

International Dispute Resolution Centre  
Fleet Street  
London, England

Thursday, 27th 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 SEVEN

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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. We come now to the second round  
2 in which the Tribunal will be addressed by the  
3 representatives of the Republic of Trinidad and Tobago.  
4 Do I gather from the seating arrangement that it is Mr  
5 Wordsworth who we will have the pleasure of hearing first?  
6 No. I gather it is Professor Greenwood.

7 PROFESSOR GREENWOOD: I am sorry, Mr President, the pleasure is  
8 to be postponed until later in the afternoon. But it is  
9 my pleasure to address the Tribunal today on behalf of  
10 Trinidad and Tobago on a day that can only be described as  
11 Tobagonian sunshine.

12 The statutory housekeeping, to start with, Mr  
13 President. I fear that you have another Judges' folder  
14 before you into which we will be putting more inserts  
15 tomorrow. This, however, will be the last Judges' folder  
16 and though not today it will tomorrow include the Virginia  
17 Commentary on Article 56 of the Law of the Sea Convention  
18 which Sir Arthur asked about on Tuesday.

19 Mr President, at this stage when, as one commentator  
20 said, everything that could be said has been said, but not  
21 everybody has yet said it, it is appropriate to take a  
22 step back and just ask what exactly this case is about.  
23 It is of course about achieving an equitable solution.  
24 The goal stated like that is simple. Its achievement  
25 however is still not an easy task for any Tribunal. It is  
26 worth keeping in mind, in my submission, that this is the  
27 task that the Tribunal is seeking to perform.

28 Barbados has made much of the fact that it has

1 offered you a simple case, a simple solution. Sir Elihu  
2 put it very succinctly in his closing speech at the end of  
3 their second round. "This is really a simple case", he  
4 said, "that has been made difficult by the complexities  
5 introduced on behalf of Trinidad and Tobago". We heard  
6 the same from the learned Attorney General of Barbados in  
7 her closing speech. Mr President, the Tribunal is  
8 entitled to ask just how simple is the case that Barbados,  
9 as the claimant in these proceedings, has put before you.

10 It is at its simplest, we would suggest, with Mr  
11 Paulsson's map which is just coming up on the screen (Tab  
12 1 of the Judges' folder). This is what I call the  
13 commendable honesty map. It shows a simple equidistance  
14 line, nothing else. This is the way that Mr Paulsson  
15 introduced the map at the end of his speech. "My subject  
16 is geography. Everything I say is subject to fishing, but  
17 that is not my subject. Radiation is a part of geography.

18 There is a place in international jurisprudence for  
19 radiation. It has, incidentally, had effects in maritime  
20 delimitation, but its effect has been orthodox. Its  
21 effect should be foreseeable. Its effect should be, as  
22 you see on the map now, neither predatory nor  
23 mischievous".

24 Well, three comments in that regard, if I may, Mr  
25 President. First of all, this map shows no difference at  
26 all between the closed in Caribbean and the open Atlantic  
27 and point B, which although it is not marked, the tip of  
28 the lozenge in the bottom right-hand corner, is still said  
29 by Mr Paulsson to be lying between to coasts. Let us just

1 have a look at what it really all involves. There, the  
2 yellow band is where the two coasts are opposite, there is  
3 the line 182 nautical miles of it down to B and 191  
4 nautical miles from point B to the nearest point on the  
5 coast of either Tobago or Barbados. Mr President, who on  
6 earth can say that point B lay between those two coasts?  
7 If one takes the formula in the Channel Continental Shelf  
8 case, it would seem to us to be self-evident, that point B  
9 lies off rather than between the two coast lines. Of  
10 course, the map tells a lot less than the whole story.  
11 There is no attempt here to show why the solution which Mr  
12 Paulsson posits gives nearly 60 per cent of the maritime  
13 space in the eastern sector to Barbados, a fact that  
14 Barbados has never contested. We raised it in the first  
15 round. Why is it that an equitable solution? The answer  
16 came there "none" from Counsel to Barbados. Not a  
17 suggestion, not a hint as to what was equitable about  
18 that, except that you are asked to take it on trust, Mr  
19 President, that the median line is always going to produce  
20 an equitable result between opposite coasts - between  
21 opposite coasts. The third point, Mr President, is this.  
22 With commendable candour, Mr Paulsson abandoned the claim  
23 in the western sector altogether. His case, he said, was  
24 subject to fishing but he was only dealing with geography.  
25 We cannot help wondering whether Mr Paulsson believes in  
26 the western sector part of Barbados' claim or even whether  
27 he would be willing to advocate the western sector part of  
28 the claim. It does not feature in her map. But it is, of  
29 course, as this map shows, a critical part of the claim

1 that Barbados is putting forward. We have to consider  
2 whether it is indeed a simple case as they say or not.

3 It is simple enough to see what is wanted. But, Mr  
4 President, the juridical basis of that claim is very far  
5 from simple. Barbados claims a single maritime boundary  
6 as valid for the shelf as for the exclusive economic zone.

7 Mr Volterra made that clear in his speech in the first  
8 round. Ms Mottley made it clear in her closing  
9 submissions on behalf of Barbados on Tuesday afternoon.  
10 But the basis for the claim in the western sector, for the  
11 beak that comes down here, around Tobago, the basis for  
12 that claim has been said to be non-exclusive rights of  
13 access to fish. Professor Reisman put it in these terms  
14 in his second round speech, "When some 60 Barbadian ice  
15 boats, each with a crew of three to five people net fish  
16 in waters south of the median line, they do not interfere  
17 with any other uses of the water column or seabed". They  
18 do not interfere with anything on the seabed at all, it  
19 seemed. Well, in one sense, Mr President, they do not.  
20 There will not be any activities by anybody else on the  
21 seabed. Rather than interfering with them, Barbados is  
22 proposing to take them unto itself. Nor are the facts on  
23 which this Barbadian claim is founded at all simple.  
24 Indeed, quite the contrary. There has been a constant  
25 shifting of ground by Barbados. Not only from one written  
26 pleading to another, but between the different speeches in  
27 the same round of this hearing. We started off, Mr  
28 President, with a centuries old traditional artisanal  
29 fishing ground and we have finished up with Sir Eli

1 telling you solemnly on Wednesday afternoon that even if  
2 the practice only stretched back 30 years that was still  
3 good enough, and by the way, surely an adjustment could be  
4 made on social and economic grounds.

5 Nor is there anything simple about the manner in  
6 which this claimed adjustment has been worked out.  
7 Professor Lowe asked Barbados the question that we had  
8 earlier asked without any success; how exactly are these  
9 different points calculated? how was the zone drawn  
10 around the north east of Tobago? It took until last night  
11 for an answer to appear to one would have thought was so  
12 fundamental a part of Barbados' claim that counsel would  
13 have been able to answer that question while he was on his  
14 feet. And the answer as we will see is as confused as the  
15 original claim was.

16 Nor is there anything simple about the two halves of  
17 Barbados' claim in their relationship with one another.  
18 The claim in the western sector and the claim in the  
19 eastern sector. In the eastern sector we are told by Mr  
20 Paulsson that as between two opposite states the median  
21 line is not only the starting point, it is the putative  
22 finishing point. The normal means of achieving  
23 equidistance. But as soon as we get to the point, if we  
24 could just go back one slide, where the two coasts  
25 actually are opposite in that yellow band equidistance is  
26 abandoned completely. Barbados instead claims 84 per cent  
27 of the Continental Shelf and the exclusive economic zone  
28 right the way down to the territorial waters of Tobago.

29 Lastly, the law on which the Tribunal is said to be



1 proceeding by Barbados is not at all straightforward.  
2 Reflect if you would on this comment by Sir Elihu in his  
3 closing speech. Sir Eli said "It has become a common  
4 place of the discussion of relevant factors in  
5 delimitation that economic and social considerations  
6 should be disregarded. Barbados suggests that this common  
7 place is ripe for reconsideration. There is no good  
8 reason why an approach to an equitable solution should  
9 exclude consideration of economic and social factors,  
10 particularly in the case of a small island state that is  
11 already inherently vulnerable." Professor Reisman  
12 describes Sir Eli as a legend and I would certainly go  
13 along with that. He resembles in some respect the great  
14 Lord Denning. Whenever Lord Denning referred to something  
15 being of commonplace, he meant that it was a well-  
16 established principle resting firmly on authority which he  
17 proposed to disregard in the decision that he was about to  
18 give. That is what you are being asked to do, to  
19 disregard one of the few really clearly -established  
20 principles. It is more than just commonplace. It has  
21 been a bedrock of jurisprudence on this subject from the  
22 very start. You are to disregard it on the basis of what,  
23 Mr President? Detailed argument of analysis of the case  
24 in which it has been laid down? No. On the basis of a  
25 couple of sentences in closing submissions at the end of  
26 the second round.

27 When Barbados says that this is a simple case which  
28 Trinidad and Tobago has complicated, we say that that is a  
29 little bit far from the truth. The reality is that

1 Barbados has confronted this Tribunal with a claim that is  
2 anything but simple. A complex wolf clothed as a simple  
3 sheep. And that is enough of the animal analogies. We  
4 have already got the bird, now we have the wolf in sheep's  
5 clothing as well. If I could contrive a diagram that  
6 moved between the bird and the wolf, I would do so, but it  
7 is beyond my artistic skill.

8 Mr President, at the end of the second round, it is  
9 customary for the state that goes last to show how the  
10 issues in the proceedings have narrowed, to see what has  
11 become common ground and what is still in dispute between  
12 the parties. But the reality in this case is that the  
13 differences have seemed to grow wider during the three  
14 sets of oral argument we have so far heard. That we say  
15 owes a lot to the fact that Barbados has simply refused to  
16 answer a whole series of questions about matters of  
17 fundamental importance to its case which Trinidad and  
18 Tobago has posed during the written pleadings and, again,  
19 in the first round of the oral argument. It has even  
20 declined so far to answer some of the difficult questions  
21 put to it by the Tribunal.

22 3.15

23 Let us have a look at ten core questions Barbados has  
24 not answered. First of all, what is the rationale for  
25 Barbados' point D or its point C, for that matter?  
26 Silence on this subject when we raised it in the first  
27 round. Mr Paulsson did not deal with it at all when he  
28 came to reply. It was only when the matter was raised by  
29 Professor Lowe at the end of day five. He said this,

1 "Thank you. There are two questions that arise out of  
2 what we have heard this afternoon and I apologise if you  
3 are planning to deal with it tomorrow, but I will put them  
4 now anyway." In fact, I am reading the wrong question,  
5 forgive me. Never mind, the point will do just as well.  
6 "The first is as a matter of international law what in  
7 Barbados' submission is the period of time during which a  
8 traditional fishing right of the kind for which it  
9 contends must be established". The second part of that  
10 question. "What, if any, is the difference in this  
11 respect between traditional, historical and habitual  
12 fishing? The second question is what is the significance,  
13 if any, of UNCLOS Article 297, paragraph 3(a) for the  
14 jurisdiction of this Tribunal in respect of Barbados'  
15 claim to a non-exclusive right to fish?" Well, it was  
16 characteristic of Professor Lowe that he apologised for  
17 raising the matter then in case Barbados was planning to  
18 deal with it on Tuesday. Of course, Mr President, the  
19 Tribunal now knows that Barbados was not planning to deal  
20 with it on Tuesday. In fact, it has not dealt with it on  
21 Wednesday or so far on Thursday either. Indeed, we think  
22 that the answer is quite simple. Barbados was hoping not  
23 to have to deal with those two questions at all. It was  
24 also hoping not to have to deal with the rationale for  
25 points C and D and only rather reluctantly, last night,  
26 did it come up with a very thin answer indeed which more  
27 or less amounts to saying, "We don't really have much of a  
28 rationale for that part of the claimed sector. The area  
29 we are really interested in is over on the north west and

1 western side of the island of Tobago".

2 Secondly, how do non-exclusive fisheries rights  
3 operate to deprive Trinidad and Tobago of its continental  
4 shelf in perpetuity? We raised that question expressly in  
5 the first round. Silence. The most that can be said is  
6 there was a degree of confusion. As Professor Reisman  
7 said, "They do not operate to do that". Mr Volterra said,  
8 "They do". But neither of them vouchsafed an answer to  
9 the question, how does this happen?

10 Thirdly, Mr President, how can Barbados' point E be  
11 said to lie between two coasts? We ask that question as  
12 well. No answer.

13 Fourthly, how can the Tribunal have jurisdiction  
14 regarding point E when Trinidad and Tobago does not claim  
15 that point but Venezuela, which is not a party, does do  
16 so? Silence.

17 Fifthly, why did Sir Harold St John tell the first  
18 maritime boundary negotiations that "the practice since  
19 the 1970s has been an observance of the median line  
20 between the two countries by fishermen". A vitally  
21 important point. How did he come to make that statement?

22 Barbados says nothing about it in its pleadings at all.  
23 Although Ms Marshall said something. She was very candid  
24 when the point was put to her in cross-examination. What  
25 she said was, "We were concerned to get our comments  
26 correct". "We were concerned to get our comments  
27 correct", including that one, Mr President.

28 Sixthly, what evidence is there of Barbadian licences  
29 south of the median line? I ask that question because the

1 Attorney General of Barbados said in her opening speech  
2 that "Barbados has licensed the whole area of its EEZ".  
3 Really. Have we been given any evidence of practice south  
4 of the median line in granting licences by Barbados?  
5 Nothing.

6 Seventhly, Mr President, why did Barbados not put  
7 before the Tribunal and at least seek to explain reports  
8 by its own officials, members of its own Government, which  
9 completely contradict its story about traditional  
10 artisanal fishing rights? We heard about people sitting  
11 there with a look of injured guilt. A rather nice phrase  
12 of Mr Paulsson's or it might have been Mr Churchill's, I  
13 cannot remember. Well, if there is ever injured guilt, it  
14 lies on the part of the Counsel for a state who has put  
15 forward evidence of one particular story while not  
16 disclosing that their own officials - their own officials  
17 - have flatly contradicted that in reports prepared before  
18 this litigation and before the witness statements. Not a  
19 word. Raised by Mr Wordsworth in the first round. No  
20 answer.

21 Eighthly, Mr President, what was unreasonable about  
22 the terms offered by Trinidad and Tobago for access to the  
23 EEZ around Tobago by Barbadian fishing vessels? A very  
24 important point in Barbados' case. The centrepiece of  
25 Professor Reisman's argument. "You denied our fishermen  
26 access. That is why we have a case", he said. I will  
27 come back to that in a few minutes. But, amazingly, apart  
28 from the suggestion that Trinidad and Tobago would only  
29 have granted access on its own terms, not a murmur about

1 what was wrong with those terms. Not a word at all. Yet  
2 it must be fundamental to the case that Barbados puts.

3 Lastly, what is the significance of article 297,  
4 paragraph 3(a)? The question that Professor Lowe put,  
5 that we flagged up, that Professor Crawford reminded the  
6 other side of. The question that I have missed out,  
7 number nine, I am sorry. What exchange of views was there  
8 on Barbados' claim? Not a word on that either in  
9 relation to jurisdiction.

10 Then, tenthly, what about the significance of article  
11 297, paragraph 3, of Barbados' position regarding the  
12 powers of the Tribunal to grant access? A fundamental  
13 issue which goes to the very heart of the claim that dare  
14 not speak its name. The claim disavowed in the Reply and  
15 then resurrected, brought back from the dead, first, by  
16 Sir Elihu and then by Professor Reisman. No answer. They  
17 did not answer it when we asked it. They have not  
18 answered Professor Lowe. I am sure that something will  
19 come in tonight now I have reminded Barbados. But this is  
20 surely the sort of question that could have been answered  
21 immediately. It should have been if Barbados was serious  
22 about this point.

23 Mr President, these are not peripheral questions.  
24 They are questions that go to the very heart of the  
25 fundamental elements of Barbados' claim on jurisdiction,  
26 on the adjustment of the median line, on the single  
27 maritime boundary that it claims, on the relationship  
28 between the eastern and western sector. Not one of these  
29 questions can have been unexpected and Barbados has had

1 ample time in which to answer them. Yet is has not done  
2 so. We say, Mr President, that the Tribunal has to draw  
3 some very hard inferences about Barbados' argument from  
4 that failure.

5 Mr President, let me take the main elements of the  
6 case and just briefly review where the parties' pleadings  
7 stand.

8 First of all, jurisdiction. Barbados has dismissed  
9 Trinidad and Tobago's objections to jurisdiction as  
10 unreal. But Part XV of the Convention on the Law of the  
11 Sea requires not just that there be a dispute but that  
12 there be an exchange of views. As Mr Wordsworth has shown  
13 and as he will develop in argument later today, that must  
14 be an exchange of views about the opposing claims which  
15 are the very essence of a dispute as defined in  
16 international law.

17 But Barbados' claim to the area south of the median  
18 line was never formally presented as an official position.

19 It was only ever put forward on an illustrative basis.  
20 So what constituted the exchange of views? No answer, Mr  
21 President. And compare the absence of an answer on that  
22 with the stance now taken by Barbados towards Trinidad and  
23 Tobago's claim to an extended continental shelf beyond 200  
24 nautical miles which had been notified to Barbados years  
25 before these proceedings were started and had been  
26 discussed in the negotiations from the very first round in  
27 the year 2000.

28 Lastly on the question of jurisdiction there is the  
29 failure to answer the point about Article 297 paragraph 3

1 to which Mr Wordsworth will return in due course.

2 PROFESSOR LOWE: Could I just ask a question at this point?

3 On the question of exchange of views in paragraph 11 of  
4 the Counter Memorial it is said that in relation to the  
5 extended Continental Shelf Trinidad and Tobago had put  
6 forward a claim but that in the absence of any defined  
7 claim line put forward by Barbados, Trinidad and Tobago  
8 was never placed in a position where a further counter  
9 proposal might have been called for. I wonder if you  
10 could say something about where the line is drawn in  
11 relation to an exchange of views in that context.

12 PROFESSOR GREENWOOD: Paragraph 11?

13 PROFESSOR LOWE: Yes.

14 PROFESSOR GREENWOOD: Forgive me while I read the relevant  
15 passage. Mr President, first of all there was more of an  
16 exchange of views on that than there could ever have been  
17 in relation to the Barbadian proposal, because the  
18 Barbadian position was never put forward as an official  
19 stance in the first place. Trinidad and Tobago's was, and  
20 it was notified as you heard in the previous round,  
21 formally and in the boundary negotiations. Secondly of  
22 course there is the point that Barbados has chosen to be  
23 the claimant in these proceedings. It is for Barbados to  
24 show that there has been the necessary exchange of views,  
25 which is a prerequisite to their seizing this Tribunal in  
26 respect of their own claim. Having done so it is not then  
27 necessary, in our submission, for Trinidad and Tobago to  
28 show a further exchange of views in relation to the  
29 elements of Trinidad and Tobago's claim. It is Barbados



1 who have brought this dispute and not us. But  
2 nevertheless, even taking account of the fact that  
3 Barbados did not come forward with counter proposals until  
4 this illustrative proposal at the end of the final round  
5 of maritime boundary negotiations, there is still we say a  
6 stark contrast between the approach taken by Barbados to  
7 establishing that there was an exchange of views on its  
8 own proposals but forward for illustrative purposes only  
9 at the end of the final round of maritime boundary  
10 negotiations and a copy of which was never handed over to  
11 the delegation from Trinidad and Tobago, and the approach  
12 they take in respect of jurisdiction over their own claim  
13 is to say there was a dispute, we knew all about it, talks  
14 had been fruitless for years. So a quantitative and a  
15 qualitative difference in the attitude between the two.

16 THE PRESIDENT: Sir Arthur has a question.

17 SIR ARTHUR WATTS: To pursue just a little bit this question  
18 of exchange of views and relationship to negotiation, I  
19 think you were suggesting that the exchange of views  
20 would be about issues of substance, because you said  
21 without a detailed map identifying Barbados' claim-line  
22 there could not be an exchange of views on the claim, but  
23 I wonder whether Article 283 is actually envisaging an  
24 exchange of views on the substance of the dispute or  
25 rather an exchange of views on the procedure to be  
26 followed, which might include negotiation or might not for  
27 resolving it. If the exchange of views is, as you seem to  
28 be suggesting, to concern the substance of the dispute,  
29 then where do exchanges of views stop and negotiations

1           begin?

2   PROFESSOR GREENWOOD:  Mr President, my function in this  
3           speech is to give a tour de raison.  Mr Wordsworth is  
4           going to deal with the details of jurisdiction immediately  
5           following me.  I will therefore do what leading counsel  
6           always do with a difficult question and gratefully say my  
7           learned junior will deal with that after the coffee break!

8           I see Mr Wordsworth losing a certain amount of colour  
9           at that remark but that cannot be helped!

10          Mr President, can we go on to the question of the two  
11          sectors, the next point in dispute between the parties.  I  
12          was very struck by the fact that in her closing  
13          submissions the learned Attorney General for Barbados  
14          referred to the eastern sector, whereas of course Mr  
15          Paulsson had denied that there was any difference between  
16          the two sectors at all.  Yet in fact the distinction  
17          between the two is central to both states' claims.  The  
18          geographical distinction we say is perfectly obvious, but  
19          in addition to that the fact that there is a juridical  
20          distinction between the two is clear in both claims.  The  
21          turning point for the line is different.  Barbados' point  
22          D on the median line in their case, our point A on the  
23          median lines on ours, but nevertheless the notion that  
24          there are two separate sectors to be delimited and that  
25          there are differences in the arguments to be deployed in  
26          respect of both of them, that it would seem is common  
27          ground.

28          What is not common ground we say rather  
29          extraordinarily is whether there is a geographical

1 difference, because Mr Paulsson argued that it is a  
2 relationship of opposite coasts throughout. Yet we would  
3 say that the fact that the maritime spaces in the Atlantic  
4 lie off rather than between the two coasts, that the  
5 relationship of the two coasts to the maritime space there  
6 is a lateral one, is perfectly obvious.

7 Mr Paulson said that his subject was geography and he  
8 did complain, very mildly and very courteously, about what  
9 he said was the unfair report given on his term card by  
10 the two Professors. I am happy to say, Mr President,  
11 that having consulted Professor Crawford we will be able  
12 to say in respect of the term card for the second term  
13 that Mr Paulsson has been at this particular school that  
14 he has made considerable progress in his chosen subject of  
15 geography! Although of course given the interpretation  
16 put on the phrase "considerable progress" by Barbados in  
17 its press releases that probably means he is going to be  
18 expelled from school tomorrow! But he has made  
19 considerable progress in geography. We regret, however,  
20 that at the end of term exam he allowed himself to be  
21 sidetracked into answering questions on English  
22 literature. That this was a mistake was evidence in the  
23 fact that he chose to answer the question on 18th century  
24 poets by writing about John Donne who died in 1631. Not  
25 only did this mistake clearly cost him marks in itself,  
26 but it also meant that he lacked enough time to answer all  
27 the questions on the geography section of the paper.

28 3.30

29 In particular his foray into English literature

1           distracted him from answering the question on what exactly  
2           is the rationale for turning point D? The best he could  
3           manage on that was to say his subject was geography,  
4           fishing was different and then to show us a map that  
5           ignored point D completely.

6           Not until last night, Mr President, did we get from  
7           Barbados even a feeble attempt at an answer about the  
8           rationale for point D, or to be more precise for the line  
9           that joins points C and D. In that answer, Mr President,  
10          what Barbados does is to refer fleetingly to two items in  
11          the evidence. My learned friend Mr Wordsworth will say  
12          more about that tomorrow. And then to tell us how it  
13          determined the locations of points C and D. But what it  
14          did not do was to answer the question why those points are  
15          there, what is the rationale for them. The fact that the  
16          reference to the evidence is so fleeting and that Barbados  
17          now says but of course the evidence shows that most of the  
18          fishing is out there in the west, suggests that in  
19          relation to that whole area, that part of the beak to the  
20          north and north-east, is effectively just throwing in its  
21          hand.

22          But to return to Mr Paulsson, I said he had made  
23          considerable progress in geography, and he had. On point  
24          A he has first of all dropped the notion which was plainly  
25          wrong that Trinidad and Tobago were trying to treat the  
26          same stretches of coast as both opposite and adjacent, and  
27          that is an important point. And secondly, and perhaps  
28          even more important, he acknowledged that there is indeed  
29          a rational justification for point A. It is true that he

1 would have put point A somewhere else. His argument was  
2 if the shape of Barbados was different point A would be  
3 further down the median line. Mr President, that is the  
4 trouble with equidistance lines. They do tend to change  
5 if the coastline is different. If Barbados lost a quarter  
6 of a city block then the turning point might indeed be  
7 somewhere else. If it lost a whole city block or two or  
8 three city blocks, or if it was ten miles further west,  
9 yes, the line would be different. That is the nature of  
10 maritime boundaries. They reflect geography as it is, not  
11 geography as it might have been or geography as somebody  
12 would like it to be. That is an important distinction.  
13 In fact it maybe that this is where the problem over 18th  
14 century poets actually surfaced, because Dr Johnson who  
15 was of course writing in the 18th century described the  
16 metaphysical poets as those who engaged in nice  
17 speculations in unusual contexts. That is in our  
18 submission exactly what Mr Paulsson was doing with  
19 geography; nice speculations in unusual contexts, where  
20 islands change their shape, their size, bits drop off,  
21 bits are added on. Multicoloured boundaries appear to the  
22 right, to the left, in front of, behind them, but Mr  
23 President, your Tribunal has to deal with the real world,  
24 with real geography, not virtual geography however  
25 cleverly presented to you.

26 The next point is estoppel. Mr Volterra made a great  
27 deal about estoppel in his argument. Trinidad and Tobago  
28 is estopped in the east. Barbados is not estopped in the  
29 west. That is the essence of his argument. It might of

1 course raise the eyebrow that he puts it quite so bluntly,  
2 because the amount of conduct on which Barbados relies in  
3 the east is a fraction of the conduct it dismisses as not  
4 amounting to an estoppel in the west.

5 But the eyebrows would have gone a lot higher over  
6 one other aspect of Mr Volterra's speech. For all the  
7 length of time that he took on estoppel there is not a  
8 word about what the criteria for estoppel are, and I would  
9 like to pause for a minute to look at those criteria.  
10 Perhaps I could invite you to turn to tab 5 in your  
11 judges' folder first of all. This is the article by  
12 Professor Bowett on estoppel before international  
13 Tribunals and its relation to acquiescence, an article as  
14 seminal in its own area as Sir Gerald Fitzmaurice's word  
15 on nonexclusive rights was in that area. If I could  
16 invite you to turn to the conclusions. The whole article  
17 is worthy of reading but I have not time to go through it  
18 all. The conclusion is on the penultimate page at 201.

19 "First of all the rule of estoppel operates so as to  
20 preclude a party from denying the truth of a statement of  
21 fact made previously by that party to another, whereby  
22 that other has acted to his detriment or the party making  
23 the statement has secured some benefit. As such the rule  
24 has been accepted by international Tribunals."

25 We can pass over paragraph 2, and then paragraph 3  
26 notes the various forms in which estoppel can arise, by  
27 treaty, exchange of notes or other undertakings in  
28 writing, and by conduct. Then over the page at paragraph  
29 4.

1           "The essentials of estoppel are (a) the statement of  
2 fact must be clear and unambiguous, (a) the statement of  
3 fact must be made voluntarily, unconditionally and must be  
4 authorised, (c) there must be reliance in good faith upon  
5 the statement, either to the detriment of the party so  
6 relying on the statement or to the advantage of the party  
7 making the statement".

8           Now it is true that that article was written nearly  
9 50 years ago, but if one turns to the case law in the  
10 international court on this subject, just to give two  
11 brief illustrations, we will see that the test formulated  
12 by Professor Bowett has stood the test of time. If one  
13 goes to volume 1 of Trinidad and Tobago's authorities, the  
14 North Sea Continental Shelf case at tab 5, the critical  
15 passage appears at paragraph 30. "Having regard to these  
16 considerations of principle, it appears to the court that  
17 only the existence of a situation of estoppel could  
18 suffice to lend substance to this contention. That is to  
19 say, if the Federal Republic were now precluded from  
20 denying the applicability of the conventional regime by  
21 reason of past conduct, declarations etc, which not only  
22 clearly and consistently evinced acceptance of that  
23 regime, but also caused Denmark or the Netherlands in  
24 reliance on such conducted detrimentally to change  
25 position or suffer some prejudice. Of this there is no  
26 evidence whatever in the present case".

27           That is in 1969, an application of the test  
28 formulated by Professor Bowett. Then in tab 6 of your  
29 Judges' folder, and I hope that I will be forgiven for a

1 short extract here from what was a long case, the  
2 chamber's decision in the Land, Island and Maritime  
3 Frontier Dispute, at page 239 - third page in the inset -  
4 towards the bottom underneath the quotation, "So far as  
5 Nicaragua relies on estoppel, the chamber will only say  
6 that it sees no evidence of some essential elements  
7 required by estoppel. A statement or representation made  
8 by one party to another and reliance on it by that other  
9 party to its detriment or the advantage of the party  
10 making it".

11 Mr President, those are the criteria for an estoppel  
12 in international law. Tried and tested over the decades.

13 There is no evidence in this case that those criteria are  
14 present in relation to the eastern sector. And Barbados,  
15 astonishingly, has made no effort either to outline what  
16 the criteria are, let alone show how it might prove  
17 compliance with them in this particular case.

18 Mr President, one could equally well say that the  
19 criteria for estoppel are not satisfied in the west  
20 either, but that does not matter because Trinidad and  
21 Tobago has not advanced a case of estoppel in relation to  
22 the western sector. What we do say, though, is that  
23 Barbados cannot simply re-write history. The facts of the  
24 matter are that until 2002 Barbados never advanced any  
25 sort of claim to the continental shelf or the exclusive  
26 economic zone south of the median line. On the contrary,  
27 it continuously treated the waters in question as Trinidad  
28 and Tobago's exclusive economic zone and negotiated for  
29 access to them on that basis. Those are facts which are



1 important in establishing the question of who has title to  
2 the shelf and zone south of the median line and around the  
3 island of Tobago. We do not say that they create an  
4 estoppel. What we do say is that the criteria for  
5 estoppel advanced by Barbados have nowhere near been made  
6 out.

7 Then there is the Trinidad and Tobago and Venezuela  
8 treaty of 1990. This, Mr President, produced some of the  
9 most overheated rhetoric we have heard in the whole of  
10 these proceedings. There is time now, we say, to take  
11 what Mr Paulsson referred to as a reality check in  
12 relation to it.

13 It seems to us that four principles are absolutely  
14 plain as day. The first is that the treaty does not bind  
15 Barbados. It even says so. The second principle is that  
16 there is no question of Trinidad and Tobago seeking in  
17 these proceedings to compensate itself as Barbados has  
18 suggested at Barbados' expense for the effects of that  
19 1990 treaty. Thirdly, the treaty is, however, in force  
20 between Trinidad and Tobago and Venezuela and Trinidad and  
21 Tobago is, therefore, precluded from advancing any claim  
22 to the area south of the 1990 treaty line. And it  
23 advances no such claim. That leads us on to the fourth  
24 principle. It follows as a matter of the most elementary  
25 principles of international law that to the extent that  
26 Barbados claims anything to the south of the 1990 line,  
27 there is a dispute between Barbados and Venezuela not  
28 between Barbados and Trinidad and Tobago. Since Venezuela  
29 is not a party to these proceedings, this Tribunal cannot

1 have jurisdiction to determine a boundary line between the  
2 point where the claimed line put forward by Barbados  
3 intersects with the 1990 treaty line and Barbados' point  
4 B, because that would be to rule upon a dispute between  
5 Barbados and a state that is not a party to these  
6 proceedings and, one might add, to give credence to  
7 Barbadian claims against Venezuela even to the south of  
8 point B. That is another matter. Barbados and Venezuela  
9 can fight that out if they wish.

10 All of that, Mr President, is elementary  
11 international law, but Barbados has tried to obscure these  
12 simple issues with a cloud of rhetoric and hot air. We  
13 had this tale of the map that fell off the back of a  
14 lorry. No idea where it came from. No idea how it got  
15 into the hands of the then leader of the Opposition in  
16 Trinidad and Tobago or, for that matter, of the newspaper  
17 from which it would appear that Barbados has gleaned it.  
18 But it was not part of their official record and, in any  
19 case, what matters, Mr President, is not what may have  
20 been banded around in negotiations for the 1990 treaty,  
21 but what was actually agreed in that treaty. Of course,  
22 it is an elementary proposition, that it is what the  
23 Government of a state does not what the leader of its  
24 Opposition might say which is conduct imputable to the  
25 state.

26 Mr President, you raised with my learned friends  
27 counsel for Barbados a question about the official map  
28 attached to the 1990 treaty. That is not in the  
29 pleadings, as they pointed out in a written response to

1 you either this morning or late last night. We will  
2 endeavour to get hold of a copy of that map tomorrow and  
3 will put it before the Tribunal. If it cannot be done for  
4 tomorrow, then we will send it in by post to the PCA after  
5 the hearing is completed.

6 The second bit of hot air and rhetoric on this. The  
7 land boundary between Guyana and Venezuela. First of all,  
8 Mr President, that could not possibly have any bearing on  
9 the dispute before this Tribunal. It simply could not do  
10 it. Secondly, commonsense, Mr President, dictates that,  
11 if a state is negotiating with a neighbour, which has a  
12 boundary dispute with another neighbour, it has got to  
13 proceed on a basis whereby it acts, as it were, without  
14 prejudice. The exchange of notes filed by Trinidad and  
15 Tobago described as "the apology with a smirk" by counsel  
16 from Barbados is, in fact, an absolutely straightforward  
17 and honest piece of diplomacy. It says that Trinidad and  
18 Tobago's acceptance of the map is not to be taken as an  
19 acceptance of Venezuela's claim to the land area in  
20 question. It could not be clearer. It could not be more  
21 straightforward and the issue could not be less relevant  
22 to the proceedings here.

23 Lastly, Mr President, Aves Island and the much  
24 discussed map which shows Aves Island (tab 7 in your  
25 Judges' folder). Mr President, one of the problems of  
26 advancing years is that I have had to start fiddling  
27 around with reading glasses, but I would need much more  
28 than reading glasses to see Aves Island on this map. I  
29 would need a magnifying glass of very considerable

1 strength. It is, in fact, highlighted now roughly  
2 opposite the island of Guadeloupe. For some considerable  
3 period of time the learned co-agent for Barbados said  
4 "This shows what the Trinidadians are up to. They called  
5 it Aves Island when it is really Bird Rock". Oh dear!  
6 This is serious stuff, Mr President. Calling it Aves  
7 Island does not make any difference whatsoever to the  
8 question that does matter which is what legal effect does  
9 it have in generating exclusive economic zone or  
10 continental shelf? That would be exactly the same whether  
11 it was an island or a rock. The description of it as an  
12 island is by no means unusual as the next slide, which is  
13 an excerpt from Charney and Alexander, will show. It is  
14 referred to as Aves Island (Venezuela) in that as well.  
15 We will take the following slide which appears at tab 9,  
16 an excerpt from the UN Division of Ocean Affairs' note on  
17 the protest by four CARICOM Governments about claims to a  
18 maritime boundary generated by Aves Island. That refers  
19 to it as Aves Island or the Island of Aves as well. It is  
20 the legal space that it may or may not generate, not its  
21 name, which is important. And, of course, in terms of its  
22 effect on these proceedings it could not possibly have any  
23 effect at all and neither state is suggesting that it  
24 does.

25 Let us turn then to the two sectors, the western and  
26 the eastern, the western sector first. In respect of the  
27 western sector, we say that Barbados' claim has quite  
28 simply fallen apart. Mr Wordsworth has shown that the  
29 claim to a traditional fishery is radically inconsistent

1 with Barbados' own reports. That is a very serious  
2 matter. It cannot be brushed aside, as counsel for  
3 Barbados sought to do by saying, "Well, our Ministry does  
4 not employ historians" or "This was written by the  
5 Ministry of Agriculture and not by the Foreign Ministry"  
6 or "You, Trinidad" - this is the most extraordinary of all  
7 - "you, Trinidad, did not call these Barbadian officials  
8 as witnesses so that we could cross-examine them". What  
9 Mr President I hope this Tribunal is asking is, what about  
10 Barbados' duty of candour to the Tribunal? Why did  
11 Barbados not say that its own claim was contradicted by  
12 reports from its own authorities?

13 Then you have the three core facts, traditional  
14 artisanal fishery, catastrophic consequences, Tobagonians  
15 do not fish these waters anyway. They do not stand up in  
16 practice, but, in the second round, after all the  
17 performance in two rounds of written pleadings and the  
18 first round of oral argument about how solid the evidence  
19 was, how does counsel or Barbados plead his case? "Two  
20 out of three ain't bad, Mr President. We do not have to  
21 get home on the first one. There does not have to have  
22 been a traditional artisanal fishery. We do not have to  
23 show 30 years. Thirty years will do", according to Sir  
24 Elihu. In fact, it need only be 25. And for 20 of those  
25 the Trinidad and Tobago EEZ had already been proclaimed  
26 in respect of this area and anything that happened within  
27 the context of the various fisheries agreements, actual  
28 and draft, of the negotiations in question.

29 It just collapses, Mr President. Mr Wordsworth will

1 say more about that. It has also collapsed on the law. I  
2 will deal with that issue tomorrow. But let me just  
3 summarise what our position is. First of all, the  
4 argument that non-exclusive rights of access to fisheries  
5 can generate sovereign rights to an EEZ and a continental  
6 shelf is simply unsustainable. Secondly, Barbados' case  
7 may rely entirely on fish, but more accurately on access  
8 to fish, but that is not the only resource in this area.  
9 It is an area which has already been the subject of  
10 licensing which may well be extremely rich in hydrocarbon  
11 resources. An unmentioned unspecified windfall, possibly  
12 of enormous proportions which Barbados is hoping to scoop  
13 with the claim that it is making.

14 3.45

15 Thirdly, Barbados has made it clear that what is at  
16 issue is access for its fishing vessels. But, Mr  
17 President, it has been offered access. It was offered  
18 access on terms better than those in the 1990 treaty,  
19 which its own Foreign Ministry thought could form the  
20 basis of an agreement, as their press release of February  
21 2004 made clear. Considerable progress. Just like Mr  
22 Paulsson's geography. And its own evidence - its own  
23 evidence, Mr President - shows that the negotiations on a  
24 fisheries agreement were far from being deadlocked. Leave  
25 aside the difference of view about the position on the  
26 maritime boundary. Ms Marshall in answer to questions in  
27 cross-examination was quite clear that the Prime Minister  
28 of Trinidad and Tobago was offering to keep the fisheries  
29 negotiations open. So the upshot of all this is that at

1 the end of its argument, Mr President, Barbados is unsure  
2 what kind of fishing activity it is relying on, it has not  
3 answered Professor Lowe's question about how long habitual  
4 traditional historic fisheries require. It has failed to  
5 prove that the fishery even existed until the very eve of  
6 the declaration of the EEZ. It has failed to show that  
7 its fishing industry has been denied access on reasonable  
8 terms. It has ignored all of the resources of the area  
9 except for fish. It is in total confusion as to the legal  
10 rationale for its claim. But it still asks the Tribunal  
11 to cut off Tobago from any EEZ or shelf to its west, north  
12 and north east, on the basis of a boundary the location of  
13 for which it has been unable to offer any coherent  
14 explanation.

15 Mr President, we will deal with the western sector,  
16 but the case against us is in such a mess that we are  
17 going to leave that until the end of the second round and  
18 concentrate on what this case is really about. What this  
19 case is really about, we say, the real heart of it, is the  
20 eastern sector.

21 Professor Crawford will deal with the eastern sector.

22 I just want to give you a taste of what our submissions  
23 will be in this respect. Throughout these proceedings,  
24 both in writing and in the oral states, Trinidad and  
25 Tobago has put forward a case designed to achieve an  
26 equitable solution in relation to maritime spaces which  
27 plainly lie off rather than between the coasts of the two  
28 states. We made it clear throughout the negotiations that  
29 Trinidad and Tobago regarded the equidistance approach as

1 leading to inequity, because it cut off Trinidad and  
2 Tobago from its natural prolongation, denies any extended  
3 continental shelf and boxed it into a corner, very similar  
4 to the corner Germany would have been boxed into had the  
5 International Court not decided the North Sea Continental  
6 Shelf cases as it did.

7 THE PRESIDENT: May I ask you a question?

8 PROFESSOR GREENWOOD: Yes, Mr President.

9 THE PRESIDENT: When you say that it cut it off from its  
10 natural prolongation, when you say "natural prolongation",  
11 are you saying its physical shelf, its physical  
12 continental shelf would be cut-off? Not its continental  
13 shelf as it may be endowed with it by a reason that it is  
14 under the EEZ, but the continental shelf of a physical  
15 kind, is that cut-off? Does it have actually a physical  
16 continental shelf that goes out to the extent that the ...

17 PROFESSOR GREENWOOD: Mr President, I see that Professor  
18 Crawford is scribbling a post-it which I suspect says that  
19 I am going to deal with this in my speech, please leave it  
20 to me. If I may, I will do so.

21 Of course, Mr President, the North Sea Continental  
22 Shelf case would have involved boxing in Germany to a  
23 greater extent into a smaller area, but that does not  
24 alter the fact that the same adherence to rigid  
25 equidistance which was rejected by the international court  
26 in that case would also operate to cut off Trinidad and  
27 Tobago here. What response do we get? These are opposite  
28 coasts, not a convincing argument geographically or  
29 juridically. And the notion that vast spaces in the



1 Atlantic lie between the two states simply does not work.

2 Mr Paulsson's argument that there is no Scilly effect  
3 here, there is no equivalent of the Isle of Scilly, that  
4 is true, but the issue is whether as the line projects  
5 seaward for a great distance, in this case 168 nautical  
6 miles on our reasoning, and 182 on Barbados', whether  
7 there is any justification for a result that gives the  
8 smaller state with the shorter relevant coastline nearly  
9 60 per cent of the maritime space, and which denies the  
10 larger state with the longer relevant coastline any  
11 extended Continental Shelf at all. We say that that  
12 argument is just as inequitable as the effect of a Scilly  
13 Isles. There is not a word about a shelf lock in  
14 Barbados' submissions and no serious argument about the  
15 cut-off other than to say that cut-off is an impossible  
16 notion between opposite states.

17 Moreover, Barbados' case rests on the thesis that at  
18 least in relation to Trinidad and Tobago's claim to an  
19 extended Continental Shelf, the EEZ regime must trump the  
20 regime of the Continental Shelf. Whatever Article 56  
21 paragraph 3 of the Law of the Sea Convention means, it is  
22 very difficult to see that it means that, that the EEZ  
23 takes priority over the Continental Shelf. It is very  
24 hard indeed.

25 Mr Volterra's answer to this was to say "nothing  
26 could possibly compensate Barbados if this Tribunal was  
27 somehow to accept that Trinidad and Tobago was entitled to  
28 any maritime territory at all to the north of the median  
29 line". But that presupposes that everything to the north

1 is Barbados' already. The very point that is in dispute  
2 in these proceedings. In any case look at the actual  
3 areas involved.

4 THE PRESIDENT: Professor Lowe would like to ask another  
5 question at this juncture.

6 PROFESSOR LOWE: It may be convenient because you may be able  
7 to answer the questions as you go through this diagram.  
8 There are two. One is simply to get clear what it is 60  
9 per cent of, if you can define the area of which you have  
10 spoken, of Barbados getting 60 per cent. And the second  
11 is a slightly different point on Article 56 paragraph 3.  
12 You are addressing it in terms of the overlap between an  
13 area of claimed Continental Shelf and an area of claimed  
14 EEZ. But of course it might also be said that the  
15 definition of the Continental Shelf under Article 76 also  
16 refers to the 200 mile criterion, so it might equally be  
17 treated as an area of overlap between two areas of  
18 Continental Shelf, in which case what is said about the  
19 conflict if any between the EEZ claims and the seabed  
20 claims does not arise in quite the same way. It would be  
21 a straight contest between two seabed claims.

22 PROFESSOR GREENWOOD: Mr President, as far as the first  
23 question is concerned I can answer it but whether I can  
24 illustrate the answer is another matter. It is 58 to 42  
25 per cent of the area of overlapping entitlements,  
26 overlapping 200 mile entitlements, in the Atlantic sector.  
27 We have a slide on that which I think Professor Crawford  
28 was proposing to show you, but that is what is referred  
29 to. If one looks at the dark striped area in yellow you

1 see Barbados' 58 per cent and in the lighter blue the 42  
2 per cent that would go to Trinidad and Tobago. In  
3 relation to the western Caribbean sector Barbados would  
4 get 84 per cent, up to 16 per cent for Trinidad and  
5 Tobago, but I do not think our slide breaks it down in  
6 that way.

7 PROFESSOR LOWE: So it is based on an assumption about the  
8 boundary between Barbados and St Lucia and Martinique.

9 4.00

10 PROFESSOR GREENWOOD: No, not this slide it is not. This is  
11 based simply on the overlap between the 200 miles arc from  
12 Trinidad and Tobago and 200 mile arc from Barbados.

13 In relation to your second question, the relationship  
14 between conflicting Continental Shelf and conflicting  
15 exclusive economic zone claims, I take the point entirely,  
16 but first of all that is not the way in which Barbados has  
17 put its case. Barbados' case is that Trinidad and Tobago  
18 could not have an exclusive Continental Shelf because of  
19 Barbados' exclusive economic zone in that area, and that  
20 is why we fell to the argument about Article 56 paragraph  
21 3 of UNCLOS. If it is in relation to the Continental  
22 Shelf, the two competing Continental Shelf claims alone,  
23 then that is a straightforward dispute, assuming there was  
24 no EEZ and the Continental Shelf regime had evolved as it  
25 has done but without the complication of an additional  
26 EEZ, one would then have the argument about whether  
27 equidistance was determinative here, which is what  
28 Barbados says, in which case of course in an area which  
29 was within 200 miles of Barbados but more than 200 miles

1 of Trinidad and Tobago, an equidistance rule would  
2 automatically mean that that area was part of the  
3 Continental Shelf of Barbados.

4 But Barbados' argument is wherever one might have  
5 drawn the Continental Shelf boundary you cannot have an  
6 EEZ out beyond 200 miles. Therefore there is an area, and  
7 we accept this, where we have a Continental Shelf claim  
8 and Barbados has a claim to the EEZ. That is a situation  
9 which we say was envisaged by the draftsman of the Treaty  
10 in Article 56 paragraph 3 and Article 56 paragraph 3 gives  
11 priority to the Continental Shelf over the exclusive  
12 economic zone.

13 PROFESSOR LOWE: Mr President, I do apologise for this,  
14 but could we go back to the map, and the second answer,  
15 but the map that illustrated the 60 per cent overlap,  
16 because I am not sure that I have understood it.

17 I can see that the hatched area represents an area of  
18 overlapping Barbadian and Trinidadian 200 mile claim.  
19 What I am not clear on is the basis of the assumption that  
20 Barbados would be entitled to maintain its 200 mile claim  
21 north of Barbados in the face of whatever claims there  
22 might be from St Lucia and Martinique, and is it not  
23 possible that one or other of those states might argue  
24 that they have an entitlement to go eastward and out to  
25 the outer Continental Shelf or whatever which would cut  
26 off Barbados in the north?

27 PROFESSOR GREENWOOD: Mr President, it is possible. Two things  
28 about that. First of all the arc, the shaded area,  
29 represents the limit of 200 miles from Trinidad and

1 Tobago. The arc which shows 200 miles from Barbados is  
2 the further arc. This is not my illustration and I am  
3 trespassing on Professor Crawford's territory. So if one  
4 took account of the whole of what Barbados would be  
5 entitled to it would of course be very considerably more  
6 than 58-48. Secondly, to the best of our knowledge,  
7 neither St Lucia nor Martinique has put forward a claim of  
8 that kind, and therefore in the dispute between these two  
9 states looking at where the claim of Trinidad and Tobago  
10 overlaps the claim of Barbados, the effect would be in  
11 this sector that Barbados would have 58 per cent and  
12 Trinidad and Tobago would have 42 per cent. I grant you  
13 that does make the assumption about St Lucia and  
14 Martinique to the north, but it equally makes an  
15 assumption about St Vincent and the Grenadines and Grenada  
16 not cutting into the Trinidad and Tobago share of the  
17 pudding.

18 Mr President, I have answered those questions as best  
19 I can off the cuff. It is probably best if Professor  
20 Crawford develops our answer to them further, as that is  
21 very much his part of the case. Mr President, before I  
22 sit down there is one last issue I need to deal with and  
23 that concerns allegations that were made earlier this week  
24 by counsel for Barbados of improper conduct on the part of  
25 Trinidad and Tobago. Mr President, we say that this is a  
26 matter that has been blown out of all proportion by our  
27 learned friends. I am sorry to have to distract the  
28 Tribunal from its real task by taking up any more time  
29 with it but the fact of the matter is that it has been

1 suggested that Trinidad and Tobago has behaved improperly,  
2 and an allegation of that kind cannot be left unanswered,  
3 especially since it was framed in such a way as to include  
4 a personal accusation of improper conduct against my  
5 learned friend Professor Crawford.

6 Mr President, the statement that gave rise to this is  
7 Professor Crawford's statement on day 4, page 89 which you  
8 will find in tab 11 of today's judges' folder. The  
9 context of this statement here is that what Professor  
10 Crawford did was to make a statement on instructions  
11 regarding Trinidad and Tobago's proposed submission to the  
12 Commission on the limits of the Continental Shelf. The  
13 context was a statement made by Mr Volterra on the opening  
14 day of these proceedings, day 1 page 95. What Mr Volterra  
15 said was the following: "Barbados has extended", and it  
16 must have been "expended", "significant time and resources  
17 on this programme. In contrast Trinidad and Tobago has  
18 not even claimed to have begun a CLCS submissions  
19 programme or to have undertaken any such activities. The  
20 Tribunal is entitled to conclude that if Trinidad and  
21 Tobago had such a programme it would have said so. This  
22 must lead to the inescapable conclusion that Trinidad and  
23 Tobago has engaged in no such activities to date. As the  
24 Tribunal is no doubt well aware the deadline for CLCS  
25 submissions is but a few years away. Trinidad and  
26 Tobago's failure even belatedly to have started a CLCS  
27 submission programme is inconsistent with the new claims  
28 that it is making in this arbitration. The Tribunal is  
29 entitled to conclude from this evidence or lack of

1 evidence that Trinidad and Tobago recognises that in truth  
2 it has no plausible claim to appropriate Barbados' EEZ and  
3 extended Continental Shelf."

4 Leaving aside the language in which that was couched,  
5 in response to that comment, Professor Crawford told the  
6 Tribunal that Trinidad and Tobago was taking steps to  
7 prepare its case, though the deadline for submission was  
8 still some years away, and he outlined what steps were  
9 being taken. That was said by Mr Volterra to be an  
10 improper statement because it was in effect counsel giving  
11 evidence.

12 Mr President, I would make three points about that.  
13 The first is that a state appearing in proceedings such as  
14 these is entitled to inform the Tribunal through its  
15 counsel what its intentions are and what steps it is  
16 taking to implement them. There is nothing whatever  
17 improper in this. It is done all the time in the  
18 international court of justice and in other inter-state  
19 proceedings; and indeed in my experience a statement of  
20 that kind is also quite common in public law proceedings  
21 in this country.

22 Secondly that is particularly the case where the  
23 other party invites the Tribunal to draw inferences about  
24 those intentions. Inferences which are unfounded.

25 Thirdly, Mr President, Mr Volterra's own statement  
26 was based on no evidence before the Tribunal. It was  
27 based instead on an assertion made by Barbados, not in  
28 fact in its Memorial but in its Reply, at paragraph 56.

29 Mr President, a statement made by a state in its

1 written pleadings is not evidence, it is an assertion. It  
2 is just as much of an assertion coming in writing in the  
3 Reply as it is coming orally from counsel at the oral  
4 stage of the hearings. Mr President, there was nothing  
5 improper in what Professor Crawford did, and we say that  
6 Barbados is making a huge fuss about nothing in respect of  
7 this.

8 Likewise with its second complaint about a statement  
9 on activities in the western sector, which Mr Volterra has  
10 had to withdraw in large part, and about which I will say  
11 nothing more.

12 Moreover, Mr President, it ill behoves Barbados to  
13 lecture us about the need not to introduce new evidence by  
14 means of counsel's submissions. It was because of that  
15 that I drew Mr Volterra's attention on Friday afternoon to  
16 the map submitted by Sir Henry Forde, when he made his  
17 submissions to you last Monday. Those maps show - perhaps  
18 ought to show purported to show - the location of fishing  
19 communities in Barbados. They have not been put in as  
20 evidence and yet the Tribunal is, apparently, being  
21 invited to rely on them on questions of pure fact. Not  
22 about questions of the intentions of state for the future,  
23 but questions of pure fact about the present. Indeed,  
24 Barbados itself had applied to put these maps in as  
25 evidence in its letter to the PCA in September of this  
26 year and your order entitled Barbados to do so. But to a  
27 timetable and with the opportunity for Trinidad and Tobago  
28 to submit evidence in response. Barbados chose not to  
29 take you up on that, but instead it has put the maps in



1 now when no response evidence is possible. The argument  
2 put forward by Mr Volterra that Trinidad and Tobago had  
3 somehow consented to this conduct, based on a comment in  
4 its letter of 15th September, is wholly unfounded. If I  
5 could take you briefly to that letter, which is at tab 12  
6 of the Judges' folder. Mr Volterra read to you paragraph  
7 5 of that letter on page 3, but that relates to a  
8 proposal about an illustrative map concerning the nature  
9 of the claim. It might have been more appropriate for Mr  
10 Volterra to read you what Trinidad and Tobago's agents had  
11 said at paragraph 3 at the bottom of page 2. "Barbados  
12 attributes to the Republic of Trinidad and Tobago  
13 Rejoinder the statement that 'there are no communities in  
14 Barbados that are reliant upon fishing as a means of  
15 livelihood' and then seeks in response to this statement  
16 to Exhibit 7 to the Rejoinder (the 1962 thesis of Annette  
17 Bair). I just in parenthesis say that you have heard on  
18 several occasions Ms Bair's thesis being dismissed as a  
19 40-year old work by a Canadian research student. That was  
20 not the way that it was characterised by Barbados when  
21 Barbados introduced the thesis or rather a short extract  
22 from it as one of the exhibits to its Reply. At that  
23 stage it was considered to be evidence that would be  
24 helpful to the Tribunal. It was not, of course, because  
25 they put the wrong chapter of it in. We put in the whole  
26 thesis and we leave the Tribunal to draw its own  
27 conclusions.

28 I revert to the quotation "to adduce 'a map showing  
29 location of communities reliant on fishing in Barbados'.

1 This Application is wholly without merit. It is Barbados  
2 that has asserted throughout that its fisherfolk are  
3 dependent upon fishing in the waters off Tobago and  
4 Barbados should have submitted any evidence in support of  
5 that assertion in its Memorial or, at the latest, in its  
6 Reply." I need not read the rest of the paragraph, Mr  
7 President.

8 Mr President, the suggestion on the basis of that  
9 letter that Trinidad and Tobago had consented to those  
10 maps being put in at all, let alone being put in at the  
11 beginning of the oral hearing, when it would have been  
12 impossible to do anything about them, is wholly  
13 misleading.

14 Mr President, the maps are clearly intended to have  
15 evidential value, but no application has been made to  
16 admit them as such. Let me make quite clear that I am  
17 making no suggestion whatever of impropriety against Sir  
18 Henry Forde or indeed against any other member of the  
19 Barbadian legal team in respect of that. Nor am I saying  
20 that Barbados is behaving improperly. My point is simply  
21 to suggest that, if Barbados is going to adopt a holier  
22 than thou attitude it needs to make sure its own house is  
23 in order. That was why, Mr President, rather than raising  
24 this matter in the hearing I raised it privately with Mr  
25 Volterra afterwards. He chose and was perfectly entitled  
26 to do so, I do not make any complaint about that, to  
27 mention our conversation in his speech on Monday morning.

28 I was trying to deal with the matter quietly. What we  
29 object to, Mr President, is being lectured about our own



1 me is 31 pages long. Interestingly, page 2 begins  
2 "Barbados' interim response to the first question". Well,  
3 if this is an interim response, the mind boggles as to  
4 what the full and detailed response might be or, indeed,  
5 how many forests will be cut down in order to produce it.

6 Mr President, we understand the difficulties of counsel  
7 operating away from base, but the fact of the matter is  
8 that this is not a proper way in which to conduct  
9 proceedings, to dump a series of answers like this on us  
10 on the penultimate day of the hearings to which we can  
11 only endeavour to reply overnight. We will endeavour to  
12 reply overnight, but I must reserve our position in  
13 relation to submitting part of our commentary in writing,  
14 given what we have just been presented with is more than  
15 half the length of the Memorial with which Barbados began  
16 these proceedings. Moreover, two of the questions - I  
17 accept that the first question raised matters that would  
18 have required some research, although in the courts in  
19 this country you would have been expected to do it  
20 overnight - the second and third questions are both  
21 matters that are central to Barbados' case. They are  
22 issues that they must have been aware of months if not 18  
23 months ago when they first filed this application. We say  
24 that it really is not right that we should be expected to  
25 respond on the hoof in that way. We have endeavoured to  
26 answer the questions put to us as they have been raised.  
27 The only time we have not been able to do that directly is  
28 where it required factual material which had to be  
29 obtained from Trinidad and Tobago.

1 THE PRESIDENT: Thank you so much. Please, Mr Wordsworth.

2 MR WORDSWORTH: Mr President, members of the tribunal, I would  
3 like to touch briefly on the question of whether there was  
4 a dispute between the parties for the purposes of article  
5 283 and then I will be coming back to the question of the  
6 meaning of fact of article of 283.1 as far as concerns  
7 what is meant by exchange of views with reference to the  
8 question raised by Sir Arthur Watts just before the coffee  
9 break.

10 So far as concerns dispute, Barbados started its  
11 reply to our jurisdictional objections on Monday with two  
12 very big guns blazing at what might be thought to be a  
13 very small target. This was Professor Reisman quoting Sir  
14 Elihu to the effect that it was absurd to suggest that  
15 there was no dispute between the parties ready for  
16 disposition by this Tribunal. The guns were, as would be  
17 expected, unerringly accurate. The trouble is that they  
18 were aiming at the wrong target. The question is not  
19 whether after two rounds of written pleadings, after ten  
20 days of oral argument, there is now a readily-  
21 ascertainable dispute before this Tribunal. The answer to  
22 that is simple. Of course there is such a dispute. The  
23 question for this Tribunal for the purposes of article 283  
24 is, was there a dispute ascertainable as of 16 February  
25 2004 when Barbados commenced this arbitration and, of  
26 course, had there been an exchange of views? Our position  
27 is firmly that the answer to both these questions is "no".  
28 As of 16 February, Barbados had yet to submit a claim  
29 line.

1           Professor Greenwood before the break spoke I think  
2           rather generously, as his wont, about Barbados having  
3           submitted an illustrative proposal of its claim line in  
4           the final round of the negotiations. That is, in fact,  
5           putting matters rather too high, because you will recall  
6           that the furthest that Barbados got was as follows. I am  
7           quoting Mr Volterra at the final round of maritime  
8           delimitation negotiations. He said, "This is just a chart  
9           for illustrative purposes, but one of the bases that  
10          Barbados has repeatedly mentioned to Trinidad in these  
11          discussions is Barbados' historic fishing rights both in  
12          and around the arm of Tobago and over towards Grenada, and  
13          that whole are over here" - presumably referring to the  
14          beak - "and if one takes those historic fishing rights  
15          into account, then it is possible to contemplate for  
16          illustration purposes a maritime boundary between the two  
17          countries that follows this red line". Of course that is  
18          the red line that we have never ever been shown. But I  
19          think that it is too high to say that that is the proposed  
20          median line or a provisional median line or a provisional  
21          claim line of any sort. It is just simply, "here is  
22          something that it is possible to contemplate". And  
23          Barbados never went any further.

24        THE PRESIDENT: You are saying that it was not ever shown, it  
25        was not even shown as Mr Volterra illustration.

26        MR WORDSWORTH: I presume that, when he said "to contemplate for  
27        illustration purposes a maritime boundary between the two  
28        countries that follows this red line here", that was on  
29        the PowerPoint presentation. That was on the slides that

1 we have never seen and this Tribunal has never seen.

2 THE PRESIDENT: That the Tribunal has never seen, but the  
3 parties saw when they were then in the room.

4 MR WORDSWORTH: The Trinidad and Tobago delegation was of course  
5 in the room then and they asked for copies and they were  
6 refused copies. That is as far as it ever went.

7 The position so far as we are concerned is that as of  
8 16th February 2004, Barbados was still very much keeping  
9 its powder dry and the first time, of course, we ever saw  
10 a claim line from Barbados was in its Memorial.

11 I turn to the question of what is meant by an  
12 exchange of views as raised by Sir Arthur. As I  
13 understood the question, it was whether it is an exchange  
14 of views on the substance of a dispute - i.e. in essence  
15 negotiations - or whether it is more of an exchange on the  
16 means by which this dispute could be settled. It is more  
17 of an administrative procedure.

18 Our first point on that is that, well, it does not  
19 matter at all, because whatever happened as of 16 February  
20 2004 Barbados jumped from deciding there is a dispute, we,  
21 Barbados, consider there is a dispute, right up to  
22 submitting its claim to arbitration under article 286.  
23 There was no intermediate stage of any kind. There was no  
24 exchange of views. We say that whatever it means we are  
25 home and dry so far as concerns the need for such an  
26 exchange.

27 Looking at it in a little more detail, I hope that  
28 you have close to hand the second volume of our  
29 authorities bundle, because I would like to take you to a

1 passage in the Virginia Commentary. This is at the very,  
2 very last page of this volume, so it is very easy to find.

3 It is right at the back of tab 30. You will see on the  
4 right-hand side there is a commentary on article 283.

5 THE PRESIDENT: This is the last page of the tab?

6 MR WORDSWORTH: Yes, it is the back of the last page.

7 Regrettably not. It is a difficult world to live in.

8 Could I possibly have one of the Tribunal's bundles and  
9 see if I can find it? On your version, which I have to  
10 say is a rather superior version, it is on the very first  
11 page of the tab. Of course, where it should be!

12 If I can ask you to pick up from 283.1, the right-  
13 hand corner, "A text similar to article 283 had already  
14 been inserted in the text prepared by the informal working  
15 group on the settlement of disputes in 1975, as a result  
16 of the insistence of certain delegations that the primary  
17 obligation should be that the parties to a dispute should  
18 make every effort to settle the dispute through  
19 negotiation." On the basis of that, it looks like article  
20 283 on the exchange of views is really aimed at  
21 negotiating on the substance of the dispute. I think that  
22 I have to continue. "The text refers to this obligation  
23 in an indirect fashion making it the main objective of the  
24 basic duty to exchange views regarding the peaceful means  
25 by which the dispute should be settled". That, I think,  
26 is implying that it is slightly more administrative in  
27 nature. "As President Amoras Singer explained it, while  
28 imposing the general obligation to exchange views and to  
29 settle disputes by peaceful means, these articles give



1 complete freedom to the parties to utilise the method of  
2 their choosing, including direct negotiation, good  
3 offices, mediation, conciliation, arbitration or judicial  
4 settlement. This mandatory exchange of views is not  
5 restricted to negotiations but also includes other  
6 peaceful means". Really, what seems to be being thought  
7 of there is that you are within an article 283 exchange  
8 and there are a variety of possibilities between the  
9 parties, one of which is let's negotiate. In the instant  
10 case, it could have been let's negotiate, and it would  
11 almost certainly have been Trinidad and Tobago saying  
12 "and, so that we can have meaningful negotiations, can you  
13 please show us what your claim line is and then we can  
14 actually get a serious negotiation going" or there are  
15 obviously other avenues for the parties with a view to the  
16 peaceful settlement of their dispute, one of which, for  
17 example, might be referring the dispute to binding  
18 settlement by way of a compromise. There are many, many  
19 different possibilities.

20 4.45

21 I think there is just one other passage that I should  
22 draw your attention to, which is in the middle of  
23 paragraph 283.3, and again this slightly supports the  
24 interpretation that this is a means towards achieving a  
25 settlement. Half way down paragraph 283.3 "in particular,  
26 as is made clear in paragraph 2, the obligation to  
27 exchange views on further means of settling a dispute  
28 revise whenever a procedure accepted by the parties for  
29 the settlement of a dispute has been terminated without a

1           satisfactory result and no settlement of the dispute has  
2           been reached."

3           We say that that is an important passage, and the  
4           whole of this passage is extremely important, concerning  
5           the interpretation of Article 283. But it is not that  
6           clear, but it seems that so far as concerns the commentary  
7           what was being thought of was perhaps more means of  
8           settlement than necessarily negotiations on the substance.

9           It has to be said however that that is not really how  
10          parties to disputes under sections 1 and 2 of Part XV have  
11          approached this in practice. If one thinks back to  
12          Southern Blue Fin Tuna and the MOX plant case and the  
13          Straits of Johor, in each instance the parties had been  
14          having negotiations on the substance of the dispute, and  
15          it is when those negotiations on the substance have broken  
16          down that there has been a submission to arbitration, and  
17          in each case the question of whether or not there has been  
18          an exchange of views under 283 has been decided by  
19          reference to the preceding negotiations on the substance  
20          of the dispute.

21       SIR ARTHUR WATTS: Does that suggest that when there are  
22          negotiations, if those negotiations hit the buffers the  
23          practice has been not to have further exchanges of views  
24          on what the next steps might be?

25       MR   WORDSWORTH: That question is saying should this Tribunal  
26          just look at this existing practice under SBT, MOX and  
27          Straits of Johor and feel reassured that it can simply  
28          approach matters in the same way in this case, and the  
29          answer to that question is No, because although these

1 cases are very helpful for one purpose, which is to show  
2 to the Tribunal that you cannot just bypass Article 283,  
3 you have to go through the process of an exchange of  
4 views, the cases do not address this issue which is how do  
5 you effect the transition between a state of negotiation  
6 under Article 74 and 83 of UNCLOS to exchange of views and  
7 then on to commencing arbitration under Article 286, and  
8 our case has always been that these are separate  
9 processes. You have to go through Article 74 and 83  
10 process, section 1 of Part XV and then on to section 2 of  
11 Part XV; and if you do not follow that process you  
12 essentially deny parties under Article 74 and 83 part of  
13 the procedural protections that are put in place by those  
14 Articles. Article 74.2 and 83.2 could have said if  
15 negotiations break down then either party would have the  
16 right to commence arbitration under section 2 of Part XV.  
17 That is simply not what those provisions have said.

18 When it comes to the cases themselves I think the Law  
19 of the Sea Tribunal has actually been in a very simple  
20 position so far as deciding whether or not the  
21 requirements of Article 283 have been met. If you take a  
22 case like MOX one party says you are about to pollute our  
23 sea. The other party says No, we are not about to pollute  
24 the sea, the discharges that we have under consideration  
25 are entirely lawful and will have no significant impact.  
26 So you have two immediately competing positions taken by  
27 the parties.

28 Then they come to UNCLOS in the context of a breach  
29 of UNCLOS, and the first party then says we do not accept

1 your position, we consider that commencing operation of  
2 such and such a nuclear facility will pollute our seas,  
3 and there you have a dispute and there it seems very  
4 simple to say the requirements of Article 283 have been  
5 met.

6 Here we come to Article 283 in a very different  
7 scenario. This is not an scenario of alleged breach of  
8 certain specified provisions, say, of Part 12 of UNCLOS.  
9 Here we are coming to UNCLOS in a situation where parties  
10 are seeking to implement UNCLOS, are seeking to effect an  
11 agreement under Articles 74 and 83, and that is a very  
12 different situation. Because Articles 74 and 83 existed  
13 in UNCLOS as a powerful means of achieving an agreed  
14 settlement on maritime boundaries there is the need for  
15 the extra protection, so you do not just say let us seek  
16 to reach an agreement, if we fail we will immediately go  
17 to arbitration. If that were the case then Articles 74  
18 and 83 would simply be a conduit through to Article 286  
19 and Part XV, and not really very useful provisions at all.

20 That is why we say there are these stages, you have  
21 to go through them, and if you break down in your  
22 negotiations under Articles 74 and 83 then you can move  
23 through to section 1 of Part XV. The exchange of views  
24 under section 1 of Part XV does not have to be exhaustive.

25 All the three cases make that perfectly clear, and you  
26 can certainly understand that, once you are operating  
27 within section 1, if your exchange of views goes nowhere  
28 then the exchange of views goes nowhere and then you can  
29 move on to section 2, one party acting unilaterally.

1           But what cannot happen is that you simply bypass  
2 section 1 altogether.

3           I wonder if it is worth going briefly to the SBT case  
4 which is in the judges' folder, tab 14. There are two  
5 points. If you look around paragraph 50 you see the  
6 positions of the parties being identified by the Court,  
7 and the fact of negotiation. Then you see the position of  
8 Japan at paragraph 56, considering that Japan contends  
9 that Australia and New Zealand had not exhausted the  
10 procedures for amicable dispute settlement under Part XV,  
11 section 1. Fine, we say that is not harmful to us at all,  
12 because ours is not a non-exhaustion case, ours is there  
13 has to be a bypass not a failure to extend section 1  
14 indefinitely. Over the page on 57, consideration that  
15 negotiations and consultations had taken place between the  
16 parties, I think that is substantive negotiations, and  
17 that the record shows that these negotiations were  
18 considered by Australia and New Zealand as being under  
19 the Convention of 1993 and under UNCLOS. Then we see the  
20 key paragraphs so far as concerns whether or not there is  
21 need to exhaust remedies under Part XV section 1 are  
22 paragraphs 60 and 61. Considering that in the view of the  
23 Tribunal a state party is not obliged to pursue procedures  
24 under Part XV section 1 of the Convention when it  
25 concludes that the possibilities of settlement have been  
26 exhausted, considering that in the view of the Tribunal  
27 the requirements for invoking the procedures under Part XV  
28 section 2 of the Convention have been fulfilled.

29           We say that is not problematic for us because ours is

1 not an exhaustion of remedies case.

2 Mr President, if I could ask you to turn to tab 13 in  
3 the bundle I would like to address one of Professor  
4 Reisman's arguments on the interpretation of Article 283.1  
5 where he said on Monday "A more sensible reading of  
6 Article 283 would take the reference to the exchange of  
7 views not as a requirement to go through what already had  
8 been done for another five or ten years, but to exchange  
9 views with respect to the organisation of the arbitration  
10 as was done".

11 Of course Professor Reisman puts forward that as an  
12 interpretation because Barbados is on relatively solid  
13 ground there. They can say Yes, we did liaise with  
14 Trinidad and Tobago so far as concerns the organisation of  
15 the arbitration. Of course only after they had submitted  
16 their Article 286 notification. So this is a very  
17 different sort of exchange of views. You will see in tab  
18 13 what we have done is to put down for you the text of  
19 Article 283.1 as now devised by Barbados, just to show how  
20 that interpretation simply does not work. "When a dispute  
21 arises between states parties concerning the  
22 interpretation or application of this Convention one of  
23 the parties may have unilateral recourse to Article 286  
24 subsequent to which the parties to the dispute shall  
25 proceed expeditiously to an exchange of views regarding  
26 organisation or other matters". It is simply not what  
27 Article 283.1 says and we would ask you to reject that new  
28 interpretation or that new construction of Article 283.1  
29 firmly.

1 4.00

2           Otherwise perhaps picking up on the theme of silences  
3 that was introduced by Professor Greenwood I would like to  
4 touch on two silences so far as concerns Professor  
5 Reisman's argument in response. First of all he said  
6 nothing at all on our interpretation of articles 74 and  
7 83, and particularly so far as concerns the second  
8 paragraph of both those articles which we contend in their  
9 ordinary meaning direct parties to section 1 not section 2  
10 of Part XV. He also said nothing at all on our  
11 interpretation of article 283.2. In fact, he said nothing  
12 at all on article 283.2 or on that passage of the Virginia  
13 Commentary that we were looking at earlier where there is  
14 a passage to which I did not take you, but at the very end  
15 of paragraph 283.3 in the Commentary, the Commentary  
16 confirms that a party may transfer a dispute from one mode  
17 of settlement to another, especially one entailing a  
18 binding decision, only after appropriate consultations  
19 between all concerned. That is at tab 30 of our  
20 authorities bundle.

21           We say that this is absolutely key, because suppose  
22 that Barbados is right and a dispute did crystallise  
23 whilst the parties were engaged in negotiations under  
24 articles 74 and 83 and that they were then seeking to  
25 settle the dispute, when that attempt at settlement  
26 failed, it was still for the parties to enter into  
27 appropriate consultations, possibly on the substance of  
28 the dispute, possibly so far as concerns the means of  
29 settlement of the dispute before Barbados could move on to

1 article 286. Of course, it simply did not do that.

2 Professor Reisman's major argument is to say that, if  
3 a bilateral agreement is required to move to the stage of  
4 commencing arbitration, then of course you never get to  
5 the stage of arbitration. He says bilateral requirement  
6 would simply end the state's right to invoke an  
7 arbitration clause as long as the other state is willing  
8 to keep saying "let's talk more". Very elegantly put,  
9 "let's talk more". Of course, that is precisely what  
10 section 1 of Part XV does not allow. That is why Southern  
11 Blue Fin Tuna and the other two cases are very relevant,  
12 because they are saying that there is no obligation to  
13 exhaust negotiations or exchange of views under section 1  
14 of Part XV. As long as you are then there, if those  
15 negotiations break down, either party can move on to  
16 article 286.

17 Mr President, a brief word on article 298 - article  
18 298 and the significance that Trinidad and Tobago never  
19 made an article 298 declaration effectively excluding the  
20 jurisdiction of this Tribunal and the fact that it is said  
21 that it will not make such a declaration as the Attorney  
22 General said in our opening. As I understood Professor  
23 Reisman, he was making the argument that the only impact  
24 of Barbados' precipitant move to arbitration was that  
25 Trinidad and Tobago lost the opportunity to make an  
26 article 286 declaration, as - and I think that this is how  
27 the argument continued - as Trinidad and Tobago made clear  
28 that it was not going to and will not now make an article  
29 298 declaration, it has effectively lost nothing. This is



1 to turn Trinidad and Tobago's argument completely on its  
2 head. Trinidad and Tobago has never put its case as one  
3 of having been deprived of the right to make an article  
4 298 declaration. Its case is that it has been deprived of  
5 the right to have the exchange of views, so have a means  
6 of negotiations on the amicable settlement of this  
7 dispute. The fact that it has made clear to this Tribunal  
8 that it will not make an article 298 declaration simply  
9 emphasises its seriousness in this regard. Trinidad and  
10 Tobago is here to negotiate with Barbados. If those  
11 negotiations were to fail in the future, then either party  
12 would still have the remedy of an article 286 submission  
13 to arbitration.

14 I am going to deal very briefly with the facts of the  
15 meeting of 16 February 2004. I am sure that the Tribunal  
16 must feel that they have almost heard enough. Professor  
17 Reisman's point was a very attractive point for this  
18 Tribunal, which say saying, "frankly, it does not matter".

19 He said, "I do not believe that these issues" - these are  
20 the factual issues as to what happened on 16 February 2004  
21 - "I do not believe that these issues are critical to  
22 establishing jurisdiction in this case for it is manifest  
23 that a dispute existed and that is decisive". Well, we  
24 say absolutely not. So a dispute did exist, according to  
25 Barbados, on February 16, 2004, but what about the  
26 exchange of views? Until it is made clear that there is  
27 no exchange of views, there has been an exchange of views,  
28 then there is no question of the article 283 criteria  
29 having both been met. This is why there is a degree of

1 common ground between the parties, because we accept that  
2 the factual questions of what happened on 16 February are  
3 of limited relevance in so far as Barbados takes the view,  
4 and still takes the view, that once it had decided that  
5 there was a dispute on 16 February, it could just jump on  
6 to arbitration, bypassing the exchange of views. If it is  
7 common ground between the parties that there was no  
8 exchange of views on 16 February 2004, then it seems, on  
9 our interpretation of article 283, that clearly the  
10 requirements of that provision have not been met.

11 So far as concerns the facts themselves, Professor  
12 Reisman rather ignored the contemporaneous evidence and  
13 asked you to prefer the evidence of Teresa Marshall and at  
14 the same time chose to impugn the testimony of Mr Charles  
15 and Mr Laveau. I am not going to take you to the document  
16 now, but I do ask you to turn at some stage to Trinidad  
17 and Tobago's Cabinet paper of 17 February 2004. This is  
18 the best contemporaneous record of what happened. This is  
19 not a document created for the purposes of this  
20 litigation. Of course, it is not. It is a confidential  
21 private Cabinet Memorandum. It records what happened.  
22 There is no mention of intractable, no mention of any  
23 invitation for Barbados to take Trinidad and Tobago to  
24 arbitration. The second key contemporaneous document is  
25 Prime Minister Arthur's statement immediately as Barbados  
26 was making its submission under Article 286. So of his  
27 statement of 16 February 2004 Professor Reisman said that,  
28 well, do not look at this too seriously, because it was  
29 couched in diplomatic language. So what if he did not say

1 that Trinidad and Tobago was acting in an intransigent  
2 way? So Barbados had no choice but to pursue the course  
3 of going to arbitration. Well, that actually makes no  
4 sense at all. Prime Minister Arthur was trying to  
5 explain to his people why they are taking this radical  
6 step of commencing these proceedings in such  
7 circumstances, if he had been left no choice by Trinidad  
8 and Tobago, he certainly would have said so. If the aim  
9 was somehow to be diplomatic and to soften the blow so far  
10 as concerns Trinidad and Tobago, again, Prime Minister  
11 Arthur would have made it clear that he was acting more in  
12 sorrow than in anger, that it was with extreme reluctance  
13 that he felt that Barbados had to take that step.

14 That submission for us cannot be sustained. So far  
15 as concerns the witnesses, very briefly, it was said that  
16 Mr Charles lacked credibility. We submit that that is  
17 completely impossible to sustain. Mr Charles was a  
18 credible and truthful witness. But, perhaps, even more  
19 relevant, his evidence had nothing whatsoever to do with  
20 the meeting of February 16, 2004. He was not there, he  
21 never said he was there and he never said anything in his  
22 statement about that meeting. I do not really see the  
23 point of the side swipe at Mr Charles.

24 So far as concerns Mr Laveau, he was criticised for  
25 being unable to confirm that he had not left the room a  
26 number of times during the meeting. Well, is there any  
27 evidence before this Tribunal that he did leave the room?

28 None whatsoever. You would have expected Barbados to put  
29 in a statement from somebody saying, "Oh well, actually

1 this Mr Laveau you have put up is unreliable. He was  
2 always nipping out of the room". It never came.

3 So we say that, if the Tribunal is having to prefer  
4 one witness's evidence over another's, it should be  
5 preferring the evidence of Mr Laveau over Ms Marshall  
6 because Mr Laveau's is consistent with the contemporaneous  
7 documentation and Ms Marshall's evidence is not.

8 If I can just ask you to turn to tab 15 of the  
9 Judges' folder, by way of a little tease, because we know  
10 that Barbados has got useful contemporaneous evidence, but  
11 it has chosen not to put it in. This is Barbados' letter  
12 of 9 September 2005. This is where it was requesting the  
13 Tribunal's permission to put in additional evidence. If I  
14 can ask you to turn over the page to the table which  
15 contains all the new evidence that it was looking to put  
16 in and look at item 2, there it seeks to address the  
17 argument in relation to the views expressed by Trinidad  
18 and Tobago's Prime Ministers at the meeting of Prime  
19 Ministers on 16 February 2004. You will see that what it  
20 is offering is contemporaneous manuscript notes of members  
21 of the Barbados delegation at the meeting. That is what  
22 we were expecting to see and we got very excited about  
23 that. But, of course, nothing ever came. So presumably  
24 someone on the Barbados legal team looked awfully  
25 carefully at those notes and decided, oh, they do not use  
26 the word "intractable" or they do not contain any  
27 suggested invitation to arbitration by Prime Minister  
28 Manning, what they do contain is something that is  
29 completely inconsistent with Barbados' position before

1 this Tribunal. So contemporaneous notes never arrived.

2 Mr President, I move now on to a different topic  
3 which is the failure to conclude a new fishing agreement.

4 This was touched on briefly by Professor Greenwood this  
5 morning and this is an issue that is important to  
6 jurisdiction because it concerns the issue of whether  
7 there was a breakdown of negotiations, but it is also  
8 important so far as concerns Barbados' case on  
9 catastrophe. We say that, if we were offering to  
10 negotiate a fishing agreement, how can there possibly have  
11 been a catastrophe so far as concerns your fishery? No  
12 catastrophe. If you do not want to negotiate with us, you  
13 are simply bringing problems on yourself. Barbados'  
14 position now is a reluctant concession that Trinidad and  
15 Tobago was willing to conclude a fishing agreement as of  
16 16 February 2004, but the position now taken is that it  
17 was not the right sort of agreement. So it is an  
18 agreement, but the wrong sort of agreement. It is a new  
19 contention and it is unsupported by any particulars at all  
20 and it is completely inconsistent with Barbados' position  
21 at the time.

22 5.15

23 If I can ask you to turn to tab 16 of the Judges'  
24 folder, just to look at this very quickly. This is a  
25 statement by Barbados on 2nd February 2004, so this is two  
26 weeks before commencement of arbitration. This is  
27 Barbados saying in as many words that, oh, the  
28 negotiations towards concluding a fishing agreement are  
29 going very well indeed. Half way through the third

1 paragraph on the first page of this statement, Barbados  
2 says "To date we have held four rounds of negotiations and  
3 made considerable progress on the drafting of a new text."

4 It does not sound like doom and gloom. Over the page,  
5 page 2 of this statement, "While it is acknowledged that  
6 there are still outstanding issues, Barbados believes that  
7 with good faith on both sides these can be resolved  
8 through the negotiating process". The contemporaneous  
9 documents show that Barbados thought it could resolve all  
10 the outstanding issues and nothing happened between 2nd  
11 February and 16th February to change the picture.

12 Over the page in tab 17 of the Judges' folder, we  
13 have just included the text of the draft fishing agreement  
14 as it stood as of November 2003. This is to make the  
15 point that actually there were a very considerable number  
16 of issues on which the parties were agreed, because you  
17 will see from the text of this draft, which I should say,  
18 incidentally, is a Barbados draft, that many, many of the  
19 matters were agreed. If you just cast your eye down the  
20 pages of the preamble, we see "agreed", "agreed",  
21 "agreed", "agreed" and so on it goes. I am not suggesting  
22 that everything in the agreement was agreed. It certainly  
23 was not. But Barbados has not shown to us or to this  
24 Tribunal any sticking points, anything that could not be  
25 resolved. You often see after a particular piece of text  
26 the words "to be negotiated". Fine. There were still  
27 things to be negotiated, but no suggestion that things  
28 could not be negotiated, certainly not so far as concerns  
29 Trinidad and Tobago.

1           If I could ask you at your leisure, as it were, if it  
2 can be seen as leisure, to look at the key articles, which  
3 are articles 4, 5, 6 and 7, which are matters like  
4 permitted species, vessels and fishing gear, duration of  
5 the fishing season, number of eligible authorised fishing  
6 vessels per season, licensing arrangement and access fees.

7           All the sort of basic sea matters that you would expect  
8 to be included in a fishing licence agreement. You will  
9 see that these are for the large part either agreed or the  
10 rubric says "To be negotiated". We simply do not see from  
11 the contemporaneous evidence anything like the case that  
12 Barbados is now putting before you that Trinidad and  
13 Tobago was unwilling to agree the right sort of fishing  
14 agreement. It was simply not the case.

15           This leaves Trinidad and Tobago's fallback argument  
16 so far as concerns the fishing agreement, which is to say  
17 that, well, a fishing agreement could not be concluded as  
18 of 16 February because our position was that the fishing  
19 issue was inextricably linked with the maritime  
20 delimitation issue. Well, that is a bizarre position to  
21 take if one is looking at the context of in particular an  
22 alleged catastrophe to Barbados fishermen. It only make  
23 sense if one steps back and looks at what Barbados is  
24 really trying to achieve. If Barbados is trying to  
25 achieve or trying to protect its fishermen from impending  
26 catastrophe, the refusal to agree a fishing agreement  
27 simply because you take it as being interlinked with the  
28 issue of maritime delimitation negotiations makes no sense  
29 at all. If what Barbados is really trying to do is to

1 create rights to hydrocarbons by interlinking the issues  
2 of maritime delimitation, on the one hand, and fishing, on  
3 the other hand, then the insistence on interlinking starts  
4 to make sense, but this is part of a litigation strategy.

5 It has nothing whatsoever to do with fishing agreements  
6 or the need to avert a catastrophe.

7 Mr President, I am going to move on to a completely  
8 different topic now, which is the topic of abuse of  
9 process. This is a topic that I can deal with briefly  
10 because it was passed over completely by Professor  
11 Reisman. Mr Volterra dealt with our interpretation of the  
12 1990 fishing agreement in the context of his speech on  
13 estoppel and acquiescence and I will just pause to deal  
14 with his argument on interpretation. What he said was as  
15 follows. He said look at the language of article 11 of  
16 the 1990 fishing agreement. You can actually see this at  
17 tab 18. He said, look at how Trinidad and Tobago has  
18 construed an identical provision in the course of the 2002  
19 to 2003 fisheries negotiations. That is what you can see  
20 underneath article 11 in this extract from the Judges'  
21 folder. I will just read what he said from the  
22 transcript. "What I have put up on the screen is article  
23 16 of the draft agreement proposed by Barbados during the  
24 most recent round of negotiations." In fact, he was wrong  
25 about that, because what he put up was the draft agreement  
26 from March 2003 negotiations not the most recent which is  
27 November 2003 which you also see on the piece of paper in  
28 front of you.

29 He said, "It is tab 161, but I suggest you need not



1 go to it, because the language is precisely the same as  
2 article 11. The text is identical and I am not going to  
3 repeat it." The point that he was making was to say,  
4 look, here you have article 11, you say that actually this  
5 does not preserve relevant rights of Barbados, but here is  
6 article 16, 2003 version, and look at what Trinidad and  
7 Tobago said at the time so far as concerns this article.  
8 They said - and this is a quote from the third round of  
9 fisheries negotiations - "It was agreed that the agreement  
10 should include a provision indicating that the fishing  
11 agreement should in no way affect the parties' respective  
12 maritime delimitation claims". Mr Volterra takes that  
13 statement as effectively interpreting article 11 of the  
14 1990 agreement by reference to article 16 of the current  
15 agreement, a slightly convoluted exercise in  
16 interpretation. And one which you see completely falls  
17 apart when you look at the new article 16 up against the  
18 old article 11 and you see that they are, in fact,  
19 materially different. They are not identical at all.

20 Article 11 of the 1990 fishing agreement we say is  
21 divided in effect into two provisions. This is at the top  
22 of the page that you have in tab 18 of the Judges' folder.  
23 This is the first. Article 11, preservation of rights  
24 divides into two. The first part: "nothing in this  
25 agreement is to be considered as a diminution or  
26 limitation of the rights of either contracting party in  
27 relation to the limits of its internal waters,  
28 archipelagic waters, territorial sea, continental shelf or  
29 exclusive economic zone". We say that that is not

1 problematic for Trinidad and Tobago in this case. It does  
2 not seek to somehow absolve Barbados of the very fact of  
3 having entered into an agreement that expressly recognised  
4 Trinidad and Tobago's EEZ simply because the whole fishing  
5 agreement is predicated on Barbados not having rights in  
6 Trinidad and Tobago's EEZ. There is nothing in essence on  
7 which this first half of the provision can bite.

8 Look at the second half of the provision. "Nor shall  
9 anything contained in this agreement in respect of fishing  
10 in marine areas of either contracting party be invoked or  
11 claimed as a precedent". All this says is the fact of  
12 Barbados' fishing in Trinidad and Tobago's EEZ cannot be  
13 invoked as a precedent. Entirely as you would expect. It  
14 is not open to Barbados to say that, well, you let us in  
15 last year, you have to let us in again. Or it is not open  
16 to Barbados to say that, oh, this is created. The fact  
17 that we have now fished in your waters has created some  
18 sort of right, so now we have a right to fish in your  
19 waters. No such right created. If you look at the draft  
20 which is in the middle of the page, and this is draft of  
21 March 2003, you will see that the language is quite  
22 different. It is not identical. I should stress that  
23 this is Barbados' draft. This is the attempt of Barbados'  
24 legal representatives 13 years down the line to put in a  
25 provision which protects their position. You will see  
26 that they do this by changing the language significantly  
27 in the second line by adding a concept of derogation and  
28 renunciation and also significantly in the final line  
29 omitting the words "in respect of fishing in the marine

1 areas of either contracting party". So suddenly what you  
2 have is an attempt at a much broader preservation of  
3 rights which might indeed have protected Barbados in a way  
4 that it now wishes it had been protected by the 1990  
5 fishing agreement, but it simply was not. It may well  
6 wish that it should not be taken as having renounced any  
7 rights to Trinidad and Tobago's EEZ by entering into the  
8 1990 fishing agreement, but, as I said, the concept of  
9 renunciation was not in article 11 of the 1990 fishing  
10 agreement. You will see below the final article on this  
11 page is the article that was in Barbados' draft of  
12 November 2003. You will see that the lawyers have been at  
13 it again, because it was obviously considered that the  
14 article 16 in the middle of your page was not sufficient  
15 to protect Barbados' position. So they have another go  
16 and greatly expand article 16 again, so that it now covers  
17 the concept of effecting or prejudicing in any way the  
18 views of either contracting party with regards to any  
19 matter relating to the law of the sea. Far, far broader  
20 language. Again, the concepts of derogation and  
21 renunciation; again the concept of precedent being created  
22 is not limited to matters in respect of fishing in the  
23 marine areas. It is much, much broader wording.

24 We say, Mr President, that when it comes to the 1990  
25 fishing agreement this is still there for you in fact to  
26 look at, to take into account, both in terms of Trinidad  
27 and Tobago's argument on abuse of process and in terms of  
28 Trinidad and Tobago's argument on recognition by Barbados  
29 of the existence of Trinidad and Tobago's EEZ. That was

1 spelled in very large letters both in the preamble to the  
2 1990 fishing agreement and in the first article to the  
3 1990 fishing agreement or the first substantive article in  
4 the 1990 fishing agreement. There is nothing in Article  
5 11 that takes away the force of the 1990 fishing  
6 agreement.

7 5.30

8 Mr President, the issue of scope, the scope of  
9 Barbados' claim in this matter and also the scope of your  
10 jurisdiction has been slightly hijacked in a sense in that  
11 it is only half an hour or maybe an hour ago - how time  
12 flies - that we have received the position of Barbados so  
13 far as concerns article 297.3. Our position on Article  
14 297.3 is quite clear. I just stress that we made this  
15 from the very beginning in our Counter Memorial. We  
16 reacted to a passage in Barbados' Memorial where they  
17 quoted Eritrea-Yemen. This is paragraph 108 of Barbados'  
18 Memorial. They said, having quoted Eritrea-Yemen,  
19 "however, after considering the special circumstances  
20 advanced by each state in that case the Tribunal decided  
21 that no variance was necessary as they concluded that the  
22 special circumstance could be protected by the award of  
23 non-exclusive rights for artisanal fishing".

24 That rung an alarm bell with us, because although in  
25 its statement of claim Barbados had made it crystal clear  
26 that it was only seeking a single maritime boundary line,  
27 suddenly it seemed to be laying the groundwork at least  
28 for a broader claim, a claim that involved non-exclusive  
29 fishing rights. So we responded to this in our Counter

1 Memorial at paragraphs 132-135 and we said it should be  
2 stressed that Barbados has not claimed and cannot claim  
3 any remedy relating to fishing rights in the EEZ of  
4 Trinidad and Tobago.

5 We then pointed to the passage from the Memorial that  
6 had caused us concern and we then pointed to an extract  
7 from Nauru to the effect that Barbados could not go beyond  
8 the confines of its notice to arbitration and statement of  
9 claim, and we then said as follows: "It follows from this  
10 principle that the Tribunal would lack jurisdiction in  
11 respect of any remedies sought by Barbados relating to  
12 fishing rights in the EEZ of Trinidad and Tobago. Nor  
13 could the Tribunal have any such jurisdiction given the  
14 restrictions on its jurisdiction that flow from Article  
15 297(3) of the Convention". So there we flag that up as  
16 clear as day at the end of March of this year.

17 Barbados' response in its Reply as I showed you last  
18 week was to say we are not claiming any remedy for non-  
19 exclusive fishing rights, but that has now been  
20 accompanied by the ever heavier hints from Sir Eli and  
21 from Professor Reisman to the effect that what they really  
22 want in this case is non-exclusive rights.

23 Barbados has now had, I have calculated, six months  
24 and 27 days in which to address the issue of Article  
25 297(3) which we say is comprehensive so far as concerns  
26 this aspect of Barbados' claim and, at well past the 11th  
27 hour, we have just received Barbados' case on Article  
28 297(3). The cogs have been whirring for months and months  
29 and months, and at last something has come out. With your

1 leave, Mr President, I am not going to seek to address  
2 that on the hoof, not having had a chance to even read  
3 what Barbados has said, so I will come back to that  
4 tomorrow.

5 If I can deal very briefly with Barbados' case on the  
6 extended continental shelf, where it was accepted by  
7 Professor Reisman that Trinidad and Tobago's claim to an  
8 extended continental shelf was indeed mentioned in the  
9 course of the negotiations on maritime delimitation. He  
10 said that through gritted teeth and said the mention was  
11 not sufficient, or words to that effect, and just to  
12 refresh your memory of what the joint report of the first  
13 round in fact records, it is "Trinidad and Tobago is not  
14 looking to stop at 200 nautical miles but to extend its  
15 seabed jurisdiction up to the maximum limit of 350  
16 nautical miles or 100 nautical miles from the 2,500 metre  
17 isobath which is subject to approval by the Commission on  
18 the Limits of the Continental Shelf." So we say that it  
19 is as clear as day that that was what Trinidad and Tobago  
20 were seeking, and it strikes us as rather curious now to  
21 say that that is not a sufficient marker.

22 Of course the other key point on this which Professor  
23 Greenwood alluded to earlier is simply that Trinidad and  
24 Tobago is not restrained by having to meet the criteria of  
25 Article 283. It is Barbados that has sought to seize this  
26 Tribunal by Article 286, it is Barbados that has to meet  
27 the requirements of Article 286 and Article 1 of Annex VII  
28 of UNCLOS and of course of Article 283. So we say simply  
29 no need for you to go into the history of our claim.

1           If I could test that submission supposing parties A  
2 and B are negotiating under Articles 74 and 83 of UNCLOS  
3 and at round two of the negotiations party A sets out its  
4 claim, at round three of the negotiations party B puts  
5 down its response to party A's claim but that is in  
6 essence all it does, or maybe it outlines in broad  
7 language where it is coming from so far as its own claim.

8           But it is addressing party A's claim at round three. At  
9 the end of round three party A says it is not working, off  
10 we go to Article 286 and we are off to arbitration now,  
11 and that of course Barbados says is entirely open to party  
12 A.

13           In those situations could it be said that party B's  
14 case in the arbitration is constrained to find by what it  
15 said during the first three rounds of negotiation? That  
16 would make no sense at all. All it has done in the  
17 negotiation is receive party A's claim, it has set down  
18 its response on party A's claim. It has not yet had an  
19 opportunity to develop its claim and yet here it is  
20 suddenly in front of an arbitration Tribunal. In those  
21 circumstances it would be bizarre indeed if party A could  
22 then said Oh well, so far as concerns your claim Article  
23 283 applies, and we have not had an exchange of views on  
24 it, so the Tribunal does not have jurisdiction.

25 PROFESSOR LOWE: Could I ask a question just to make sure  
26 I understand what the submission is. Take a different  
27 examples where parties A and B are negotiating over a  
28 territorial sea boundary, negotiations break down, party A  
29 goes to a Tribunal. Can party B put in by way of its

1 response a claim to an EEZ boundary in addition to the  
2 territorial sea claim, and what if any is the difference  
3 between that situation and a situation where there has been  
4 discussion over an EEZ boundary and a separate discussion  
5 over extended continental shelf boundary?

6 MR WORDSWORTH: That is a difficult question without any  
7 doubt, but I do not think it is one that we have to  
8 respond to, because the negotiations in this case were  
9 under Articles 74 and 83 of UNCLOS. So it is not a case  
10 where there have been very confined negotiations under one  
11 particular part of UNCLOS and where you can say whatever  
12 was in the parties' minds was constrained by a particular  
13 concept, i.e. negotiations in relation to the territorial  
14 sea.

15 So far as concerns our case whatever was in the  
16 parties' minds was at all times delimitation of both the  
17 EEZ and the continental shelf, so we would say the  
18 question does not really arise.

19 PROFESSOR LOWE: And that is evident in the record of the  
20 meetings, is it? I cannot remember.

21 MR WORDSWORTH: That they are negotiations under Articles 74  
22 and 83, yes, absolutely.

23 Mr President, with your permission that concludes my  
24 remarks on jurisdiction. I know it is rather later in the  
25 day than we would have hoped, but if I could ask you to  
26 invite Professor Crawford to make his remarks so far as  
27 concerns delimitation up to 200 miles.

28 THE PRESIDENT: Mr Wordsworth, I think Professor Orrego has a  
29 question.



1 PROFESSOR ORREGO: Mr Wordsworth, if I might take you back to  
2 tab 17 which is the draft fisheries agreement and go back  
3 from the eastern sector to the western part, there are two  
4 questions that I would like to ask in respect of annex 1  
5 of that agreement which you have attached at the end,  
6 which is the sketch showing different areas. The proposed  
7 fishing area and the closed area. We are well aware of  
8 course that that was put forth by Trinidad and Tobago only  
9 for illustration and that there was no agreement and that  
10 Barbados had another idea which was referred to, relevant  
11 fishing areas and so on.

12 My first question is this. Was this a type of area  
13 admitting beforehand that nothing was as precise as it  
14 could be in a final agreement because this was just a  
15 sketch, but was this a kind of area that Trinidad and  
16 Tobago was prepared to consider in which there could be  
17 fishing activities by Barbadian vessels of some sort?  
18 That is one question.

19 The other one is that this is evidently confined to a  
20 certain part of the map, but that further up there would  
21 be in principle the equidistance line separating Barbados  
22 from Barbados from Tobago which is not drawn. Would there  
23 be any relationship between this graphic that was drawn  
24 and the existence or non-existence of an equidistant line  
25 in between the two islands, or was that entirely unrelated  
26 in your view? Did you grasp that?

27 MR WORDSWORTH: I think I did grasp it, which is to say what  
28 is the relationship, if any, between this proposed fishing  
29 area and the equidistance line?

1 PROFESSOR ORREGO: Yes, from the point of view that one is  
2 in the graphic and the other one is not. Does that mean  
3 anything or nothing?

4 MR WORDSWORTH: I would have thought it meant nothing because  
5 the date of this agreement is November 2003 when Barbados  
6 had recoiled completely from its earlier statements that  
7 there was a de facto median line between the parties so  
8 far as concerned fishing, and I am thinking for example of  
9 the passage that Professor Greenwood took you to earlier.

10 I think it would be quite surprising to see a median line  
11 on this map as late as November 2003 because that would  
12 have been inconsistent with Barbados' case as of November  
13 2003, which was suddenly developing in a very unexpected  
14 rush so far as we were concerned to all this in fact being  
15 within Barbados' EEZ.

16 PROFESSOR ORREGO: Thank you; and on the first question,  
17 I am not pressing you to answer anything now, because I  
18 understand that you will come back to this tomorrow. Is  
19 that correct; you may wish to consider that.

20 5.45

21 MR WORDSWORTH: I may wish to, but the genesis of the fishing  
22 area as I understand it can be found in the second round  
23 of negotiations on the fishing agreement, where paragraph  
24 21 - I will just give you the reference and read out the  
25 passage - Barbados tried to shift matters forward and said  
26 "in response to Trinidad and Tobago's rejection of the use  
27 of a Common Fisheries Zone approach and its assertion that  
28 Barbados' fishing boats were habitually fishing areas  
29 close to the territorial sea which were unquestionably

1 within the jurisdiction of the Trinidad and Tobago, the  
2 Barbados delegation proposed that as a way forward the  
3 Trinidad and Tobago side might wish to indicate an area  
4 unquestionably within its national jurisdiction and in  
5 which consideration could be given to granting access to  
6 Barbadian boats and the specifics of access can be  
7 negotiated. Barbados suggested that this area should be  
8 just outside Trinidad and Tobago's territorial sea".

9 You can see that as late as March 2002, Barbados is  
10 taking a position that, oh well, we do accept that large  
11 swathes of this maritime territory in fact do  
12 unquestionably fall within Trinidad and Tobago's EEZ, but  
13 to enable us to make progress while we are fighting over  
14 maritime boundaries and the like, let us see if we can  
15 agree an area which is unquestionably within your EEZ so  
16 that we can have access to that area. That was clearly  
17 the thinking behind Barbados at this stage and along the  
18 line that evidently results in the area that you can now  
19 see in annex 1 to Barbados' draft of November 2003. I  
20 think that before going final on that, I would like to  
21 check that with my colleagues behind.

22 PROFESSOR ORREGO VICUNA: One just further clarification for  
23 discussion, if I understood rightly this is an  
24 illustration put forward by Trinidad and Tobago, in spite  
25 the fact that the draft is a Barbados draft, because at  
26 some point in the text in connection with Article 4, which  
27 is the one that defines it, if I remember rightly ...

28 MR WORDSWORTH: I think that it is Article 2.

29 PROFESSOR ORREGO VICUNA: Article 2. There is reference to an

1 alternative TT at the top of page 6 and then says ...

2 MR WORDSWORTH: Professor, I quite see that.

3 PROFESSOR ORREGO VICUNA: That would be a reflection of the TT  
4 suggestion.

5 MR WORDSWORTH: Yes.

6 PROFESSOR ORREGO VICUNA: Thank you.

7 THE PRESIDENT: Thank you so much, Mr Wordsworth. Do you wish  
8 to begin in these remaining ten minutes, Professor  
9 Crawford?

10 PROFESSOR CRAWFORD: Sir, a leading question has been defined as  
11 a question to which the asker knows the answer. Sir, we  
12 have had quite a lot of searching questions today and we  
13 have had dumped on us 30 pages of response to which we  
14 will want to respond tomorrow to remove the word "interim"  
15 to the response, so that at the end of tomorrow pleadings  
16 are over. The word "interim" gives us considerable  
17 concern. We will respond to that, but, on the basis that  
18 everything will then have been said. On that basis, I am  
19 going to deal, if I may, very briefly, with the argument  
20 for conduct and I will come back to what I may describe,  
21 with respect to Mr Volterra, as the real arguments  
22 tomorrow.

23 Mr President, members of the Tribunal, in this  
24 presentation, now sub-divided and not merely divided, I am  
25 going to deal with the issues concerning the Atlantic or  
26 eastern sector raised by counsel for Barbados in their  
27 Reply. The presentation is now in three halves. In the  
28 first half, which is the first ten minutes, I am going to  
29 deal with the conduct argument. Tomorrow I am going to

1 deal in my first part of tomorrow's presentation with the  
2 question of delimitation within 200 nautical miles of the  
3 coast of Trinidad and Tobago and then I will deal with the  
4 question of declaration of the continental shelf beyond  
5 200 nautical miles in the final part of that presentation.

6 I shall start with Barbados' argument on conduct  
7 north of the equidistance line in the Atlantic sector  
8 which is said to give rise to an estoppel. Professor  
9 Greenwood has dealt with the law of estoppel. The crucial  
10 point is that Barbados has been on notice for the best  
11 part of 20 years that we have a claim to the outer edge of  
12 the outer edge of the continental margin. I refer very  
13 briefly to four documents. First is the amendment to our  
14 continental shelf legislation of 1986, the Continental  
15 Shelf Amendment Act of 1986, which is tab 19 in your  
16 folders. It is absolutely explicit. It extends the  
17 continental shelf of Trinidad and Tobago to the outer edge  
18 of the continental margin using definitions drawn from the  
19 1982 Convention. That is 1986. Of course, the Convention  
20 was not then in force as between the parties. This was  
21 simply a freestanding act of legislation by Trinidad and  
22 Tobago, though of course based upon the language of the  
23 1982 Convention. That is the first step. I should say  
24 that Barbados does not have continental shelf legislation.

25 It does not need to have it. No one is suggesting any  
26 adverse inference is to be drawn from that, but we do and  
27 our legislation was clear.

28 The second document I took you through in the first  
29 round. This was the third party note of 27 March 1992

1 which makes it clear. It was rather dismissed by counsel  
2 for Barbados who said that it was rather general. Well,  
3 it is categorical, you can read it, but you read it in the  
4 context of the existing legislative definition.

5 The third was the unequivocal statement made in the  
6 first round of the boundary talks to which Mr Wordsworth  
7 has already referred.

8 The fourth was the third party note of 2001 to which  
9 I also took you in the first round. Those four items -  
10 there are others, but they will do - are internally  
11 consistent and coherent and they go all the way back to  
12 1986. That position was never abandoned.

13 In a situation where a party is on notice that  
14 another party brings forward a claim in the context of a  
15 maritime boundary delimitation, there is a strong  
16 presumption against the abandonment. There is a strong  
17 presumption that miscellaneous items of conduct at inter-  
18 Governmental level - at some intermediate level,  
19 arrangements about seismic searches and so on - do not  
20 amount to an abandonment of a position taken at the  
21 highest level of government through the third party note  
22 from the Ministry of Foreign Affairs and so on.

23 It is against that background that the extremely  
24 unpromising argument against estoppel has to be put  
25 forward.

26 Mr Volterra complained that I did not deal in the  
27 first round with the various items of conduct that he  
28 relied on. In fact, I did, but I did it briefly because I  
29 did not think they were worth - if I may say so with great

1 respect - a row of beans in the light of the test laid  
2 down by Cameroon and Nigeria which Mr Volterra dismissed  
3 in a line. That test is so stringent, the Cameroon and  
4 Nigeria test, that nothing of this sort could possibly  
5 meet it. The evidence in Cameroon and Nigeria was  
6 infinitely stronger than it is here and it still was not  
7 enough.

8 The Tribunal may be interested in the discussion of  
9 the question of conduct which is made by the arbitral  
10 tribunal in the Nova Scotia/Newfoundland case, which was  
11 before Cameroon and Nigeria and which took as its basic  
12 text the positions taken by the court in the Libya-Malta  
13 case and still, of course, dismissed the argument on  
14 conduct. You will be able to see, if you read that award,  
15 that the conduct on which the parties relied in that case  
16 was somewhat more extensive than the conduct on which  
17 Barbados relies here. I will leave you to make that  
18 assessment for yourself. It still was not enough. And  
19 that is on a more flexible and more open test for the  
20 effective conduct than anything that could survive what  
21 the court said in Cameroon-Nigeria.

22 That having been said, at six minutes to six, let me  
23 deal with the five issues of conduct. Oil licensing.  
24 There was no specific licensing of the area which is  
25 claimed by Trinidad and Tobago. There was a general  
26 licence, the 1978 concession, but it covered the whole  
27 region and was unspecific. Mr Volterra said (I quote day  
28 5, page 25, line 23) "Oil companies in the region,  
29 including oil concessionaires of Trinidad and Tobago, have

1 recognised Barbados' jurisdiction in the area". Mr  
2 President, members of the Tribunal, it is not for oil  
3 companies to recognise the sovereign jurisdiction of other  
4 states. They are subject to the sovereign jurisdiction of  
5 other states. Recognition is an inter-state process, not  
6 a process carried out by oil companies. There were  
7 reports in the press in the Cameroon-Nigeria case of  
8 arbitrations between oil companies. Whether or they  
9 happened we do not know, but they would have been  
10 irrelevant if they did. We are dealing with sovereign  
11 rights. We are not dealing with corporate rights.

12 As you can see from the Conoco letter, which I am  
13 afraid I have lost in the array of paper here, there was  
14 in fact no wells drilled at relevant times in the area  
15 claimed by Trinidad and Tobago.

16 Let me take you to the seismic map produced by  
17 Barbados. Now, you can see up in the north west area,  
18 that is what I call seismic. That is seismic. That is  
19 systematic seismic shooting on a grid basis. Compare that  
20 with the area below our claim line. Those are sporadic  
21 lines not part of any systematic programme. Lines in the  
22 sea transient - and I am sure that there are both 18th and  
23 17th century poems about transient lines in the sea. I  
24 was not quoting the Aegean Sea case, which of course was  
25 on a somewhat different issue, for anything more than the  
26 quite simple proposition that seismic explorations come  
27 and go. That is not a systematic seismic programme. It  
28 is nothing about which we should have protested.  
29 Trawling. As in Jan Mayen, boats can come and go. We are



1 not dealing with land sovereignty. We are not dealing  
2 with effectivités along inhabited frontiers. We are  
3 dealing with maritime delimitation in the context in which  
4 claims are being put forward. If this Tribunal is to move  
5 the law of maritime delimitation towards the situation in  
6 which every time someone does something on one side of a  
7 marine boundary someone else has to protest, there are  
8 going to be extreme difficulties. There are many  
9 situations in the world in which claims are opposed and  
10 unresolved. The thought that, once the claim is on the  
11 table nonetheless everyone has to continue to protest,  
12 continue to obstruct, continue to watch out, would be a  
13 most counterproductive precedent that I am sure you are  
14 not contemplating.

15 Full co-operation in the Zone of Co-operation. We  
16 had the wonderful sight on Tuesday of Mr Volterra having  
17 made so much of the Zone of Co-operation having to refer  
18 back to find out if anything had been done. We have  
19 raised that question on several occasions, in fact I have  
20 raised it at each stage of our pleadings, and we got no  
21 reply. When Mr Volterra was asked point blank by a member  
22 of the Tribunal, he had to go back to base. He said " ...  
23 the requirement, for example, in relation to the Co-  
24 operation Zone Treaty, to do due diligence" - a splendid  
25 phrase - "and confer with the Ministry back in  
26 Bridgetown". He had to confer with the Ministry back in  
27 Bridgetown. Now we have a reply on bits of paper. There  
28 are meetings that had to be postponed. You might say, to  
29 paraphrase St Augustine, "Lord give me effectivités but

1 not yet". In any event, to talk about the conservation of  
2 the marine resources of this tiny speck in the middle of  
3 the globe - which I have to say even for a sailor as  
4 accomplished as Mr Paulsson - if it could even be located,  
5 is quite bizarre. So let us not talk more about the Zone  
6 of Co-operation.

7 Then we have the preparation for the Annex II  
8 Commission. Mr Volterra has complained. I thought I was  
9 going to be struck off by the Tribunal. I am grateful to  
10 Professor Greenwood for his defence. I am waiting for his  
11 fee note with perhaps as much trepidation.

12 I have to say, Mr President, whether a state  
13 contemplates making an application which it is entitled to  
14 make under a treaty to an international body is a matter  
15 of which that state has notice, and I do not apologise for  
16 telling you that we have that intention. We have not  
17 provided you with a desk-top study any more than they  
18 have. The only desk-top study you have got is one that was  
19 put in late, the Parsons report, which relates to the  
20 continental shelf of a third state. That is the only  
21 information you have got. I will come back to this  
22 question tomorrow when I am dealing with the substance of  
23 the outer continental shelf. But that is the situation.

24 6 pm

25 In any event, the preparation of a claim to the Annex  
26 II Commission is not an effectivité. As I showed you in  
27 the first round, the Annex II Commission has no competence  
28 over lateral boundaries. This was not challenged by  
29 Barbados. No one denies that Barbados will be in a

1 position to claim an outer continental shelf. It has  
2 always been accepted and the fact that it is making tracks  
3 - it does not seem to be making much by way of tracks of a  
4 substantive character which you have to make for an outer  
5 continental shelf argument, but I will let that remark  
6 pass. No inference of abandonment of claims is to be  
7 drawn.

8 I refer you again to what the court said in Cameroon-  
9 Nigeria to which Mr Volterra devoted one sentence.

10 "Conduct is irrelevant in maritime delimitation unless it  
11 amounts to an agreement express or implied. In the  
12 context where a state has put forward categorically for 20  
13 years a claim to an outer Continental Shelf no agreement  
14 can be implied"

15 6.00

16 As the Tribunal in the Newfoundland/Nova Scotia case  
17 said, you do not improve a bad argument about agreement by  
18 converting it into an argument about estoppel. Actually  
19 those of us who understand the law of estoppel think it  
20 made matters worse. Mr President, I will stop there.

21 THE PRESIDENT; Thank you so much, Professor Crawford. It is  
22 now 6 o'clock. We will adjourn till tomorrow morning at  
23 10.

24 MR VOLTERRA: Mr President, if I may, before you move to  
25 rise. Barbados feels that it must respond to the remarks  
26 of Professor Greenwood at the outset of his address after  
27 the coffee break, with the permission of the Tribunal.  
28 These remarks will be very brief.

29 THE PRESIDENT: Please proceed.

1 MR VOLTERRA: Thank you. This is in relation to Professor  
2 Greenwood's comments about Barbados' response to Professor  
3 Lowe's question. And may I start my remarks with the  
4 observation that Professor Greenwood's comments about that  
5 are as untenable as his earlier attempts to excuse  
6 Trinidad and Tobago's improper pleading from last week.  
7 Good counsel that he is, he took the opportunity of  
8 defending Professor Crawford to repeat all of the  
9 assertions that were made by Professor Crawford. But they  
10 became neither more proper nor should the Tribunal pay any  
11 more attention to them merely by their indirect  
12 repetition.

13 I have three observations to make about Professor  
14 Greenwood's response to Barbados' answers to Professor  
15 Lowe's question. The first is that, of course, Barbados  
16 was asked some dozen questions by the Tribunal and we  
17 welcomed them and we welcome any more that the Tribunal  
18 has for us. The Tribunal is of course aware of the  
19 calendar of the hearing, the order of pleading and the  
20 timing of the questions and the timing of our response,  
21 and I do not feel that I need to go into that  
22 particularly.

23 But the suggestion that Barbados has been lax somehow  
24 in its efforts to respond in terms of timing cannot be  
25 seriously made. By way of comparison, Trinidad and Tobago  
26 was left at the end of round 1 with one question from the  
27 Tribunal and it took three nights and two and a half days  
28 before it gave its answer to Barbados on the afternoon on  
29 Monday, as Barbados began its second round. Barbados

1 makes no complaint as to that timing.

2 Second, in relation to the remarks about the  
3 reference in the answer to it being interim, the Tribunal  
4 will of course recall that Professor Lowe asked for a  
5 review of all the case law and a note about it. The  
6 Tribunal will of course be aware that this was in the  
7 midst of our pleadings. We did what we could with the  
8 available time and resources that we have and we tried to  
9 give a serious, reflective answer to a very serious  
10 question and deservedly so. But it is not a comprehensive  
11 view, as the answer explains, and it is not a  
12 comprehensive view as was requested. Barbados recognises  
13 that there is still work to do and in the note suggests  
14 that if the Tribunal still wants a further comment from  
15 Barbados that we are prepared, within a reasonable period  
16 of time, to do so to the extent that it feels that we have  
17 not answered the question fully. We did not want the  
18 Tribunal to think that we were telling them that this was  
19 something which was a full response. We wanted to give a  
20 answer to Trinidad and Tobago in time for Trinidad and  
21 Tobago to make a response. So we are in the Tribunal's  
22 hands and undoubtedly it will give directions to the  
23 parties on this point.

24 Thirdly and finally, Mr President, in relation to the  
25 outrage that has been expressed by all three counsel for  
26 Trinidad and Tobago today about the timing of the  
27 response, I would only direct the Tribunal (I am afraid  
28 you do not have it in front of you) to the relevant  
29 transcript from day 6 of the hearing. I will read the

1 references into the record, but this is the uncorrected  
2 version I think so there might be some variation. At page  
3 31, Professor Crawford notes exactly what I have just  
4 described in terms of Trinidad and Tobago's timing for its  
5 response. He says "When we were asked a question by  
6 Professor Orrego Vicuna we took some trouble to ensure  
7 that the answer to that question was provided in writing  
8 on the first day of Barbados' reply", and so they did just  
9 as we have done in relation to Professor Lowe's questions.

10 He then goes on to say, at the bottom of page 31 top  
11 of page 32 "but we would have grave concern if those  
12 replies", and he is talking about the replies of Barbados,  
13 "were provided later than Thursday". That is of course  
14 today. Professor Crawford then states definitely at what  
15 I have as line 8 of page 32 "Sir, the questions were asked  
16 yesterday. Yesterday is Monday and we are asking for  
17 replies on Thursday. Close of business on Thursday will  
18 be enough." Therefore, Mr President, Barbados apologises  
19 for having submitted the questions some three hours  
20 earlier than the close of business on Thursday.

21 Thank you, Mr President.

22 THE PRESIDENT: Thank you, Mr Volterra. Professor Crawford.

23 PROFESSOR CRAWFORD: Mr President, can I take it that it

24 is then understood that the word interim was interim in  
25 relation to a potential order from the Tribunal? We want  
26 to reach a situation in which these pleadings are closed  
27 by the end of business tomorrow. If of course the  
28 Tribunal, having reviewed, we will respond to the 31 pages  
29 or whatever it is tomorrow, and those responses of course

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will not be in writing but in the course of our oral submissions, and if necessary we will make a special short presentation.

Our concern is to ensure that the situation after the end of tomorrow is that if the Tribunal would like further information or argument from either of us the Tribunal is at liberty to ask for it, but in the absence of a request we remain silent and await your eventual award.

THE PRESIDENT: Thank you so much. We will resume tomorrow morning at 10 o'clock. Thank you very much for your arguments today.

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

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