

International Dispute Resolution Centre
Fleet Street
London, England

Monday, 24th 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 FIVE

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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 afternoon. There are a few housekeeping
2 points before we begin. First, we trust that counsel are
3 putting in to our reporters corrections of the transcript.
4 You will notice that there are various minor
5 imperfections in an excellent transcript, and putting in
6 footnote citations where counsel wish to put them in
7 remains to be done.

8 Please recall that there will be a reception at 6.30
9 on Friday for all the participants and it would be helpful
10 if each side could inform our registry of the number of
11 persons who will be attending the reception.

12 I should note that our ranks have been augmented by
13 the arrival of the hydrographer, Mr Gray, who has met with
14 his opposite numbers and has come armed with a number of
15 charts.

16 I think with that we are ready to begin, Mr Volterra.

17 MR VOLTERRA: Mr President, I speak to you in my capacity as co-
18 agent of Barbados. Before Barbados begins its round two
19 submissions, Barbados must bring the following to the
20 Tribunal's attention. I ask the Tribunal to turn to tab A
21 of your Judges' folder from today. There you will find a
22 copy of the rules of procedure with which you are
23 familiar. May I direct your attention to article 13,
24 paragraph 1, of the rules of procedure? Article 13.1
25 states "All written and oral pleadings, document and
26 evidence submitted in the arbitration, verbatim
27 transcripts of meetings and hearings and the deliberations
28 of the arbitral tribunal shall remain confidential unless
29 otherwise agreed by the parties."

30 During the past week there have appeared in the
31 Trinidad and Tobago press a number of articles about this
32 arbitration that contain details of the written and oral
33 pleadings of the parties and a number of them contain
34 specific references from the verbatim transcripts. One
35 article, published in a Trinidad and Tobago newspaper this
36 past Saturday is entitled "Barbados a predator, tribunal
37 told". Copies of the articles that have come to Barbados'
38 attention can be found at tabs B and C of your Judges'

1 folder. Article 13 sub 1 of the rules of procedure was
2 specifically agreed by the parties. It cannot be credibly
3 claimed that Trinidad and Tobago has forgotten about it.
4 Indeed, in relation to the incident that was dealt with
5 off the record on Friday of last week, the co-agent of
6 Trinidad and Tobago specifically requested of me that
7 Barbados agree that the incident be subject to Article 13,
8 paragraph 1. Barbados honoured that request. Article 13,
9 paragraph 1, is of course not a gag rule and does not
10 preclude notifications of the existence of the
11 arbitration. In the interests of full disclosure, the
12 Tribunal will find at tabs D and E copies of Barbados'
13 press releases made in relation to the hearing which, as
14 the Tribunal can verify for itself, do not violate Article
15 13, paragraph 1.

16 Trinidad and Tobago has at no time sought Barbados'
17 agreement that article 13 sub 1 be waived. Trinidad and
18 Tobago has simply decided to ignore Article 13, paragraph
19 1. This is a matter of disappointment and concern to
20 Barbados, in the same way as Trinidad and Tobago's conduct
21 in submitting the joint reports and including specific
22 references to them throughout the text of its Counter
23 Memorial, contrary to the express verbal and written
24 undertakings of its co-agents and Messrs Charles Russell.

25 Until this point, Barbados and its agent had taken
26 the position with the Barbados public and the media that
27 they are unable to disclose details about this case.
28 Trinidad and Tobago's unilateral disregard of Article 13,
29 paragraph 1, contrasts starkly with the position that
30 Barbados has taken publicly. Barbados is already finding
31 that Trinidad and Tobago's unilateral disregard of Article
32 13, paragraph 1, and dissemination of inaccurate accounts
33 has put it in an uncomfortable position within the region
34 and within Barbados itself. Barbados is a democratic
35 system with an enlightened people who take a lively and
36 engaged interest in the public actions which affect them
37 and their nation. Because of the proximity of Barbados to
38 Trinidad and Tobago, the Barbadian public reads the

1 newspapers and websites of its neighbour and has thus been
2 exposed to the one-sided and distorted versions of this
3 procedure. Even if Trinidad and Tobago were now to
4 recommit itself, however belatedly, to comply with Rule
5 13, paragraph 1, a hypothetical commitment whose
6 credibility would be doubtful, Barbados must correct the
7 misimpressions which have been created by Trinidad and
8 Tobago's failure to comply. The Tribunal will understand
9 when Barbados points out with the greatest regret that in
10 the circumstances it would clearly be inequitable for
11 Barbados to be expected to continue to observe Article 13,
12 paragraph 1.

13 Mr President, I ask you to call upon Professor
14 Reisman to commence Barbados' submissions in relation to
15 the second round.

16 THE PRESIDENT: Thank you, Mr Volterra. Professor Reisman.

17 PROFESSOR REISMAN: Mr President, members of the Tribunal,
18 I suppose it is not good form for counsel to quote one of
19 his colleagues to the Tribunal, but since I am quoting Sir
20 Elihu, who is a legend, perhaps I can begin by recalling
21 something that he said at the very outset of these
22 proceedings last week. He said "there is a distinct
23 element of unreality, indeed absurdity, in the continual
24 suggestion by Trinidad and Tobago that there is no dispute
25 between the parties ready for disposition by this
26 Tribunal". Indeed wholly aside from five years of
27 fruitless formal negotiations preceded by several decades
28 of disagreement, it was odd for a respondent to contest
29 the rightness of jurisdiction in a case in which all the
30 documents submitted demonstrated, along with the elaborate
31 legal argumentation, that a full blown dispute existed and
32 had proved itself intractable to a negotiated solution.
33 After one week of presentation by each party what better
34 adjective than intractable captures the situation?

35 Even Trinidad and Tobago's able counsel could not
36 keep himself from slipping into characterising the events
37 as a dispute. Professor Crawford, for example, said "Of
38 course the zone of co-operation was concluded way after

1 the critical date in the sense of the notification to
2 Barbados by Trinidad and Tobago that it did not accept the
3 positions that were being taken". Day 4 page 68. In
4 other words there was a dispute before February 16 2004.
5 Indeed there was a dispute from the moment Trinidad and
6 Tobago insisted on maintaining the Trinidad and Tobago
7 Venezuela Treaty.

8 The mis-named joint reports show the dispute by their
9 very structure. The parties were so far apart they could
10 not even produce a joint report, but were simply joining
11 two separate reports prepared by each. The reports leave
12 no doubt that the parties were in dispute over the very
13 methodology to be used in the delimitation.

14 Perhaps Trinidad and Tobago might say that this was
15 just a dispute about method, but method is central in
16 maritime delimitation. The North Sea Continental Shelf
17 case, described by Professor Crawford as the fons et origo
18 of maritime boundary law, was "just" a dispute about
19 method and method is hardly the only intractable dispute
20 between the parties.

21 Mr Wordsworth reviewed Trinidad and Tobago's theory
22 of UNCLOS, according to which "a state of disagreement on
23 a wide range of issues" cannot be a dispute under Part XV.

24 According to him, no matter how clear and intractable the
25 disagreement may be, a party is still obliged to start
26 over again under a different provision and to go through
27 everything again.

28 He solemnly quoted South West Africa, "it must be
29 shown that the claim of one party is positively opposed by
30 the other", apparently believing that in this case it
31 speaks for itself. We agree that it does. The claims of
32 one party are positively opposed by the other.

33 Both agent and counsel for Trinidad and Tobago have
34 declared that, if only the Tribunal would stop this
35 hearing and send the parties back, Trinidad and Tobago
36 would not denounce its arbitration commitment. But, Mr
37 President, send the parties back for what? Five or ten
38 more years of negotiation? We are simply baffled by the

1 interpretation which Trinidad and Tobago imposes on
2 Article 283 which would require states that had negotiated
3 fruitlessly for five years or ten years, if five years is
4 only "an early stage", according to our friends, in order
5 finally to be allowed to pass through the gate of Part XV,
6 section 1. The Methanex award referred to a popular
7 Canadian film entitled "Ground Hog Day" in which a
8 character was obliged to live through the same day again
9 and again and again. Does UNCLOS really call for a Ground
10 Hog Day scenario?

11 In the circumstances of this case, a more sensible
12 reading of Article 283 would take the reference to the
13 exchange of views, not as a requirement to go through what
14 already had been done for another five or ten years, but
15 to exchange views with respect to the organisation of the
16 arbitration, as was done. In any event, Barbados is
17 confident that the Tribunal will not impose an absurd
18 meaning on the text but will follow the wise course of
19 Southern Blue Fin Tuna, MOX and Malaysia-Singapore.

20 I will not comment on Trinidad and Tobago's reference
21 to a memorandum by the President of the Conference of 31
22 March 1976. In our written as well as oral submissions,
23 we have already explained our view of why it has no
24 authority, and we have little to add. Or, perhaps, one
25 thing to add. Mr Wordsworth took you through much of the
26 document but no mention was made of the President's
27 conclusion. Let me read it into the record, "In
28 conclusion", he said, "I should like to point out that any
29 provision in the informal single negotiating text on these
30 and other matters must not be construed as indicating a
31 strong preference for the procedure stipulated in the text
32 but merely as a basis on which negotiation might take
33 place".

34 Wholly aside from the fact that the provision which
35 the President was talking about was in a draft that was
36 not adopted and is different from what ultimately entered
37 UNCLOS, of what we ask is the statement an authoritative
38 interpretation?

1 The Agent of Trinidad and Tobago has effectively
2 waived the right of denunciation which it earlier claimed,
3 that Barbados had taken from it by its allegedly
4 precipitous initiation of arbitration. This can be found
5 at day one, page 11. Given this, there appears to be no
6 reason now why the Tribunal should not affirm its
7 jurisdiction. I shall have more to say about the
8 implications of this waiver in a moment.

9 Mr President, Barbados does not believe that we need
10 to rehearse our criticisms of this part of Trinidad and
11 Tobago's jurisdiction objection because they are detailed
12 in our written submissions and in our presentation last
13 week. Nor will we restate our criticism of Trinidad and
14 Tobago's contention that after five years of negotiations
15 "the negotiations are still at an early stage". I will
16 not restate our rejection of Trinidad and Tobago's notion
17 that the conclusion that further negotiations are
18 fruitless must be bilateral rather than unilateral. A
19 bilateral requirement would simply end the state's right
20 to invoke an arbitration clause as long as the other state
21 was willing to keep saying "Let's talk more". In most
22 cases in which one state wishes to avoid having to
23 arbitrate, the recalcitrant state will say that. And all
24 of this, Mr President, without even getting to the problem
25 of Article 298, to which I will return.

26 The case law on this point, as we showed in our
27 Reply, supports us. Trinidad and Tobago had raised the
28 cases without elaboration or analysis in its Counter
29 Memorial, simply citing them as supporting its case.
30 After our analysis and refutation in the Reply, the cases
31 did not re-appear in the Rejoinder, only to resurface in
32 last week's hearing where Mr Wordsworth announced that
33 they could be distinguished.

34 3.15

35 Mr President, we believe they are in point, they are
36 good law and sound judicial policy. The alternative would
37 choke off a meaningful dispute resolution system. What
38 those decisions say is entirely applicable to the case at

1 Bar. Our written submissions and statements to the
2 Tribunal deal fully with the issues and we are content to
3 have you judge us on them, but there are a number of
4 specific issues on which new arguments were raised last
5 week and I would like to address them briefly.

6 There has been disagreement over what transpired in
7 the meeting on February 16, 2004 in Bridgetown between the
8 Prime Ministers of the respective states. Barbados has
9 submitted that Prime Minister Manning said that the issue
10 of the Trinidad and Tobago/Venezuela treaty was
11 intractable and, tauntingly, that Barbados could proceed
12 to arbitration if it wished. Trinidad and Tobago contests
13 this. The Tribunal has had the benefit of the affidavit,
14 oral testimony and cross-examination of Ms Teresa
15 Marshall, Permanent Secretary of Barbados' Ministry of
16 Foreign Affairs and Mr Andre Laveau and Mr Eden Charles of
17 Trinidad and Tobago's Ministry of Foreign Affairs.
18 Ambassador Sealy, appearing as counsel, also presented
19 some purportedly factual material. I do not believe that
20 these issues are critical to establishing jurisdiction in
21 this case for it is manifest that a dispute existed and
22 that is decisive, but I submit that Ms Marshall, who was
23 present at all the meetings and, as Permanent Secretary,
24 was deeply involved with all of the issues covered,
25 demonstrated by affidavit and viva voce testimony the
26 credibility of her account of the events, and that
27 conversely Mr Laveau could not even confirm that he had
28 not left the room a number of times during the meeting,
29 while Mr Charles by his inability to explain serious
30 discrepancies between his affidavit and contemporaneous
31 documentary evidence, the accuracy of which he himself was
32 responsible for certifying, demonstrated that he lacked
33 credibility as a witness. Ambassador Sealy confirmed that
34 the reports were entirely accurate, flatly contradicting
35 Mr Charles' testimony. His presentation puts Mr Charles
36 and his testimony in even more doubt.

37 Mr Wordsworth dwells on the statement by Prime
38 Minister Arthur issued after the meeting on February 16,

1 in order to impugn Prime Minister Arthur's credibility and
2 Barbados' submission that the meeting demonstrated the
3 intractability of the dispute and the need for repairing
4 to arbitration. Mr President, members of the Tribunal,
5 Barbados is content without further comment to leave to
6 the rich diplomatic experience of the Tribunal the
7 interpretation of the content of what was a diplomatic
8 document, and in this regard Barbados is content also
9 without further comment to leave Sir Arthur's question of
10 the evidentiary value of Trinidad and Tobago's Cabinet
11 Note, which was prepared after the arbitration commenced,
12 to the wise judgment of the Tribunal.

13 As I said, I do not believe that these issues are
14 critical to establishing the Tribunal's jurisdiction, for
15 it is the manifest existence of the dispute which is
16 decisive. I recall them to you however as they provide a
17 useful sense of the context and just how far apart the
18 parties are on the facts as well as the law.

19 Trinidad and Tobago asserted several times last week
20 that it was prepared to conclude a separate fishing
21 agreement and would have but for Barbados' invocation of
22 arbitration. I have no doubt that Trinidad and Tobago was
23 prepared to conclude and to conclude quickly a fishing
24 agreement at any time after 1991 on its own terms, and
25 you may be sure that Barbados was not only prepared but
26 anxious to conclude an agreement. After all, it was
27 Barbadian fisherfolk and not Trinidad and Tobago's who
28 were being excluded from their fishing grounds by Trinidad
29 and Tobago. The problem was and is that Trinidad and
30 Tobago's terms were not acceptable to Barbados. Barbados
31 believed that the terms did not meet its minimum
32 requirements and entitlements. It takes two parties to
33 make an agreement. After five years of unsuccessful
34 negotiation during which Barbadian fishing vessels were
35 arrested and even taken, and at the end of which Trinidad
36 and Tobago had undertaken certain steps with Venezuela, it
37 was reasonable, if not inescapable, for Barbados to
38 conclude that if it believed the fishing and the

1 delimitation were inseparable, as it did and as it does,
2 only an arbitration Tribunal could solve the problem.

3 For the same reason, Trinidad and Tobago's contention
4 that Barbados' fishing problems were of its own making
5 because it had exercised its right to arbitrate is hardly
6 credible. It would be credible if Trinidad and Tobago had
7 authorised Barbadian boats to operate in the traditional
8 fishing grounds pending resolution of the dispute. But of
9 course Trinidad and Tobago did not do that.

10 I would like to recall in this connection the option
11 available to a reluctant respondent under UNCLOS Article
12 298 to denounce "at any time after acceding to the
13 Convention its obligations including obligations to
14 arbitrate". This provision has, as the Tribunal knows,
15 been used in the past. When it is used it strips the
16 other party to a dispute of its right to implementation of
17 the Convention by a neutral decision maker. As you can
18 see from what you have heard in the last week, the loss of
19 fishing rights would have been calamitous for Barbados,
20 given that facts on the ground were about to be created
21 and its artisanal fisherfolk were being arrested.
22 Trinidad and Tobago never, in the course of some 20 months
23 of exchanges of pleadings during which it has consistently
24 objected to your jurisdiction, ever stated to Barbados or
25 to this Tribunal that it would not exercise its rights
26 under Article 298, if only Barbados suspended the
27 arbitration and returned to negotiation. Only now, no
28 longer in limine litis, not at the gate of the court house
29 but in the court house, does Trinidad and Tobago state
30 that it will not exercise its right if the Tribunal orders
31 the parties to return to negotiation. This is an empty
32 gesture, as Trinidad and Tobago no longer has that right,
33 vis-a-vis Barbados, but it does confirm that the Tribunal
34 may proceed to the merits.

35 We listened attentively to Mr Wordsworth's recitation
36 of Trinidad and Tobago's theory of Barbados' alleged abuse
37 of process in exercising its right to arbitration, and
38 then asking for rights under international law and not

1 merely for the contingent concessions which any party that
2 is negotiating in good faith makes in an effort to achieve
3 a settlement. We have set out our legal arguments in this
4 respect both in our Reply and in our oral presentation
5 last week. As Mr Wordsworth has said, nothing in this
6 regard that does not appear in Trinidad and Tobago's
7 written submissions, we will not, Mr President, abuse your
8 process by repeating what is already in the record.

9 I turn to Trinidad and Tobago's objection to what has
10 been called the scope of jurisdiction. Barbados has
11 submitted in its pleadings, and through Sir Henry and Mr
12 Fietta, the fact of artisanal fishing by Barbadian
13 fisherfolk in waters to the south of the median line.
14 These fisherfolk must as a matter of their economic
15 survival, follow the flying fish and its pelagic predators
16 in their yearly peregrination from waters close to
17 Barbados to waters close to Tobago and south of the median
18 line. Trinidad and Tobago contests our position that this
19 pattern of fishing has deep historical roots. We believe,
20 Mr President, that we have established as good a case as
21 can be made for historical practice, given the paucity of
22 documentation and the lack of interest of the colonial
23 government which viewed sugar cane and not artisanal
24 fishing as the cash crop and wealth producer. Be that as
25 it may, the evidence which is incontrovertible is that
26 this pattern has been followed since at least 1942 when
27 ice boats were introduced. The actual date may have been
28 several years earlier. Barbados has, we believe,
29 demonstrated the consequences for the community of
30 fisherfolk, some 6 per cent of the workforce, and the
31 consequences for the Barbadian economy as a whole of
32 exclusion from these fishing grounds. I will have
33 occasion later today to remind the Tribunal of just what
34 level of consequence must be demonstrated in contemporary
35 international law in order for this to constitute special
36 circumstance. By reference to prior precedents, this
37 constitutes a special circumstance for which international
38 law provides a remedy, either adjustment of the

1 provisional median line or the establishment of a non-
2 exclusive access regime.

3 For reasons which need not be rehearsed at this
4 juncture, Barbados has asked for an adjustment of the
5 median line and has indicated where it believes that
6 adjustment should be made. I draw the Tribunal's
7 attention to the notice of arbitration which includes
8 explicit and prominent reference to the fishing issue.
9 The issue has been joined as to whether the tribunal may
10 select and order, through the armamentaria which
11 international law provides it, a less extensive remedy
12 than the one which Barbados has requested. Trinidad and
13 Tobago submits that the Tribunal may not. It must give
14 Barbados the whole hog, exactly what was prayed, or
15 nothing. We think that the ultra petita rule is perfectly
16 clear. The Tribunal may provide a remedy of less than
17 what was petitioned but not a remedy of more than what was
18 petitioned. Indeed, tribunals hardly ever establish a
19 maritime boundary exactly where the winning party wants
20 it. They often give it considerably less. In Eritrea-
21 Yemen, a non-exclusive fishing regime was ordered, even
22 though what had been requested was an entire boundary,
23 designed to take account of this resource use. The
24 fishing regime had not even been claimed.

25 Mr President, Barbados submits that, if the Tribunal
26 in its wisdom concludes that our artisanal fishing
27 constitutes a special circumstance, it is for the Tribunal
28 to select or fashion an appropriate remedy as long as it
29 is within the remedy for which we have asked and a regime
30 of non-exclusive access falls within that remedy.

31 3.30

32 Incidentally, this issue is in no way a product of
33 Bajan alchemy, as we were accused last week. It was
34 Trinidad and Tobago and not Barbados that raised the issue
35 of a regime of non-exclusive fishing rights, accusing us
36 in its Counter Memorial of implying it. In our Reply we
37 simply indicated what in any case would have been obvious
38 to the Tribunal, that it may order a remedy less than that

1 prayed. I suspect that the problem for counsel has less
2 to do with their curious fascination with apples, oranges
3 or lemons and more with their fear that, if, as we hope,
4 this Tribunal should order any of the possible remedies to
5 the special circumstance which we have established,
6 Trinidad and Tobago or their counsel will get the
7 raspberry. But, Mr President, counsel are wrong here as
8 well, for there is no hidden raspberry in their imaginary
9 fruit basket. If the median line is adjusted, Barbados
10 fisherfolk will be able to fish in the areas in which they
11 have fished, while Tobagonian fisherfolk will be able to
12 fish in their traditional areas. Alternatively, if a
13 regime of non-exclusive access is ordered for the
14 artisanal fisherfolk to pursue, on a seasonal basis, the
15 flying fish and its pelagic predators, Trinidad and Tobago
16 will lose nothing, as it does not fish those waters for
17 those fish, and, given the life span and the replenishment
18 pattern of the flying fish, no threat to conservation is
19 posed.

20 I should also mention very briefly Professor
21 Greenwood's suggestion that Mr Volterra and I were
22 presenting different claims south of the median line.
23 That is not correct, Mr President.

24 We have submitted that Trinidad and Tobago's claim to
25 the extended continental shelf or EEZ is inadmissible for
26 not having been the subject of an exchange of views and,
27 in terms of competence, has been assigned by UNCLOS to
28 another organ. Trinidad and Tobago argues that it is
29 mentioned in the joint reports. Perhaps, but for a party
30 seemingly obsessed with the need for multiple reiterative
31 exchanges of views before UNCLOS arbitration may commence,
32 the threshold is suddenly dropped to the floor. We find
33 no record of exchanges of views in the reports or the
34 transcripts or a supported claim to the ECS, nor we
35 believe will the Tribunal. We are content to refer the
36 Tribunal to those records for its decision without further
37 comment.

38 As for the issue of competence, the only

1 international precedent, St Pierre and Miquelon, clearly
2 holds that this matter does not fall within the
3 jurisdiction of an Annex VII tribunal. Our learned
4 friends' gloss on this decision is that the tribunal there
5 was ducking a hard-to-handle case. But that is not what
6 the case says and it is really insulting to a panel of
7 very distinguished international lawyers. The issue was
8 not the difficulty of the case any more than the Southern
9 Blue Fin Tuna tribunal can be accused of ducking a hard
10 case. In both instances, jurists sensitive to, and
11 respectful of, the limited jurisdiction of international
12 tribunals resisted an importuning litigant and remained
13 faithful to the law. Again, Mr President, we are prepared
14 to rest our case on these two points on the written and
15 oral record.

16 Mr President, that concludes my presentation. May I
17 ask you to call on Mr Volterra?

18 THE PRESIDENT: Thank you, Professor Reisman. Mr Volterra.

19 MR VOLTERRA: Thank you, Mr President, I address the Tribunal
20 now as counsel and advocate of Barbados.

21 During my first presentation in round one of this
22 hearing, I distilled Barbados' submissions on estoppel and
23 acquiescence into five propositions. They appear before
24 you now on the screen and I will reiterate them.

25 One, the doctrines of estoppel and acquiescence apply
26 and are determinative in the present case. Two, the
27 evidence on the record confirms that Barbados has
28 exercised its sovereign rights and jurisdiction to the
29 north of the median line in the area now claimed by
30 Trinidad and Tobago for a prolonged period of time and in
31 a notorious manner, without protest from Trinidad and
32 Tobago. Three, the Tribunal is therefore precluded from
33 considering Trinidad and Tobago's claims to the north of
34 the provisional median line. Four, the evidence on the
35 record establishes that Barbados has never acquiesced with
36 Trinidad and Tobago's recent and limited activities in the
37 area to the south of the median line claimed by Barbados.

38 Therefore, five, the Tribunal is not precluded from

1 considering Barbados' claim there.

2 At the beginning of this round two, these submissions
3 remain intact.

4 Estoppel and acquiescence apply to this case. I
5 noted in my presentation on day one that the parties
6 appear to be agreed that the doctrines of estoppel and
7 acquiescence, which had been introduced to the arbitration
8 first by Trinidad and Tobago, were applicable to the case
9 as a matter of law.

10 On day four, Trinidad and Tobago stated that it was
11 not putting forward a claim of estoppel in relation to
12 Barbados' claim to the south of the median line. This can
13 be found at the transcript on page 43. It can also be
14 found at tab 159 of your Judges' folder for reference
15 only. I do not need you to turn to it now.

16 Despite having made that statement, Trinidad and
17 Tobago continued to say - and I quote from line one of
18 page 43, which is still tab 159 and appears on your screen
19 - Trinidad and Tobago went on to say that "until 2003
20 Barbados never advanced a claim of its own to this area,
21 that it always dealt on the basis that what it was after
22 was access for its fishermen to our waters and it now puts
23 its claim for an adjustment exclusively on that denial of
24 a right of access: a punitive delimitation."

25 Barbados is content that Trinidad and Tobago's words
26 speak for themselves on this particular point about the
27 applicability of estoppel and acquiescence. And, of
28 course, not 24 hours before making that statement - the
29 one I have just quoted - during day three and under the
30 rubric of an abuse of rights claim, Trinidad and Tobago
31 had indeed confirmed that it had made and continues to
32 make an argument based on Barbados' purported acquiescence
33 with Trinidad and Tobago's jurisdiction to the south of
34 the median line.

35 The parties disagree as to the facts and their legal
36 consequences, though. Thus, Trinidad and Tobago made
37 submissions on its objections to the admissibility of
38 Barbados' claim to the south of the median line. This

1 starts at line 28 of page 29 of the transcript, day 3.
2 Trinidad and Tobago referred to a purported period
3 "approaching 20 years of recognition by Barbados that the
4 area it now claims is within Trinidad and Tobago's EEZ".
5 That is found at line 15 of page 80 of the transcript day
6 3.

7 But the evidence is on the record confirming that
8 Barbados never recognised Trinidad and Tobago's recent and
9 limited activities in the relevant area. Trinidad and
10 Tobago bases its acquiescence case on the 1990 Fishing
11 Agreement between Barbados and Trinidad and Tobago. Our
12 opponents scoffed at the description of it as a
13 provisional modus vivendi but failed to note that it
14 lasted only one year. Hardly an agreement in perpetuity.

15 In any event, Trinidad and Tobago repeated its analysis
16 of the 1990 Fisheries Agreement and subsequent Fisheries
17 Agreement between the parties as being premised on
18 Barbados' acceptance of Trinidad and Tobago's jurisdiction
19 in the maritime area to the south of the median line.
20 This added nothing new to Trinidad and Tobago's arguments
21 on this topic and, to be fair, my earlier presentation to
22 the Tribunal on the fisheries agreement and the later
23 negotiations added nothing new to Barbados'. The issue
24 appears to be clearly joined and Barbados is content to
25 rest on its pleadings.

26 THE PRESIDENT: Excuse me, Mr Volterra, but Ms Joyce advises
27 that the buzz that we have been startled by is caused by
28 telephones in proximity to microphones, so anyone who has
29 a telephone might move it away from the microphone.
30 Proceed, Mr Volterra.

31 MR VOLTERRA: Thank you, Mr President. We are all such good
32 friends in this room and we all know each other's mobile
33 numbers. If this buzz keeps going I am sure the PCA can
34 start ringing around to see whose phone rings and find the
35 culprit!

36 I was saying that the issue in relation to whether
37 Barbados has accepted or not Trinidad and Tobago's
38 purported jurisdiction over the relevant area to the south

1 of the median line appears to be clearly joined as between
2 the parties, and Barbados is content to rest on its
3 pleadings.

4 Trinidad and Tobago's argument is that this 1990
5 agreement and all subsequent discussions on fisheries was
6 premised on Barbados' recognising Trinidad and Tobago's
7 jurisdiction to the south of the median line that it
8 claims, and Barbados argues that this agreement is nothing
9 more than a modus vivendi. As should be clear from the
10 record, Barbados was desperately seeking a way to stop
11 Trinidad and Tobago from arresting and harassing its
12 artisanal fisherfolk as they fished their traditional
13 grounds off Tobago. The context of the 1990 Fisheries
14 Agreement in the aftermath of the first Trinidad and
15 Tobago arrests supports this. Further confirmation is
16 found in the position taken by Trinidad and Tobago in
17 relation to the parties preservation of rights during the
18 recent bilateral negotiations. The Tribunal is thus faced
19 with a decision on this evidence as to whether to place
20 greater primacy on the preamble and Article 2.1 and
21 similar Articles of the 1990 Fisheries Agreement or
22 whether to place greater primacy on the preservation of
23 rights found in Article 11. The Tribunal will recall that
24 last week I contrasted Trinidad and Tobago's
25 contemporaneous position on this point, on the
26 interpretation of the preservation of rights, with its
27 position in this arbitration. I stated that it is
28 difficult to think of language that could have been a
29 clearer contradiction of Trinidad and Tobago's current
30 argument than that contemporaneous position.

31 Mr President, counsel for Trinidad and Tobago failed
32 entirely to address this determinative evidence of its
33 contemporary position in the first round.

34 3.45

35 I will ask the Tribunal's indulgence to revisit it
36 once more. This is found at tab 160 of your judges'
37 folder and it is Article 11 of the 1990 Fisheries
38 Agreement. It says, Article 11, "Preservation of rights.

1 Nothing in this agreement is to be considered as a
2 diminution or limitation of the rights which either
3 contracting party enjoys in respect of its internal
4 waters, archipelagic waters, territorial sea, continental
5 shelf or exclusive economic zone, nor shall anything
6 contained in this agreement in respect of fishing in the
7 marine area of either contracting party be invoked or
8 claimed as a precedent". Fishing in the marine areas of
9 either contracting party. Not fishing in the marine areas
10 of Trinidad and Tobago.

11 Remember that Trinidad and Tobago's interpretation of
12 the 1990 Fisheries Agreement and any subsequent
13 negotiations only makes sense if Article 11 is viewed as a
14 preservation of rights that enures to the benefit of
15 Trinidad and Tobago only. And only in relation to
16 Barbados' fishing in Trinidad and Tobago's purposed EEZ.

17 What I have put up on the screen is Article 16 of the
18 draft agreement proposed by Barbados during the most
19 recent round of negotiations. It is tab 161, but I
20 suggest you need not go to it because the language is
21 precisely the same as Article 11. The text is identical
22 and I am not going to repeat it.

23 Keep in mind that Trinidad and Tobago's
24 interpretation of these clauses in this arbitration is
25 that they are not problematic to its current arguments
26 because, and I quote counsel for Trinidad and Tobago at
27 page 81 line 16 of transcript day 3: "Barbados has no
28 relevant rights to be preserved. The whole 1990 Fishing
29 Agreement is predicated on Barbados not having rights to
30 Trinidad and Tobago's EEZ". In other words Articles 11
31 and 16 were entirely for Trinidad and Tobago's benefit.

32 But let us consider what Trinidad and Tobago's
33 contemporaneous interpretation of this preservation of
34 rights clause was up to but a few years ago, and you will
35 find this at tab 162. It is also on the screen. The
36 records of the recent negotiations between the parties
37 contains a notation by Trinidad and Tobago of its own
38 position. So this is Trinidad and Tobago's own notation of

1 its own position at the time of the negotiations a few
2 years ago. Trinidad and Tobago said "It was agreed that
3 the agreement should include a provision indicating that
4 the fishing agreement should in no way affect the parties'
5 respective maritime jurisdictional claims". In other
6 words, there is "parties" in the plural. There is an
7 apostrophe missing but I suggest that that is merely a
8 grammatical and typographical error. And it is the
9 parties, including Barbados as well as Trinidad and
10 Tobago, and their respective maritime jurisdictional
11 claims.

12 Mr President, Trinidad and Tobago has chosen to
13 ignore this evidence, but that contemporaneous statement
14 by Trinidad and Tobago in relation to fishing by Barbados
15 fisherfolk in the area claimed by Barbados to the south of
16 the median line can only make sense if it is understood as
17 a recognition by Trinidad and Tobago that Barbados has
18 "maritime jurisdictional claims" in that area. Otherwise,
19 that statement makes no sense whatsoever.

20 It only makes sense if it constitutes a recognition
21 by Trinidad and Tobago of Barbados' claims and that they
22 were being preserved by the preservation rights of this
23 clause. Thus, far from being a recognition by Barbados of
24 Trinidad and Tobago's jurisdiction, this evidence
25 establishes at the very least that it was Trinidad and
26 Tobago that was recognising that Barbados had maritime
27 jurisdictional claims in the area. If this is so, and it
28 must be on the terms of Trinidad and Tobago's very own
29 words as of two years ago, that must be the determinative
30 end of Trinidad and Tobago's acquiescence argument.

31 Nonetheless, Trinidad and Tobago referred also to
32 warnings that were given by Barbados to its fisherfolk by
33 the Barbados government and in the Barbados press at two
34 points in the history of this dispute, and those warnings
35 were about fishing in the traditional fishing grounds off
36 Tobago.

37 It is true, Mr President, that during two periods of
38 crisis a number of warnings did advise the fisherfolk of

1 Barbados not to venture south of the median line. And it
2 is true that a number of warnings did refer to the waters
3 of Barbados as being to the north of the median line. But
4 Barbados points out that such warnings were isolated to
5 two brief periods and periods of crisis, and it did not
6 emanate from the Ministry of Foreign Affairs. The
7 Ministry of Agriculture of Barbados was keen that the
8 fisherfolk of Barbados not be arrested by Trinidad and
9 Tobago, and in the immediate aftermath of the crisis,
10 while they were going on, was telling them not to
11 exacerbate the situation to their own detriment, or at
12 least not to be the instruments of exacerbation because of
13 the activities of Trinidad and Tobago.

14 Trinidad and Tobago does not dispute this description
15 that Barbados has put forward; nor does it challenge the
16 evidence that Barbados has put into the record that it
17 also at the same time warned its fisherfolk during these
18 periods of crisis only to stay out of Tobago's territorial
19 waters. There were some warnings that made no mention of
20 a median line, and you can see this in Lieutenant
21 Commander Dowridge's affidavit, which is at tab 163.

22 By no means could these isolated and inconsistent
23 occurrences be read as recognition by Barbados of Trinidad
24 and Tobago's jurisdiction in this area. Nor could
25 Trinidad's self serving unilateral record of a single
26 meeting between its officials and a Barbadian official,
27 which the Barbadian official had requested to protest
28 against the fishing arrests, constitute any recognition.

29 In any event, Trinidad and Tobago's recognition
30 during the most recent round of negotiations that Barbados
31 has maritime jurisdictional claims in the area belies
32 Trinidad and Tobago's arguments on this point in this
33 arbitration.

34 Despite Trinidad and Tobago's clear contemporaneous
35 position up to the end of the recent round of negotiations
36 that I have just taken down from the screen, Trinidad and
37 Tobago continues to refer to the records of the first
38 round of the most recent negotiations between the parties

1 on fishing and delimitation to try and support its claim.
2 Counsel asserted that the joint reports of that first
3 round clearly show that Barbados accepted that there were
4 no special circumstances to require the adjustment of the
5 median line to the south. This can be found at tab 164.
6 Counsel said "As we saw in the first round of the maritime
7 boundary negotiations Barbados was quite clear first of
8 all that there were no special circumstances justifying a
9 departure from the median line. Barbados seeks to explain
10 that away by saying that all Sir Harold St John meant was
11 that there were no special circumstances as suggested by
12 Trinidad and Tobago. Therefore there was nothing that
13 might vary the line to the north."

14 Trinidad and Tobago's counsel went on to state that,
15 if Sir Harold actually meant what Barbados said he meant,
16 then he would have said so. Well, let us look at what Sir
17 Harold did say. This can be found at tab 165 of the
18 judges' folder and I suggest you might want to turn to it.

19 This is found at the last sentence of the paragraph
20 on page 11. Sir Harold, it is recorded, told Trinidad and
21 Tobago that "Barbados did not recognise any special
22 circumstances as put forward by Trinidad and Tobago which
23 would justify a deviation from the median line position."

24 Barbados has argued that that statement from the joint
25 reports confirms that Barbados did not recognise any
26 special circumstances as put forward by Trinidad and
27 Tobago which would justify a deviation from the median
28 line position. Trinidad and Tobago, you will remember,
29 argues that if that was what Barbados meant then Barbados
30 would have said so. But Mr President, that is precisely
31 what this statement does say. Barbados is puzzled by
32 Trinidad and Tobago's argument on this point and thinks it
33 should be dismissed.

34 In relation to Trinidad and Tobago's assertion that
35 Barbados recognised Trinidad and Tobago's jurisdiction
36 south of the median line in the relevant area, on the
37 basis of hydrocarbon activities, Trinidad and Tobago
38 referred to the letter and map relating to the seismic

1 programme of Barbados' concessionaire to the south of the
2 median line including areas beyond Barbados' claim. The
3 Tribunal will no doubt recall that the parties disagree
4 about which map relates to the letter. You can find the
5 letter and the map that Trinidad and Tobago says is
6 related to the letter at tab 166 and you may wish to have
7 that map to hand. I am going to make a number of
8 observations about the maps, so I ask you to turn to it.

9 This is the map that Trinidad says was relating to the
10 letter. The observations that I have are three. First,
11 you will note that it is a roughly-drawn sketch rather
12 than the sort of map one would expect in these
13 circumstances. Second, the lines of the proposed seismic
14 shoots clearly run beyond the area of Barbados'
15 jurisdiction to the south of the median line. Even if
16 Trinidad and Tobago's interpretation of the letter and
17 interpretation of this map is correct, any permission
18 being sought can be safely described as being in relation
19 to the area beyond Barbados' jurisdiction as shown on the
20 map. Third, it seems just too coincidental that there
21 also appears to be an unrelated sketch superimposed on to
22 this map that just happens to coincide with Trinidad and
23 Tobago's current claim in this arbitration. You can see
24 the line heading off what seems to be an 88 degree azimuth
25 from a point A. It just appears to be - and there is no
26 explanation of this at all. Now, Mr President, Barbados
27 submits that this map must be rejected as inauthentic and
28 at the very least without proper provenance. The map that
29 was attached to this letter has been submitted by
30 Barbados.

31 I turn now to Trinidad and Tobago being estopped from
32 its claim to the north of the median line. Last week
33 Trinidad and Tobago referred to a 1992 diplomatic note in
34 which Trinidad and Tobago made a general statement about
35 equidistance lines. The general language of that note
36 stands on its own terms. It is insufficient in Barbados'
37 submission to displace the specific facts and failures to
38 act of Trinidad and Tobago in relation to the area to the

1 north of the median line that it now claims. Those acts
2 and omissions are of a far greater weight than any
3 isolated and generalised utterance.

4 Trinidad and Tobago again returned to the Cameroon-
5 Nigeria case in relation to the question of the
6 sufficiency of oil activities. Trinidad and Tobago
7 chose to ignore the fact that I brought to the
8 Tribunal's attention that Barbados is not seeking to use
9 its oil activities as special circumstances to require
10 an adjustment of the median line. The views of the
11 court are therefore of limited relevance.

12 In like manner the passage in the Aegean Sea case
13 referred to by counsel for Trinidad and Tobago in
14 support of Trinidad and Tobago's request that the
15 Tribunal ignore Barbados' oil activities is of no
16 assistance to Trinidad and Tobago. You can find that
17 passage of the decision at tab 166A of the Judges'
18 folder. Of course, at paragraph 30, page 10 of the
19 decision are the words in question. The Tribunal is
20 well aware that this decision was about a request for
21 provisional measures. It was rendered in a context
22 where the court was never going to take up jurisdiction.

23 The court was considering the nature of seismic
24 activity in the context of the legal standard of
25 irreparable harm. Barbados has a number of observations
26 to make.

27 First, Barbados' oil activities in the relevant
28 area to the north of the median line are not only
29 limited to seismic activity. For example, since 1978
30 Barbados has also granted a number of oil concessions
31 that cover this area. Oil companies in the region,
32 including oil concessionaires of Trinidad and Tobago,
33 have recognised Barbados' jurisdiction in this area. A
34 fact that has not been challenged by Trinidad and
35 Tobago. There are clearly some settled expectations.

36 Second, the Aegean Sea case involved a request for
37 provisional measures. The court was evaluating the
38 character of seismic activity, as I said, in relation to

1 a standard of irreparable harm. That inquiry and frame
2 of reference is of course entirely different from an
3 evaluation of whether such activity or acquiescence to
4 it can have a manifestation of sovereignty by means of
5 an exercise of jurisdiction. The Tribunal can, no
6 doubt, think of many types of activities that may not
7 cause irreparable harm but that, nonetheless, constitute
8 an assertion or recognition of or acquiescence to
9 jurisdiction and the exercise of sovereign rights.

10 4.00

11 In sum, neither of the two cases relied upon by
12 Trinidad and Tobago give it any support.

13 I turn now briefly to Trinidad and Tobago's one
14 claimed purported exercise of jurisdiction to the north
15 of the median line. This was its proposal in 2003 to
16 engage in a seismic shoot to the north of the median
17 line.

18 In my first submission last week, I pointed out the
19 flaws in this evidence. For example, the proposal came
20 too late in time, 2003. Barbados protested it. Oil
21 companies in the region protested it. Trinidad and
22 Tobago's own oil concessionaires far away from any of
23 the relevant area before the Tribunal told Trinidad and
24 Tobago that this proposed seismic shoot violated
25 Barbados' territorial sovereignty to the extent that it
26 went to the north of the median line. And the area of
27 the proposed shoot, to the north of the median line, of
28 course, went beyond the area now claimed by Trinidad and
29 Tobago and, thus, it was not activity a titre de
30 souverain. Finally, I pointed out that there was no
31 evidence on the record that Trinidad and Tobago actually
32 ever carried out its proposed seismic shoot.

33 In the first round last week, Trinidad and Tobago
34 did not address this issue at all. It made no
35 submission whatsoever in the face of this challenge to
36 the 2003 proposed seismic activity.

37 In this respect, Mr President, I hope that I am not
38 required during Trinidad and Tobago's second round, as I

1 was in the first, to protest against Trinidad and
2 Tobago's inventive and ad lib assertions of new
3 arguments and facts.

4 I turn now to Trinidad and Tobago's activities to
5 the north of the median line in the area now claimed by
6 Trinidad and Tobago. Last week I described Barbados'
7 five categories of activities. I pointed out that in
8 its written pleadings Trinidad and Tobago focused
9 exclusively on Barbados' oil activities. Trinidad and
10 Tobago did so again last week. I refer the Tribunal to
11 counsel for Trinidad and Tobago's submissions at day 4.

12 This can be found at tab 167 and is from the transcript
13 at page 64, line 14. "I am dealing with the
14 preclusionary argument of Barbados that Trinidad and
15 Tobago is estopped from making any claim north of the
16 equidistance line because of its failure to protest or
17 inaction in the face of a miscellaneous range of
18 activities. As I demonstrated before lunch, the
19 activities do not amount to much, they were pretty
20 transitory, they did not, for example, involve anything
21 beyond seismic activity of a transient uncoordinated
22 character. They certainly did not involve serious
23 exploration".

24 Barbados does not agree with Trinidad and Tobago's
25 pre-emptory dismissal of its activities in the relevant
26 area.

27 At tab 178 of your folder, you can see a list of
28 the categories of Barbados' activities in the relevant
29 area that I took you to last week. These activities are
30 now on the screen before you. They are comprised of,
31 one, Barbadian legislation; two, Barbadian Coast Guard
32 patrolling activity; three, Barbadian oil exploration;
33 four, the Barbados-Guyana Exclusive Economic Zone Joint
34 Co-operation Treaty and associated activities; and,
35 five, Barbados' extended continental shelf programme for
36 its CLCS submission. All this evidence remains
37 unchallenged as of today.

38 You may recall that Professor Crawford made a

1 forceful assertion that Barbados had granted no oil
2 concession in this area until 1992. With respect, he is
3 in error. The evidence is clearly on the record that
4 Barbados entered into its first concession over this
5 area in 1978 with Mobil. Now the 1978 concession
6 continued and there was another one in 1996, but there
7 is no 1992 Barbados oil concession as such. Perhaps,
8 counsel was confused because 1992 was a date that fit
9 conveniently with a number of theories that Trinidad and
10 Tobago has.

11 Mr President, before I turn to address the improper
12 attempt by Trinidad and Tobago to introduce a new
13 argument and new evidence by way of an unverified
14 assertion which, unfortunately, required my interrupting
15 Professor Crawford's presentation on Friday afternoon, I
16 must draw the Tribunal's attention to yet another
17 regrettable submission by Professor Crawford that
18 occurred earlier the same day.

19 This can be found at tab 169 of the Judges' folder.

20 This is an extract from Professor Crawford's afternoon
21 presentation on Friday. It is found at pages 59 and 60
22 and at lines 35 to 38 and the next page 1 to 3 of the
23 transcript. As I said, a copy is in your Judges' folder
24 at tab 169. Professor Crawford pleaded as follows:
25 "Apart from possibly miscellaneous seismic activity no
26 actual drilling was done in the area which is the
27 subject of Trinidad and Tobago's claim in these
28 proceedings. That is the claim to the north of the
29 median line. That is incidentally quite unlike the
30 situation in the west where Barbados claims areas which
31 have been the subject of established licences which are
32 the subject of actual exploitation". Professor Crawford
33 is asserting that in the areas of the south of the
34 median line claimed by Barbados there had been
35 established licences that are the subject of actual
36 exploitation.

37 It is Barbados' hope that Professor Crawford
38 perhaps lost his place in his notes and spoke in error.

1 There is certainly no evidence whatsoever before this
2 Tribunal that there are any oil licences in the area to
3 the south of the median line claimed by Barbados, let
4 alone established licences.

5 If Trinidad and Tobago was, in fact, seeking to
6 make a new argument by a bold assertion of two new facts
7 in the afternoon of the last day of the first round of
8 oral pleadings, that is completely unacceptable. It is
9 on the record of this arbitration that shortly before
10 its commencement, Trinidad and Tobago sought to offer
11 oil licences in the area to the south of the median line
12 claimed by Barbados. It is also on the record that
13 Barbados protested that attempt. It is also on the
14 record, as I stated last week and was not challenged,
15 that no oil company has taken up those concessions. If
16 the facts that Professor Crawford improperly sought to
17 introduce to this proceeding are true, then Trinidad and
18 Tobago has deliberately conducted new activities in the
19 disputed area that is the subject of this arbitration.
20 That conduct, if it has occurred, would have been covert
21 and it would have been a most serious act of bad faith
22 and completely unacceptable.

23 As I noted just now, Professor Crawford has either
24 pleaded improperly or in error. In either case the
25 Tribunal must disregard his assertion.

26 I turn now to that part of Professor Crawford's
27 pleading on Friday that provoked my interruption of his
28 presentation which you, Mr President, suggested that I
29 keep in suspended animation until this week. It relates
30 to Barbados' programme in relation to its extended
31 continental shelf commission to the CLCS. This is
32 something that has been in Barbados' pleadings since its
33 Memorial. Until Professor Crawford's remark at the end
34 of the day on Friday, Trinidad and Tobago had been
35 entirely silent on this point. On Monday last week I
36 addressed this topic. I invite you to turn to tab 170
37 of the Judges' folder to read what I said. This is page
38 95 of transcript day one and it starts at line 10.

1 "Barbados has expended significant time and resources on
2 this programme. In contrast, Trinidad and Tobago has
3 not even claimed to have begun a CLCS submission
4 programme or that it has undertaken any such activities.

5 The Tribunal is entitled to conclude that, if Trinidad
6 and Tobago had such a programme, it would have said so.

7 This must lead to the inescapable conclusion that
8 Trinidad and Tobago has engaged in no such activities to
9 date. And the Tribunal is no doubt well aware that the
10 deadline for CLCS submissions is but a few years away.
11 Trinidad and Tobago's failure, even belatedly, to have
12 started a CLCS submission programme is inconsistent with
13 the new claims that it is making in this arbitration.
14 The Tribunal is entitled to conclude from this evidence,
15 or lack of evidence, that Trinidad and Tobago recognises
16 that, in truth, it has no positive claim to appropriate
17 Barbados' EEZ and extended continental shelf".

18 Thus, I stated that there was no evidence that
19 Trinidad and Tobago had again engaged in such activities
20 and that the Tribunal was entitled to draw conclusions
21 from that.

22 Professor Crawford on Friday asserted a new
23 argument to the effect that Trinidad and Tobago had
24 purportedly engaged in such activities. I ask you to
25 turn to tab 171 of your Judges' folder. There you will
26 find pages 89 and 90 of the day four transcript. At
27 line 23 I introduced my objection by asking where in the
28 pleadings is the evidence to support the bald assertion
29 just made by counsel for Trinidad and Tobago. Professor
30 Crawford avoided my question and sought to justify his
31 attempt to introduce an entirely new claim in relation
32 to a new fact by way of a bald assertion of unproven
33 fact.

34 Finally, on page 90, that is the second page, at
35 line 3, and I ask you, please, to turn to that,
36 Professor Crawford admits that Trinidad and Tobago has
37 produced no evidence on this point. You will see this
38 highlighted on the screen. "If all you say is that we

1 have not produced evidence, then I accept that we have
2 not produced evidence".

3 Mr President, it gives me no pleasure to say this.

4 We are all friends in this room and I have the highest
5 respect for Professor Crawford. But on this occasion,
6 and no doubt entirely out of character, he acted
7 improperly. He sought to make a new claim in relation
8 to a new fact about which he knew Trinidad and Tobago
9 had made no prior submission and had submitted no
10 evidence. He knew, or certainly should have known, this
11 and yet he went ahead. After having admitted that
12 Trinidad and Tobago had not produced any evidence on
13 this point, Professor Crawford sought to argue that a
14 lack of evidence cannot be a basis for estoppel. That
15 is a legal argument and it is open to Trinidad and
16 Tobago to make it. It is not open to Trinidad and
17 Tobago to seek to make an entirely new claim based on a
18 bald assertion of new and unproven facts. The Tribunal
19 must disregard and take no account of Professor
20 Crawford's assertion on this point.

21 Mr President, I now turn to the maps submitted by
22 Sir Henry Forde as part of his pleadings on day one of
23 the hearing. Those maps are illustrations showing the
24 location of fishing communities in Barbados and they are
25 found in the Judges' folder of Barbados from day one. I
26 need not take you to them now. Immediately after the
27 audience on Friday, following hard upon my objection to
28 Professor Crawford's pleadings, counsel for Trinidad and
29 Tobago approached me on a with prejudice basis. They
30 asked me to explain the circumstances of the inclusion
31 of those maps as part of Sir Henry's presentation.
32 Counsel for Trinidad and Tobago wanted that
33 explanation, they said, in order that they might decide
34 whether to raise an objection to them. Presumably, Mr
35 President, there is no coincidence in the timing of the
36 urgent approach from counsel for Trinidad and Tobago,
37 given that the maps had been included by Sir Henry in
38 his presentation more than four days beforehand.

1 Perhaps Trinidad and Tobago are considering making a
2 belated protest to the Tribunal along the lines of "We
3 might have been caught acting improperly, but so did
4 they". In any event, Barbados' explanation is as
5 follows.

6 4.15.

7 In its Memorial and Reply Barbados referred at
8 numerous points to its fishing communities and their
9 dependence on fishing. Barbados hopes very much that
10 the Tribunal has not missed this point at this stage in
11 the proceedings.

12 I have provided samples of this from Barbados'
13 pleadings for you at tabs 172 and 173, but you need not
14 go to them. There are references to Barbados' fishing
15 communities in the evidence on the record before the
16 Tribunal and the witness affidavits of the Barbados
17 fisherfolk also identify specifically and by name some
18 of those communities.

19 Trinidad and Tobago made no response in its Counter
20 Memorial to the claim of Barbados that there are such
21 fishing communities. Nor did it respond to the specific
22 identification of some of them in the evidence. In its
23 Rejoinder, Trinidad and Tobago finally did respond. In
24 paragraph 84, sub 3 of its Rejoinder, Trinidad and
25 Tobago argued that there are currently no fishing
26 communities in Barbados or communities dependent upon
27 fishing in Barbados. So there was a dispute between the
28 parties as to whether there are fishing communities or
29 communities dependent on fishing in Barbados. Both
30 parties had submitted evidence. Indeed, Trinidad and
31 Tobago had submitted a 1962 PhD thesis as its evidence.

32 Nothing like up to date evidence, is there? And
33 Barbados has submitted FAO research, fisherfolk
34 affidavits and more. Indeed, Mr President, Barbados has
35 submitted an affidavit from the President of the
36 Barbados National Union of Fisherfolk Organisations in
37 which she said about her role as President of that
38 organisation - and I quote from her affidavit which is

1 to be found at volume 4 of the Memorial - "As President
2 I speak regularly with the people in all of the fishing
3 communities and with most of the fishermen in Barbados
4 ... Fishing is the only source of income a lot of the
5 families here in Barbados have ... They usually have a
6 crew of two or three. A lot of the Barbadian fishing
7 boats, including the ice boats, have crews that are made
8 up of fishermen from the same family or neighbours from
9 the same community ..."

10 Trinidad and Tobago says that there are no
11 communities. Barbados says that there are.

12 On 9 September 2005 Barbados sought permission to
13 submit additional evidence, including illustrative maps
14 of fishing communities. That request can be found at
15 tab 174, for your convenience, but I will not ask you to
16 turn to it. Trinidad and Tobago protested against some
17 but not all of these supplementary materials in a letter
18 dated 15 September 2005. One of the materials to which
19 Trinidad and Tobago objected was the fishing maps.
20 Trinidad and Tobago's response can be found at tab 175
21 and I will shortly be taking you to that. The Tribunal
22 gave its permission for Barbados to submit all of the
23 material in a response communicated by the Permanent
24 Court of Arbitration on 17 September 2005 from Mr Dane
25 Ratliff. That can be found at tab 176, but again you
26 need not turn to it at the moment. Mr President, it had
27 taken Trinidad and Tobago so long to respond to
28 Barbados' original request that Barbados was left with
29 less than 48 hours to submit the additional material.
30 Therefore, Barbados did not submit material under two of
31 the categories for which it had received permission,
32 noting in its cover letter of 19 September 2005 that it
33 did so "in the interest of an economy of process" and in
34 light of Trinidad and Tobago's consent in its letter of
35 15 September to certain categories of documents.

36 Barbados had taken the view in relation to the
37 fishing community maps that, if Barbados wished to
38 create and submit illustrative maps for use during the

1 hearings, it would be at liberty to do so. They would
2 not represent a new claim or new evidence. On this last
3 point, Barbados relied on Trinidad and Tobago's
4 statements in its letter of 15 September. Now I will
5 ask you to turn to that. Trinidad and Tobago's letter
6 of 15 September can be found at tab 175. I will ask you
7 to turn to the second page and to paragraph 5. There
8 Trinidad and Tobago had said that Barbados had taken too
9 conservative a view of the material to be submitted. I
10 direct your attention part way down paragraph 5. "If
11 Barbados' cartographers had just thought of a new way of
12 illustrating a point that Barbados wishes to make, that
13 is hardly a compelling case for making a further
14 submission. Such an illustration is not 'evidence' in
15 any proper sense of the word. It is of course open to
16 either party to make use of new visual aids
17 incorporating information in the record and presenting
18 it in a convenient way in presenting its case at the
19 oral hearing. If Barbados wishes to supply visual aids
20 to the Tribunal and to the Republic of Trinidad and
21 Tobago in advance of those hearings the Republic of
22 Trinidad and Tobago has no objection." Trinidad and
23 Tobago made the same observation mutatis mutandis in
24 relation to other categories of material. Now, Barbados
25 accepts that Trinidad and Tobago made that statement in
26 the context of maritime maps, but the statement by
27 Trinidad and Tobago was unequivocal and general in its
28 application. Certainly, the maps that Sir Henry used
29 last week fit squarely within Trinidad and Tobago's
30 observation at paragraph 5. By submitting the maps as
31 part of his oral pleadings, Sir Henry was not
32 introducing a new claim, he was not introducing a new
33 argument, nor was he submitting any new evidence of any
34 new fact.

35 Mr President, this brings me to the end of my
36 presentation. In concluding, Barbados submits that its
37 prolonged and notorious exercise of sovereign rights and
38 jurisdiction in the area to the north of the median line

1 now claimed by Trinidad and Tobago called for a timely
2 reaction from Trinidad and Tobago if it wished to object
3 to Barbados' rights over the area. Trinidad and
4 Tobago's first and only protest came a few years ago,
5 well after the dispute had materialised. During the
6 interim, for three decades, Barbados and its oil
7 concessionaires, as well as other states in the region,
8 relied upon that lack of objection. Trinidad and
9 Tobago's belated claim seeks to disrupt the settled
10 expectations of even its own oil concessionaires. Its
11 failure to protest constitutes acquiescence to Barbados'
12 sovereign rights and jurisdiction to the north of the
13 median line. Trinidad and Tobago is thus estopped from
14 making a belated claim to that area. In contrast, there
15 is no evidence of recognition by Barbados to Trinidad
16 and Tobago's purported rights to the south of the median
17 line in the disputed area. On the contrary, there is
18 very recent evidence from Trinidad and Tobago's own
19 hands that showed Trinidad and Tobago recognised
20 recently that Barbados has claims to maritime
21 jurisdiction in that area. The Tribunal is not
22 precluded from considering Barbados' claim to the south.

23 Mr President, I imagine that this might be a
24 suitable moment to take a coffee break. After the
25 resumption of the hearing, could I ask you to call upon
26 Mr Stephen Fietta to continue Barbados' pleadings?

27 PROFESSOR LOWE: I have two questions that I would like to ask
28 that have come out of the presentations earlier this
29 afternoon. The first is for Professor Reisman. The
30 question is, could you summarise for the assistance of
31 the Tribunal the precedents that there are for tribunals
32 that have been asked to delimit boundaries, giving
33 remedies other than the delimitation of a boundary,
34 together with a note explaining how far that non-
35 delimitation remedy was either requested or contemplated
36 in the terms of reference to the tribunal?

37 The second question, Mr Volterra, arises from your
38 presentation. Could you summarise for us the activities

1 followed by Professor Reisman, who will respond in more
2 detail to the legal submissions that were made last week
3 by Professor Greenwood.

4 As the Tribunal will recall it is Barbados' case
5 that the fishery off Tobago, upon which Barbados'
6 fishing communities are dependent throughout much of the
7 fishing season, constitutes a special circumstance
8 requiring adjustment of the provisional median line.
9 The area of adjustment required is illustrated here on a
10 map that appears at tab 53 of your folder. The Tribunal
11 will recall also from Barbados' opening submissions last
12 week that Barbados' case rests upon three core factual
13 submissions. They are shown once more for ease of
14 reference on the slide before you. They are first,
15 Barbadian fisherfolk have been fishing off the island of
16 Tobago for centuries. Second, Barbadian fishing
17 communities, which form a substantial part of the
18 working population of the island's small economy, are
19 dependent upon fishing in the area claimed off Tobago,
20 particularly for flying fish. And third, the fisherfolk
21 of Trinidad and Tobago do not fish in the area claimed
22 by Barbados and thus are in no way dependent upon it.

23 Mr President, Trinidad and Tobago's response to
24 these submissions rests upon a fundamental misconception
25 of Barbados' case for adjustment of the provisional
26 median line. The response can perhaps best be
27 illustrated by reference to the words of Mr Wordsworth
28 last week. At the very opening of his submission on
29 Barbados' special circumstance Mr Wordsworth said
30 "Barbados has chosen to make its claim in the western
31 sector by reference to three so called core facts. The
32 first of these is the key to Barbados' case in the
33 western sector. This is the alleged traditional
34 artisanal fishing by Barbadian fishermen in flying fish
35 grounds off Tobago.

36 "If Barbados is wrong about this, the whole of its
37 case in the western sector falls away." (Day 3, page
38 112, lines 31-37).

1 Mr President, this appraisal of the respective
2 importance of Barbados' three core factual submissions
3 in relation to the fishery off Tobago is completely
4 misplaced. It amounts to a brazen assertion that, were
5 the Tribunal to find that Barbados' first core factual
6 submission is not made out on the evidence, there would
7 be no need at all to consider the catastrophic
8 consequences that would be caused to Barbados by a
9 median line boundary in the west. Nor would there be
10 any need to consider the fact that the fisherfolk of
11 Tobago do not fish in significant numbers in the area of
12 Barbados' claim. As Professor Reisman will confirm,
13 this approach runs completely counter to the established
14 case law on maritime delimitation.

15 Barbados remains firmly of the view that the
16 historical record clearly demonstrates that Barbadians
17 have been fishing off Tobago for centuries. Sir Henry
18 Forde will have more to say on this in a moment. But in
19 any event, as we said last week, each of Barbados' three
20 core factual submissions stands independent of the
21 other. Thus, if the Tribunal were to be satisfied in
22 light of Barbados' second core submission that the
23 median line proposed by Trinidad and Tobago would have
24 catastrophic repercussions upon the Barbadian fishing
25 communities then the boundary must be adjusted to the
26 south. Any failure to do so would, in Barbados'
27 submission, amount to a manifestly inequitable result.

28 The need for adjustment is all the clearer given
29 that, pursuant to Barbados' third core factual
30 submission, the fisherfolk of Tobago do not fish in
31 significant numbers in the area of Barbados' claim.

32 Indeed as a matter of law Barbados would submit
33 that it is the second and third of Barbados' three core
34 factual submissions and particularly the second
35 submission that is of special importance to the
36 Tribunal's task. After all, throughout the recent cases
37 in which the question of fisheries has been considered
38 in the context of maritime delimitation, starting with

1 Gulf of Maine and followed by Jan Mayen and
2 Eritrea/Yemen, the fundamental concern was not how the
3 proposed delimitation might have impacted upon the
4 fishing communities of the past. Rather, the
5 fundamental concern was to ensure that the solution
6 arrived at would not be radically inequitable for the
7 contemporary fishing communities that stood to be so
8 heavily affected by the delimitations at issue in those
9 cases.

10 The reason for this is simple. Much as Trinidad
11 and Tobago might try to pretend otherwise, there is a
12 human aspect to maritime delimitation. And as the
13 written and oral pleadings of Barbados have consistently
14 demonstrated, there are substantial fishing communities
15 in Barbados whose very futures depend upon the
16 delimitation to be affected in this case. Not to mention
17 the fact that any loss of access to the flying fish
18 fishery off Tobago would have serious repercussions for
19 the entire social and cultural fabric of the small
20 island nation of Barbados.

21 At the heart of Barbados' second core submission is
22 the inescapable fact that the median line boundary
23 claimed by Trinidad and Tobago in its so called western
24 sector would have the catastrophic repercussions that
25 Barbados has described throughout its written and oral
26 pleadings. That this is the case is demonstrated by
27 the substantial witness and other evidence that Barbados
28 has submitted, much of which has been completely
29 unchallenged by any evidence to the contrary. By
30 contrast, Trinidad and Tobago has not made any serious
31 assertion that the Barbadian claim line would have any
32 equivalent catastrophic repercussions for Trinidad and
33 Tobago, or more specifically, for the fishing
34 communities of Tobago.

35 This is the key importance of the third factual
36 submission. Consistent with the approach taken
37 throughout its written pleadings, Trinidad and Tobago
38 virtually ignored Barbados' third core submission in its

1 oral pleadings last week. As we shall see in a moment
2 even those brief arguments that were intended to address
3 Barbados' third core factual submission were in fact
4 directed at a completely different point. Namely, the
5 question of how important the flying fish is generally
6 to the fisherfolk of Tobago regardless of where it is
7 caught.

8 Mr President, ignoring for a moment the fundamental
9 misconception by Trinidad and Tobago of the nature of
10 Barbados' claim for adjustment of the median line,
11 Barbados remains of the view that each of its three core
12 factual submissions is made out in this case.

13 At this juncture, with the Tribunal's permission, I
14 would like to hand over to Sir Henry Forde, who will
15 address the response that has been made by Trinidad and
16 Tobago to Barbados' first two core factual submissions.

17 Thank you.

18 THE PRESIDENT: Thank you, Mr Fietta. Sir Henry, please.

19 SIR HENRY FORDE: Thank you, Mr President. Mr President,
20 members of the Tribunal, as it has done throughout its
21 written pleadings in this case Trinidad and Tobago spent
22 a great deal of time last week seeking to discredit the
23 first of Barbados' core factual submissions, namely that
24 Barbadian fisherfolk have been fishing off the island of
25 Tobago for centuries. In particular Trinidad and Tobago
26 led the Tribunal through a number of reports written in
27 the mid to late 20th century by a combination of local
28 fisheries administrators, scientists and post graduate
29 students. Many of the later reports rely upon the
30 historical assumptions contained in the earlier reports,
31 but not one of them was written by an historian. In fact
32 the broad historical passages that they contain are
33 merely by way of background to what are essentially
34 reports on certain aspects of contemporary fisheries at
35 the time when they were written.

36 The Tribunal will recall that it is Barbados who
37 relies on the work of the renowned local historian Dr
38 Karl Watson of the University of the West Indies. It

1 was he who described the relatively developed nature of
2 the Barbadian fishery during the colonial period, with
3 particular reference to Barbados' fleet of ocean-going
4 vessels which engaged in fishing for pelagic species,
5 including the flying fish. The relevant passage appears
6 at tab 66 of your folder, though there is no need to
7 refer to it again now.

8 Of course it was also in an ocean-going vessel that
9 Mr Charnock set out from Barbados to fish off Tobago in
10 1724. It was from these ocean-going vessels also that
11 Barbadians repeatedly exercised their right to fish off
12 Tobago under the 1749 treaty between Britain and France
13 until the question of sovereignty over Tobago was
14 finally settled in favour of the British in 1814; and
15 it was in such ocean-going vessels that Barbadians
16 continued seasonally to fish off Tobago throughout the
17 British colonial period so as to meet the huge demand
18 for flying fish across Barbados during the 19th and
19 early 20th centuries. Indeed it was in the ocean-going
20 schooners that Barbadian fisherfolk were sailing to fish
21 snapper off the coast of Brazil and the Guyanas by the
22 early 20th century, as early as 1933 according to the
23 available records.

24 Mr Wordsworth submitted last week that the catch of
25 each of these vessels was marketed in Port-of-Spain, not
26 Barbados and that, to cite his words, it was "a complete
27 non sequitur" to use this evidence to establish that
28 Barbadian fisherfolk were thus capable of fishing in the
29 traditional artisanal fishing area off Tobago during
30 this period. Of course we submit it is not a non
31 sequitur at all. It is established that the Barbadian
32 schooners were, by the early 1930s at the latest,
33 capable of travelling to the coast of South America and
34 returning approximately 700 miles to Port-of-Spain, and
35 at times Barbados with their catch.

36 Even by that time the catch was preserved on ice.
37 It should follow that the Barbadian schooners were more
38 than capable of travelling between 58 and 147 miles, to

1 be precise, from Barbados to the traditional fishery off
2 Tobago before returning with their catch to Barbados.

3 What is more, the 1942 report of Mr Brown, upon
4 which Trinidad and Tobago relies, makes specific
5 reference to the fact that those schooners that were
6 fishing off South America by that time would
7 periodically return to Barbados from Port-of-Spain with
8 an incidental catch, and those are the exact words,
9 "incidental catch". The relevant passage appears at tab
10 180 of your judges' folder.

11 One only has to glance at any map of the region to
12 see that the incidental catch must necessarily have come
13 from the traditional fishery off Tobago which was so
14 well known to the Barbadian fishermen and which lay
15 directly in their path home from Trinidad.

16 Mr President, I would like to move on to address Mr
17 Wordsworth's remarks in response to Barbados' second
18 core factual submission. Faithful to the approach taken
19 throughout by Trinidad and Tobago in their written
20 pleadings, Mr Wordsworth spent comparatively little time
21 on this fundamental aspect of Barbados' case. He
22 promised to address it "somewhat briefly", and he kept
23 his word. Yet again Trinidad and Tobago thus failed to
24 respond to the detailed submissions made by Barbados
25 about the dependence of its fishing community upon the
26 fishery for flying fish and associated species off
27 Tobago. This is not because, as Mr Wordsworth asserted
28 at the opening of his submission, the dependence of
29 Barbados and its fishing communities upon the fishery is
30 an irrelevance so long as Barbadians have not been
31 fishing off Tobago for centuries. Far from it, as
32 Professor Reisman will demonstrate further shortly.
33 Rather, Trinidad and Tobago's approach is led by the
34 fact that it is well aware of the crucial importance
35 today to Barbados and its fishing communities of the
36 fishery off Tobago during substantial parts of the year.

37 Nevertheless, Mr Wordsworth did make a rather half-
38 hearted attempt to question the ongoing artisanal nature

1 of the Barbadian fishery off Tobago. He said, in a
2 passage appearing at lines 18-20 on page 17 of the
3 transcript, "the ice boat fishing of Barbados has
4 expanded to the point where it is shifting towards a
5 large scale commercial operation". As Mr Fietta
6 explained last week, the installation of small ice holds
7 on many Barbadian fishing boats around the 1970s has not
8 transformed the Barbadian fishing fleet into anything
9 even vaguely approaching an industrial one. The Tribunal
10 will recall the image of a small converted day boat from
11 the DVD video that was shown last week. But this appears
12 not to have satisfied Trinidad and Tobago. So here is
13 another image, tab 181, this time from a 1992 report on
14 which Trinidad and Tobago relies extensively in relation
15 to the nature of the Barbadian fishery. The tribunal
16 might be forgiven for thinking that this is a game of
17 "spot the difference". But, as the caption makes
18 clear, the image shows first a typical day boat and,
19 second, a typical ice boat used in the flying fish
20 fishery of Barbados. What is the difference between the
21 two? I reply, not much. The ice boat, like many in the
22 fleet, is simply a converted day boat which has been
23 extended by a few feet so as to make room for the
24 installation of a small ice box and some other
25 incidental improvements. The average ice box is about
26 ten feet long and eight feet wide. Barbados therefore
27 rejects completely Trinidad and Tobago's assertion that
28 the Barbadian fishery is industrial or quasi-industrial
29 in nature.

30 In his oral submissions, Mr Wordsworth restricted
31 himself essentially to three points in connection with
32 Barbados' dependence upon the traditional artisanal
33 fishery off Tobago. The first was simply a repetition
34 of the point made in his opening to the effect that
35 Barbados cannot use arguments of catastrophic impact in
36 the absence of proof that the fishery off Tobago has
37 existed continuously for centuries. We have already
38 explained why this argument is completely without merit

1 and displays either complete misconception or perhaps a
2 complete misrepresentation of Barbados' case. Mr
3 Wordsworth's second point was that, if there is to be
4 any catastrophe in Barbados, in the event of non-
5 adjustment of the median line in the so-called western
6 sector, this will be entirely of Barbados' own making.
7 After all, he says, it was Barbados and not Trinidad and
8 Tobago that brought an end to the negotiations over a
9 new fishing agreement. The Tribunal will be only too
10 aware by now that ever since the beginning of the former
11 rounds of bilateral negotiations in July 2000, the
12 parties have been in dispute as to the role of fisheries
13 in the delimitation process. Barbados has always
14 insisted that fisheries are inextricably linked with the
15 delimitation process, while Trinidad and Tobago has been
16 keen to de-link the two issues at every opportunity.

17 Ms Marshall has testified that at the meeting
18 between Prime Ministers of 16 February 2004 sharply
19 different views were exchanged on the interrelation of
20 fisheries and maritime delimitation. Paragraph 7 of her
21 first affidavit of 1 June 2005 speaks to this, though
22 you need not turn to it now.

23 It was therefore entirely in character for Trinidad
24 and Tobago to attempt to de-link the fisheries issue
25 immediately following the 16th February 2004 meeting
26 after the Prime Minister of Trinidad and Tobago's
27 statement that the maritime delimitation issue was
28 intractable and after the commencement of the present
29 proceedings by Barbados. Having considered throughout
30 the course of negotiations that fisheries were
31 inextricably linked with the delimitation process, it is
32 hardly surprising that Barbados refused Trinidad and
33 Tobago's renewed attempt to de-link the two issues. In
34 any event, Mr President, throughout the negotiations on
35 fisheries, Trinidad and Tobago had not at any point
36 proposed a meaningful regime of access for the Barbadian
37 fisherfolk to the traditional fishery off Tobago. Thus,
38 as paragraph 85 of Barbados' Memorial explained, the

1 limited access accorded by the 1990 fishing modus
2 vivendi was ignored by the Barbadian fisherfolk who
3 continued to fish off Tobago as they always had.

4 Mr Wordsworth's third point in relation to
5 Barbados' second core factual submission is that it is
6 "astonishing that Barbados has not sought to quantify
7 the damage that will be caused by any cessation of
8 fishing in the traditional fishing area off Tobago".
9 But, again, this submission demonstrates a fundamental
10 lack of understanding of Barbados' claim in relation to
11 its traditional artisanal fishery off Tobago. First, we
12 say that the fishery is artisanal. The fishermen sail
13 out from Barbados in their small boats, catch flying
14 fish and associated species wherever they can and return
15 back to Barbados with their catch. When they travel to
16 the waters off Tobago to fish, they might stop for a
17 short time to fish to the north of the median line,
18 should they by chance come across a school of flying
19 fish on their way to, or back from, the traditional
20 fishing area. But they do not separate their catch
21 depending upon which side of the median line the fish
22 were caught. They do not keep records of where each
23 fish was caught. There would therefore be no data upon
24 which Trinidad and Tobago's imagined expert could base
25 his or her report. Trinidad and Tobago is seeking to
26 introduce into this aspect of the case the legal fiction
27 that all damage must be precisely quantified in order
28 that the Tribunal can identify whether or not there
29 would be any catastrophe if Barbadian fisherfolk were to
30 be prevented from continuing to fish in their
31 traditional fishing ground. It is our submission that
32 this approach is unsustainable.

33 The consequences that would befall Barbados in such
34 circumstances have been clearly demonstrated by the
35 multiple evidence that has been submitted to this
36 Tribunal, much of which has not been challenged by
37 Trinidad and Tobago.

38 Barbados has established that flying fish and their

1 dolphin predators make up 80 per cent of the annual
2 Barbadian fish catch. It has also demonstrated that
3 those employed in Barbados' maritime fishery and their
4 dependants make up around 10 per cent of the island's
5 entire working population. The sudden shock that would
6 be caused by any loss of the fishery off Tobago and the
7 inevitable rise of unemployment that would result would
8 in our submission destabilise the small economy of
9 Barbados. What is more, the consequences would extend
10 even beyond financial ruin for many in the Barbadian
11 fishing communities and will strike at the very heart of
12 the social and cultural fabric of the land of the flying
13 fish.

14 Mr President, in a final swipe at the unchallenged
15 witness evidence of 15 Barbadian fisherfolk, who have in
16 our submission graphically described the consequences of
17 any loss of fishing off Tobago, Trinidad and Tobago
18 seeks to assert that their testimony, to use Mr
19 Wordsworth's words, "is not redolent of any
20 catastrophe". Mr Wordsworth referred to Mr Everton
21 Brathwaite's statement in one of the D.V.D. video clips
22 shown last week, to the effect that any loss of fishing
23 access off Tobago would be "a little strenuous on a lot
24 of people". Mr Wordsworth refers to this rather
25 superciliously as a "marvellous turn of phrase". The
26 relevant passage appears at lines 8 to 17 of page 23 of
27 the transcript.

28 In essence, Mr Wordsworth seeks to damn Mr
29 Brathwaite for not using the magic word "catastrophic"
30 in the video clip. The video clip captures these
31 fishermen candidly as they are. They are not reading
32 scripts. They are not being coached. They did not
33 spontaneously use the word "catastrophic" any more than
34 they would use the words "the exercise of sovereign
35 rights" to describe what they are doing off Tobago.
36 Indeed, Mr Brathwaite uses the terms of relative
37 understatement that are so typical of the Barbadian
38 fishing people. Counsel for Trinidad and Tobago

1 obviously fails to appreciate the cultural subtleties of
2 language and its use. If Mr Brathwaite had been an
3 English fisherman and had said that the loss of a
4 fishery would give him a "spot of bother" or used some
5 similar understatement, then we have no doubt that
6 counsel for Trinidad and Tobago would have known
7 precisely what was meant. Barbados insists that, to any
8 Barbadian or, as we say, to any Bajan, the words of the
9 Bajan or Barbadian fisherfolk speak for themselves in
10 relation to the seriousness of the consequences of any
11 loss of access to the fishery off Tobago. Thus, for
12 instance, early in his statement, at paragraph 10, Mr
13 Brathwaite states that "fishing is important to me,
14 because it enables me to feed my family and gives me a
15 home. About 50 per cent of my income comes from fish
16 that I catch off Tobago. I could not survive without
17 it. The same is true for many in my community".
18 Perhaps to Mr Wordsworth these words "I could not
19 survive without it" are not redolent of catastrophe, but
20 in our submission they are to Mr Brathwaite and the
21 fisherfolk.

22 Mr Everton Brathwaite is, of course, not alone.
23 All of Barbados' fishing witnesses tell a similar story.
24 Barbados therefore leaves this Tribunal to read each of
25 the affidavits at its leisure. But purely by way of
26 example, 50-year old Joseph Knights states at paragraph
27 10 of his affidavit (tab 183 of the judges' folder)
28 "Fishing is very important to me because it is the only
29 job that I have and it is my livelihood. Fishing off
30 the coast of Tobago is very important to my survival. I
31 depend on it. A lot of fishermen from Barbados do most
32 of their fishing there. I do most of my fishing there
33 as well." He continues at paragraph 11 saying that "I
34 would say that the majority of my income comes from the
35 fish that I catch off the coast of Tobago". Perhaps, Mr
36 President, most tellingly of all many of the Barbadian
37 fisherfolk continue to fish off Tobago, notwithstanding
38 the risk of arrest and prosecution by Trinidad and

1 Tobago, because, as Ms Angela Watson, the President of
2 the Barbados National Union of Fisherfolk Organisations
3 explains in her affidavit, "they must in order to
4 survive".

5 Mr President, for all of the reasons explained
6 during the first round of oral submissions and set out
7 in more detail in Barbados' written pleadings, any loss
8 of access to the traditional fishing grounds off Tobago
9 would entail catastrophic repercussions for the fishing
10 communities of Barbados, resulting in widespread
11 unemployment and poverty throughout much of our small
12 island. The inevitable plunge in flying fish catches
13 will also have extremely serious consequences for the
14 unique social and cultural identity of Barbados. It is
15 primarily for these reasons that Barbados asks the
16 Tribunal to adjust the provisional median line to the
17 south in the manner indicated in paragraphs 141 to 145
18 of Barbados' Memorial so as to ensure that Barbadian
19 fisherfolk are secured continued access on an equitable
20 basis to their traditional fishing ground off Tobago.

21 Mr President, Mr Fietta will now complete this
22 aspect of Barbados' submissions, with your permission,
23 and with special reference to the third core factual
24 submission and some general conclusions on the special
25 circumstances of this historic and unique case. Thank
26 you, Mr President.

27 THE PRESIDENT: Thank you, Sir Henry. Mr Fietta, please.

28 MR FIETTA: Thank you, Mr President. Barbados' third core
29 factual submission is that the fisherfolk of Tobago do
30 not fish in the area claimed by Barbados and, thus, are
31 in no way dependent on it for their livelihoods. I do
32 not need to spend much time at all on this submission
33 for the simple reason that Trinidad and Tobago has had
34 so little to say about it. Indeed, to the extent that
35 Mr Wordsworth did seek to address the issue in his
36 presentation last week, he actually addressed an
37 entirely different point with which Barbados would not
38 take any issue at all. In introducing his argument at

1 lines 20 to 22 of page 23 of the transcript for day
2 four, in a passage appearing at tab 184 of your Judges'
3 folder, Mr Wordsworth described Barbados' third
4 submission as relating to the alleged non-exploitation
5 by Tobago of the flying fish fishery. Mr Wordsworth
6 proceeded to describe the importance of flying fish to
7 the contemporary Tobagonian fishing fleet and concluded
8 at the bottom of page 25 of the transcript by asking "So
9 how can it be said that the flying fish fishery is of no
10 importance for Tobago? Clearly that is wrong".

11 5.15

12 Barbados would not dispute that the flying fish is
13 of some importance to the fishing people of Tobago.
14 That this is the case is confirmed by the evidence that
15 has been submitted by Barbados in this arbitration. A
16 small flying fish industry emerged in Tobago after
17 visiting Barbadians introduced the people there to the
18 traditional methods for fishing and boning flying fish
19 in the 1960s. But, Mr President, that is entirely
20 besides the point. Barbados' submission is that the
21 fisherfolk of Tobago do not fish in significant numbers
22 in the area claimed by Barbados. In other words, beyond
23 the 12 mile limit. That this is the case is
24 demonstrated clearly by each and every one of the three
25 pieces of evidence relied upon by Mr Wordsworth to rebut
26 Barbados' supposed, but non-existent, argument relating
27 to Tobago's exploitation of flying fish generally.

28 I will take each of these three pieces of evidence
29 in turn. The first, an FAO fishery country profile from
30 the year 2000, which appears at tab 185 of your Judges'
31 folder, is actually relied upon by Barbados as
32 demonstrating that about 95 per cent of the vessels in
33 the Tobagonian fishery, the flying fish fishery, are
34 pirogues, powered by outboard motors engaged in day
35 fishing close to shore. The second piece of evidence
36 relied upon by Mr Wordsworth is a 1992 report on the
37 flying fish fishery of Trinidad and Tobago, which
38 appears at tab 186 of our Judges' folder. This report

1 is even more specific, stating that the Tobagonian
2 flying fish fleet consists of about 75 pirogues and one
3 ice boat and employs approximately 125 fishermen.

4 The third piece of evidence relied upon by Mr
5 Wordsworth is a report by, among others, Dr Arthur
6 Potts, who is a member of the Trinidad and Tobago
7 delegation in these proceedings. He confirms,
8 presumably on the basis of the previous 1992 report,
9 that between 1988 and 1991 the Tobagonian flying fish
10 fleet consisted of about 75 pirogues and one ice boat
11 and employed approximately 125 fishermen. Dr Potts's
12 report appears at tab 187 of your Judges' folder.

13 So none of the evidence relied upon by Trinidad and
14 Tobago rebuts Barbados' third core factual submission.
15 The small pirogues that make up the overwhelming
16 majority of the Tobagonian fishing fleet engage
17 exclusively in day fishing within the 12 mile limit.
18 Last week we took the Tribunal through a variety of
19 evidence that confirms this inescapable fact, including
20 the statements of Trinidad and Tobago's own officials
21 during fisheries negotiations between Barbados and
22 Trinidad and Tobago as recently as 2003. We also
23 explained that this feature of the Tobagonian fishing
24 fleet was likely to remain in place throughout the
25 foreseeable future.

26 In summary, Barbados maintains that, although the
27 fishermen of Tobago do fish for flying fish, they do so
28 close to shore within the 12 mile limit. Their fishing
29 activities are, therefore, completely irrelevant to
30 Barbados' claim. It is for this simple reason that
31 Trinidad and Tobago is constrained from arguing that the
32 Barbados claim line would have any significant
33 repercussions for the fishing communities of Tobago.

34 Mr President, members of the Tribunal, this is an
35 exceptional case of maritime delimitation. The fishing
36 ground that lies at the heart of Barbados' claim in the
37 west is of enormous seasonal importance to the Barbadian
38 artisanal fishing communities. But, as the evidence

1 before you demonstrates, it is of no significant
2 importance to the fisherfolk of Trinidad and Tobago,
3 who, Barbados contends, fish in completely different
4 areas. Therefore, it is only one party that argues that
5 the other party's proposed delimitation line would
6 entail catastrophic repercussions to its fishing
7 communities. Never before has an international tribunal
8 been faced with such a one-sided dependency upon the
9 fishing resources of the relevant area and never before
10 has an international tribunal been faced with a fishing
11 resource that is of such great symbolic importance to
12 the society, culture and history of one of the state
13 parties before it. The unique factual circumstances of
14 this case can be illustrated by a brief comparison with
15 the circumstances that surrounded the three leading
16 recent authorities of Gulf of Maine, Jan Mayen and
17 Eritrea-Yemen.

18 In the Gulf of Maine case, both the United States
19 and Canada went to great lengths to make the Chamber of
20 the Court aware of the importance to them of the fishing
21 resources at stake, particularly those of the Georges
22 Bank. But the Chamber determined in its judgment that
23 the delimitation line at which it had provisionally
24 arrived, via the application of other geographical
25 considerations, was not "radically inequitable". As the
26 Chamber stated, at paragraph 238 of its judgment, in a
27 passage that appears at tab 188 of the Judges' folder,
28 the Court's choice of delimitation line ensured Canada
29 very nearly all the major locations of its most
30 essential catches and, conversely, the locations that
31 had been traditionally fished by the United States lay
32 entirely on the United States' side of the dividing
33 line. The Chamber thus concluded that nothing less than
34 a decision which would have assigned the whole of
35 Georges Bank to one of the parties might possibly have
36 entailed "serious economic repercussions" for the other.

37 Nine years later, in the Jan Mayen case, again both
38 Norway and Denmark before the plenary Court emphasised

1 the importance of their respective interests in the
2 fishing resources of the relevant area. At paragraph 75
3 of its judgment, which appears at tab 189 of your
4 Judges' folder, the Court noted that in Gulf of Maine
5 the Chamber had recognised the need to take account of
6 the effects of the delimitation on the parties'
7 respective fishing activities. In light of that case
8 law, the Court concluded at paragraph 76 that the median
9 line was too far to the west for Denmark to be assured
10 of an "equitable access" to the capelin stock. As a
11 result the Court made what it called a "substantial
12 adjustment" to the median line in the southern zone of
13 the boundary, which constituted the principal fishing
14 area in dispute between the parties.

15 Finally, in Eritrea-Yemen, the Arbitral Tribunal
16 observed at paragraph 48 of its award in the second
17 phase of the proceedings that each of Eritrea and Yemen
18 had made much of fishing, including as to both the past
19 history and the present situation. But the Tribunal
20 concluded at paragraph 72 of its award (tab 190 of the
21 Judges' folder) that neither party had succeeded in
22 demonstrating that the line of delimitation proposed by
23 the other party would produce a "catastrophic or
24 inequitable effect on the fishing activity of its
25 nationals or a detrimental effect on fishing communities
26 or economic dislocation of its nationals". As a result,
27 in Eritrea-Yemen, the Tribunal did not accept or reject
28 the line of delimitation proposed by either party on
29 fisheries grounds, though it did, of course, later make
30 provision for the continuation of the traditional regime
31 of access enjoyed by the fishermen of both states, to
32 which Professor Reisman will refer further in a moment.

33 For all the reasons that I have described, the
34 factual circumstances of the present case are radically
35 different from those that applied in each of the three
36 previous cases to which I referred. Only one of the
37 parties in this case, Barbados, submits that the
38 proposed delimitation line of the other, Trinidad and

1 Tobago, would be radically inequitable. The factors in
2 support of that argument are, we say, overwhelming. By
3 contrast, the adjusted median line proposed by Barbados
4 would be entirely consistent with current fishing
5 practices and would ensure equitable access to the
6 essential fishing grounds off Tobago, both for the
7 fisherfolk of Barbados outside the 12 mile limit and for
8 those of Tobago within the 12 mile limit. That adjusted
9 line proposed by Barbados truly does reflect the natural
10 equilibrium that exists between the fisherfolk of the
11 two islands.

12 Mr President, this concludes Barbados' factual
13 submissions in relation to the special circumstance that
14 exists to the south and west of the median line.
15 However, before I hand over to Professor Reisman it
16 falls on me to respond to the four questions that were
17 posed by the Tribunal at the close of last week's
18 proceedings in relation to the facts of the fishing
19 case.

20 The Tribunal requested that the parties provide
21 information in relation to four issues. First, the
22 locations at which Barbados flying fish vessels were
23 apprehended by Trinidad and Tobago since 1970; second,
24 the area north of the median line where flying fish are
25 normally to be found before and after their migrations
26 to waters south of the median line; third, the area
27 south of the median line where during the appropriate
28 season there are typically large concentrations of
29 flying fish; and, fourth, the areas south of the median
30 line where Barbadian fisherfolk have since 1970 made
31 most of their catches of flying fish.

32 Mr President, as regards the first question,
33 Barbados would point out that Trinidad and Tobago did
34 not commence its sporadic practice of arresting
35 Barbadian fishing boats off Tobago until 1989. The
36 circumstances surrounding those arrests, together with
37 the consequent 1990 fishing modus vivendi, are described
38 at paragraphs 80 to 85 of Barbados' Memorial. Barbados

1 does not know the precise locations of the 1989 arrests
2 because Trinidad and Tobago has never provided them.
3 Trinidad and Tobago resumed arresting Barbadian
4 fisherfolk off Tobago in 1994. Between 1994 and 2004
5 the crews of 18 Barbadian boats were arrested by
6 Trinidad and Tobago. It is the Trinidad and Tobago
7 Coast Guard that would be best placed to identify the
8 precise location of each of those arrests. Sometimes
9 locations were provided by Trinidad and Tobago to
10 Barbados, sometimes they were not, as can be seen from
11 the list of arrests that appears at appendix 92 of
12 Barbados' Memorial. This is reproduced at tab 191 of
13 your Judges' folder. However, Barbados has plotted
14 those arrests whose locations were provided by Trinidad
15 and Tobago on a map and that map appeared as map 11 in
16 Barbados' Memorial. This is reproduced at tab 191 of
17 your Judges' folder. The area of the arrests is the
18 shaded area marked "B" on that map and the Tribunal will
19 see that it is within the traditional artisanal fishing
20 area, which is marked "A" on the map. The one exception
21 is a single boat that was arrested after it drifted by
22 accident into Trinidad and Tobago's territorial sea, as
23 explained at paragraph 86 and footnote 125 of Barbados'
24 Memorial. That one arrest explains why the southern
25 point of the area marked "B" on the map slightly
26 overlaps with the territorial sea of Trinidad and
27 Tobago.

28 5.30

29 As regards the second question, flying fish are
30 particularly scarce to the north of the median line
31 during the first three months or so of the fishing
32 season, from around November to January, or sometimes
33 until February, and they are also very scarce to the
34 north of the median line around the end of the season,
35 during June and July. This scarcity is described by the
36 fisherfolk in their affidavits. By way of example
37 Barbados would refer the Tribunal to paragraph 6 of the
38 affidavit of Joseph Knight, paragraph 11 of the

1 affidavit of Everton Brathwaite, paragraph 5 of the
2 affidavit of John Harding and paragraph 5 of the
3 affidavit of Elvis Clark.

4 Conversely the flying fish is commonly found all
5 around Barbados throughout the middle three or four
6 months of the fishing season, particularly between
7 February, or sometimes not until March, and May; so
8 February until May or March until May, depending upon
9 the season.

10 The reason why flying fish are so plentiful to the
11 north of the median line at certain times of the year,
12 and so scarce in that area at other times of the year
13 when they are plentiful off Tobago, is described in
14 Barbados' expert report, which appears at appendix 88 to
15 Barbados' Memorial. In an extract from the executive
16 summary of the report, which appears at tab 193 of your
17 folder, Drs Hunte, Mahon and Oxenford refer to the
18 fairly substantial movement of adult flying fish among
19 the islands of the eastern Caribbean, and state that
20 flying fish clearly move from Barbados to Tobago and
21 vice versa.

22 The Tribunal's third question asks for details of
23 the area south of the median line where, during the
24 appropriate seasons, there are typically large
25 concentrations of flying fish. As I have just explained
26 with reference to the expert report of Drs Hunte, Mahon
27 and Oxenford, the flying fish is a highly mobile
28 migratory species. Charting their movement and
29 identifying areas where large concentrations of the fish
30 can typically be found is thus a very inexact science.

31 Particular trends of movement can of course be
32 identified such as the seasonal passage of the fish
33 between the waters of Barbados and those of Tobago, but
34 the precise location of large concentrations of the fish
35 continually changes. Therefore Barbadian fisherfolk
36 describe the area of the traditional artisanal fishery
37 quite broadly, with reference to waters off the north
38 west, north and north east of Tobago. Nevertheless, the

1 evidence before the Tribunal does appear to suggest that
2 large concentrations of flying fish are most typically
3 found in the areas off the north and north west coasts
4 of Tobago, both within and outside the 12 mile limit.

5 As regards the area outside the 12 mile limit, this
6 is implicitly demonstrated by the fact that the sporadic
7 arrests of Barbadian fisherfolk have consistently taken
8 place in an area to the north and north west of Tobago,
9 as map 11 to Barbados' Memorial clearly shows.

10 As regards the area within the 12 mile limit, this
11 is demonstrated by the 1992 report on the flying fish
12 fishery of Trinidad and Tobago to which I referred
13 earlier. That report contained a map which illustrates
14 the flying fish fishing grounds that are exploited by
15 the fisherfolk of Tobago in their small day boats. This
16 map appears at tab 193A of your folder. Again those
17 fishing grounds are located off the north and north west
18 coasts of Tobago. It is worthy of note that the 1992
19 report from Trinidad and Tobago indicates, consistent
20 with Barbados' third core factual submission, that
21 Tobagonian fishermen generally fish in an area 8 to 12
22 kilometres from shore, using geographical formations as
23 landmarks for the fishing grounds.

24 The fishing areas shown on the map as constituting
25 the flying fish fishery of Trinidad and Tobago extends
26 less than 12 miles from the coast of Tobago, as
27 demonstrated by this slide. In other words that fishery
28 in the Trinidad and Tobago report which is exploited by
29 the fishing boats of Tobago, lies entirely within the
30 territorial sea of Tobago, entirely consistent with
31 Barbados' third core factual submission.

32 Finally as regards the Tribunal's fourth question,
33 this asks for an indication of the area south of the
34 median line where Barbadian fisherfolk have since 1970
35 made most of their catches of flying fish. As the
36 evidence before the Tribunal confirms, the fisherfolk of
37 Barbados have traditionally fished throughout the area
38 claimed to the south of the median line. Barbadian

1 fisherfolk are not required to report back on where they
2 have made their catches, and like most fisherfolk around
3 the world they are notoriously reluctant to be too
4 specific about where they believe the largest
5 concentrations of fish are to be found. Nevertheless,
6 as I have just described, the evidence does appear to
7 suggest that the largest catches of flying fish have
8 been made by Barbadians in the areas off the north and
9 north west coasts of Tobago. These catches have been
10 made in a corridor of water that stretches south west
11 from the median line and that extends outwards from the
12 north and north west coasts of Tobago, beyond the 12
13 mile limit. Again all of the arrests of Barbadian
14 fisherfolk illustrated on map 11 to Barbados' Memorial
15 are within this corridor of water, with the exception of
16 the one boat that drifted just within the 12 mile limit.

17 Mr President, members of the Tribunal, with your
18 permission I will now hand over to Professor Reisman who
19 will address Trinidad and Tobago's submissions resisting
20 the legal basis for Barbados' case for adjustment of the
21 median line to the south.

22 THE PRESIDENT: Thank you, Mr Fietta. Professor Lowe would
23 like to pose a question.

24 PROFESSOR LOWE: One point of clarification on what you
25 have just said. You have referred a lot to fishing on
26 the north and north west of Tobago. Could you say
27 something about the way in which the boundaries of zone
28 A were drawn to the east of those areas and how it came
29 about that on the basis of the pattern of fishing zone A
30 has the shape that it has.

31 MR FIETTA: Thank you. As is the custom I would like to
32 consult with the Tribunal's permission before we answer
33 that question.

34 THE PRESIDENT: I would like to pose a further question
35 which is this. Is there evidence that the industrial
36 factory fishing which Barbados maintains has been
37 licensed by Trinidad and Tobago results in fishing in
38 the area now claimed south of the median line by

1 Barbados?

2 MR FIETTA: Thank you, Mr President. Again I believe the
3 answer to that is close to hand but I would like to
4 consult before formally answering the question

5 THE PRESIDENT: Professor Reisman, would you like to resume
6 please?

7 PROFESSOR REISMAN: Thank you, Mr President. Mr President,
8 members of the Tribunal, Trinidad and Tobago seems to
9 misperceive Barbados' argument on the law with respect
10 to fisheries and my colleagues have asked me to address
11 this issue. Let me start by continuing with the
12 consequences which Sir Henry and Mr Fietta have
13 presented to you.

14 As a factual matter we believe that we have
15 established that the closure of the fishing areas to the
16 south of the median line will have the most severe of
17 consequences for Barbados fisherfolk. Trinidad and
18 Tobago has expressed doubt and even scorn about this
19 but, as my colleagues have just explained, it has not
20 submitted evidence to controvert it.

21 That notwithstanding, we accept that the burden is
22 on us to prove these facts, and we believe we have.

23 Mr President, members of the Tribunal, you will
24 have noted that I said "severe consequences" and not
25 "catastrophic repercussions". Whether the legal
26 standard is "catastrophic repercussions" and what that
27 means or whether the test is "inequitable effect",
28 "detrimental effect" or "economic dislocation" is a
29 question to which I will return, but putting the
30 question of legal standard aside for the moment the case
31 that severe consequences will follow the closure of
32 those waters has we submit been made. It is clear from
33 evidence which even Trinidad and Tobago has adduced, for
34 example the Brown study, that long distance as opposed
35 to coastal artisanal fishing has been conducted by
36 Barbadian fisherfolk in the waters in question since
37 1942, by which time artisanal fisherfolk were using ice.
38 In other words artisanal fisherfolk have been fishing

1 those waters for more than two generations. In this
2 regard, I would like to correct a mis-statement I made
3 in my comments on jurisdiction. I there said that
4 evidence of ice boats indicates their use since 1942.
5 That is not correct. I had meant to say evidence of the
6 use of ice by schooners and sloops, which is the
7 evidence that I was referring to, and I apologise for
8 that mis-statement.

9 As a separate matter we believe we have discharged
10 our burden of proof that Barbados schooners have worked
11 the waters in question for centuries, though here we
12 acknowledge that there is a thin documentary record for
13 reasons which are understandable. Trinidad and Tobago
14 has implied in its arguments that we are claiming
15 historic waters for which there is quite properly an
16 extremely high evidentiary burden. Mr President, we are
17 not claiming historic waters. That is not the issue
18 here. We are claiming that non-exclusive rights to fish
19 were created and non-exclusive rights for fisherfolk are
20 not our invention. We are relying on Sir Gerald
21 Fitzmaurice and since this issue seemed to be of some
22 mis-perception I would like you to look at a selection
23 from his classic article one more time. He says "whereas
24 claims to exclusive rights founded on the acts of
25 individuals can only be maintained if the individuals
26 were authorised either in advance or ex post facto by
27 the adoption and ratification of the acts, such would
28 not appear to be the case where all that is involved is
29 a claim to possess and to be entitled to continue to
30 enjoy rights of a non-exclusive character". We are
31 gratified, Mr President, that Trinidad and Tobago has
32 apparently to its own surprise acknowledged that the
33 international legal provision of non-exclusive rights is
34 permissible, and we noted with some interest that as
35 their presentation proceeded their counsel seemed to
36 become more and more enthusiastic about non-exclusive
37 rights.

38 The rights which were acquired were, as Sir Gerald

1 explains, acquired and to be enjoyed by the fisherfolk
2 but they also became those of their state, a transition
3 that is common in international law, especially as
4 individuals cannot prosecute claims such as these at the
5 international level on their own behalf. But even when
6 the state of nationality also acquires those fishing
7 rights they are still non-exclusive fishing rights. I
8 emphasise, these non-exclusive rights to fish were never
9 territorial right, but they were rights which
10 international law recognised.

11 Whether the waters to the south of the median line
12 became EEZ at some point or whether they remained high
13 seas or remained in an undetermined status as Professor
14 Crawford suggested in Day 3 page 25, the record is clear
15 that Trinidad and Tobago has sought to exclude our
16 fisherfolk from these waters based on a legal conviction
17 that Trinidad and Tobago is entitled to do this. This
18 is a common point. Of course we are in a maritime
19 boundary delimitation between states in coastal
20 opposition, in which the method of delimitation is the
21 projection of a provisional median line subject to
22 adjustment, if a special circumstance is established.
23 Fishing by one state on the other side of the
24 provisional median line can be a special circumstance,
25 and we think there is ample authority for that. If this
26 special circumstance were not to be addressed by the
27 provision of some remedy as part of a maritime
28 delimitation, would the results be so severe as to be
29 catastrophic, thus requiring an adjustment of the
30 boundary or a non-exclusive access regime. This is the
31 question of the standard for which we must turn in the
32 first instance to prior case law and then to general
33 international law.

34 5.45

35 Gulf of Maine, of course, is the first case to
36 expressly formulate the rule. I put this in tab 195. I
37 believe it will be on the screen as well. "What the
38 Chamber would regard as a legitimate scruple lies rather

1 in concern lest the overall result, even though achieved
2 through the application of equitable criteria and the
3 use of appropriate methods for giving them concrete
4 effect, should unexpectedly be revealed as radically
5 inequitable; that is to say as likely to entail
6 catastrophic repercussions for the livelihood and
7 economic well being of the population of the countries
8 concerned".

9 But, having expressed the rule, the Chamber did not
10 elaborate it or provide us with an example of how it was
11 to be applied. Not, I would emphasise, because as a
12 general legal matter the rule was irrelevant as a
13 special circumstance, but because the provisional line
14 which the Chamber had settled on and was then testing
15 against the special circumstances did not produce the
16 catastrophic repercussion. The Chamber said,
17 "fortunately, there is no reason to fear that any such
18 danger will arise in the present case", and so on. The
19 rest of the quotation of course continues at the same
20 tab of 195.

21 Mr President, we come to Jan Mayen in which the
22 plenary Court started by endorsing the prior decision by
23 the Chamber as "case law". It referred to it as "case
24 law."

25 Then the plenary Court said - and I think these
26 words are quite important and, with your permission, I
27 will take you to them, tab 196 - "As has happened in a
28 number of earlier maritime delimitation disputes, the
29 parties are essentially in conflict over access to
30 fishery resources. This explains the emphasis made on
31 the importance of fishing activities for their
32 respective economies and on the traditional character of
33 the different types of fishing carried out by the
34 populations concerned."

35 Then the plenary Court goes on to cite the Gulf of
36 Maine case.

37 It says, "In the Gulf of Maine case, which
38 concerned a single maritime boundary for continental

1 shelf and fishery zones, the Chamber dealing with the
2 case recognised the need to take account of the effects
3 of the delimitation on the parties' respective fishing
4 activities by ensuring that the delimitation should not
5 entail catastrophic repercussions for the livelihood and
6 economic well being of the population of the countries
7 concerned".

8 Then Jan Mayen says, "In light of this case law,
9 the Court has to consider whether any shifting or
10 adjustment of the median line as fishery zone boundary
11 would be required to ensure equitable access to the
12 capelin fishery resources for the vulnerable fishing
13 communities concerned". Note: it is not "catastrophic
14 consequence" that is to be averted here, it is simply to
15 ensure "equitable access" to the fishing resource for
16 the vulnerable fishing communities concerned.

17 The Court does not appear to have assumed that it
18 was a demonstration of catastrophic consequence,
19 whatever that would have meant in the context, which had
20 to be proved. An unadjusted median line might be
21 inequitable, it would not have been catastrophic. In
22 fact, according to the Court's summary in its judgment
23 of the parties' position - and I will return to those in
24 a moment in more detail - the Court makes clear that
25 neither party has pleaded catastrophic repercussion,
26 although they certainly seem to be speaking in terms of
27 what I have referred to as severe consequences. Denmark
28 stated that "Greenland benefits economically from all
29 fishing within the Greenland zone". According to the
30 court summarising Denmark's position, "Denmark has also
31 stressed the dependence of the Inuit population of
32 Greenland on the exploitation of the resources of the
33 east coast of Greenland, particularly where sealing and
34 whaling are concerned". As for Norway, again the Court
35 summarising and to some extent editing their positions,
36 as I will explain when I take you to the pleadings, the
37 Court said, "Norway has indicated that the waters
38 between Jan Mayen and Greenland have long been the scene

1 of Norwegian whaling, sealing and fishing and that the
2 various fishing activities in the Jan Mayen area account
3 for more than 8 per cent of the total quantity of
4 Norwegian catches and that they contribute to the
5 fragile economy of the Norwegian coastal communities".
6 That is paragraph 74, of course, of the judgment.

7 Mr President, plainly the contingency for
8 adjustment of the provisional median line was not put in
9 terms of catastrophe but severe cost. Indeed, the Court
10 seems to have viewed it in this fashion. After
11 reviewing the seasonal migration pattern of the capelin,
12 not unlike the paradigm of seasonal migration pattern
13 that Mr Fietta has described, the Court said, "It
14 appears that the seasonal migration of the capelin
15 presents a pattern which north of the 200 mile line
16 claimed by Iceland may be said to centre on the southern
17 part of the area of overlapping claims, approximately
18 between that line and the parallel of 72 degrees north
19 latitude and that the delimitation of the fishery zone
20 should reflect this fact" - "the delimitation of the
21 fishery zone should reflect this fact". "It is clear
22 that no delimitation in the area could guarantee to each
23 party the presence in every year of fishable quantities
24 of capelin in the zone allotted to it by the line. It
25 appears, however, to the Court that the median line is
26 too far west for Denmark to be assured" - there is no
27 reference to catastrophe here - "of an equitable access
28 to the capelin stock since it would attribute to Norway
29 the whole of the area of overlapping claims. For this
30 reason also the median line thus requires to be adjusted
31 or shifted eastward". The key words, Mr President, seem
32 to be "adjustment in order to ensure equitable access to
33 the fishing resource in question".

34 With your permission, Mr President, this may be a
35 juncture at which to respond to Professor Brownlie's
36 question, which was posed to our delegation. May I
37 proceed with that?

38 THE PRESIDENT: Please.

1 PROFESSOR REISMAN: As you will recall, Professor Brownlie
2 asked in relevant part - and I think this is on the
3 screen - "Is it the case that in the Jan Mayen case,
4 which you considered very extensively, either of the
5 parties relied upon the doctrine of traditional fishing
6 rights? That is my question".

7 The capelin fishing industry was of relatively
8 recent vintage and was not fished by artisanal means.
9 Indeed, as it became clear in the exchange of the
10 pleadings, not even by Greenland fishermen, but by
11 foreign ships under licence. So a key part of the
12 dispute did not concern traditional artisanal fishing.
13 Nonetheless, as the selection from the judgment which I
14 read earlier stated - and is back on the screen - both
15 Denmark and Norway referred to the consequences,
16 respectively, of the Inuit of Greenland and to the
17 "fragile economy of Norwegian coastal communities", the
18 latter of which of course had been a factor in the
19 Court's adjustment in Norway's favour of certain
20 boundaries in Anglo-Norwegian Fisheries.

21 The statements of the respective parties in the
22 pleadings were, as you would expect, more ambitious.
23 Denmark tried to place considerable emphasis on
24 traditional indigenous communities in Greenland, though
25 the relevance to the capelin fishing industry was
26 tenuous, as I said, because it started in the 1970s.
27 But it acknowledged in its Memorial that "Greenland
28 fishing activities had developed from small scale
29 fishing from kayaks and other primitive boats into an
30 industry utilising modern equipment, including large
31 sea-going trawlers and other highly-specialised
32 vessels". That is a quotation from the Memorial at page
33 46. Norway, for its part, denied that the Danish boats
34 fishing for capelin were even from Greenland, which
35 ultimately in the exchanges Denmark acknowledged and
36 acknowledged that Greenland was exploiting the capelin
37 by means of the issuance of fishing licences - not
38 exactly an artisanal traditional fishing activity. It

1 claimed, though, that one fourth of the labour force and
2 80 per cent of export earnings were due to the fishing
3 sector. It also sought to emphasise the people's ties
4 to the sea as a cultural factor, but, for its part,
5 Denmark contended that Norway's fishing could not be
6 considered traditional in the sense used in the
7 fisheries and fishery jurisdiction cases.

8 Norway, for its part, contended that the waters in
9 the vicinity of Jan Mayen were traditionally important
10 for Norwegian whaling. Of course, shortly before this
11 there had been a suspension of multiple whaling
12 activity. Norway acknowledged that most of the capelin
13 that was being taken -and this was a very large industry
14 - was used to process oil and meal and only a small
15 proportion was consumed and that was essentially a
16 luxury item for the high end of the market.

17 Norway also contended that the "shrimp fisheries
18 off Jan Mayen contribute to the fragile economies of
19 Norwegian coastal communities".

20 I will not go through more, because, I think,
21 Professor Brownlie, that you have a flavour of this. I
22 think that the parties did try to spice their
23 submissions with traditional types of claims but, in so
24 far as it was the capelin fishing that was the critical
25 resource at stake, and that was already subject to
26 highly-industrial fishing conducted by flag ships of
27 other nations, I do not think that the traditional
28 artisanal fishing arguments that were sought, whether
29 for whaling or sealing or fishing, were particularly
30 influential. But I do think that the fact of
31 traditional artisanal fishing was before the Court and,
32 apparently, important enough for the Court to refer to
33 it if illusively in this part of its discussion, albeit,
34 as I said, in far less dramatic terms than those used by
35 the parties and they did not reject it outright. But it
36 does not appear to have been the Court's primary focus
37 in this part of its decision, which was of course
38 industrial fishing for capelin.

1 6.00

2 The Court's concern in this part of its decision
3 seems to have been more universal about the
4 vulnerability of all communities, a universal human
5 susceptibility, which is not limited to traditional
6 artisan peoples. With respect to such vulnerability,
7 the Court indicated that it believed that it could be
8 legally accommodated if there were a legal remedy that
9 could be ameliorated by adjustment of a maritime
10 boundary. In our view, the Jan Mayen analysis would be
11 solid ground for the remedy which Barbados prays. This
12 is the Barbados delegation's response to Professor
13 Brownlie's question.

14 I was tracking the evolution of the standard that
15 is applied in determining whether or not, once a special
16 circumstance is alleged, it warrants being characterised
17 as a special circumstance entitled to the fashioning of
18 an appropriate remedy.

19 This brings us now to Eritrea-Yemen, which, as our
20 friends have correctly stated, arose under a special
21 agreement and not under UNCLOS, but which we believe
22 applied the same international law and for that reason,
23 not to speak of the distinction of the arbitrators in
24 that case, is relevant to our inquiry. This award also
25 avoided using the strict catastrophic test as the
26 exclusive standard, though a closure of the waters in
27 question to either state might have had that consequence
28 for their respective traditional artisanal fishermen.
29 Eritrea-Yemen used a more inflected test: a line or
30 boundary that might otherwise meet the tests of
31 international law could be inequitable were it to
32 "produce a catastrophic or inequitable effect on the
33 fishing activity of its nationals or detrimental effects
34 on fishing communities and economic dislocation of its
35 nationals". That is tab 190.

36 Eritrea-Yemen directly involved traditional
37 artisanal fisherfolk and introduced some other
38 standards. Note that Gulf of Maine and Jan Mayen have

1 been presented here as equal alternatives, catastrophic
2 or inequitable effect on the fishing activity, along
3 with another equally valid contingency, detrimental
4 effect on fishing communities and economic dislocation
5 of its nationals. The detrimental effects on the
6 communities that would be caused by the putative line
7 seem to be linked to individual economic dislocation.
8 That is why I think they say detrimental effects of
9 fishing communities and economic dislocation of its
10 nationals.

11 It would appear, Mr President, members of the
12 Tribunal, that as international maritime boundary law
13 has matured it has become more sensitive to the human
14 consequences of delimitations and has supplied tribunals
15 with a more inflected code of contingencies for
16 adjustment of a provisional line to take account of a
17 special circumstance that implicates severe consequences
18 for vulnerable communities.

19 Mr President, members of the Tribunal, I will
20 return to Eritrea-Yemen in the discussion of remedies,
21 but I would at this juncture like to pursue
22 international law's increasing sensitivity to the human
23 rights dimension, or the human dimension, for a moment.

24 Something that has been addressed, I think very
25 eloquently, by Sir Henry.

26 As was said in the first round, international human
27 rights are not an additional chapter in international
28 law, but a normative element that now affects every
29 other chapter, including maritime boundary delimitation.

30 Trinidad and Tobago complains that we did not elaborate
31 the human rights law that governed this matter. Mr
32 President, the triage which counsel must practise in
33 order to present a case within a limited time often
34 assumes that some points are obvious and so we thought
35 was the human rights dimension, especially after Sir
36 Henry presented the situation in the Barbadian
37 fisherfolk communities. But, as the need has arisen,
38 let me return to the human rights issue.

1 First, lest the record suggest that this issue was
2 not argued, I would refer the Tribunal to paragraph 126
3 and paragraph 127 of our Memorial and footnotes 165 and
4 166 there where, incidentally, you will also see that we
5 noted that Trinidad and Tobago had denounced the
6 American Convention on Human Rights. In our Memorial,
7 we refer to Article 17, paragraphs 1 and 2 of the
8 Universal Declaration of Human Rights and to the
9 European Commission's decision in *Banér v. Sweden*,
10 holding that fishing rights are a proprietary interest
11 entitled to protection under Article 1 of Protocol 1.
12 It seemed to be suggested, Mr President, that human
13 rights do not enter into this case, because Trinidad and
14 Tobago denounced the American Convention. I hope that
15 there is no implication in Mr Wordsworth's statement
16 that Trinidad and Tobago believes that it is not bound
17 by international human rights obligations because of the
18 denunciation. A state may not shed international human
19 rights obligations so easily and certainly not in the
20 Inter-American human rights system. When a state in the
21 Americas, which is a member of the OAS, denounces the
22 American Convention, the only human rights consequence
23 is that it is no longer subject to scrutiny of its
24 actions there under the American Convention by the
25 Inter-American Human Rights Commission, the body which
26 oversees investigation and reporting on alleged
27 violations of the Convention. But the state remains
28 subject to the American Declaration of Rights and Duties
29 of 1948, the forerunner of the Convention, containing
30 most of the same rights, including in its Article 23 the
31 rights to property, and serving as the authoritative
32 statement of human rights in the OAS Charter. Indeed,
33 the Inter-American Commission has even applied the
34 declaration to states in the Americas which were never
35 party to the Convention. Mr President, in so far as
36 this tribunal must apply "other rules of international
37 law not incompatible with this Convention" - of course a
38 quote from Article 293 of the Convention - "we believe

1 that it is appropriate to apply human rights law in a
2 case before it in which states have accepted its
3 jurisdiction". And without, of course, entering into a
4 discussion of jus cogens, we submit the hardly-
5 contentious proposition that it was not intended that
6 UNCLOS be inconsistent with human rights law. We submit
7 that international human rights law cannot sanction a
8 decision with severe human rights deprivations when
9 alternatives which would have averted those consequences
10 are readily at hand and equitable in the circumstances.

11 Sir Henry and Mr Fietta have demonstrated the grave
12 consequences to Barbadian fisherfolk that are at stake
13 here. Sir Henry has put a human face on the
14 consequences to which human rights law applies.

15 That brings us, Mr President, to the issue of
16 remedies for a special circumstance. I would like first
17 to address the law in general and then to particularise
18 it to the case at Bar. Our friends across the aisle
19 effected great amusement at the idea that a tribunal's
20 decision to prescribe an adjustment of a boundary when a
21 special circumstance has been established is remedial
22 and anticipatory or prospective. Mr President, members
23 of the Tribunal, that is exactly what it is. A special
24 circumstance is a finding of a consequence, whether
25 geographical, economic or humanitarian, which would flow
26 from the installation of the provisional median line as
27 the permanent maritime boundary. Once a tribunal finds
28 a special circumstance, it determines the appropriate
29 remedy that ameliorates the special circumstance, taking
30 account of that circumstance and that context and in
31 ways that are as equitable as the situation allows.
32 Thus, in Jan Mayen, the Court said "it is proper to
33 begin the process of delimitation by a median line
34 provisionally drawn", paragraph 53. And immediately
35 after that it said, "The Court is now called upon to
36 examine every particular factor of the case which might
37 suggest an adjustment or shifting of the median line
38 provisionally drawn. The aim in each and every

1 situation must be to achieve an equitable result". That
2 is paragraph 54. "The median line is a geographical
3 exercise in situations of coastal opposition and it is
4 presumptively equitable. But, if it is demonstrated
5 that because of the special circumstance it would not
6 be, an adjustment to redress the inequity is
7 appropriate." So the entire notion of special
8 circumstance imports a remedial theory and, of course,
9 remedies are future oriented. As for remedies for a
10 special circumstance being punitive, as our friends
11 across the aisle said, they are intended to be remedial
12 and not punitive. Mr President, I would doubt that
13 Norway viewed the Court's remedy for the special
14 circumstance in Jan Mayen as punitive. Certainly, in
15 the case before you a remedy of boundary adjustment or
16 of access regime for non-exclusive fishing will not be
17 punitive whatever Trinidad and Tobago might say as, if I
18 may repeat Mr Fietta, it allocates to each fishing
19 community the area which it has fished and this would
20 provide equitability to both parties. The special
21 circumstance and the remedy are analytically quite
22 separate and each is subject to very strong legal
23 guidelines. The fashioning of a remedy is subject to
24 the ultra petita rule within the domain of the Tribunal.
25 The two species of remedies which have been issued by
26 prior tribunals have been boundary adjustment, as in Jan
27 Mayen, and access regimes for non-exclusive fishing, as
28 in Eritrea-Yemen. Barbados has asked for adjustment of
29 the provisional median line as the simplest and most
30 economic remedy, one which is in particular self-
31 executing. It would not affect Trinidad and Tobago's
32 fishing activity which does not use the same waters and
33 does not, moreover, pursue the same fish. We accept
34 that the Tribunal may award us less than the adjusted
35 line we request, as in Jan Mayen, or, in its wisdom,
36 order a regime for access and non-exclusive fishing use.
37 We hope that we have persuaded you, Mr President,
38 members of the Tribunal, of the human implications of

1 the delimitation of this part of the boundary, the
2 special circumstance that obtains, the law that governs
3 it, and the justification for a remedy.

4 6.15

5 Mr President, I thank you very much for being so
6 indulgent as to allow me to go past our concluding hour.

7 May I ask before the Tribunal rises that it recognise
8 for a moment Mr Volterra.

9 THE PRESIDENT: Thank you so much, Professor Reisman. Mr
10 Volterra.

11 MR VOLTERRA: Thank you, Mr President. Barbados has noted
12 the Tribunal's comment at the resumption of the hearing
13 after the tea break today, for which Barbados is
14 grateful. I am instructed to tell you by the Agent of
15 Barbados, Deputy Prime Minister and Attorney General
16 Mottley, that Barbados must, however, respectfully
17 request a clarification; a clarification so as to avoid
18 the acutely paradoxical and unfair result that Barbados
19 is punished for Trinidad and Tobago's violation of the
20 rules.

21 The position as of today is that Trinidad and
22 Tobago has made prejudicial comments to the press and to
23 the public, and Barbados' citizens and neighbours are
24 even now pressing Barbados and Barbados' government for
25 a comment in response.

26 Simply to ask both sides henceforth to observe the
27 rules does not leave Barbados on a level playing field.
28 It would put Trinidad and Tobago in the position of
29 unfairly benefiting from its own breach, having its
30 views being the only ones diffused in the media, on the
31 internet and around the globe, including within
32 Barbados.

33 Trinidad and Tobago has said that it is trying to
34 ascertain the facts related to this incident. Mr
35 President, it matters not how Trinidad and Tobago came
36 to disseminate its views of this arbitration in breach
37 of Article 13.1. Barbados respectfully asks the
38 Tribunal to indicate an urgent and realistic solution,

1 preferably this evening, so as not to allow yet another
2 new cycle to pass in which Trinidad and Tobago's most
3 extreme claims, including that Barbados is a predator,
4 are the only views that are aired to the world, the
5 region and to Barbados' own people, whilst Barbados is
6 deprived of its droit de la réponse. The Tribunal will
7 appreciate that such an inequitable effect would not be
8 legally or politically acceptable.

9 If the Tribunal would find it appropriate, Barbados
10 would welcome the opportunity immediately to join
11 Trinidad and Tobago in a meeting with the Tribunal in
12 camera.

13 Thank you, Mr President, for your indulgence.

14 THE PRESIDENT: Thank you, Mr Volterra. Before we respond to
15 that, and I think we would want to confer about that
16 among ourselves, and ask you to await our response, do
17 you wish to put a question on the substance of what we
18 were hearing?

19 PROFESSOR LOWE: Thank you. There are two questions that
20 arise out of what we have heard this afternoon and I
21 apologise if you are planning to deal with it tomorrow,
22 but I will put them now anyway. The first is, as a
23 matter of international law, what in Barbados'
24 submission is the period of time during which a
25 traditional fishing right of the kind for which it
26 contends must be established; and the second part of
27 that question, what if any is the difference in this
28 respect between "traditional", "historic", and
29 "habitual" fishing.

30 The second question is what is the significance, if
31 any, of UNCLOS Article 297 paragraph 3(a) for the
32 jurisdiction of this Tribunal in respect of Barbados'
33 claim to a non-exclusive right to fish?

34 THE PRESIDENT: Thank you. All of you need not stay but I
35 would ask that the Co-Agents remain for a moment while
36 the Tribunal steps out and consults in its breakout room
37 and will return in five minutes.

38 **(Adjourned till 10 a.m. tomorrow morning)**