shelf doctrine could have gone in its origin
35 and, indeed, those two ways of approaching it were
36 respectfully championed by the United States through the
37 Truman Proclamation and by the United Kingdom in some of
38 its early thinking about rights to the seabed beyond the

1 territorial sea. The United Kingdom in its early stages
2 tended to prefer methods based upon occupation, by analogy
3 from the pearl fishers of Ceylon, I think, and occupation
4 is much more like the sort of concept that you have in
5 land territory. The Truman Proclamation avoided that
6 concept entirely and, of course, the Truman Proclamation
7 was at the origin of the customary law of the continental
8 shelf and in this respect, although the exclusive economic
9 zone is in practice dependent upon proclamation,
10 nonetheless, it has gone the same way. The core idea of
11 the Truman Proclamation is that every coastal state has
12 necessarily by operation of law and without any action on
13 its, behalf without any need for claim, certainly without
14 any need for occupation, a continental shelf to the outer
15 edge of the continental shelf area as recognised at the
16 time. In other words, the Truman Proclamation was based
17 on the idea of the equality of coastal states in terms of
18 potential entitlements to continental shelf, whether those
19 coastal states were Trucial States with no indigenous oil
20 capacity at all or the United States of America. That
21 doctrine has been adopted.

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

29 Against that background, it is possible to consider
30 the Barbados arguments on estoppel, but before I do and
31 given that explanation as to why arguments like estoppel
32 have characteristically failed, I want to refer to a
33 diplomatic note of Trinidad and Tobago dated 27th March
34 1992, which is in volume 3 of the Counter Memorial, tab
35 15. I am sorry it is not in the Judges' folder. It
36 refers to the activities of Barbadian fishing vessels and
37 it says that the Ministry of Foreign Affairs of the
38 Republic of Trinidad and Tobago - it is a third party note

1 - has the honour to inform the Ministry of Foreign Affairs
2 if Barbados that the Government of Trinidad and Tobago
3 does not recognise the equidistance method of delimitation
4 and consequently rejects its applicability, save by
5 express agreement to a maritime boundary delimitation
6 between Trinidad and Tobago and Barbados in respect of the
7 delimitation of marine and sub-marine areas that lie
8 between the two states in the Caribbean Ocean and Atlantic
9 Ocean. Already you see the two sectors are present. One
10 might say even prescient.

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

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

28 Mr Volterra relied on a series of acts which he said,
29 taken individually or collectively, added up to an
30 estoppel against us. For example, he referred to seismic
31 activity and he showed the map which showed a degree of
32 seismic activity of an unspecified character. The map
33 that he showed is a compilation. It is not clear when
34 those seismic shots were run or by whom or under what
35 auspices. They do not constitute a systematic programme,
36 unlike, for example, the quite detailed seismic shoots
37 that have been carried out on the north west coast or off
38 the north west coast of Barbados which clearly do

1 constitute a systematic activity. If one was able to go
2 to the records which underlie that seismic activity, one
3 would, I imagine, find that it did have a systematic
4 activity. There was isolated seismic activity to the
5 north of the equidistance line in the Atlantic sector.
6 Anyone who is used to looking at seismic maps will say
7 that, yes, there was some seismic activity, but not very
8 much. There was, as Mr Volterra said, some legislation,
9 in particular the Barbados Act of 1978 of which we have
10 heard such a lot. There was patrolling. An affidavit by
11 a Barbados naval commander was produced in which there was
12 evidence of patrolling up and down or generally in the
13 region. There was a zone of co-operation and there was
14 the granting of several concessions, none of them, of
15 course, before 1992 and none of them confined to the area
16 or anything like the area which is the subject of this
17 dispute.

18 I will come back to each of those activities in a
19 moment, but I draw your attention to the Trinidad and
20 Tobago diplomatic note of 8th June 2001, which is annex 46
21 of volume 3 of the Counter Memorial, which repeats the
22 earlier position taken by Trinidad and Tobago in the note
23 of 1992. These are representative, they are not
24 exhaustive. There are others in the file. It says that
25 until the exact location of the Trinidad and
26 Tobago/Barbados maritime boundary in the Atlantic Ocean
27 east of Trinidad and Tobago and south east of Barbados is
28 agreed on, Trinidad and Tobago cannot acquiesce in any
29 authorisation by Barbados of exploration or exploitation
30 of the natural resources of the area that is the subject
31 of overlapping claims to maritime jurisdiction. It goes
32 on to say that Trinidad and Tobago does not recognise the
33 validity of certain concessions granted since 1992. There
34 were two of them, in fact. They are both of a fairly
35 broad area. Apart from possibly miscellaneous seismic
36 activity, no actual drilling was done in the area which is
37 the subject of Trinidad and Tobago's claim in these
38 proceedings. That is, incidentally, quite unlike the

1 situation in the west, where Barbados claims areas which
2 have been the subject of established licences which are
3 the subject of actual exploitation.

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

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

31 That of course at this stage of the proceedings was
32 provisional measures. It was not merits. Nonetheless,
33 that is the character of seismic activities of a
34 transitory character. It does give information and I
35 suppose on a strict view it could give information which
36 may be of benefit to a potential exploiter, but it is
37 transitory. In this case it was carried out in waters
38 some distance away. It might conceivably and as part of a

1 programme call for a protest but as part of occasional
2 scientific or other voyages it would go unnoticed in the
3 waters of which Mr Paulsson spoke so eloquently the other
4 day.

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

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

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

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

1 **(Adjourned for a Short Time)**

2 THE PRESIDENT: Professor Crawford, will you please resume?

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

13 MR ORREGO: Thank you.

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

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

31 This is a graphic which was produced as part of the
32 pleadings in that case which showed in different colours
33 the actual oil wells and pipelines which had been drilled
34 south of the Bokassi Peninsula, which was of course also
35 in dispute in the case. Purple are the Cameroon
36 installations; green the Nigerian installations and blue
37 are Equatorial Guinea installations. Equatorial Guinea
38 intervened in the proceedings. I used to practise with my

1 children getting them to draw a line which kept all the
2 colours separate and I can assure you that they are very
3 good at doing it, but it did not take them long. It was
4 pretty obvious that the parties were proceeding on the
5 basis of, to put it at its lowest, a modus vivendi, which
6 made the indications in Tunisia-Libya pale into
7 insignificance. This oil practice went back to the
8 fifties. Many of these installations were inter-visible;
9 even in wet weather of which there was quite a lot in the
10 region, you could still see them, so there was any amount
11 of notice. What did the court say in response to the
12 Nigerian argument that this, in effect established the
13 boundary through practice. The court said at paragraph
14 304 of the judgment at page 141 (tab 26, volume 2, page
15 141) and I will just read the crucial sentence, 'Oil
16 concessions and oil wells are not in themselves to be
17 considered as relevant circumstances justifying the
18 adjustment or shifting of the provisional delimitation
19 line. Only if they are based on express or tacit
20 agreement between the parties may they be taken into
21 account'. If this was not a tacit agreement, then a
22 fortiori what we see in the Atlantic sector does not even
23 remotely approach it.

24 Mr President, members of the Tribunal, my Francophone
25 friends, notable I suppose before this Tribunal by their
26 absence, profess completely to be baffled by the doctrine
27 of estoppel which they regard as an unnecessary Anglo-
28 Saxon intrusion of an infectious character into the pure
29 body of international law, but I have to say that
30 sometimes I share their concern. Here we have an
31 allegation of estoppel which, first of all, contradicts a
32 clear position on the record taken by Trinidad and Tobago,
33 which, secondly, takes the form of inactivity or failure
34 to act in circumstances many of which required no action,
35 in a situation where there is absolutely not the slightest
36 evidence of any acting on this inactivity in reliance upon
37 the assumed representation. I think with respect there is
38 every indication that Barbados would have done what it did

1 irrespective of any particular incidents. And which there
2 is not the slightest evidence of any detriment. In those
3 cases where the international court has said there is a
4 doctrine of estoppel in international law, it has laid
5 down the classic requirements. None of them is present
6 here. There is a tendency for advocates - and I criticise
7 no one of course - when they cannot find an agreement to
8 say that, well, there must be an estoppel. The conditions
9 for an estoppel are actually tougher than the conditions
10 for an agreement because an estoppel lacks, by definition,
11 the essential element of actual consent. The essential
12 element of actual consent was missing here and the idea
13 that it can be substituted for by a series of
14 miscellaneous events of a nondescript character but mostly
15 involving omissions is, with respect, fantastic.

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

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

30 Taking the Atlantic sector as we have defined it, and
31 excluding territorial sea and archipelagic waters,
32 equidistance line divides that relevant area in a ratio of
33 58 to 42. That is percentages. Obviously, it is slightly
34 an approximate figure but that is near enough. The
35 equidistance line gives Barbados in the Atlantic sector
36 not much short of 60 per cent of the relevant area for EEZ
37 purposes. This of course without looking at the areas
38 beyond which are EEZ of Barbados and which are not in

1 dispute as EEZ in these proceedings. Well, that is a
2 number. By itself it is not dispositive, but it is an
3 indication. Let us look at some of these.

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

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

24 Mr Paulsson was prepared to accept that applying the
25 vector theory, that is to say looking at the east facing
26 projections of the three islands, the ratio was 3.6 to 1.

27 He did of course dispute the relevance of the coastline
28 of Trinidad and we answered that showing that in fact the
29 coastline of Trinidad, ignoring the little projection at
30 the top, actually faces directly on to the equidistance
31 line. But there we have a ratio of 3.6 to 1.

32 Another possibility is to take the relevant
33 coastlines, the east facing coastlines, along the coast in
34 some level of simplification but the actual configuration,
35 and measure those, and we get a ratio of 8.9 to 1 if we do
36 that. I note of course that the north east facing
37 coastline of Barbados is not regarded as relevant for this
38 purpose, because it looks away from the area to be

1 delimited. It does indeed, Mr Paulsson; if you stood in
2 the middle of that coastline you would be looking in the
3 wrong direction.

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

27 3.15

28 Taking there range of possibilities of different ways
29 of measuring coastal ratios, the east facing coastlines of
30 Trinidad and Tobago range from Mr Paulsson's figure of
31 3.6:1 up to nearly 9:1, looking at the actual length of
32 coastlines, which is, one might say, almost the orthodox
33 way of doing it. The ratio is in the single figures, but
34 that is not uncommon. It is some way between 3.6 and 9.

35 If you look at the disparity in coastal lengths that
36 have made a difference in the earlier cases, you find that
37 they fall into that range. Obviously, there are a few
38 that are lower, the Gulf of Maine was the famous figure

1 of, I think, 1.38 or it may have been 1.32, when some
2 adjustment was made. It was certainly a much smaller
3 figure. Jan Mayen was a little larger, something of the
4 order of 9:1. But those sorts of figures are regarded as
5 giving rise to a situation where there is disparity in
6 coastal lengths. There is obviously disparity in coastal
7 lengths in this case.

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

1 maritime space? And the answer we submit in the light of
2 these factors is no.

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

30 Professor Reisman the other day engaged in a lengthy
31 criticism of the principle that one should look at the
32 regional implications, in particular that one should look
33 at the delimitations reached in the region to see whether
34 they gave guidance as to what might be done in a situation
35 where there is a state, a small island state, acting in
36 this significant blocking capacity. He was particularly
37 critical of the Guinea Bissau case which he said, as a
38 jurisprudential outlier, should be given no credit. Of

1 course, Guinea-Guinea Bissau was not an outlier, although
2 there are things that one might say about it. Because the
3 basic point was made, as I said yesterday, in the
4 dispositive of North Sea Continental Shelf case itself,
5 paragraph 101D(3), "Although the formulation was slightly
6 different, the effects, actual or prospective, of any
7 other continental shelf delimitations between adjacent
8 states in the same region"; those were the court's words
9 in 1969. One of the differences between that formulation
10 and the formulation adopted by the Tribunal in the Guinea-
11 Guinea Bissau case is the Tribunal's reference to
12 prospective continental shelf delimitations, delimitations
13 that might be reached in future. Professor Reisman made
14 the point, and it is a fair point, that why should two
15 states deny themselves bilaterally a situation which is
16 equitable as between them just on the hypothesis that
17 other states may behave in a certain way. That is a
18 reasonable proposition and the formulation in the North
19 Sea Continental Shelf case is not subject to the same
20 criticism.

21 But what we have here, with respect, are two existing
22 delimitations. We are not engaged in a hypothesis as to,
23 for example, the Dominica-France delimitation or as to the
24 Trinidad and Tobago-Venezuela delimitation. We know the
25 situation in broad terms as to the states which lie behind
26 Trinidad and Tobago and Barbados, those states have not
27 made overtures in the direction of the nightmare scenario
28 which was shown to you the other day in which Barbados
29 stands like this, with states zooming by in different
30 colours and presumably at different speeds. But that
31 nightmare scenario is a figment of Barbados' imagination.

32 None of those states have made proposals of that kind and
33 there would be no basis for them to do so. But two groups
34 of states, two on each side of Barbados, have actually
35 agreed definitive delimitations which take into account
36 the situation and which both of them adjust the
37 equidistance line in a significant respect. For you
38 simply to adopt the equidistance line in this situation

1 would be, in effect, to tell those groups of states that
2 they were crazy to make "concessions" - I use the word in
3 inverted commas, it is the sort of word we have been
4 getting from the other side - to their neighbours in the
5 interests of giving them some access to maritime
6 resources. It is perfectly clear with the Trinidad and
7 Tobago-Venezuela line; it is perfectly clear with the
8 France-Dominica line. We say that it gives you guidance.

9 It does not of course determine what you are to do,
10 because no one says that the regional implications test,
11 whether it comes from North Sea Continental Shelf or
12 Guinea-Guinea Bissau, determines the delimitation, but it
13 gives you guidance as to what states negotiating carefully
14 in their own interests over time have thought to be equitable,
15 and we say is equitable here.

16 In fact, three agreements have been mentioned because
17 we mentioned France, Dominica, Trinidad and Tobago and
18 Venezuela. Barbados has mentioned St Lucia-Martinique, so
19 I should say something about that as well. Yesterday I
20 analysed Trinidad and Tobago and Venezuela in some detail.

21 I am not going to repeat what I said then. I defended it
22 against the charge that it was unlawful. I defended it
23 against the charge that it took land territory or maritime
24 territory away from other states and we can leave that
25 statement as it stands. But let me have a look now at the
26 France-Dominica boundary. This is a case where after
27 several rounds of negotiations, I think in the end there
28 were four, France, on behalf of Guadeloupe and Martinique
29 and Dominica agreed a boundary which diverged very
30 significantly from equidistance, in the interests of
31 getting Dominica out to the 200 mile line. The red line
32 that you can see is the actual agreed boundary, and you
33 can see that it is closed at the Eastern end.

34 I will come back to that closure when I talk about
35 the Outer Continental Shelf in my second speech this
36 afternoon because Barbados relies on that little line,
37 though it is not particularly enthusiastic about the
38 agreement for other purposes.

1 You can see the dashed line that is the equidistance
2 line and you can see that Dominica would have been very
3 significantly shelf locked and zone locked if equidistance
4 had been adopted. Instead it got a projection out to the
5 200 mile line not indeed unlike the projection in the St
6 Pierre and Miquelon case, though in a different situation.

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

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

33 I should simply mention that in the article by Colson
34 on delimitation of outer Continental Shelf to which I will
35 come back in my next speech, there is a brief but
36 perfectly good natured discussion of the Trinidad and
37 Tobago-Venezuela agreement at page 95 adding to the
38 literature on that agreement.

1 Barbados relies on the St Lucia/Martinique boundary
2 somewhat to the west here, and you can see that boundary
3 and where Barbados is, as a situation in which
4 equidistance was applied in the region without any need
5 for variation, and it is true that that line is a very
6 slightly simplified equidistance line.

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

14 The paragraph from the relevant article in Charney
15 and Alexander from which Professor Reisman read a little,
16 the article as a whole being in your binder, I should read
17 the whole paragraph. It says that the boundary line is
18 applied between the opposite coasts of two islands "of
19 comparable shape, size and geomorphology, situation along
20 the same angle axis in a north/south direction and barely
21 17 nautical miles apart. But no islands, reefs or rocks
22 provoking special circumstances and no lopsided straight
23 baseline constructions. Consequently the ensuing
24 equidistance line embodies and reflects the sense of
25 equity. Its prolongation eastward and westwards thus
26 develops a relationship of double frontage adjacency and
27 reflects the same equity." In other words the author of
28 that article treated this as a case, as he described it,
29 as double frontage adjacency at the two ends of the line
30 which proceeds through the gap between the two arms.

31 3.20

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

35 He also wrote a report on the Dominica/France
36 boundary in which he said along the same lines, "In the
37 first place the French island of Marie-Galante is situated
38 between Guadeloupe and Dominica in a relationship of

1 oppositeness, but it extends further eastwards than the
2 latter. Dominica's coastline on the Atlantic is generally
3 convexed, but in the delimitation with Guadeloupe, due to
4 the convexities of Marie-Galante on one side and
5 Martinique on the other, the relationship turns into
6 adjacency as the boundary advances to the Atlantic ocean".

7 Again, the notion of adjacency. Coasts which start out
8 as opposite turn into something else as lines advance,
9 which is precisely the situation we say applies here.

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

22 Having got to that point, it is of course the case,
23 and the reader of maritime boundary delimitations will be
24 struck by the extent to which the court or the tribunal
25 engages in preliminaries of all sorts, rejecting arguments
26 of estoppel, dealing with issues about relevant coasts,
27 and then they come to the adjustment. The Jan Mayen case
28 is a conspicuous example of this but there are many
29 others. The adjustment is often made relatively briefly.

30 Of course, the grounds for making this adjustment do not
31 necessarily dictate the adjustment that is made. We do
32 not for one moment suggest, for example, that you take a
33 proportionality range here and simply apply it so as to
34 divide up the area. We are criticised for that, but that
35 is a misunderstanding of what we do. You get to the stage
36 where an adjustment has to be made, an adjustment which is
37 reasonable in the circumstances and the question is to
38 find a criterion for doing so.

1 The first issue in this case is where the turning
2 point should be. Obviously, if there is an adjustment,
3 the adjustment has to start in a certain place. I have
4 already dealt with this in response to one of the few
5 blind spots in Mr Paulsson's presentation the other day in
6 which he forgot our twice repeated explanation of Point A,
7 but we will show it to you again. Point A is not, of
8 course, the dividing line between the Eastern or Atlantic
9 and the Western or Caribbean sector. It is the last point
10 on the equidistance line which is determined by a base
11 point on the south west facing coast of Barbados.
12 Thereafter the line is determined by points further to the
13 east which look on to the area to be delimited. It is one
14 of these issues, of course, like the sorites paradox, a
15 line has to be drawn, a point comes where precisely it
16 comes is a question of appreciation. The Anglo-French
17 arbitration had that problem. You cannot say precisely
18 the spirit goes now or that it goes in another moment.
19 That is a very bad quotation from Donne, but I am sure
20 that the actual passage will spring to your mind. There
21 is a point in time when you are clearly passed the
22 situation of relative oppositeness and where you are in a
23 lateral position. We say that Point A is a defensible
24 place for that. We have a reason for it. It contrasts
25 strikingly with the total absence of any reason for Point
26 D.

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

36 The question now is how much deviation to make.
37 Again, we have provided an explanation for that in our
38 Counter Memorial, which again Barbados has chosen to

1 misunderstand and to parody. Essentially the east facing
2 coastal frontage of Trinidad and Tobago, which we
3 described as a vector, a vector being the direction of a
4 particular region taken by reference to a certain angle.
5 We took that and we measured along the 200 nautical mile
6 line from the tri-point, which you can see. This means
7 that the corridor, the salida, that was agreed between
8 Trinidad and Tobago and Venezuela is taken against us. We
9 have not simply transferred the burden of that agreement
10 on to Barbados. We have accounted for it in the length
11 and it is not the total length of our coastline, it is the
12 length of the vector since we are adjusting in order to
13 create a presence on the maritime boundary in the east.
14 It creates what we submit is a modest presence. In
15 particular, it is compared with the enormous areas still
16 left to Barbados. We do not suggest, and it can never be
17 suggested that any judge who has taken part in any
18 maritime boundary case I think will believe, whether by
19 reference to the weather in the Hague or in any other part
20 of the world, that there are different ways of doing
21 things. We do not suggest that this is necessarily the
22 unique way of dealing with the problem. We have analysed
23 the problem and it calls for an adjustment. We have
24 proposed a method of dealing with the adjustment and we
25 have given reasons for it. It is for the tribunal to
26 assess the balance for itself, evidently, in the context
27 and reach its own conclusion as to what would be
28 appropriate, but it cannot be said that there were not
29 reasons given, whereas in relation to the adjustment
30 proposed by Barbados no reasons at all were given.

31 The final issue is the assessment of the
32 proportionality of the adjustment. I said earlier that
33 the equidistance line divided the Eastern sector in the
34 ratio of 58:42, approximately. With the adjustment the
35 division is essentially 50:50. In other words, it splits
36 the difference. There are many examples in maritime
37 boundary situations where an equality is equity approach
38 has been taken. I have to say that we only discovered it

1 was 50:50 after we worked out what the vector was. The
2 idea of the vector was a concept taken from the St Pierre
3 and Miquelon case, with the idea of a corridor, of course
4 applied in this geographic situation which goes out to the
5 200 nautical mile line. It turned out that taking the
6 north side axis of Trinidad and Tobago and expressing that
7 as a vector produced a result which was essentially a
8 50:50 split of the total area of overlapping EEZ claims.
9 That is an accident. It was obviously going to make an
10 adjustment of some sort from the status quo ante and
11 equality is equity as I have said. The Tribunal may find
12 its own methods of doing equity in the circumstances, but
13 it cannot be said that this line is inequitable on the
14 face of it. It gives us a reducing corridor out to 200
15 miles. It leaves Barbados with vast sways of maritime
16 boundary, subject only of course to the eventual
17 delimitation with France in relation to its northern
18 territories. We can get a sense of what that is likely to
19 be from the agreement already reached.

20 Finally, I should deal with Professor Lauterpacht's
21 point in his opening speech about what he suggested was
22 our failure to deal with the little stretch between our
23 Point A and their Point D. He said that our paragraph 2
24 rejected the Barbados claim line in its entirety, and that
25 is true. He said that that left the little area A to D,
26 as it were, unattached, a vacant line, just as Mr Volterra
27 thought that the area south of our claim line, so far as
28 EEZ was concerned beyond 200 nautical miles, was also
29 vacant, which it is not. But, of course, what we have
30 done is to take Point A as a point whose location is
31 determined in the way that I have explained and to extend
32 the line west and east in the manner set out in our
33 submissions. The whole of the boundary is delimited in
34 that way out to the 200 nautical mile line. I will deal
35 in my next speech with the question of what you do then.
36 The virtue of this is that we do not start with the tri-
37 point. The Tribunal does not have to determine the tri-
38 point and that is appropriate. Barbados which makes great

1 play with the rights of third states talks all the time
2 about tri-points with third states. In our case the line
3 starting at a point on the equidistance line which is
4 indisputably a point on the boundary between these two
5 states involving no other party, then extends in opposite
6 directions until it reaches the maritime zone applicable
7 to the state in question or the outer edge of the
8 exclusive economic zone as the case may be, leaving the
9 question of further delimitation for further discussion.
10 That is an appropriate method, from a technical point of
11 view, of describing the boundary. To start at an
12 appropriate point on the equidistance line which is on any
13 view a pertinent to the two states and then to direct the
14 line in the opposite direction in the way that the
15 Tribunal determines is appropriate, and that is what is
16 done in our submission. There is no gap, but I have to
17 say that counsel for Barbados were looking for gaps.

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

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

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

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

38 Let me be quite clear what it is we are saying about

1 that sector. We are saying that Trinidad and Tobago has
2 continental shelf rights there, but we accept that
3 Barbados has exclusive economic zone rights. In one part
4 of his presentation, Mr Volterra said that both parties
5 were claiming single maritime boundaries throughout. Mr
6 Volterra of course is entirely at liberty to tell the
7 Tribunal what his claim is, but he cannot speak with
8 authority, I am afraid, about what our claim is. This is
9 an area in which the single maritime boundary is not what
10 we are contending for. We are contending for a split, an
11 area where the continental shelf pertains to Trinidad and
12 Tobago but the exclusive economic zone pertains to
13 Barbados.

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

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

1 of a neighbouring state.

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

6 3.45

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

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

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

29 The most fundamental of all the rules of law relating to
30 the continental shelf enshrined in Article 2 of the 1958
31 Geneva Convention, though quite independent of it, namely
32 that the rights of the coastal state in respect of the
33 area of continental shelf that constitutes a natural
34 prolongation of its land territory into and under the sea
35 exists ipso facto and ab initio by virtue of its
36 sovereignty over the land, and as an extension of it in an
37 exercise of sovereign rights for the purpose of exploring
38 the sea bed and exploiting its natural resources.

1 "In short there is here an inherent right. In order
2 to exercise it no special legal process has to be gone
3 through. Nor have any special legal acts to be performed.

4 Its existence can be declared and many states have done
5 this, but does not need to be constituted. Furthermore,
6 the right does not depend upon its being exercised. To
7 echo the language of the Geneva Convention it is exclusive
8 in the sense that if the coastal state does not choose to
9 explore or exploit the areas of shelf appertaining to it,
10 that is its own affair, but no-one else may do so without
11 its express consent".

12 Mr President, although that was of course referring
13 to the continental shelf regime as embodied in the 1958
14 Convention, the Court was also quite clear that the basic
15 contours of that regime existed as a matter of customary
16 international law, and those basic contours are five.
17 These are sovereign rights, that they are automatic or
18 inherent; they belong to the state whether it claims them
19 or not; but they are exclusive, even if you do not claim
20 your continental shelf rights expressly no other state may
21 explore or exploit the resources in that shelf without
22 your consent. The continental shelf rights are a
23 prolongation of land territory, they are the extension of
24 the sovereignty of the state from its land territory out
25 to the seabed adjacent to that territory, and that is of
26 course the language used in the Truman Proclamation in
27 1948. And the fifth feature is that the extent of the
28 continental shelf under this regime is not limited to 200
29 nautical miles from the coast. It was indeed the
30 geographical phenomenon in the way in which it was
31 incorporated into customary international law. The 200
32 nautical mile limit which has become so important was
33 grafted on as an additional source of rights, means for
34 states that could not establish a continental shelf in the
35 ordinary geographical sense to acquire right of the seabed
36 and subsoil they would not otherwise have.

37 That was the legal regime that existed under the 1958
38 Convention for the states parties to it and under

1 customary international law prior to the Law of the Sea
2 Convention.

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

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

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

37 Mr President, that provision in Article 56.3 is only
38 necessary on the assumption that in a particular area the

1 rights under the exclusive economic zone regime and the
2 rights under the continental shelf regime can belong to
3 two different states. If that cannot happen then Article
4 56.3 is unnecessary. Article 56.3 is in our submission a
5 very clear indication that the exclusive economic zone
6 does not prevail over continental shelf rights; quite the
7 reverse. It was intended to take effect subject to the
8 existing rights under the continental shelf regime.

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

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

22 A number of points in relation to that. Of course
23 the point is made by Barbados that a single maritime
24 boundary is highly desirable and has become the norm in
25 international practice. It is highly desirable, it is
26 frequently the practice of states. But nothing in the Law
27 of the Sea Convention requires states to conclude an
28 agreement on a single maritime boundary. There is no rule
29 of international law that says that the boundary between
30 the shelf of two states and the boundary between the zone
31 of two states must follow the same line at all points.
32 And in our Counter Memorial and our Rejoinder we gave a
33 number of illustrations from state practice where two
34 states had agreed upon different boundary lines.
35 Moreover, the possibility of there being different
36 boundary lines is expressly recognised by the
37 international court in its decision in the Jan Mayen case
38 where it rejected the proposition that the boundary

1 between the shelf and the zone necessarily had to follow
2 the same course. It held that the boundary lines in that
3 particular case did follow the same course, but not that
4 they had to do so, and in that respect I would draw your
5 attention in passing to the report of the Conciliation
6 Commission in the earlier Jan Mayen matter between Iceland
7 and Norway. The Conciliation Commission there did indeed
8 propose a different line for fisheries resources from the
9 line for the continental shelf.

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

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

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

35 Mr President, it is true that neither Libya/Malta nor
36 any of the other cases was dealing with the situation that
37 we have here, where one state claims continental shelf
38 rights over a particular area beyond 200 miles from its

1 shores and another state claims that it has exclusive
2 economic zone rights, and because it has exclusive
3 economic zone rights over that area it also has
4 continental shelf rights of the area.

5 4.00

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

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

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

37 Secondly we say that Barbados' argument amounts to
38 turning Article 56 of the Law of the Sea Convention on its

1 head. Instead of exclusive economic zone rights in the
2 seabed and subsoil having to be exercised in accordance
3 with continental shelf rights, which is what the Article
4 says, continental shelf rights would only be able to exist
5 at all where there were exclusive economic zone rights
6 with which they were compatible. That is an extraordinary
7 180 degree turn in the proper meaning of that provision.

8 To try and support it Barbados makes two points.
9 First of all it says "in accordance with" is not the same
10 thing as "subject to". That is a fascinating proposition.

11 Suppose that one had a statement in a treaty or for that
12 matter in a statute that said that particular conduct had
13 to be in accordance with law. Does that mean that it
14 could be in accordance with law but not subject to the
15 law? It simply does not make sense linguistically or
16 logically. Barbados' interpretation of Article 56.3
17 renders the formula in that provision essentially
18 meaningless.

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

27 The third reason why Barbados' interpretation cannot
28 be correct in our submission is that it would involve a
29 deprivation of prior rights, it would involve precisely
30 what Professor Reisman said there was a strong presumption
31 against, because continental shelf rights have existed,
32 whether claimed or not, for several decades before the
33 arrival on the scene of the exclusive economic zone.
34 Moreover continental shelf rights were not confined to 200
35 nautical miles from the shore of the coastal state to
36 which they adhered. Therefore immediately prior to the
37 EEZ becoming part of customary international law it would
38 have been perfectly possible for state A to have had

1 continental shelf sovereign rights over an area of the
2 continental shelf at let us say 230 nautical miles from
3 its coast, but still 200 nautical miles from the coast of
4 state B, its neighbour.

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

34 One last comment before I conclude. It is well
35 established that, if there is a single maritime boundary,
36 then it is much easier to deal with rights in the seabed
37 and subsoil. There is no question about that. That is
38 why single maritime boundaries have been popular. But the

1 fact that it is easier to do it this way does not mean
2 that it is impossible to do it in any other form. For
3 many years before the exclusive economic zone came into
4 existence you had rights in the water column which were
5 res communis, which could be exercised by anyone because
6 the water column was classified as high seas. Yet below
7 that you had the continental shelf rights pertaining to
8 the coastal state. It is the very essence of the Truman
9 Proclamation. If we claim rights to the seabed, this does
10 not affect the water column. That might have been a bit
11 messy, but it worked perfectly well. For the same reason
12 with the guidance provided by article 56.3, we say that
13 the coincidence of exclusive economic zone rights in State
14 A and continental shelf rights in State B is capable of
15 working. That, we say, is precisely what you have in this
16 part of the Atlantic sector.

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

21 THE PRESIDENT: Yes.

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

27 PROFESSOR GREENWOOD: To the extent that that is regulated by
28 the continental shelf regime, it would be the state that
29 had the continental shelf rights in that area, not the
30 state that had the exclusive economic zone rights. That,
31 in our submission, is the natural consequence of article
32 56, paragraph 3.

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

37 PROFESSOR GREENWOOD: It is not displaced, Mr President, rather
38 the exercise of the rights of the EEZ in respect of the

1 seabed and subsoil must in accordance with the provisions
2 of the continental shelf regime. If the continental shelf
3 regime vests in sovereign rights in a different state and
4 it is only in that case that article 56.3 is important,
5 then it would be the continental shelf regime which
6 prevails and not the EEZ.

7 PROFESSOR LOWE: Thank you.

8 THE PRESIDENT: We will stand adjourned until 4.25.

9 **(Short Adjournment)**

10 THE PRESIDENT: Professor Crawford, please.

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

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

30 First of all, as to fact. The parties agree that in
31 the relevant area there is an outer continental shelf of
32 approximately the dimensions shown. It is not surprising
33 so relatively close to a major continent with very
34 substantial rivers that you would get an outer continental
35 shelf of a sedimentary kind such as this. Similar
36 features exist in the Gulf of Guinea where there was a
37 very similar river system. It is intuitively plausible
38 that there is outer continental shelf and both parties

1 have depicted it in broadly the same way.

2 4.30

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

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

28 PROFESSOR CRAWFORD: The lines are shown on the map.

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

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

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

1 evidence of any of these things.

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

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

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

25 PROFESSOR CRAWFORD: In any event, let us assume for the sake of
26 argument, and, in deference to Mr Volterra, Trinidad and
27 Tobago is behindhand with its preparations to the Annex II
28 Commission, let us assume that, I will not tell you that
29 that is not the case because the weekend is approaching.
30 Even if that is so, no consequence is to be drawn against
31 us. I have to say that my impression, as a matter of
32 impression, is that many states are behindhand. But to
33 say that a state which is behindhand in its preparation
34 to meet a deadline in 2009 has thereby acquiesced in the
35 loss of rights, if that is what Mr Volterra said, and no
36 doubt he can correct himself next week, is a new doctrine
37 of international law to add to Professor Reisman's
38 remedial delimitation theory. We can call it anticipatory

1 estoppel.

2 I turn to make three observations about the
3 institution of the continental shelf. You will have
4 noticed that Barbados uses the phrase "extended
5 continental shelf" to describe the area which both parties
6 agree lies more than 200 nautical miles from their
7 coastlines. We have used the phrase "outer continental
8 shelf" which is also used by Mr Colson in his American
9 Journal of International Law article which is one of the
10 relatively few useful items in the literature on the outer
11 continental shelf in 97 American Journal at page 91. The
12 Convention, in fact, does not use either term. For
13 example, annex 2, article 3 has the phrase "the outer
14 limits of the continental shelf in areas where those
15 limits extend beyond 200 nautical miles", which is
16 absolutely accurate, but a bit of a mouthful. It does not
17 really matter which we use. What is clear is that the
18 Convention refers to a single institution of the
19 continental shelf which may or may not extend beyond 200
20 nautical miles. It extends to the outer limits of the
21 continental shelf as they are defined, whether those outer
22 limits happen to fall at 10 miles, 50 miles, 250 miles or
23 whatever.

24 Although from time to time one catches traces of a
25 contrary assumption in Barbados' argument, there are not
26 two continental shelves, outer and inner, intended and
27 extended, so to speak, there is only one. Just as there
28 are not two continental shelf doctrines, one old and one
29 new, there is not the old continental shelf of 1958 and
30 the new continental shelf of 1982. The continental shelf
31 is a profoundly customary institution. Indeed, I would
32 say that it is one of the distinctive new customary law
33 institutions of the post-1945 period. It is of course
34 expressed in the various conventions but we have seen
35 curiously that those parts of the conventions of 1958, and
36 we may find eventually of 1982, which are out of line with
37 the custom give way to the custom. The custom prevails in
38 this situation over time. The relationship between custom

1 and treaty is a more complex matter than is sometimes
2 believed. For example, in 1969 the court endorsed those
3 aspects of the 1958 Fourth Convention as custom which were
4 reflected in the customary practice of states starting
5 with the Truman Proclamation and rejected those which were
6 not. Above all, the presumption of equal distance.
7 Article 83's renvoi to international law, as referred to
8 in article 38 of the statute of the International Court of
9 Justice saw states, no doubt conveniently, accepting this
10 reality rather than seeking to override it and, more
11 generally, the 1982 Convention does not seek to override
12 the existing customary institution of the continental
13 shelf as it expresses any particularises it. It adds to
14 the body of law, it does not, we submit, detract from it.

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

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

33 To summarise, the continental shelf of the Truman
34 Proclamation always had in it, so to speak, to become what
35 it has become. The 1982 Convention defines the outer
36 limit of the continental shelf, a definition previously
37 singularly lacking, and creates a mechanism for
38 determining their extent. It does not constitute the body

1 of rights which go to make up the continental shelf
2 pertinent, as the court said in 1969, ipso jure to the
3 coastal state without need for proclamation, without need
4 for occupation, without need for activity. And does so
5 out to the outer limits of the continental shelf without
6 reference to a 200 nautical miles line.

7 That is my first observation about the continental
8 shelf.

9 My second observation is that there has been from the
10 Truman Proclamation onwards a significant legal difference
11 between the regime of the continental shelf and the regime
12 of the water column. There still is. The continental
13 shelf is a zone of exclusive rights, by definition. The
14 EEZ, despite its title, is a distinct and overlying legal
15 regime, a specific legal regime, to use the language of
16 the Convention, language which is protean but very
17 carefully calculated. No state has an obligation to
18 determine the sustainable yield of the continental shelf.

19 A wise state might leave the oil in the ground for 100
20 years on the basis that then it will be rich beyond the
21 images of Cereuses.

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

36 We can talk about the meaning of article 56. It is
37 plainly not an attempt to treat the exclusive economic
38 zone as having any form of priority. Of course, as

1 between states parties to the treaty, it could have been
2 given priority. It was not.

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

13 I move from my observations to questions of
14 jurisdiction. Barbados says that you have no jurisdiction
15 over the Trinidad and Tobago outer continental shelf claim
16 for four reasons. It says that the claim is a new one,
17 which was not put forward until the eleventh hour. It
18 says that there has never been an exchange of views on it.

19 It says that to decide it involves deciding on the right
20 of a third party, the international community, as well as
21 infringing on the jurisdiction of the Annex II Commission.

22 It says that Trinidad and Tobago can have no rights
23 outside 200 nautical miles from its own coast and within
24 200 nautical miles of Barbados' coast because Barbados'
25 rights trump.

26 4.15

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

35 First of all jurisdiction. The first point to make
36 here is that Barbados had notice that we claimed a line
37 out to the outer edge of the continental shelf. There are
38 a number of indications of this. The first of course was

1 the 1990 Convention with Venezuela, which is explicitly
2 such a line in relation to that boundary, explicitly, and
3 I took you to the relevant provision the other day. Why
4 would we claim less in relation to our northern boundary.

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

10 "Trinidad and Tobago is looking at a single all
11 purpose delimitation line for the seabed and subsoil in
12 the adjacent waters. Trinidad and Tobago", it goes on,
13 "is not looking to stop at 200 nautical miles but to
14 extend its seabed jurisdiction up to the maximum limit of
15 350 nautical miles or 100 nautical miles from the 2,500
16 metre isobath which is subject to approval by the
17 Commission on the Limits of the Continental Shelf". That
18 is the first round and it could not be clearer.

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

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

1 dispute and Barbados knew it.

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

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

30 The second reason which is supplementary is that in
31 any event, even if there had been an onus on us to ensure
32 that there had been an exchange of views before bringing
33 this claim forward as respondent in reply to the Barbados
34 claim, Barbados could not argue that there had been no
35 exchange of views because it cut off the negotiations. We
36 were perfectly willing to go on with the negotiations; it
37 cut them off and it takes the consequences of having done
38 so. For those reasons the claim is admissible.

1 I move to the question of the relationship between
2 your jurisdiction and of the Annex II Commission.
3 Barbados says that the Annex II Commission is the
4 authority body in these respects and it has the quite
5 remarkable power through making the recommendation to
6 create a situation of an outer continental shelf line,
7 which is opposable ergo omnis, a very remarkable
8 phenomenon which goes beyond the normal authority of
9 judicatory bodies by reason of Article 76 in Annex II.
10 But of course the Annex II Commission's mandate is
11 categorically clear; it is to delimit the outer edge of
12 the continental shelf, it is to work out precisely where
13 applying the formulas of the Convention the outer shelf is
14 to be located. It is delimiting the domain of states as
15 against the domain of the deep seabed. It is not dealing
16 with delimitation inter se, and that is categorically
17 clear from Article 76 paragraph 10, which says the
18 provisions of this Article are without prejudice to the
19 question of delimitation of the continental shelf between
20 states with opposite or adjacent coasts. That
21 delimitation question is separate from and the provisions
22 of this Article dealing with the Commission are without
23 prejudice to the issue of delimitation.

24 I refer also to Annex II Article 9; the actions of
25 the Commission shall not prejudice matters relating to
26 delimitation of boundaries between states with opposite or
27 adjacent coasts. The Commission cannot determine for
28 itself, because if it could do so it would have to
29 delimit laterally inter se. The Commission cannot
30 determine for itself which is the coastal state in respect
31 of a particular segment of outer continental shelf, but it
32 may well matter as Colson points out. It can matter quite
33 a lot depending on the configuration, which is the
34 relevant coastal state. The Commission say to the states
35 you sort that out for yourself and do it first, and as
36 Colson points out at 93-94 of his article the Commission's
37 rules actually allow for this to happen, for example by
38 allowing delays while it is worked out. The Commission's

1 rules actually say "Competence with respect to matters
2 which may arise in connection with the establishment of
3 the limits inter se of the continental shelf rests with
4 states". That is a summary of rule 46 in annex 1 of the
5 rules of procedure of the Commission.

6 It is true, and Barbados relies upon the decision of
7 the Court of Arbitration in the St Pierre and Miquelon
8 case which stopped the mushroom stalk at 200 miles, and
9 you can see the delimitation that it made. The Tribunal
10 did this by saying that any decision by this court
11 recognising or rejecting any rights of the parties over a
12 continental shelf beyond 200 nautical miles would
13 constitute a pronouncement involving a delimitation not
14 between the parties but between each one of them and the
15 international community, represented by organs entrusted
16 with the administration and protection of the
17 international seabed area that has been declared to be the
18 common heritage of mankind, and it stopped there. But it
19 expressly left open the question whether and what would
20 happen after that point. That is paragraph 78-79 of the
21 decision. You can see now why that is plainly wrong. The
22 end of the mushroom stalk is within 149 nautical miles of
23 Sable island which is part of Canada, part of the Province
24 of Nova Scotia; and the blue arc is the Canadian
25 exclusive economic zone. The end of the mushroom stalk is
26 well within the Canadian Continental Shelf, and the Annex
27 II Commission has no jurisdiction over that area, its
28 jurisdiction is limited to cases where the shelf extends
29 200 miles beyond the coast. The question of delimitation
30 would have to be completed as between France and Canada
31 before the continental shelf could perform its function.
32 Until then it would not know with respect to the relevant
33 arc which the coastal state was and having regard to the
34 formulas it has to apply it needs to know. The point is,
35 as Colson said, that when you get to the 200 mile line you
36 may be 200 miles from one state but more or less than 200
37 miles from another state, and that is indeed the case
38 between Canada and the United States resulting from the

1 Gulf of Maine decision, the point where the boundary stops
2 in the Gulf of Maine case is closer to Canada than it is
3 to the United States.

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

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

32 The only Tribunal which has actually delimited as
33 between two adjacent territorial entities beyond 200
34 nautical miles in this way is the Newfoundland and Nova
35 Scotia Tribunal. You will see the delimitation from the
36 award of the Tribunal there. The blue line is the
37 approximate location of the 200 nautical miles line. You
38 will notice that the Tribunal's boundary just goes past

1 the end of the mushroom stalk, but that is a different
2 story. We will not talk about it now.

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

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

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

37 I turn to the merits of the outer continental shelf
38 claim of Trinidad and Tobago. Here, of course, we have to

1 distinguish what I am going to call the intermediary zone
2 and the zone of pure continental shelf. There is an area
3 where Barbados has exclusive economic zone rights by
4 reason of its distance from the coast. The area is less
5 than 200 nautical miles from Barbados and it, therefore,
6 has the rights under part 4 of the Treaty. Nonetheless,
7 we say that that area was, and from the inauguration of
8 the principle of the continental shelf always has been,
9 the continental shelf of Trinidad and Tobago or one to
10 which Trinidad and Tobago had a valid claim. Those claims
11 have to be delimited both laterally and in terms of the
12 distinction between the water column and the seabed. It
13 is, if you like, a sort of strata title and strata title
14 delimitation is a perfectly conceivable idea. Barbados
15 seems to think that you can only draw lines in one
16 direction, but there are many situations in which
17 different states have rights over the same bit of
18 territory. But what? Actually, Barbados does not take
19 that position. Barbados wants to have rights, at least
20 behind the hand, as Professor Greenwood put it, over our
21 territory in terms of the access rights that it is
22 claiming. It wants access rights over our territory if
23 you will not give it more. Those are rights which would
24 be rights in relation to a territory of another which used
25 to be a perfectly respected chapter in the old
26 international law books. It has tended to disappear but
27 the institution has not disappeared. Just because we tend
28 to think of states as normally territorially delimited in
29 the vertical plain does not mean that they are always so.
30 Rights can exist and be adjusted as between two states in
31 relation to the same area of the globe. It is a mistake
32 to think that just because a general institution is
33 created by a multilateral treaty that that institution
34 overrides and displaces all particular rights and
35 obligations that relate to particular pieces of territory.
36 That was the proposition for which Professor Reisman
37 contended the other day. That proposition I think is
38 correct as a matter of general law. What was incorrect

1 was the idea that you could acquire such a right by virtue
2 of an asserted breach of an obligation of a state
3 previously having it. That is to say the territory could
4 change hands because of a breach of an obligation. A very
5 curious idea, as well, of course, as all the factual
6 underpinnings which were necessary in order to get to that
7 situation.

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

13 Our primary submission then is that the continental
14 shelf is the prior institution and that nothing in the
15 1982 Convention takes away our existing vested rights over
16 the continental shelf existing prior to the proclamations
17 of the EEZ of both parties. Sir Elihu tried to bridge the
18 gap by postulating an earlier customary exclusive economic
19 zone but these parties proclaimed their exclusive economic
20 zone and acted on the basis of those proclamations. That
21 continental shelf existed prior to the entry into force of
22 UNCLOS. Nothing in UNCLOS overrides it. It still exists.

23 Barbados argues that the France-Dominica agreement of
24 1987 shows that there can be no rights beyond 200 nautical
25 miles. It is interesting that Barbados likes regional
26 implications when they suit it. It is only the
27 unfavourable regional implications that they do not like.

28 But it points to the fact, which is true, of course, and
29 which we depicted when we showed you the delimitations in
30 the region in our Counter Memorial, something the
31 applicant had singularly failed to do, it is true that the
32 parties closed the 200 mile corridor of Dominica and that
33 the area beyond it is French continental shelf. France
34 goes around the corridor at the end of the both sides.

35 It is also true, and you will see this in the account
36 given by Dundas, which I referred to earlier, that
37 Dominica proposed to keep going beyond 200 nautical miles
38 and was told by Monsieur Gilbert Guillaume, as he then

1 was, "You can't do that". Well, when you are told by
2 Monsieur Gilbert Guillaume that you cannot do something,
3 it tends to be true and the claim was dropped promptly.
4 From this event, Barbados draws the inference that it was
5 accepted that the end of 200 miles was the end of any
6 possibility of rights of Dominica. Well, you can read the
7 travaux for yourself, but it seems to us that what
8 Dominica was referring to was the possibility that it
9 would get further high-seas rights beyond 200 miles in a
10 situation in which someone held them. France said, "Don't
11 be silly, this is where you stop". There is no mention in
12 the travaux of outer continental shelf and there is no
13 indication that at the time these discussions were
14 occurring anyone had the bright idea that Mr Parsons has
15 now had that there might be outer continental shelf out so
16 far.

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

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

37 I would note that the depths of which the outer
38 continental shelf, if that is what it is, exists in this

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

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

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

35 Well, these extreme scenarios should be taken with a
36 degree of scepticism. It is true that one can dream up
37 problems that could theoretically arise when sitting exam
38 questions for one's students. The reality is that the EEZ

1 is about the living natural resources of the 200 mile
2 zone. The continental shelf is about hydrocarbons and we
3 do not have to worry too much about andalitic* worms.

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

33 We referred to the Torres Strait Treaty between
34 Australia and Papua New Guinea, to the Australia-Indonesia
35 Treaty of 1997, not yet in force, to the United Kingdom-
36 Faroes Island Agreement, which provides for different
37 continental shelf and fisheries boundaries and a special
38 area of joint jurisdiction. That agreement was concluded

1 in 1999. The details of these agreements are in
2 paragraphs 280 to 282 of our Counter Memorial.

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

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

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

33 If Barbados is right Trinidad and Tobago is excluded
34 from that area. The area is at present of uncertain value
35 in terms of resources, who knows, but we are talking about
36 a delimitation that will last for centuries. We are
37 talking about access to resources which may in the future
38 with what technological developments who knows be of

1 immense value to the coastal states, and it is that
2 opportunity, the equality of that opportunity, which
3 Trinidad and Tobago seeks.

4 How do you draw the line beyond 200 miles from
5 Trinidad and Tobago? Colson has done a very useful review
6 of the agreement so far reached. He makes the point that
7 there are not many of them. There has only been the one
8 decision which was the decision of a domestic Tribunal,
9 though with international law as its applicable law, but
10 it may be helpful if I read the relevant passage from
11 Colson, tab 41 in your folder, page 96. You know Mr
12 Colson and his expertise in this field, and what he says
13 on a subject like this should be taken seriously. In
14 summary he says "several aspects of the limits of state
15 practice stand out. First the coastal states concerned
16 establish these bilateral boundaries on the assumption
17 that the area in question was theirs to delimit as outer
18 continental shelf without reference to the Commission" -
19 that is the Annex II Commission. "Second these outer
20 continental shelf boundaries generally began as
21 demarcations between opposite coasts although in some case
22 as the boundaries extend seawards the coasts of the
23 neighbouring countries assume a posture of adjacency", so
24 we are pleased to see that Mr Colson is not taken in by
25 the Barbados theory that 200 miles away or so you are
26 still between opposite coasts. "Third, whatever
27 methodology the state employed to delimit the 200 nautical
28 mile portion of the boundary was extended and thus applied
29 to the delimitation of the outer continental shelf."
30 Referring to the seven treaties of which this article is a
31 review he says: "There is no change in methodology in any
32 of these boundaries. (4) While geological and
33 geomorphologic factors pertaining to Article 46 criteria
34 were clearly employed to determine the final point on some
35 of these boundaries there is no evidence that such
36 considerations figured in the delimitation of the maritime
37 boundary itself.

38 "This limited state practice probably has no

1 particular legal relevance for future delimitations at the
2 outer continental shelf between neighbouring states.
3 Nonetheless as discussed below it suggests that states are
4 mindful of the application of well known principles and
5 methods in this context, but with an eye to the criteria
6 of Article 76 in some circumstances."

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

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

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

31 There is no reason to think here any more than there
32 was in the Newfoundland/Nova Scotia case that the boundary
33 so extended is inequitable to either party. It will have
34 the result when the Venezuela-Trinidad and Tobago boundary
35 is completed of leaving to Trinidad and Tobago a modest
36 fraction of the putative outer continental shelf. It
37 still leaves to Barbados a very substantial fraction, but
38 it means that each of the coastal states enjoys the

1 possibility of that future opportunity which with respect
2 this Tribunal should not decline. Accordingly that is our
3 claim line. It is, as Mr Volterra admitted, an optically
4 simple line. I hope as we have presented it, it is a
5 simple line as well. Of course you can dance around it,
6 but if you are going to dance around I hope you do so
7 elegantly with a fan like Sir Elihu.

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

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

22 Apart from that the Tribunal has canvassed a number
23 of possible questions that it might put to the parties,
24 and most of them it has put aside at least for the moment.

25 It would be grateful for any information the parties can
26 provide as follows, and in asking these questions on this
27 particular segment of the exchanges we have had it should
28 stress that the Tribunal has formed no view on any of the
29 issues of the case.

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

32 (a) the locations at which Barbados flying fish
33 vessels were apprehended by Trinidad and Tobago since
34 1970;

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

38 (c) The area south of the median line where during

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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.)
