

International Dispute Resolution Centre
Fleet Street
London, England

Friday, 28th 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 EIGHT

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ATTENDANCES

Barbados was represented by:

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

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

Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate

Professor Michael Reisman, Counsel and Advocate

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

Sir Henry Forde QC, Counsel and Advocate

Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins

Mr Adrian Cummins QC, Counsel

Dr David Berry, Counsel

Ms Megan Addis, Counsel, Latham & Watkins

Ms Teresa Marshall, Permanent Secretary, Foreign Affairs

Mr Edwin Pollard, High Commissioner for Barbados in London

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

Mr Francois Jackman, Senior Foreign Services Officer

Mr Tyronne Brathwaite, Foreign Services Officer

Mr Christopher Parker, Fisheries Biologist, Fisheries Division

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

Mr Anderson Kinch

Mr Oscar Price, Information Technology Support, Latham & Watkins

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

Mr Dick Gent, UK Hydrographic Office

Dr Robin Cleverly, UK Hydrographic Office.

Ms Michelle Pratley, Assistant, Latham & Watkins

Ms Claudina Vranken, Assistant, Latham & Watkins

The Republic of Trinidad and Tobago was represented by:

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

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

1 THE PRESIDENT: Good morning. Let us resume. I think

2 Professor Crawford is to speak next. Please, Professor
3 Crawford.

4 PROFESSOR CRAWFORD: Mr President, members of the Tribunal, I
5 will spend this morning completing what I was going to say
6 yesterday and then saying what I hoped I would be able to
7 say today on the question of the outer continental shelf.

8 That will take us up to what may be an early lunch or, if
9 there is enough time, Mr Wordsworth will then talk about
10 the factual issues arising in the Caribbean sector. Then

1 Professor Greenwood will deal with the legal issues
2 arising in the Caribbean sector and respond to the extent
3 that it has not already been done to the comments made in
4 the Barbados written replies to questions from the
5 Tribunal. That will be followed by the Agent who has
6 promised not to act as an advocate - but you never know
7 with agents!

8 The Tribunal asked for a copy of the Venezuela Treaty
9 map which is shown on the screen. I do apologise, I must
10 say that I was under the impression that it was in the
11 folders, and it is not. We will give you proper copies of
12 it, but that is it. That is the authorised text that was
13 attached to the Treaty. Due to logistics problems, we
14 have not been able to get you a copy this morning but we
15 will provide one.

16 Mr President, members of the Tribunal, in yesterday's
17 short intervention I dealt with the questions of conduct
18 and I do not propose to revert to them unless members of
19 the Tribunal have any questions about conduct. One or two
20 of the issues of conduct will be dealt with by Mr
21 Wordsworth in his presentation this afternoon or later
22 this morning.

23 Our position is that the question of delimitation in
24 the Atlantic or eastern sector is a question, as indeed Mr
25 Paulsson said it was, of geography and law and there are
26 essentially no questions of disputed fact which pertain in
27 any sense that is capable of making a difference to the
28 delimitation in that sector. Mr Paulsson, of course, gave
29 the image of the person patrolling up and down the

1 equidistance line keeping facts at bay. A very impressive
2 personation but we say that in this sector an accurate one
3 as well, at least as to the question of what he was
4 keeping at bay, though not as to the question of the line
5 he was patrolling.

6 The first point to make rather briefly concerns the
7 question of the two sectors. There was a lot of
8 discussion in the first round about the distinction
9 between the Caribbean and the Atlantic sector. I have to
10 say that my impression is that, although of course neither
11 side has abandoned any positions, this is an arbitration
12 based on the excretion of arguments rather than the
13 focusing of them and, in fact, that issue has largely gone
14 away. If you look at the arbitrations, that it is
15 relevant that you are out in a lateral sector is clear
16 whether or not you use the duality of adjacent and
17 opposite states. We would say that the way in which the
18 Anglo-French Tribunal dealt with that question is
19 emblematic. France, of course, it is true, as Mr Paulsson
20 has said, made an argument that Article 6 of the 1958
21 Convention did not cover the field and that there was a
22 third category. The Tribunal rejected that and there was
23 no textual basis for it. But, nonetheless, they still
24 said that you got to a stage where you were dealing with a
25 lateral boundary and they attached considerable
26 significance to that. I will not take you to the relevant
27 passages. They are set out in our pleadings. But we say
28 that it is quite clear that, when we are in the Atlantic
29 sector and the further we progress into the Atlantic

1 sector the more it is clear, we are dealing in a lateral
2 situation. The considerations that make cut-off
3 irrelevant as between opposite coasts do not apply as you
4 move away from the coasts where minor variations in the
5 angle of the line can make very considerable differences
6 in the overall result. That is the fundamental point.

7 The question of classification, whether you call it
8 lateral or in a situation analogous to that of adjacent
9 states, it does not matter, what matters is the
10 fundamental principle that as you move away from any
11 coasts the direction of the line becomes acutely sensitive
12 to where it starts from.

13 Barbados complained about our use of the
14 International Hydrographic Office's distinction between
15 the Caribbean and the Atlantic sector, but it is pretty
16 obvious that there is such a distinction and one would not
17 be surprised that that, the competent organisation, drew
18 the distinction. If I am going for a holiday in the
19 Caribbean you tend to say You lucky man; if I say I am
20 going for a while day in the Atlantic, someone would
21 wonder if I had taken leave of my senses.

22 Of course it is true, we can go back to the sorites
23 paradox, how many grains make a heap. Everyone knows that
24 at a certain point we have a heap and everyone knows when
25 there are two grains we do not yet, and there is a
26 dividing line. There is a problem of when you have got to
27 having a heap, and the sorites paradox says because you
28 can never tell which particular grain makes the difference
29 therefore the concept of a heap makes no sense. That is

1 obvious rubbish and it is obvious rubbish here; that
2 Barbados says because you can never tell precisely where
3 you move from the Atlantic to the Caribbean or the other
4 direction therefore the distinction does not exist. Well,
5 on that basis the next time I go for a Caribbean holiday
6 apparently I will be in West Africa, and again I think I
7 would prefer with great respect to my Sierra Leonian
8 friends to be in the Caribbean.

9 The hydrographer made a reasonable distinction which
10 reflects all distinctions on all maps. Just as it is
11 reasonable we say to say that the Barbados coast turns
12 where it turns. That it turns is clear and we will say
13 some more about its turning later on.

14 Let me take you to the graphic which Mr Paulsson
15 showed you which determines Point E. We have added point
16 A to that graphic. Point E of course is the apex to the
17 triangle beyond the area actually claimed by Trinidad and
18 Tobago. Mr Paulsson apparently adheres to the view that
19 point E is between opposite coasts but we can leave that.

20 You can see from that graphic with point A added that
21 point A is a considerable distance into the Atlantic
22 sector. It is not and was never put forward as being on
23 the boundary of the Atlantic sector, though I do accept
24 that the original proposal made by Trinidad and Tobago in
25 the negotiations, which had a departing line - we will
26 call it point A1, if you like - which was considerably
27 further to the north west and was put on the basis that
28 that is where the division between the sectors started.
29 The original proposal put forward in the negotiations was

1 predicated upon a distinction between the Caribbean and
2 the Atlantic sector that began the adjustment from the
3 median line precisely at that point. As we have said, an
4 initial proposal in negotiations - and in the way in which
5 the negotiations developed - was that Trinidad and Tobago
6 was never called upon to make a counter proposal. Members
7 of the Tribunal will be familiar with the normal course of
8 maritime boundary negotiations in which proposals are put,
9 come backwards and forwards, and adjustments are made,
10 sometimes minor, sometimes major. You saw the account by
11 Mr Dundas of that process in relation to the Dominica
12 Agreement. It is a standard process in negotiations. You
13 are not to be prejudiced because you make what might in
14 retrospect be regarded as something of an ambit claim as
15 your first point. Any arbitrator who did do that would
16 not be regarded as doing their job particularly well. But
17 what is significant is that that proposal was based upon
18 the principle that is now put forward by Trinidad and
19 Tobago, the principle of a distinction between the
20 Atlantic and the Caribbean Sea, the principle of a
21 divergence to the north from the equidistance line to take
22 into account the natural prolongation of the east-facing
23 coast of Trinidad and Tobago, the principle based upon
24 differential coastal lengths.

25 In any event, the problem of exclusive categorisation
26 between adjacent and opposite that arose before the court
27 because it was applying Article 6 of the 1958 Convention
28 does not arise here. Article 6 is de passé so far as
29 continental shelf delimitation is concerned. Article 6

1 has never been enforced between the parties because
2 Barbados was never a party to the 1958 Convention. That
3 issue simply does not arise.

4 Mr Paulsson says that the Anglo-French case is
5 irrelevant in this situation because we do not have a
6 Scilly Isles problem. There is no, as it were, piece of
7 land belonging to Barbados before Barbados, which is the
8 analogy of the extension out to Land's End, of the
9 mainland of the United Kingdom. That is true. Barbados
10 is a single island and, as far as we know, its
11 annexationist aims extend only to Tobago, though one never
12 knows.

13 The point, however, is not simply the Tribunal used
14 the additional extension eastwards of the Scilly Isles as
15 a basis of an adjustment which produced a northward shift
16 in the line to the benefit of France. The point was that
17 the final United Kingdom base point in relation to that
18 situation was considerably further to the west than the
19 final French base point. This was regarded in the
20 configuration of the coasts in that case as producing an
21 equity swinging the line to the south.

22 If you reverse the situation, we are of course on the
23 other side, on the Caribbean side of the Atlantic. It is
24 exactly the same here. The problem is what effect is the
25 Tribunal to give to the fact that Barbados lying further
26 east than Trinidad the line is swung very considerably to
27 the south causing a cut-off effect. And we would say a
28 considerably more pronounced cut-off effect than anything
29 that existed in the Anglo-French case.

1 Faced with cut-off in relation to relevant coasts of
2 the kind we have here, there is no example where a
3 Tribunal has simply said that you are stuck with the
4 equidistance line. The nearest to that was Cameroon and
5 Nigeria to which I will return. Apart from that, in every
6 case there has been some form of adjustment and some form
7 of extension, at least out 200 miles.

8 That, Mr President, members of the Tribunal, is all I
9 have to say on the distinction between the sectors. It is
10 clear we are in a lateral area here. The coasts are off
11 and over against each other in relation to the area under
12 delimitation. That puts us, we say, in a situation which,
13 as all the cases have said, is analogous to that of
14 adjacent coasts.

15 10.45

16 I now move to the question of the case for
17 adjustment. Our case for adjustment is put on four
18 grounds. First, we say that their median line in the
19 Atlantic cuts us off from the continental shelf and the
20 exclusive economic zone. Indeed, we do not have a
21 boundary on the exclusive economic zone out to 200 miles.

22 Subject to the eventual delimitation between Venezuela
23 and Guyana, it may well be that, if the equidistance line
24 is applied here, we are the only state facing on to the
25 Atlantic in that situation. I will come back to that
26 later on.

27 The first point is that there is a distinct degree of
28 cut-off.

1 Counsel for Barbados have tended to say, "Cut-off,
2 you have got 190 miles. That is not cut-off". Of course,
3 counsel for Barbados are singularly insensitive to the
4 notion of cut-off. They seem to regard 13 miles as not
5 cut-off, because they are taking up to 12 miles off Tobago
6 and, if that is not cut-off, well, I have never seen cut-
7 off. Anyone who regards this as an ordinary form of
8 continental shelf claim will, I think, necessarily be
9 insensitive to cut-off. The tortoise would regard being
10 encapsulated in a case as a natural state of affairs and
11 would not envy the impaler. In our situation, facing
12 east, we have completely open sea for thousands of miles
13 and yet we are cut off. Tobago will have to get used to
14 being a tortoise if Barbados' claim is upheld, but that
15 deals with the Caribbean sector to which my friends will
16 return later today. That is the first point, the point of
17 cut-off.

18 The second point, and it was discussed at some length
19 with Professor Lowe yesterday, is that their median line
20 produces a division of the exclusive economic zone area of
21 overlapping claims, between the two states, in a ration of
22 58/42. That is approximate and you might draw the
23 boundary slightly different. They tend to want to include
24 in our territory, the territory which is on the south of
25 the Venezuela line of 1990 - we of course do not include
26 it because we do not claim it - so there might be some
27 minor adjustments. But they did not come back on that
28 figure. That figure stands in the record, and you can see

1 it even graphically when you look at the actual situation
2 of the boundary.

3 Of course we are not saying that that in and of
4 itself makes the case for adjustment, but it is certainly
5 part of the case for adjustment and it is a significant
6 figure.

7 The third element is that of coastal frontages and
8 you have heard Mr Paulsson eloquently on the subject of
9 coastal frontages and I will revert to those in a moment.

10 The fourth question is the situation which we say is
11 shared with Venezuela in relation to these coasts, that we
12 are squeezed in between Guyana and Barbados in a way that
13 it is inequitable in principle in the same way as Germany
14 was in the North Sea Continental Shelf case, and I will
15 come back to that graphically in a moment.

16 Those are the four elements which taken together make
17 the case for an adjustment.

18 I have to say looking at the extent which
19 international courts have made adjustments to equidistance
20 lines only a dogma of equidistance would deny that case.
21 Courts it is true, and we fully accept that courts start
22 with an equidistance line, but the practice has been that,
23 if a case for adjustment has been made, in particular in
24 an adjacent coast or lateral coast situation, adjustments
25 have been made. It is often said that, if you look at the
26 total number of agreements, the equidistance line
27 agreements considerably outnumber agreements based on so-
28 called equity. That language, which tends to be used by
29 geographers and not lawyers, is misleading because from a

1 legal point of view all maritime boundaries have to accord
2 with equity, whether they are based on equidistance or
3 not. The question is whether equidistance in the
4 situation produces an equitable solution. But even so as
5 the Tribunal will know there are many maritime boundary
6 situations in which equidistance stares you in the face.
7 In particular between opposite coasts. The fact that
8 naturally enough those situations result in equidistance
9 boundaries does not mean that the situations which go to
10 litigation, the situations where disputes cannot
11 apparently be resolved, are situations where things are
12 more difficult. And in those situations, looking at the
13 universe of cases where Tribunals have had to delimit
14 equidistance lines are actually in the minority.
15 Tribunals have regularly adjusted provided the case for
16 adjustment was made.

17 As I said only a dogmatic of equidistance would deny
18 the case, but then Mr Paulsson does dogmatics with
19 magnificent eloquence. He is Mr Equidistance of the
20 Barbados side; keeping I might say an equitable distance
21 from his colleagues, who are far from being equidistant,
22 who are encroachers to a man. But Mr Paulsson even shows
23 you graphics which are inconsistent with their case and
24 says do not talk to me about fish - he is evidently a meat
25 eater!

26 It is the unhappy duty of his colleagues to claim 84
27 per cent of the Caribbean sector south of the equidistance
28 line. You saw Mr Paulsson's claim line. This is counsel
29 with an independent delimitation policy. The appeal of Mr

1 Paulsson's argument, and it was appealing, it was
2 beautifully presented, was precisely its inconsistency
3 with Barbados' overall case. Lord make me equidistant,
4 says Barbados, but not yet; not until we get out of the
5 Caribbean sector. Mr Paulsson has the grace to be
6 thoroughly and consistently equidistant.

7 Let me summaries briefly what we say on each of the
8 four elements of the case for adjustment, and I stress
9 that these are cumulative.

10 I have dealt with the cut-off point in the Atlantic.
11 The only point to add was the emphasis which the
12 Honourable the Agent of Barbados herself laid on the
13 importance of outer Continental Shelf resources in this
14 case. It is one of the remarkable ironies of this case,
15 and the more you go into it the more ironies it has, that
16 Barbados is essentially using fish, the existence of which
17 is not proved, in order to deny us outer Continental Shelf
18 resources. In the Atlantic sector this is the case about
19 the Continental Shelf, but the fish, do not talk to me
20 about fish, says Mr Paulsson. The fish are an added bonus
21 to the menu. There is no suggestion that Barbados is
22 going to co-operate with Guyana on oil in the zone of co-
23 operation, there is no evidence in the record that any
24 seismic test has ever been done, and how you would do a
25 seismic test in that little funny shape I do not know.
26 What they are going to do there is co-operate on fish, but
27 there is no evidence of that co-operation as well, even Mr
28 Volterra, who one can take as the sole progenitor of the
29 zone of co-operation, had to refer back to base in order

1 to find out whether there had been any activity there, and
2 he has not come up with any except for meetings. It would
3 be a funny place to meet. Perhaps we can go for a holiday
4 in the zone of co-operation, in which case one would not
5 be in the Caribbean.

6 PROFESSOR LOWE: If I may before you move on, unless I
7 misheard I think you said when you opened this speech that
8 you were talking about cut-off of the Continental Shelf
9 in the EEZ.

10 PROFESSOR CRAWFORD: Yes.

11 PROFESSOR LOWE: Is it cut-off of the Continental Shelf
12 in the EEZ or is it the cut-off ---

13 PROFESSOR CRAWFORD: It is cut-off in a number of respects.

14 First of all we do not get out to 200 miles. There are
15 dicta saying that that is a minimum. I appreciate, and I
16 will talk after the coffee break about whether we get
17 beyond 200 miles. But we do not get out to 200 miles even
18 of EEZ. That means we do not suggest that having been
19 stopped at the point where we are stopped according to
20 Barbados' theory that we can then be resurrected later on.

21 If we are stopped there we are stopped for good. We have
22 been quite clear about that. That means we lose outer
23 Continental Shelf possibilities entirely, and that is a
24 further cut-off. There are two elements.

25 PROFESSOR LOWE: I do want to get this clear in my mind.

26 Are you saying that there is a distinct argument on cut-
27 off in terms of access to the extended Continental Shelf
28 or are you saying that it is all part of the same
29 principle of cut-off from the Continental Shelf and EEZ?

1 PROFESSOR CRAWFORD: As formulated by the Court in relation
2 to relevant zones that distinction was not made. Of
3 course we say there is a single Continental Shelf doctrine
4 though there are Conventional accoutrements of the
5 Continental Shelf doctrine beyond 200 miles. But the
6 Continental Shelf doctrine is basically the customary law
7 zone which extends to the outer edge of the continental
8 margin. So the cut-off would apply in relation to that
9 zone, whether we were cut off at 200 or 192 or 50. We
10 also say of course that we are cut off from being
11 represented on the 200 mile line of the EEZ though
12 representation in relation to EEZ itself might be thought
13 to be of lesser significance.

14 MR BROWNLIE: Can I just ask, do you think that cut-offs are
15 a matter of delimitation or do you think cut-off is a
16 matter of delimitation alone, or do you think it is also a
17 question of entitlement?

18 PROFESSOR CRAWFORD: We are in a position of overlapping
19 potential entitlements. Assuming that there is nothing
20 like an estoppel, both parties have entitlements which
21 extend throughout the complete area of the zones
22 appertaining to their coasts. The coasts generate the
23 entitlement. However, in the process of delimitation, it
24 may be that, as between overlapping zones, cut-off is
25 relevant as to how you carry that out. So I would say
26 that both elements are engaged. There is the underlying
27 question of title and there is a question of how you
28 adjust the conflict between the areas of overlapping
29 potential entitlement. And the cases are clear that you

1 do that in such a way that you can never eliminate cut-off
2 there are overlapping potential entitlements, obviously.
3 The only state which is not cut off is the state which is
4 completely isolated in the middle of an ocean. But you
5 can minimise cut-off and courts consistently do.

6 The second element, the inequitable division of the
7 areas that I have already dealt with and Barbados said
8 nothing further about.

9 As to our coastal frontages, I would refer you again
10 to the map which is tab 22 in your folder. We have simply
11 presented there, actually based on a Barbadian graphic and
12 based upon the ideas of north-south lines which show
13 frontages as seen from the east, a ratio of 6:1. There
14 are a number of ways of calculating the ratio. Mr
15 Paulsson calculated at 3.6:1 and then I think rather
16 regretted his calculation. If you take the actual
17 coastlines, it gets to about 9:1, the actual coastlines
18 facing to the east. The point to make is that the
19 Tribunals have taken such ratios into account down to the
20 level of for example, 1.38:1. As the Court said in
21 Libya/Malta, referring back to the Gulf of Maine case. It
22 is undeniable that Tobago has an Atlantic coast. Just as
23 it is undeniable that the United Kingdom had an Atlantic
24 coast, even though that Atlantic coast took the form of a
25 point. It is rather curious - it would be rather curious,
26 in fact - to leave out the tip of the hat of Trinidad even
27 though one part of that coast points directly north and is
28 irrelevant to the Atlantic sector and one part points - I
29 think Mr Paulsson said - in the direction of South Africa.

1 I take his word for it. The fact is that the point
2 points directly at the median line and is part of that
3 coast and generates areas of overlapping potential
4 entitlement.

5 Then the fourth point is our position, and a position
6 we share with Venezuela, two states with significant
7 coastal frontages on to the region, in between two
8 outlying states which are projected further in front of
9 them. In the same way that Denmark and the Netherlands
10 were projected further in front of Germany in the North
11 Sea Continental Shelf cases. You can see the equidistance
12 lines in the North Sea Continental Shelf cases with
13 Germany, as it were, caught in the middle.

14 In order to take us to our Caribbean holiday, we are
15 going to turn that around and compare it with the
16 situation of Barbados and Guyana as compared with Trinidad
17 and Tobago and Venezuela. Now, looking at that, you can
18 see that those two coastlines, which are very substantial
19 coastlines in the region, are cut off and are squeezed in
20 this situation. They are in exactly the same, in
21 principle, inequitable situation. It is true that
22 Germany's situation was marginally worse and it is true
23 that Venezuela's situation is even worse than ours, which
24 was why, in the context of a genuine negotiation, the
25 salida was agreed. But, nonetheless, it is undeniable,
26 notwithstanding that Barbados does not have a long
27 coastline, that we are faced with that situation as a
28 result of the application of the equidistance principle.

29 11.00

1 Mr Paulsson said that even in a situation of adjacent
2 coasts, different coastal lengths do not themselves create
3 the case for adjustment, and that is true. We have never
4 said that differential coastal lengths in themselves
5 create a case for adjustment, because each coast generates
6 in a directly outward direction its own entitlement which
7 in this situation might be thought to be sufficient. But
8 as soon as there is any offset of one of those coasts
9 against the other, as you see here, things change
10 radically. The line veers off, as it did in relation to
11 Germany, and in that situation the combination of those
12 two factors, as in the North Sea Continental Shelf cases,
13 creates a case for an adjustment. Here the slight
14 location of state B in front of - to the east of - state
15 A, despite the fact that it has a considerably shorter
16 coastline, has the effect that you can see in relation to
17 state A and which the court said was inequitable in
18 relation to Germany in North Sea Continental Shelf cases.

19 The only modern case in which situations where a
20 state was cut off was not adjusted by the Court is the
21 Cameroon/Nigeria case. But it is worth pointing out that
22 in the Cameroon/Nigeria case the relevant coast of
23 Cameroon was actually considerably shorter than that of
24 Nigeria and there was a blocking third state directly
25 offshore - directly offshore and, indeed, 24 miles
26 offshore. The Court declined - and I have to say in the
27 circumstances reasonably - to compensate Cameroon for the
28 existence of Equatorial Guinea at Nigeria's expense. That
29 was a three-state situation where the relevant coastline

1 of Cameroon up to Cape Debuncha, which was the strait with
2 the island of Biyoka, was considerably shorter than the
3 Nigeria relevant coast; something of the order of 1:1.7;
4 1:2. It is not authority for the simple application of an
5 equidistance situation in a bilateral case with open coast
6 offshore and no third state involved.

7 That, Mr President, members of the Tribunal, is the
8 case for adjustment. The question is how to adjust. I
9 move to the next part of my discussion which is labelled -
10 I will read the label into the record since Mr Paulsson
11 had the grace to read another label into the record - "of
12 points arbitrary and otherwise".

13 Of course, we have had virtual silence on point D.
14 Only recently have we been told what the rationale is for
15 point D and it still does not seem to us to constitute a
16 rationale.

17 Sir Eli returned to the alleged gap between point D
18 and point A on Tuesday and accused us, again, of having a
19 gap in our line. Sir Eli, as an advocate, is nothing but
20 pertinacious and, since I have never managed to persuade
21 him on almost anything, I did not really expect to do it
22 this time, but I do hope to persuade the Tribunal.

23 There is of course no gap. It is true that there is
24 a short area where the claims of the parties are co-
25 existent. But why should we use their point D as part of
26 the description of our claim line? It is simply one of
27 the innumerable points along the equidistance line as one
28 proceeds from far out in the Atlantic on one's way to the
29 leeward side of Tobago. Why should we incorporate point D

1 in our line when Barbados has so signally failed to offer
2 a rationale for it?

3 Actually, it is not just point D, it is the whole of
4 the bottom mandible of the predatory bird. Look at the
5 line C-D. When asked by Professor Lowe to justify their
6 claim to the line C-D east of Tobago and south of the
7 median line, Barbados was not able to give an immediate
8 reply. It is a fundamental part of their case. You would
9 have thought that it would have come to the lips of even
10 Mr Paulsson, if he had been asked, but perhaps less
11 willingly than in the case of others. But, no, one of the
12 non-equidistance team still could not answer. It was back
13 to base for further instructions. Yesterday they provided
14 a reply of sorts, referring to the fisherfolk affidavits
15 and to parallelism with the Trinidad and Tobago, St
16 Vincent and the Grenadines median line. According to
17 their view, we do not have a shared maritime boundary with
18 St Vincent and the Grenadines; something which I am sure
19 will come as a surprise to our friends in St Vincent and
20 the Grenadines.

21 We have been thinking about how you might justify the
22 line C-D. For example, one suggestion was that, if you
23 took all the teacups in which Mr Volterra has made a storm
24 during the course of these proceedings and laid them end
25 to end, they might reach along the line C-D. But counsel
26 from this side thought that we might give Mr Volterra a
27 big tea set to reflect his capacity for doing things with
28 teacups. Unfortunately, Harrods did not have one big
29 enough! But there are two real storms in these waters,

1 not only those stirred up by Mr Volterra. There are
2 strong currents. It is not a place to make tea, it is not
3 a place to have a holiday, not a place to steer an ice
4 boat.

5 Point D having disappeared, we come to point A.
6 We stress here that we are at the level of implementation.

7 The case for adjustment has been made and the question is
8 how to adjust. As I said in the first round, the Tribunal
9 will be aware that, once the case for an adjustment is to
10 be made, there is some flexibility as to the way in which
11 the adjustment is made. No one who has sat in this case,
12 whether in the equitable weather of London or the less
13 equitable weather of The Hague, could actually think that
14 there is one and only one way of making an adjustment.
15 The question is whether we have provided good reasons for
16 the adjustment we propose. And we were rather baffled
17 when counsel throughout said that we had not.

18 Now at last, to do him credit, Mr Paulsson faces up
19 to it. He shifts from saying that we gave no reason for
20 point A to saying that we gave a reason that he does not
21 accept. That is fair enough. He does not have to accept
22 it. Indeed, it would be a surprise if he had. But at
23 least in round four of the pleadings in this case he
24 confronts point A. What does she say? The Cape of
25 Last Hope, he called it, very wittily. He said - and I
26 quote day 6, page 14 line 15 - "The Cape of Last Hope does
27 indeed control point A". He accepts that we are right.
28 We say that that point marks the point where the coast of
29 Barbados turns from being directly opposite Tobago to

1 facing out on to the Atlantic and we took as our turning
2 point, point A, the first point as you move up the
3 equidistance line that is controlled by a point on the
4 opposite coast. Mr Paulsson accepts that we were
5 cartographically correct. The Cape of Last Hope does,
6 indeed, control Trinidad and Tobago's point A, he said.
7 But what does he do then? What does he say then? That,
8 if base points on the Atlantic-facing Barbados coast were
9 different, point A would be different. And what does he
10 do? He actually excises bits of Barbados. Barbados is a
11 small island. We are told - and I can understand it - it
12 is supposed to be absolutely beautiful and they actually
13 lose some of it. That is a real catastrophe. Much more
14 than the disadvantage that 90 ice boat crews would have of
15 having to apply for licences to fish where they say that
16 they have always fished. Here they have lost a
17 significant area. We thought originally that they had
18 lost the airport, but they did not quite lose the airport.
19 That would have had a serious effect on the Barbados
20 tourism industry. But the area they lost, you can see it
21 is rather nice. Ananias Point - what they are prepared to
22 give up for point E. Indeed, Barbados has to get smaller
23 in order to get larger. This is ironic. Another irony in
24 the context of maritime delimitation. It is a sort of
25 reculer pour mieux sauter. I tell you I would much prefer
26 Ananias Point to point E.

27 PROFESSOR LOWE: Before you leave that, can I just ask you
28 perhaps to develop the thought, it might be said to be
29 paradoxical that a state should be prejudiced in a

1 maritime delimitation by having a coast that extends
2 further towards the median line than would a coast which
3 would have given it a larger entitlement. Is that
4 something where you think there is any legal principle in
5 play?

6 PROFESSOR CRAWFORD: It is a factor to be taken into account.
7 As I have said, we are dealing with the questions of
8 modalities. You are entitled to take into account the
9 actual configuration of the coastlines. I am simply
10 making the point that we were criticised throughout the
11 written pleadings for reconfiguring geography. The very
12 first time that Barbados actually confronts our real case,
13 they reconfigure geography. They do it at a very late
14 stage. It is up to the Tribunal to decide, assuming that
15 it is persuaded that there should be an adjustment, the
16 point at which that adjustment should occur. I refer you
17 to the relevant paragraphs towards the end of the arbitral
18 award in the Anglo-French case, where that precise issue
19 arose. The Court of Arbitration said, "We are not going
20 to adjust simply from the point where we judge that the
21 Channel coast has become the Atlantic. We are going to go
22 a bit further out". And they gave reasons for doing it.
23 The situation is different in this case in terms of the
24 minute particulars, but the principle is the same. We
25 gave a reason for point A. You might want to adjust
26 point A to take into account Ananias Point. I am not
27 sure. That is a matter for the Tribunal. What I am
28 saying is that the only critique that Barbados has now
29 made of point A involves their reconfiguring geography.

1 The point is that there is a point A. Mr Paulsson
2 wanted to place it a long way further down the line. We
3 might have chosen a point, as Trinidad and Tobago did in
4 its first round, which was closer to the division between
5 the Caribbean and the Atlantic. But we would submit that
6 geography being as it is and not as Mr Paulsson would wish
7 it to be, it would be difficult to choose a point further
8 to the south east, having regard to the distinction
9 between the relevant coasts.

10 The second point in the context of modalities is that
11 of method of adjustment. Having said a great deal about
12 it in their Reply, Barbados said almost nothing about it
13 in their oral reply this week and, thus, it is necessary
14 to say very little by way of response.

15 Mr Volterra said that our 88 degree azimuth was
16 copied from a line on a map, which you can see here, a
17 sketch map put forward in relation to a request for
18 seismic work to be done and he hypothesised that the line
19 you see, the more or less east-west line, on that map - it
20 is only a sketch - is what gave us the idea. In fact,
21 that line is not the same as our claim line, as you can
22 see by comparing them.

23 Mr Wordsworth will take you to that map in the
24 context of the eastern sector claim shortly, but you can
25 see the two maps more or less superimpose. You can see
26 the lines are quite different. You can also see that the
27 actual seismic work was north of our claim line.

28 I turn to the question of regional factors. The
29 principle of taking regional factors into account and the

1 principle of taking existing delimitations into account
2 goes back to the dispositive of the North Sea Continental
3 Shelf cases to which Professor Reisman this week made no
4 reference whatever. I have taken you to that passage in
5 the last round and I will not repeat it. Let us just look
6 at the map of the region. An initial point to make is
7 that we show the delimitations of the states, Antigua,
8 Barbuda and so on, independently of Bird Rock or Aves
9 Islands. We also show what it would be if Aves Island
10 were given full effect. So there is no question of any
11 recognition there.

12 You can see that to the north of Barbados with the
13 exception of St Lucia, which is directly opposite Barbados
14 and is, we submit, essentially in the position that
15 Cameroon is vis-a-vis Biyoka. All the other states are
16 represented on their 200 mile lines. It is true of
17 Martinique, it is true of Dominica and it is true of
18 Guadeloupe. The reason for that, of course, is that the
19 adjustment of the Dominica maritime boundary by agreement
20 to which I have already taken you. You see to the south
21 Guyana is represented on the 200-mile line and, by reason
22 of the salida, so is Venezuela, subject of course to an
23 agreement between Venezuela and Guyana on their respective
24 maritime boundaries, a matter which is of no concern to
25 us.

26 The only state which is not represented on the 200-
27 mile line is Trinidad and Tobago, despite the fact that it
28 has a longer coastline than any of the states that I have
29 mentioned in the Caribbean by a very considerable margin.

1 Professor Reisman tried to get rid of the Venezuela
2 agreement. Mr Volterra tried to turn it into a pact with
3 the devil. He actually used the word "aggression". I
4 thought for one moment he was going to invoke the Security
5 Council powers under Chapter 7, which in relation to an
6 agreement made in 1990 would be a slightly odd thing to
7 do.

8 The Attorney General in his reply will say something
9 about the so-called back-of-the-truck map. What matters
10 is the actual map of the delimitation and we will be
11 giving this to you. I apologise for our oversight in not
12 having done so. The exchange of notes is categorical. We
13 do not take any position as against Venezuela in that
14 Treaty, but, of course, in subsequent diplomatic
15 exchanges, as the Attorney General will explain, we made
16 our position on the Essequiba land dispute entirely clear.

17 The actual outer line that appeared on the treaty map
18 is shown on the graphic here, and it is quite clear that
19 it extends beyond the 200 nautical mile line that was in
20 fact expressly stated to do so. The map was published at
21 the time. The protests against it were delayed and
22 artificial.

23 PROFESSOR LOWE: Excuse me, Professor Crawford, but I think the
24 map from the treaty is in our folders at tab 30.

25 PROFESSOR CRAWFORD: You seem to have a magical folder, in
26 which case I would like to have it back afterwards because
27 I have always wanted one!

1 The logistics of getting the folders overnight seem
2 to have defeated us, but I promise that if you have not
3 got it this is not discrimination but simply incompetence.

4 Mr Volterra said that the Salida was not at all
5 modest. To describe it as modest he said in his
6 characteristic tone of phrase was breathtaking. I am glad
7 that Mr Volterra after the end of these proceedings will
8 be able to get his breath back.

9 Let me take you to the tables which show you the
10 areas and the word conceded of course means areas conceded
11 relative to the median line, that is to say what level of
12 concession, what level of agreement was reached, to move
13 the boundary away from the presumptive equidistance line
14 or the beginning point of an equidistance line. You can
15 see that the Salida out 200 miles in Trinidad and
16 Tobago/Venezuela agreement was 800 square nautical miles.

17 Dominica/France, the area as compared with the
18 equidistance line at 3,500 square nautical miles, a major
19 concession. Denmark/Netherlands/Germany putting the
20 aggregate areas together obviously, they are more or less
21 divided between the two states, was something that was
22 about 3,750 square nautical miles. Canada/France of course
23 was in the opposite direction, because the maritime
24 boundary of St Pierre and Miquelon was much smaller than
25 it would have got under equidistance, but even then the
26 Court allowed the islands out to 200 miles, even though
27 the area "given up" or as compared with the median line
28 was over 11,000 square miles. In the case of Trinidad and
29 Tobago/Barbados our claim line involves an area of 4,524

1 square nautical miles claimed by Trinidad and Tobago in
2 the Atlantic sector north of the median line with Barbados
3 and out 200 miles.

4 As these things go that is in the range of
5 adjustments that are made in these sorts of situations. I
6 draw no particular conclusion from that, but Mr Volterra
7 said the Salida was breathtaking. We adhere to the view
8 that it was modest.

9 The President asked a question which implied, and
10 justifiably implied, concern about the position of the
11 inner states in the Caribbean, St Vincent and the
12 Grenadines and so on, and if we can go back to the
13 regional map I will say a word about that.

14 It relates to the question that Professor Lowe
15 yesterday asked Professor Greenwood, and I will not give
16 you the score card that we gave Professor Greenwood but I
17 will tell you that he passed comfortably in his geography
18 test. You will see that St Vincent and the Grenadines is
19 directly opposite Barbados, the main island of St Vincent
20 and the Grenadines. There is a considerable distance
21 between them, and there are small islands to the south
22 which look into the gap between Tobago and Barbados. We
23 are talking over distances of the order of 80 nautical
24 miles.

25 I come back to what I said in the first round.
26 Delimitation is inherently bilateral; you cannot operate
27 maritime delimitation except on a bilateral basis. Every
28 zone of potential overlapping claims is distinctive to the
29 states concerned, and every maritime boundary case, much

1 more than land boundary cases or other cases, carries with
2 it the proviso this decision is made between these two
3 states and is without prejudice to the rights of third
4 states. Our maritime boundary claim line recognises that.

5 We take no position and you need take no position in this
6 arbitration as to the claims of St Vincent and the
7 Grenadines. I can say, consistently with our position
8 that a state is entitled to know what claims it makes or
9 is made against us, that St Vincent and the Grenadines
10 have so far made no claim against us to move through the
11 gap. If we do that claim will have to be dealt with in
12 accordance with international law and in accordance with
13 the provisions of the Convention. But it is not, I
14 submit, a reason for giving Barbados what it wants in this
15 case.

16 There is a further irony here. Barbados implicitly
17 says look at these other states, but these other states
18 are significantly disadvantaged by Barbados' claim. If
19 you decide Barbados' claim in the way they want you will
20 slam the door on St Vincent and the Grenadines. Much more
21 so than if you decide our claim the way we want. Or in a
22 method which responds to the claims to apportionment that
23 we put forward.

24 We submit that the concern which is a legitimate
25 concern about these states is a matter to be resolved with
26 those states, with whom my understanding is that both
27 parties here have excellent relations, and in the context
28 initially of negotiations and subsequently if it comes to
29 it a third party settlement. Our claim line does not

1 prejudice that proposal. I have to say that Barbados'
2 claim line in particular south of the equidistance line in
3 this sector based upon fisheries most certainly does.

4 We say regional factors confirm and support our line.

5 Nothing was said by Barbados in this second round on the
6 question of proportionality as a method of checking the
7 equity of the result, although there was a great deal of
8 rhetoric about their being excluded from the full extent
9 of the outer Continental Shelf. Well, the level of
10 exclusion depends on the eventual conclusion to the
11 arbitration. You will see from the depiction of our claim
12 line that north of the Venezuela line, the area we claim
13 is actually a trapezoid area in which our outer
14 Continental Shelf is contracting, indeed it is not
15 entirely clear if the Venezuela line is extended as the
16 1990 agreement contemplate that we would get to the outer
17 edge of the outer Continental Shelf. That is a matter for
18 discussion. What is absolutely clear is that Barbados
19 gets a very substantial 200 mile frontage with all that
20 that entails, and we have seen from the Parsons report
21 that there may yet be surprises in store in terms of
22 further claims to outer Continental Shelf based on
23 completely new theories of plate tectonics and so on.

24 For these reasons, Mr President, members of the
25 Tribunal, our claim line within 200 miles conforms with
26 Article 74 and Article 83 of the Convention and should be
27 prescribed by the Tribunal. After the coffee break I will
28 move to discuss the issue of the outer Continental Shelf,
29 with your leave, Mr President.

1 THE PRESIDENT: Thank you so much, Professor Crawford. We
2 will adjourn until 20 before 12.

3 **(Short adjournment)**

4 THE PRESIDENT: Professor Crawford.

5 PROFESSOR CRAWFORD: Mr President, members of the Tribunal,
6 may I pay a tribute to Professor Reisman for at last
7 seeking to confront our case on the outer Continental
8 Shelf in his very careful speech the other day without
9 resort to cartwheel graphics. He did it by trying to show
10 that the 1982 Convention effectively replaced earlier law
11 with a more extensive Continental Shelf doctrine which is
12 subordinated to the EEZ. I am going to call that the
13 trumping theory.

14 It is a specific manifestation of a broader view
15 about the relationship between the two institutions which
16 Evans in his excellent article in the 1993 British Year
17 Book refers to as the absorption theory. It is the theory
18 that as far as it goes the EEZ absorbs the Continental
19 Shelf. Of course it does not absorb the Continental Shelf
20 beyond 200 miles, but within 200 miles it does.

21 It was a view that the Continental Shelf should be
22 abrogated entirely and replaced by the EEZ. That
23 obviously did not happen. But the absorption theory
24 remains as a theory as to what happened within 200 miles,
25 and the Barbados trumping theory is an aspect of the
26 absorption theory.

27 12.00

28 I refer to the Evans article which is tab 22 and we
29 have put the whole article into your bundle and in due

1 course you can look at what it says. We say that the
2 trumping theory like the absorption theory of which it is
3 part is historically wrong. But we also say, and I am
4 going to deal with this first, that it is wrong even in
5 terms of UNCLOS.

6 Before outlining the trumping theory and explaining
7 it I want to review the information before the Tribunal as
8 to the geomorphology of the Continental Shelf off the east
9 coast of the parties and indeed of South America, and I
10 want to enter a caveat as to that.

11 In an early communication with the Tribunal -- If I
12 could just interrupt for a moment, first of all I
13 apologise that some of the Judges' folders are only just
14 now being returned. I mentioned earlier that we were not
15 trying to discriminate against people, it was simply
16 incompetence. The incompetence was of course that of
17 counsel in not telling instructing solicitors in time
18 which graphics we were going to use. Everyone has worked
19 extraordinarily hard on both sides and I pay as much
20 tribute to our people as Mr Volterra did to Ms Addis

21 In an early communication with the Tribunal Barbados
22 showed the outer Continental Shelf in the relevant area.
23 We agreed in principle with their depiction. We took the
24 view that this was not a matter requiring the Tribunal's
25 decision. All the Tribunal had to do was to decide the
26 location of the lateral boundary beyond 200 miles assuming
27 that we got that far. It did not need to and could not
28 decide how far out that boundary went. Hence our figure
29 1.3 in our Counter Memorial, which shows where we think

1 the outer edge of the continental shelf is and which
2 Barbados did not challenge. You will have noticed that
3 both parties have picked out the outer continental shelf
4 in this region in broadly the same way. This is now a
5 Barbados graphic. You can see the red dotted and dashed
6 line is their view of where the outer edge of the
7 continental margin is. These are essentially the same
8 broad depictions. It is not for this Tribunal and the
9 Tribunal does not need to say minutely where it is. There
10 is no evidence of any physical discontinuity in the shelf
11 from the coasts of Trinidad and Tobago eastwards.
12 Assuming that physical discontinuities make a difference,
13 and they have never made a difference yet; the "Hurd Deep"
14 and things like that have been consigned to
15 geomorphological history from a legal point of view.

16 If Barbados had wanted to oppose our outer
17 continental shelf claim by saying that our real
18 continental shelf stopped within 200 miles of our coast,
19 they could have done so. They did not do so. They say
20 that they have done lots of seismic work in the area, but
21 they did not produce any of it. The received view is that
22 geomorphology within 200 nautical miles now no longer
23 matters. I quote, for example - generally we refrain from
24 quoting the works of the members of the Tribunal, but the
25 only one I could find in a hurry was Churchill and Lowe,
26 page 148.

27 That is true, although subject to one proviso. The
28 1982 Convention gave to those, who did not have, a
29 continental shelf. Even if your coastline went straight

1 down to the abyssal sea floor you have still got a 200-
2 mile continental shelf. That was an act of excretion.
3 That was in addition to the rights of states. It was not
4 a subtraction. The 1982 Convention generally speaking
5 operated by way of addition and not replacement and not
6 overriding, as I will show.

7 Coming back to the geomorphology, the Tribunal can
8 readily believe that there is outer continental shelf in
9 this location, apart from the graphics and the very
10 limited amount of information that we have provided for
11 you for the reasons that I have explained. Trinidad, as
12 you have been told, is continental in origin, it is
13 geologically part of the South American continent. There
14 are major rivers in the north east of South America. The
15 situation is prima facie analogous to that of the Gulf of
16 Benin where major rivers over geological time have created
17 sedimentary dispositions and, therefore, oil. Of course,
18 Barbados in one of Mr Gent's graphics showed you the
19 situation in the Gulf.

20 On Tuesday, Professor Reisman showed a series of
21 graphics from which it was sought to infer that our outer
22 continental shelf is a virtual matter, a product of the
23 1982 Convention alone. I will just show you those
24 graphics very briefly. There is a line there called the
25 shelf break and there is an indication of what is called
26 the foot of the slope line. Well, the Tribunal has not
27 had any evidence of the foot of the slope line. We have
28 no comment on it at this stage. We do not think that it
29 is legally relevant. There was no intermediate definition

1 of the continental shelf as between the 1958 definition,
2 which was almost immediately displaced, as I will go on to
3 show you, and the eventually definition embodied in our
4 1986 legislation and, of course, in the 1982 Convention.
5 There was no intermediate accepted definition of the
6 continental shelf. I will come back to that later on. We
7 do not, as it were, comment on the foot of the slope line
8 shown in that graphic which is unsupported by any other
9 evidence. We do not complain about it either. It is
10 information for you. If the Tribunal were to attach any
11 consequences to that line, we would respectfully ask to be
12 allowed the opportunity to provide more information about
13 it. But we do not think that it is relevant.

14 To summarise, the parties are agreed that eastwards
15 of their respective coastal frontages there is outer
16 continental shelf, in the terms of the 1982 Convention,
17 well beyond 200 nautical miles from their respective
18 coasts. They are also agreed that the actual extent of
19 the outer limit of the continental shelf is a matter for
20 the Annex II Commission and is outside your mandate. Your
21 task is that of delimitation inter se of areas which you
22 can properly take, but need not decide, appertain to the
23 coastal states in the region. In terms of the way in
24 which this is done, as I have demonstrated in my first
25 round, the task of delimitation inter se occurs first.
26 That makes the delimitation inter se in a sense slightly
27 hypothetical, because you are delimiting an area you do
28 not precisely know the extent of. The same thing is true
29 in relation to delimitation versus a third state. There

1 are well-known techniques for dealing with that and there
2 is no reason why they cannot be applied here.

3 I now turn to Barbados' trumping theory. Barbados'
4 trumping theory is very simple. It consists of two
5 propositions. Proposition one is that a state is entitled
6 to all the EEZ which is within 200 nautical miles of its
7 coast and beyond 200 nautical miles of any other state's
8 coast. In other words, just by virtue of geography, if
9 you find an area of ocean which is within 200 nautical
10 miles from your coast and more than 200 nautical miles
11 from any other coast, it is your EEZ.

12 We do not for present purposes have to deal with the
13 hypothesis that there might be disconnected bits which met
14 that criteria. For the purpose of the argument, I will
15 accept that that is true, that a state is entitled by
16 virtue of distance alone to any areas as EEZ within 200
17 nautical miles of its coast and beyond 200 nautical miles
18 of any other coast. That is the first proposition.

19 The second proposition is that in any case where
20 there is EEZ, it trumps continental shelf. Continental
21 shelf rights are lost in any area which is geographical
22 EEZ in the sense explained in proposition one.

23 Proposition two, the trumping proposition, is not
24 contained in the Law of the Sea Convention, but it is
25 asserted by Professor Reisman.

26 Let us assume three states in the coastal
27 relationship you see, A, B and C, which is in a manner the
28 North Sea Continental Shelf relationship. Let us assume
29 that after the decision of the Court, that is the

1 equidistance line. After the decision of the Court, these
2 states being law abiding agree on continental shelf
3 boundaries. And they agree on them like that, which is a
4 reasonable reflection of the North Sea Continental Shelf
5 decision. Subsequently they each enact exclusive economic
6 zone legislation and the 200 mile line is there. The
7 position, if the trumping theory is correct, is that the
8 areas shown in pink and whatever that colour is - I shall
9 say crimson because my sense of colours, as you can
10 detect, is erratic, but whatever it is - the two pinks,
11 those two areas are within 200 nautical miles of the
12 coasts of A and C and beyond 200 nautical miles of the
13 coast of B. They are, therefore, exclusive economic zone
14 of states A and C and not exclusive economic zone of state
15 B. That is uncontroversial. The trumping theory says
16 that state B loses its continental shelf over the two
17 areas in pink. moreover, it loses its entitlement to outer
18 continental shelf as well. That is the trumping theory.
19 And it would not matter that the areas in pink were 20
20 nautical miles or 1 nautical mile thick. There would
21 still be enough. That would be the end of it. The
22 exclusive economic zone has replaced the continental shelf
23 beyond 200 nautical miles. It is a curious thing because
24 the exclusive economic zone is not supposed to be beyond
25 200 miles, but that is the trumping theory.

26 The Tribunal should not think that this is something
27 that a professor has dreamed up in a sleepless night and
28 the problem will only arise in eccentric Caribbean or
29 Atlantic contexts. In fact, it will arise wherever three

1 conditions are met. One, maritime boundaries are drawn
2 from adjacent or lateral coasts outwards beyond 200
3 nautical miles. There are 70 or 80 situations in the
4 world of which that is true, as a minimum. Two, there is
5 outer continental shelf in those regions. Three, either
6 the delimitation within 200 nautical miles is not a strict
7 equidistance line or, whether or not it is a strict
8 equidistance line, one of the relevant coasts lies
9 somewhere in front of the others. In either of those two
10 situations, there will be an overlap of the exclusive
11 economic zone of one state with what would otherwise be
12 the continental shelf of the other.

13 Let us take a general graphic of the North American
14 coastline. Fairly familiar, you might think. These are
15 two fairly litigious societies and this is fairly
16 litigious coastline. There are three decided continental
17 shelf or maritime boundary delimitations in this area.
18 These conditions are met for each one of them. Let us
19 take first of all Newfoundland/Nova Scotia. For the sake
20 of argument, let us assume that Newfoundland, sick of
21 federation and of squabbling about Quebec's accession,
22 decides to secede itself, it was once independent, let us
23 assume that it becomes independent again. So the maritime
24 boundary apparently drawn between Newfoundland and Nova
25 Scotia becomes an international boundary. Looking at that
26 boundary, you will see that there is an area which is
27 within 200 nautical miles of the coasts of Nova Scotia and
28 beyond 200 nautical miles of the coasts of Newfoundland.
29 The area in red which was attributed to Newfoundland by

1 the Court of Arbitration in that case would, under the
2 trumping theory, become Nova Scotia, because it is within
3 their EEZ. The second example is the Gulf of Maine. As I
4 said last week, where the chamber stopped the boundary is
5 at 200 miles from the United States coast but it is
6 actually 192 miles from the Canadian coast. So as an area
7 it is considerably smaller, which is Canadian EEZ, but,
8 nonetheless, on the US side of the extension of the line.

9 It would come as a slight surprise if there needs to be
10 another arbitration on the Gulf of Maine, but no doubt, Mr
11 President, you will enjoy sitting on it. The function of
12 maritime boundary delimitations is to resolve disputes not
13 to stick them further out. And it would be very odd if
14 these decisions were not definitive. Yet the trumping
15 theory basically overrides. The third situation there is
16 the mushroom stalk of St Pierre and Miquelon. Because St
17 Pierre and Miquelon are slightly in front of the
18 Newfoundland coast, the mushroom stalk goes slightly
19 beyond the 200 mile line of the Canadian coastline.

20 Therefore, there is an area which is definitely EEZ of St
21 Pierre and Miquelon, which is not EEZ of Newfoundland.
22 And the question was, what happened beyond that? An issue
23 which is the subject of a dispute or at least of a
24 discussion.

25 That is the trumping theory. It is capable of
26 applying in significant numbers of cases. It is not a
27 mere abstract question.

28 In order to concede to the logic of Professor
29 Reisman's argument, I am going to take the position under

1 UNCLOS as if UNCLOS was written on a clean sheet of paper.

2 Then I am going to come back to that. Our argument, is,
3 of course, that whoever is stronger first in time is
4 stronger when it comes to rights - qui prior est tempore
5 potior est jure. We say that the priority of the
6 continental shelf doctrine is a matter of customary law
7 and the manifest absence of any intention in UNCLOS to
8 take rights away has the effect that our continental shelf
9 survives. That is essentially an argument about the
10 temporal, historical and customary law relationship
11 between the two institutions. Professor Reisman put it
12 essentially as an argument about the terms of UNCLOS
13 itself. I want to meet that argument on its own terms
14 before coming back to the argument that I made last week,
15 which put things, as it were, in their right historical
16 and legal order.

17 Let us assume that the continental shelf and the EEZ
18 doctrines were coeval and that their expression so far as
19 this Tribunal is concerned - not a difficult assumption to
20 make - is to be found in the actual language of the
21 Convention and nowhere else, without recourse to prior
22 customary law or history, that is more debated, but let us
23 not refer to it.

24 You have a clean slate on which it is inscribed - it
25 is probably a very large slate - the 1982 Convention. The
26 first point to note is that the various parts of the
27 Convention are laid side by side. Some attention is paid,
28 as Professor Reisman pointed out, to the relations between
29 parts, but the order of the parts is not an indication of

1 any priority. Rights or obligations under one part apply
2 under another and the relations between them will have to
3 be sorted out in the course of actual functioning of the
4 Convention. It is manifestly evident that there are two
5 zones and not one.

6 12.00

7 I refer to Evans, which you will find in your folder,
8 at page 287 when he says that the absorption position was
9 advanced by a number of advocates of the EEZ regime. This
10 is at page 287, tab 32. He says at the top of that page,
11 "During the negotiations of UNCLOS III this position" -
12 that is absorption - "was advanced by a number of
13 advocates of the EEZ regime, but this was not acceptable
14 to the majority of states, many of whom already considered
15 themselves to have rights beyond the 200 mile limit by
16 virtue of pre-existing norms." You will know that the
17 footnote refers, inter alia, to Trinidad and Tobago. That
18 was the position taken inter alia. It was taken by many
19 states. It was taken by Trinidad and Tobago, Australia
20 and others. It then refers to Article 56, and I will come
21 back to Article 56 in a moment. It says, "The better view
22 is that Article 56 assures the primacy of the shelf regime
23 over the EEZ as regards rights to the seabed and subsoil.

24 No matter what its ambit, however, it is clear that it
25 provides no support for the view that the continental
26 shelf has been absorbed by the EEZ and such a view would
27 now appear to be untenable".

28 THE PRESIDENT: You make a distinction, Professor Crawford,
29 between what is a regime of primacy and what trumps?

1 PROFESSOR CRAWFORD: We are concerned with a particular
2 manifestation of a regime of primacy which is what happens
3 when what is indisputably the EEZ of one state comes into
4 being in relation to an area claimed as continental shelf
5 by the other. I will come on at the end of this
6 presentation of the Convention regime to express a view as
7 to how those issues may be resolved. The trumping theory
8 is a manifestation of the broader view that the EEZ takes
9 priority in case of conflict.

10 PROFESSOR LOWE: Could I ask a question of clarification? The
11 passage that you have just cited from Evans has a
12 footnote, footnote 26, to work by Professor Orrego Vicuna
13 and to the Libya/Malta case. Do either of those
14 references make it clear whether the absorption that they
15 are talking about is either in terms of the extent of the
16 rights over the seabed or in terms of the modality of the
17 exercise of the rights over the seabed, which are two
18 different possible interpretations of that phrase?

19 PROFESSOR CRAWFORD: The paragraph from the ICJ judgment is
20 talking in general terms and making it clear that there
21 are two ... I have to say that the paragraph is not
22 conspicuous by its clarity, but it does at least stand for
23 the basic proposition that there are two distinct
24 institutions. The Court, I think, if I may say so, has
25 gone further in later judgments in clarifying the
26 distinct character of the institutions and I will come to
27 those. I am afraid I am going to have to come back on the
28 question of Professor Orrego Vicuna's statement which is
29 quoted in the footnote.

1 PROFESSOR ORREGO: If the Court was not clear that
2 reference must be still more unclear!

3 PROFESSOR CRAWFORD: It is inappropriate for counsel to
4 say that members of the Tribunal have committed a non
5 sequitur, but there are occasions when that may be so!

6 They are distinct zones. They are distinct in their
7 legal character. Let us look at this. This is elementary
8 stuff but I think the Tribunal is confronted with an
9 elementary question. I mean an elemental question. Not
10 an easy question but an elemental one. Part V, the
11 exclusive economic zone is an area beyond and adjacent to
12 the territory sea subject to the specific legal regime in
13 which the coastal state has sovereign rights. I also
14 refer to Article 59, which of course has no parallel in
15 relation to the Continental Shelf.

16 Compare that with the Continental Shelf provisions in
17 Part VI. Article 76, the much more categorical assertion.

18 The Continental Shelf of a coastal state comprises the
19 seabed and its subsoil of the submarine areas etc. The
20 rights of the Continental Shelf of the coastal state as
21 set out in Article 77, sovereign rights for the purposes
22 of exploring and exploiting its natural resources.
23 Exclusive and inherent, not dependent on exercise. They
24 exist as such.

25 Article 78 is significant. Legal status of the
26 superjacent waters. The rights of the coastal state over
27 the Continental Shelf - we say we are the coastal state
28 in relation to these areas - do not affect the legal
29 status of the superjacent waters or the airspace above

1 those waters. Now it is significant that Article 78 was
2 previously Article 3 of the 1958 Convention and the words
3 "as high seas" appeared in Article 3 of the 1958
4 Convention. They were deleted. In other words the
5 intention was that Article 78 would stand as a statement
6 about the legal status of the superjacent waters whether
7 or not they were high seas.

8 Article 81, the coastal state shall have exclusive
9 right to authorise and regulate drilling on the
10 Continental Shelf for all purposes. There is undoubtedly
11 some overlap between the two zones, it is obvious there is
12 an overlap, but it is important to stress two points. A
13 general point and a specific point. The general point is
14 that UNCLOS proceeds by addition and cumulation, not by
15 substitution or derogation, unless it expressly so
16 provides. That is the manner of international law. That
17 is why people talk about proliferation of Tribunals. We
18 get new things but we do not necessarily get rid of old
19 ones. We add but we do not take away generally speaking.

20 The specific point is this. The EEZ is an optional
21 elected zone. You do not have to have it if you do not
22 want it. You do not have to assume the responsibilities
23 if you do not want to have them. If there are no fish in
24 your waters you do not have to go round looking for fish.

25 Not all states have an EEZ. Some have an exclusive
26 fishery zone. Let us say that the EEZ had been an
27 exclusive fishery zone, that is that all the sovereign
28 rights had related to marine natural resources, would it
29 have been suggested that the trumping theory was tenable.

1 In that situation an exclusive fishery zone, my
2 understanding is that the United Kingdom still only has an
3 exclusive fishery zone, and the Continental Shelf could
4 obviously coincide. It is true that there is a question
5 about sedentary species but sedentary species are
6 expressly taken out of the regime of the EEZ and put in
7 the regime of the Continental Shelf, reflecting the
8 history of the matter.

9 The trumping theory must hold therefore that
10 potential EEZ prevails over actual Continental Shelf,
11 whereas the evidence is that this is not at all what was
12 intended, and I refer to the quotation in Attard's book a
13 quotation from an Australian statement during the debates
14 in UNCLOS which is at page 138, tab 40. This is Attard's
15 book on the exclusive economic zone where he quotes an
16 Australian statement at the conference defending the
17 autonomy of the Continental Shelf. The Australian
18 delegate said (page 138) (and he introduces the quote by
19 identifying three trends, I think Evans identifies four
20 but he is talking about the same set of questions, the
21 final and prevailing trend envisaged the two institutions
22 as autonomous. They will be complementary and not
23 mutually exclusive.) Then there is a quotation from the
24 Australian statement: "It is necessary to respect
25 existing sovereign rights to coastal states over the
26 resources of the natural prolongation of their land
27 territories, as in the case of their territories above sea
28 level. ... The unity of the Continental Shelf should be
29 preserved and should be reflected in the relevant draft

1 articles. The rights and duties of the coastal state in
2 relation to the superjacent waters will be dealt with in
3 connection with the proposed 200 mile economic zone.
4 Beyond 200 miles the superjacent waters would of course be
5 part of the High Seas."

6 That is the view that prevailed subject to two
7 provisos. I said last week that there is a single
8 Continental Shelf extending if it extends beyond 200
9 nautical miles. The 200 nautical mile line does not mark
10 a discontinuity in relation to those states that have
11 outer Continental Shelf. Obviously for those states that
12 did not they got it anyway, but that was an addition and
13 not a subtraction. In relation to states that have an
14 outer Continental Shelf it is true that the Convention
15 imposes some additional constraints beyond 200 miles.
16 Indeed there is a potential fiscal liability beyond 200
17 miles, a sort of deal and I do not think anyone could
18 suggest it is customary international law, but a deal as
19 part of the Convention arrangement. On the other hand if
20 you join the Convention you have the advantage of the
21 Annex II Commission, so in effect the tax is what you pay
22 for the price of getting an ergo omnes outer Continental
23 Shelf through the Annex II mechanism.

24 Subject to that it is a single entity, both inner or
25 outer Continental Shelf, where it is a geographical
26 Continental Shelf. I was going on now to the next point
27 which was to look for the textual indications in the
28 Conventions for issues of priority because I think this
29 comes next.

1 To the extent that the Convention directs itself to
2 the issue of priority the indications are that the
3 Continental Shelf has priority. The first I have
4 mentioned is Article 68 sedentary species. Sedentary
5 species are of course part of the living marine natural
6 resources and it would have been in a way more logical to
7 treat them as part of the marine ecosystem and as subject
8 to the EEZ, but no, the prior situation already
9 established where the sedentary species were part of the
10 Continental Shelf was maintained and that is in Article
11 68. It refers to Part VI for sedentary species and the
12 obligations of the EEZ state and the rights of the EEZ
13 state do not extend to sedentary species.

14 12.15

15 Subject to sedentary species the scheme is that
16 broadly the EEZ is living marine resources plus
17 Continental Shelf to those who do not have it with the
18 exception of sedentary species, and the position of EEZ
19 states substantively as to fisheries is jurisdictionally
20 protected by Article 287.3A about which we have heard a
21 lot. That exception from jurisdiction which is not the
22 subject of reservation, it is an exception in the
23 Convention, is the jurisdictional corollary of the
24 substantive rights given by Article 62. Professor
25 Greenwood will come back to this question in refuting
26 Barbados' completely novel interpretation of the
27 jurisdictional exception when he speaks this afternoon.

28 Part VI of course includes Article 83 and although
29 the language of Article 83 is the same as Article 74 it

1 does not mean that the same line will necessarily result.

2 It might, probably will and usually does, but they are
3 distinct provisions. If there was a single line why not
4 have one provision and simply incorporate the other by
5 reference?

6 We tend to address international law issues as though
7 states were always in agreement and not prepared to comply
8 with the law, but that is not the case most of the time.
9 Let us take two states that want to agree and are prepared
10 to comply with the law. Let us assume that they are
11 prepared to agree because the considerations are different
12 or the priorities are different, one state wants a fishery
13 and the other state wants the seabed, perhaps for
14 historical reasons or whatever. They agree that and there
15 are some examples of such agreements. That is all they
16 agree. They agree that one state has seabed rights and
17 one state has water column rights. The convention will
18 solve all their problems. They will have to talk to each
19 other, they will have to co-operate, but there will be no
20 conflict, they will be able to look in the Convention to
21 find who has what right. Which is the coastal state for
22 particular purposes will follow from the provisions of the
23 Convention and the side-by-side operation of the two parts
24 of the Convention. It will be possible to tell who has to
25 do what. Mining on the deep-sea bed, those installations,
26 continental shelf; sedimentary species, continental shelf;
27 fisheries issues, generally speaking pollution - well, all
28 states have an obligation in relation to pollution -
29 generally the coastal state. The coastal state has the

1 control there. No doubt their co-existence will call for
2 co-operation, but this is an UNCLOS commonplace. UNCLOS
3 did not intend to make the EEZ into territory. It
4 intended to make it into a zone in which there were a
5 range of rights held by different states and it did not
6 intend to override the rights held by the continental
7 shelf states.

8 I come then to Article 56, paragraph 3. This is the
9 nearest we get to an express reference to the relationship
10 between the parts. It says, "The rights set out in this
11 Article with respect to the seabed and subsoil should be
12 exercised in accordance with part 6". It is true that
13 that statement is not unequivocal and we have set out in
14 tab 39 the travaux of Article 56, paragraph 3 to which you
15 can refer. An earlier version of Article 56 was more
16 categorical and used the words "subject to" and it was
17 changed. This information is provided in the Virginia
18 Commentary.

19 Professor Reisman draws from that the conclusion that
20 this is about rights which operate, as it were, by way of
21 exception from the general system of predominance of the
22 EEZ. That is not what the Article says. The Article is
23 concerned with seabed and subsoil rights and expressly
24 refers to Part VI. I would accept that in the context it
25 is not a categorical statement of the domination of Part
26 VI, but it certainly cannot be read the other way.
27 Professor Reisman said, "Why does the phrase 'subject to'
28 not appear in Part V?" Exactly the same question can be

1 asked about Part VI. To the extent there is a "subject
2 to", it is a subject to for the benefit of Part VI.

3 The International Court case has established the
4 principle of parallelism and the possibility that
5 boundaries, continental shelf and EEZ boundaries, may
6 exist in different locations. I refer to the Jan Mayen
7 case where the Court said that it had to go through a two-
8 stage process. It is true that in a spirit of realism, if
9 that is the right word, the Court said that, well, what is
10 really at stake is the capelin stock. We will deal with
11 that and then we do not see any reason for not adopting
12 the same solution to the continental shelf. Neither
13 party, of course, argued for a different solution. There
14 was no suggestion that there were, in fact, continental
15 shelf resources at stake. But the principle of the mode
16 of operation of the Court in Jan Mayen, which is not a
17 special agreement case and not a case where a single
18 maritime boundary was mandated, is illustrative. Then you
19 have the subsequent statement, the important statement of
20 the court, in Qatar/Bahrain that the single maritime
21 boundary is an institution of state practice and not of
22 the Convention. "And not of the Convention". Clearly
23 correct. The Tribunal can accept a single maritime
24 boundary mandate, but, if it does accept it, it may have
25 effect on the applicable law.

26 The doctrine on the matter: it is impossible to do a
27 systematic review and, in particular, impossible to do it
28 without referring to works of members of the Tribunal,
29 which in general we have tried not to do. But I would

1 refer you to Evans at page 287, the passage that I have
2 already read to you, where he says that the better
3 interpretation of Article 56.3 is that it subordinates the
4 EEZ to the continental shelf. I also refer you to Attard,
5 at page 139 (tab 40), where he says "Article 56 states
6 that EEZ right with respect to the seabed and subsoil set
7 out in Article 56 shall be exercised in accordance with
8 part 6. It may be argued that these provisions merge the
9 shelf regime with that of the EEZ regime. It is submitted
10 [this is Attard's view] that a more reasonable view would
11 interpret Article 56.3 as recognising the autonomy of both
12 institutions by ensuring that with respect to rights over
13 the seabed and subsoil it is the shelf regime which
14 remains applicable. This view is confirmed by the
15 drafting of the Convention which deals with the EEZ and
16 the shelf in two parts".

17 Finally, and this time Mr Paulsson's thumb-nail is
18 accurate, in a thumb-nail review of the literature, I
19 refer to the brief discussion in Dupuy and Vignes, which
20 is tab 41, where they say at page 342, "It is the
21 continental shelf which has subsumed the seabed of the
22 exclusive economic zone and not the other way around".

23 Professor Lowe asked Professor Greenwood yesterday a
24 question about competing continental shelf rights in an
25 area where state A has outer continental shelf and state B
26 has EEZ and continental shelf. I think that was the point
27 of the question, although it was tied up with a different
28 question which was then the subject of most of the
29 discussion. Our view would be that in that case there is

1 simply a continental shelf. It is true that there is a
2 superjacent EEZ as part of that shelf and there is a
3 question of delimitation of the continental shelf as
4 between the two states. If the continental shelf of state
5 A in that situation is outer continental shelf and state A
6 is a party to the Convention, the various provisions of
7 the Convention would apply. There will simply be an issue
8 of delimitation.

9 It is not suggested that the way in which the
10 Convention dealt with this was ideal. It was obviously
11 the result of a compromise of a series of claimant states
12 coming in and saying that we want this and we want that.
13 So things were added. But in that situation it is poor
14 legal technique to say that things were also taken away,
15 when there is no evidence that they were taken away. All
16 the evidence is that the process was additive, all the
17 evidence is that when it came to core continental shelf
18 rights, which by then included even sedentary species, the
19 continental shelf prevailed.

20 As a matter of general technique, one would do, I
21 think, what the court has been doing which is to try to
22 harmonise the two regimes to the extent possible to avoid
23 deciding more than is necessary and to avoid making
24 general pronouncements. That is, as it were, what one
25 would think would be ordinary judicial techniques. That
26 is no reason to duck the issue. If the institutions are
27 different, it follows that situations can arise in which
28 one will have to prevail over the other. One can

1 minimise the extent where that happens but one cannot
2 avoid it.

3 I would say with great respect to the Tribunal, do
4 not lay down the law which the legislature in the form of
5 the conference expressly refused to do, the rule that the
6 EEZ prevail over the continental shelf. Whenever they
7 confronted that issue, they rejected that rule.

8 Harmonisation is not the same thing as assimilation. I am
9 sorry, I should have said that the earlier versions of
10 Article 56.3 contain the words "without prejudice to" and
11 not "subject to". That was changed to "in the exercise
12 of", in the final version of Article 56.3.

13 We say that the trumping doctrine fails in terms of
14 UNCLOS itself. If UNCLOS was written on a clean sheet, it
15 would still come to the conclusion that a state can have
16 continental shelf and that another state can have EEZ
17 above it. The provisions of Article 78 in particular are
18 significant here as well as Article 56.3. This conclusion
19 is formidably reinforced by the history on which states
20 at the third Law of the Sea Conference, including Trinidad
21 and Tobago, relied. The history of the matter is that
22 there was pre-existing continental shelf doctrine by now
23 well established in existence for the best part of 40
24 years. And that from the point of view *qui prior est*
25 *tempore potior est jure*.

26 Professor Reisman misrepresented my position when he
27 spoke - and I say this with great respect, because it is
28 fascinating to hear a master at work - but he
29 misrepresented my position. I did not say - and of course

1 I did not say - that the continental shelf doctrine from
2 the Truman Proclamation never changed. It went through a
3 pronounced evolution. But the key underlying delimits of
4 the continental shelf doctrine have remained remarkably
5 stable. The doctrine of natural prolongation. The
6 continental shelf appertains to the coastal state
7 independently of any acts by the coastal state of claiming
8 or occupation. A fundamental proposition. A doctrine
9 that delimitation is to be determined by agreement in
10 order to reach an equitable result. Not the principle of
11 equidistance, which was rejected in the North Sea
12 Continental Shelf case. The North Sea Continental Shelf
13 case preferred the Truman Proclamation formulation of that
14 matter over the 1958 Convention. Of course, it changed.

15 The continental shelf changed in numbers of ways over
16 this period, but within a continuous unitary tradition
17 going back to its origins. UNCLOS is not writing on a
18 clean slate, it is a Palimpsest. Compare in terms of the
19 status of the two institutions, the treatment of the
20 continental shelf in 1969 by the Court and the treatment
21 of the exclusive economic zone in 1974, and you have an
22 encapsulation of the difference.

23 Professor Reisman relied on Article 1 of the 1958
24 Convention which of course contained the very
25 unsatisfactory compromise defining the outer edge. The
26 first point to make of course is that Barbados has never
27 been a party to the 1958 Convention and, therefore, that
28 provision has never applied in the relations between these
29 two states. That I think is a minor point. The major

1 point is that it became clear very early on that the
2 exploitability criterion had no logical terminus and the
3 effect, though no one thought that it would eventually
4 happen, would be to divide the whole of the abyssal
5 seabed. Very soon that aspect of the definition of the
6 continental shelf was seen to be an unsatisfactory
7 legislative compromise. It was never incorporated into
8 the customary law of the institution of the continental
9 shelf. I refer, for example, to O'Connell and
10 unfortunately in the time I have not been able to give you
11 the relevant pages in your folder, but the reference is
12 volume 1 of "O'Connell The International Law of the Sea"
13 at page 493, where he says, "When in the mid-1960s the
14 possibility of exploitation of the deep seabed was
15 recognised, the exploitability criterion in Article 1 was
16 seen to raise serious difficulties of interpretation,
17 producing" - and this is at page 494 of O'Connell -
18 "practical extinction of the 200 metre isobar as a
19 conventional limit to the continental shelf". That was in
20 the sixties. If it was practically extinct as a
21 conventional limit in the sixties, imagine its status as a
22 matter of customary law.

23 12.30

24 The map shown by Professor Reisman to which I have
25 taken you again, which of course, as you have seen for the
26 first time this week and as to which we have said we have
27 no immediate comment, did not use the 1958 definition of
28 the 200 metre isobath and that was passe by the 1970s. No
29 one criticised states, for example, Trinidad and Tobago,

1 when it passed legislation in the terms of the outer
2 continental shelf, ignoring any notion of the Article 1
3 definition of 1958. Barbados, of course, has not made
4 these points because its own claim to the continental
5 shelf incorporates a broad shelf doctrine. Indeed,
6 Barbados has less of a geographical shallow continental
7 shelf than Trinidad and Tobago. The continental shelf is
8 about natural prolongation and in the modern law it has
9 never been limited to inshore areas. Nor has there ever
10 been any intermediate definition between the Article 1
11 definition, which has failed even as a conventional
12 definition, and the definition that is now adopted. There
13 was a situation which was potentially open ended to which
14 the 1982 Convention has put a limit and established a
15 mechanism. That is the situation. It is curious,
16 incidentally, that I heard Professor Reisman as saying
17 that the natural prolongation was introduced in 1982, but
18 of course it goes right back to the North Sea Continental
19 Shelf case and implicitly to the Truman Proclamation.

20 The position is, we say, that the broad shelf was
21 part of customary international law before the start of
22 the third Law of the Sea conference and, in any event,
23 before the 1982 Convention entered into force. The 1982
24 Convention codified and clarified the law but did not
25 extend it in terms of the continental shelf to new
26 domains.

27 I refer to someone who I have to say I regard
28 enormously highly in the field of the law of the sea, as a
29 person who combines practical experience and insight, Mr

1 Colson, whose article on delimitation of the outer
2 continental shelf is the best thing that I have seen on
3 the subject. We have put that article in your folder (tab
4 38). It says quite a lot about other things as well, but
5 it seemed best to give you the whole thing. It was not in
6 the bundle of authorities. I refer to what Mr Colson says
7 at page 102 of that article, "It may be useful to recall
8 that the outer continental shelf has been with us all
9 along. It did not just appear with Article 76. Article 6
10 of the 1958 Continental Convention makes no distinction
11 between broad continental shelves and narrow continental
12 shelves, nor does the customary international law of
13 maritime delimitation. Consequently, to think that the
14 delimitation of the outer continental shelf arises only
15 now in the context of Article 76 is a mistake". The same
16 view was expressed by the Newfoundland/Nova Scotia
17 Tribunal which, acting under the 1958 Convention, to which
18 Canada was then a party, delimited the continental shelf
19 off to the outer edge of the continental margin. Mr
20 Colson also concludes in a passage at page 96, which I
21 read in the first round and will not read to you again,
22 but in a situation where the maritime boundary of the
23 continental shelf within 200 nautical miles has to be
24 extended, the practice so far has been to extend it in the
25 same direction. That is what the only judicial decision,
26 though it was a domestic decision, did. We do not suggest
27 that there is any new relevant circumstance and nor, it
28 appears, does Barbados.

1 I emphasise again the bilateral character of the
2 exercise. You are not deciding who has Continental Shelf
3 to the south of the line, but you are deciding that
4 Barbados as against Trinidad and Tobago does not. This is
5 a quintessentially a bilateral exercise which produce
6 equity between the parties, equities with other parties
7 are matters for other proceedings.

8 Mr President, for these reasons we say that the claim
9 line which I justified in the first part of this
10 presentation extends beyond our 200 nautical mile line, is
11 not trumped by the exclusive economic zone of Barbados
12 within 200 miles from their coasts. Our Continental Shelf
13 pre-existing as a matter of international law and not
14 overridden by the 1982 Convention and then continues to
15 the outer margins of the Continental Shelf determined in
16 accordance with international law.

17 Mr President, members of the Tribunal, thank you for
18 your attention.

19 THE PRESIDENT: Thank you so much, Professor Crawford. Will
20 another speaker speak this morning?

21 PROFESSOR CRAWFORD: Yes, Mr Wordsworth is ready with his
22 fishery facts.

23 THE PRESIDENT: Please, Mr Wordsworth.

24 MR WORDSWORTH: Mr President, members of the Tribunal, lunch
25 time approaches and I am afraid fish is on the menu once
26 again. Before I grapple with the factual issues in the
27 western sector for the last time in this case I would just
28 like to stress why this is an important topic, and the
29 answer is quite simple, because the facts so far as

1 concerns the western sector deal definitively with
2 Barbados' western sector case, and this is the simple way
3 through for the Tribunal so far as concerns dismissing
4 Barbados' case on the western sector.

5 The issues of fact in this case are unusually
6 straightforward and Trinidad and Tobago will be asking the
7 Tribunal to make a determination of the relevant facts in
8 the western sector, in particular to find that Barbados
9 has not discharged its burden of establishing the
10 existence of the alleged traditional artisanal fishery off
11 Tobago.

12 Of course that is an issue of mixed fact and law
13 because it brings into the question what is a traditional
14 artisanal fishery and also brings to the fore the question
15 that Professor Vaughan Lowe raised on Monday concerning
16 differences between traditional, habitual artisanal and
17 the like. We will touch on those issues briefly this
18 afternoon. But so far as concerns the facts there is one
19 simple determination that we do request that you make, and
20 this is to find that there was no fishing by Barbados in
21 the area now claimed prior to the late 1970s.

22 We say that is the key fact in this case so far as
23 concerns the western sector. Mr Fietta says, No, no, no,
24 Trinidad and Tobago has simply missed the point. He says
25 our response on the facts rests on a fundamental
26 misconception of Barbados' case for adjustment of the
27 provisional median line. In brief terms what he is saying
28 is "Hang on a second, we have three core facts and you are
29 really only focusing on the first of these core facts, and

1 it is enough for us if we get home on say the second core
2 fact which concerns catastrophe or the third core fact
3 concerning non-exploitation by Tobago's fishermen of the
4 EEZ fishing resource".

5 With that in mind we have to remind ourselves what
6 Barbados' case is really about; what is the special
7 circumstance in this case, what is the case that we have
8 come to meet. If I could ask you to go to your judges'
9 folder and turn to tab 43 in the folder we have set out an
10 excerpt from Barbados' statement of claim. This is the
11 third page in tab 43. About half the way down you see a
12 heading which is "essential facts". Familiar in a sense,
13 it reminds us of the core facts. Here we have the
14 essential facts in the statement of claim. What are the
15 essential facts? Facts under paragraph No 3 is to do with
16 coastal opposition. Then we have the key fact so far as
17 concerns the western sector. Barbadian fisherfolk enjoy
18 traditional fishing rights in maritime territory beyond
19 the territorial seas around the island of Tobago by virtue
20 of Barbados' historical fishing activities there. Facts 5
21 and 6 are not relevant for present purposes. So that is
22 the way that Barbados defined its case in its statement of
23 claim so far as concerns an alleged special circumstance.

24 Nothing whatsoever on catastrophe, nothing whatsoever on
25 non-exploitation by Trinidad and Tobago of the EEZ.

26 If I can ask you to turn over to tab 44 in the
27 judges' folder, here we have a couple of extracts from
28 Barbados' Memorial, and if you could turn to page 2,
29 paragraph 7 at the bottom, and this is page 2 of Barbados'

1 Memorial and is telling the Tribunal what its case is.
2 "It is Barbados' submission that in order to reach an
3 equitable solution in the present case the western part of
4 the Barbados, Trinidad and Tobago median line must be
5 adjusted so as to take account of a special circumstance,
6 the fact that Barbados fisherfolk have traditionally
7 fished by artisanal methods in the waters off the north
8 west, north and north east coast of the island of Tobago.

9 This Barbados fishery off Tobago is based principally on
10 the flying fish, a species of pelagic fish that moves
11 seasonally to the waters off Tobago. The flying fish is a
12 staple component of the Barbados diet and important
13 element of the history, economy and culture of Barbados.
14 Barbadians have continuously fished off Tobago during the
15 fishing season to catch the flying fish as well as
16 associated pelagic species that prey on the flying fish.
17 The adjusted median line which gives effect to this
18 special circumstance is shown on map 3". That is the
19 basis for Barbados' case in the western sector, one
20 special circumstance, alleged traditional fishing.

21 Nothing about catastrophe, nothing about non-exploitation.

22 If I could just emphasise the point a little further
23 and ask you to turn the page to Barbados' conclusion and
24 submission, this is still within the same tab in its
25 Memorial. It opens paragraph 140 by saying there should
26 be a provisional median line and then this second sentence
27 says "this line should then be adjusted so as to give
28 effect to a special circumstance and thus lead to an
29 equitable solution. The special circumstance is the

1 established traditional artisanal fishing activity of
2 Barbadian fisherfolk south of the median line". That is
3 the sole special circumstance that supports Barbados' case
4 in the western sector, and our approach which I think
5 cannot be criticised is to say we will seek to knock out
6 the facts underlying that special circumstance, and then
7 Barbados' case for special circumstance for any deviation
8 of the median line simply falls away, and that is
9 precisely what we have done in our written pleadings and
10 also in our oral submissions of last week.

11 It is for that reason that we have not concentrated
12 to such a degree on catastrophe or non-exploitation,
13 because it simply does not matter. It is not the special
14 circumstance that Barbados has put before this Tribunal.
15 There is an issue here of procedure. If Barbados had made
16 a different case, if it had brought a different special
17 circumstance before the Tribunal, then we would have
18 approached matters quite differently and then I would have
19 spent however long of last week on catastrophe or non-
20 exploitation. There was no need because that was not how
21 Barbados has put its case. It is too late for Barbados to
22 change its case, however it may wish to when it comes to
23 its reply, because it is unable to reply to our position
24 on the facts so far as concerns traditional artisanal
25 fishing in the western sector.

26 Mr President, I do not want this introduction to our
27 case on the facts to sound defensive so far as concerns
28 catastrophe; we have no need at all to be defensive, and
29 if we had such a need if Barbados had a strong case on

1 catastrophe you can be quite sure that in his closing
2 remarks on Tuesday Sir Elihu would not have been trying to
3 downgrade what is required by way of catastrophe as a
4 matter of international law. He would not have been
5 saying to you, "Well, some of the cases have talked about
6 catastrophe, but what is catastrophe; it is only a
7 question of economic and social consequences, so it does
8 not really matter. You can accept something that is very
9 considerably less than catastrophe", although of course he
10 did not tell you what that was.

11 12.45

12 We say so much for Mr Fietta's big point. Trinidad
13 and Tobago has responded to the case that Barbados has
14 brought and Barbados cannot now bring a different case
15 with a different special circumstance.

16 I will come back to the facts on catastrophe after
17 lunch, but I would turn briefly to deal with Barbados' old
18 case, because that is how it is seen by Barbados it would
19 appear, on traditional artisanal fishing, and the few
20 arguments and snippets of evidence that Barbados put in
21 its reply submissions on Monday.

22 First a couple of general points on the quality of
23 the evidence that we have put before you, because Sir
24 Henry Forde took Trinidad and Tobago to task for relying
25 on a combination of local fisheries administrators,
26 scientists and post-graduate students. He said that our
27 mistake was not to rely on the work of historians. When
28 he said "the work of historians", what he meant was the
29 one historian that Barbados had been able to find who says

1 anything that supports Barbados' case. This is a novel
2 submission that you should favour the work of a general
3 historian over the scientists and experts in the field.
4 It is also novel in the sense that it was never made
5 before by Barbados in its written or oral submissions.

6 I would like to take you before the lunch break to Mr
7 Watson's work which is relied on by Barbados. This is at
8 tab 45 of the Judges' folder. This is an extract from the
9 Journal of the Barbados Museum and Historical Society.

10 This is the historical work that you are asked to rely on.

11 Overleaf you will see "notes on the contributors" and you
12 will see at the very bottom - no need necessarily to turn
13 it around - a reference to Karl Watson, who is Senior
14 Lecturer at the Department of History in Barbados. He is
15 not even a professor. Then you turn over the page to the
16 contents and you will see that Barbados is, in fact,
17 relying on an extract from the work "Beneficent Bee",
18 Journal of Robert Poole, edited by Karl Watson. That is
19 about three quarters of the way down the table of
20 contents. Then we turn to the extract that Barbados relies
21 on and this is page 592, two thirds of the way down. You
22 will see Robert Poole is talking about small punch.

23 "Small punch is the common drink of the place, as there
24 are here plenty of fish serving for food. So there are
25 some serving merely to excite curiosity and bespeak the
26 wisdom of God in the beauty and variety of the creation".

27 This is all very interesting stuff. Then we see the
28 basis for Barbados' case. This is the historical work
29 that you are asked to rely on. Editors note: "Of all the

1 English speaking West Indian islands during the colonial
2 period, Barbados had the most developed fishing industry.
3 Whereas the other islands concentrated their efforts on
4 inshore or re-fishing, Barbados from as early as the
5 seventeenth century employed a fleet of ocean-going
6 vessels which engaged in fishing for pelagic or deep
7 waters species. The flying fish industry was so well
8 developed that the common name for flying fish was
9 'Barbados pigeons'." Then Robert Poole continues in
10 wonderful eighteenth century style, going on about the
11 soap fish and other sort of fish. He does not even
12 actually mention the flying fish. And that is it. But
13 you are asked to prefer the few lines of an editor's note
14 in I have to say what strikes me as being a slightly
15 obscure journal by so far as we know a little known
16 historian, we have not been told anything about him at
17 all. You are to prefer that to the reams and reams of
18 scientific and expert reports that Trinidad and Tobago has
19 put into the record in this case. That is a quite
20 extraordinary submission and we ask you in your spare time
21 to just go through volume 5 of our Counter Memorial and
22 volume 2 of our Rejoinder and you will see report after
23 report after report. And look at the references to these
24 reports. You will see that they are very, very thoroughly
25 researched documents. They are bang on point. They are
26 the relevant material and they have not been referred to
27 by Barbados. That is very surprising, on the one hand,
28 but, on the other hand, you can say that it is very
29 explicable because again and again and again they show

1 that there was no fishing by Barbados for flying fish or
2 associated species in the area that it now claims prior to
3 the late 1970s.

4 Mr President, I wonder if that is a convenient moment
5 to break for lunch.

6 THE PRESIDENT: Surely. We will break and resume at ten to
7 three. Thank you so much.

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

9 THE PRESIDENT: Good afternoon. Mr Wordsworth, would you like
10 to resume, please?

11 MR WORDSWORTH: Mr President, with your leave. You will recall
12 that at the end of the morning session, I was looking at
13 Barbados' penchant for what it characterises as
14 historical, evidence, that is the evidence of one
15 historian in this rather bizarre article on the Beneficent
16 Bee. I am sorry, it is not an article, but the 18th
17 century journal, the Beneficent Bee. It is this editor's
18 note that really provides a very substantial foundation
19 for Barbados' case on the facts.

20 I was referring also to the wealth of scientific and
21 expert evidence generated very largely Barbadian fishery
22 officials that Barbados has not taken this Tribunal to.
23 To make that point good, could I ask you to turn to tab 46
24 of your newly-refreshed Judges' folder? At tab 46, purely
25 by way of example, I have included the first page of the
26 2001 report of Mr Parker of Barbados' Fisheries Division,
27 Ministry of Agriculture, but I have also included beyond
28 that first page the references on which he relies in his
29 report. You will see there page after page after page of

1 the references. These are all papers that are essentially
2 bang on point. In fact, here there are 38 references
3 referred to by Mr Parker. They are almost all on the
4 flying fish fishery or issues relevant to the flying fish
5 fishery, and none of this material has been referred to by
6 Barbados. And Barbados is seeking to dismiss all these
7 scientific reports as if they are somehow worthless,
8 somehow not the best evidence. Yet these are very
9 thoroughly researched, very serious papers by people -
10 mainly Barbadian - of the most obvious high standing,
11 because these are by officials in the Barbados Fisheries
12 Division, for example. In a similarly dismissive and
13 inventive vein, Sir Elihu in his closing on Tuesday said
14 that the tribunal should prefer the current witness
15 evidence of Barbados' fishermen over the ample documentary
16 evidence in the contemporaneous reports, as Trinidad and
17 Tobago had not brought along the authors of these reports
18 for cross-examination. He said that Trinidad and Tobago
19 has not introduced this material in the form of witness
20 statements that could have led to the cross-examination of
21 their authors. Later he characterised the wealth of
22 evidence in these contemporaneous reports as being really
23 a form of hearsay, just experts picking up their knowledge
24 from secondary sources. This was not really the sort of
25 material an international tribunal should be relying on.
26 I think that it is true testimony to Sir Elihu's skill as
27 an advocate that he made this submission without, I
28 noticed, going red in the face, as if he actually meant
29 it. For it to be suggested that somehow Trinidad and

1 Tobago should be cross-examining Barbadian officials of
2 the 1940s and 1950s, some of whom are probably no longer
3 alive, that we should be seeking to call as witnesses or
4 to somehow call for cross-examination the current
5 employees of Barbados' fisheries Division or perhaps it is
6 also suggested that we should be calling for cross-
7 examination the Barbadian Minister of Agriculture,
8 Fisheries and Food who signed off on the contents of the
9 1982 FAO report that I took you to last week. Also the
10 Permanent Secretary of the Ministry of Agriculture, the
11 Deputy Permanent Secretary of the Ministry of Agriculture.

12 Somehow Trinidad and Tobago should be calling these
13 people in front of you to testify as to what they said in
14 these reports of 20, 30, 40 years ago or whatever the case
15 might be. This makes absolutely no sense whatsoever and
16 one can also ask the question, well, what on earth could
17 be the point? Apart from anything, if these officials,
18 people like Christopher Parker, people like Mr Willoughby,
19 who are as far as we know still alive, still employees of
20 Barbados' fisheries division, if they had anything to say
21 to undermine what they said in these reports of 2001 or
22 dates prior to the commencement of this litigation, you
23 can be absolutely sure that Barbados would have called
24 these people along, and they would have said in 2001 I
25 said this. I said in 2001 that there was no fishing by
26 Barbadian fishermen in the area to the south of the median
27 line prior to the arrival of the iceboats and the like
28 late 1970s, but I did not really mean that, and I did not
29 really mean that for the following reasons, and you would

1 have some sort of witness statement in front of you to
2 that effect from Barbados. But of course you do not.

3 I hardly, in fact I do not need to remind this highly
4 experienced Tribunal that across the ages both municipal
5 courts and international Tribunals have preferred
6 contemporaneous documentary evidence over witness evidence
7 for the simple reason that the contemporaneous evidence is
8 contemporaneous, it precedes the litigation. It is not
9 evidence given by somebody who is trying to get a point
10 across or whose evidence has been procured for the sole
11 purpose of trying to achieve a certain end in an
12 arbitration or litigation. The author of the
13 contemporaneous report has always been taken as the most
14 reliable and impartial source.

15 In this case this is all the more so, because there
16 is no suggestion that the authors of these reports have
17 any particular axe to grind, they are just scientists and
18 experts doing their job. And not only that, but they are
19 largely of Barbadian nationality. They are largely people
20 who were in the employ or are currently in the employ of
21 Barbados' fisheries division. Why on earth should they be
22 drawing up reports that would be harmful to Barbados'
23 interests, unless what they were saying was true, and of
24 course it is demonstrably true.

25 THE PRESIDENT: Do we have the full text of this article in our
26 pleadings somewhere?

27 MR WORDSWORTH: Mr President, yes. I am sorry I should have
28 given you the reference to it. It is exhibit 24 to

1 Trinidad and Tobago's Counter Memorial and that is in
2 volume 5.

3 THE PRESIDENT: Thank you so much.

4 MR WORDSWORTH: I would stress that that is only an example and,
5 if you go to the other reports of which there are many in
6 volume 5, and also volume 2 of our Rejoinder, you will see
7 the same point. Ample references.

8 I just wanted to return very briefly to Sir Elihu's
9 hearsay point just to ask the question, well, which
10 evidence would any court or tribunal prefer? Would they
11 prefer the evidence of interested witnesses who are
12 speaking to events often before they were born or would
13 they prefer the documentary evidence of disinterested
14 Barbadian fishery officials who were alive at the relevant
15 times and were simply doing their job, their job being to
16 record accurately information as to Barbadian fisheries
17 practices in the 1940s, 1950s and so on. It so happens
18 that that type of information has become relevant in this
19 case, highly relevant in this case. Of course, when the
20 authors were drawing up the reports, they were simply
21 doing their job and that is why you can rely on them. So
22 we say that it is simply not a difficult question. You
23 have incredible witness evidence, the fishermen tales and
24 you have ample contemporaneous documentary evidence.

25 Mr President, the point should also be made that,
26 when it suits Barbados, it dips into the contemporaneous
27 evidence, documentary evidence. It takes a snippet here
28 and a snippet there. You will remember from my
29 presentation last week that actually it suited Barbados to

1 quote just three pages of the Annette Bair thesis of 1962.
2 They just dipped in to take out what it wanted. It did
3 not matter to Barbados that that section of Annette Bair's
4 thesis was wholly irrelevant to the case it has brought
5 before this Tribunal. It was to do with a different
6 fishery, different practices, but nonetheless it put it in
7 and it said to you that, well, you can rely on this, this
8 is evidence that as of 1940s Barbados could indeed travel
9 significant distances with its fishing vessels. So what
10 Trinidad and Tobago is telling you that it could not, so
11 far as concerns the traditional flying fish fishery, can
12 be taken as incorrect. This is a very important point,
13 because what Barbados is trying to do with these snippets
14 from Bair, and there is another snippet argument made on
15 the basis of Brown's 1942 report, is to pull the wool over
16 the Tribunal's eyes. It is trying to say, "Oh well, look
17 as of the 1940s, so far as concerned the red snapper
18 fishery, we could get the required distances", so it wants
19 you, the Tribunal, to think, "Oh well, so Barbadian
20 fishermen were capable of doing these distances.
21 Therefore, whatever we have been told about ice boats not
22 being introduced until the late 1970s is not strictly
23 relevant". Well, that entirely esoteric fact concerning
24 the red snapper industry might have been relevant if
25 Barbados had brought a traditional artisanal red snapper
26 fishery case. Of course, it has not. Everything about
27 this case is the flying fish case. We have looked at
28 coins, we have looked at bank notes, we have looked at the
29 emblem of Barbados. We read Barbados' Memorial, we read

1 its Reply, its case is being brought solely by reference
2 of the flying fish fishery, and then we have a little tag-
3 on of "and associated pelagic species". That is it. That
4 is the traditional artisanal fishing in this case on which
5 Barbados relies. You cannot look beyond that. It is not
6 open to Barbados to say that 50 years ago for a while we
7 fished for red snapper and we could do that with boats, we
8 had means of storage. So what? Absolutely so what? That
9 is not the case that has been brought before you.

10 3.15

11 Just to make that point good, at tab 47 of the
12 Judges' folder we have put in a small extract of Bair, the
13 1962 thesis, just to show how absurd really Barbados' red
14 snapper case is, because you will see at the top of the
15 last paragraph there -and this is from the chapter called
16 "Extraordinary Activities", the Barbadians affected by
17 this fishery were few and its life span short. That is
18 it, that is the red snapper fishery. That is why you do
19 not have a traditional artisanal red snapper fishery case
20 in front of you, because it came and it went. It is
21 simply not open to Barbados to mis-quote Bair and to
22 misquote Brown, to ignore the passages or chapters in
23 these works which deal with the traditional fishery.

24 Something that struck me in Sir Henry Forde's
25 presentation on Monday was the way he picked out on a
26 passage in Brown's 1942 report which is about the red
27 snapper fishery, and that red snapper fishery involved
28 Barbadian vessels essentially fishing from the Port-of-
29 Spain in Trinidad, fishing off Guyana. As it happens the

1 fish were gutted and cleaned by Guyanans and then they
2 were stored, brought back to Trinidad and Tobago,
3 offloaded there, and then Sir Henry made something of the
4 fact that Brown refers to on the way back to Barbados for
5 refitting or the like these vessels made incidental
6 catches, and he said incidental catches, what could these
7 vessels have been catching, it must have been flying fish.

8 Brown does not say this is incidental catches of flying
9 fish, and even if it were so it is so irrelevant because
10 Barbados does not run an incidental non-artisanal
11 fisheries case. It is traditional, it is artisanal, there
12 is no evidence at all before you that this fleeting red
13 snapper fishery was an artisanal fishery, all the evidence
14 points in quite the opposite direction.

15 So we say that this attempt to cherry pick the
16 smallest snippets from Brown and Bair should be rejected
17 outright.

18 I move on briefly to a few remarks on the nature of
19 the iceboat fishery. We get to 1979 and at last the
20 iceboats arrive. Very few at the beginning I have to say.

21 In 1979 there are only two iceboats, and it is only from
22 then that you see this very marked expansion. Mr Fietta
23 has shown you pictures of a couple of iceboats and said
24 these do not look like large scale commercial vessels, how
25 can it be said that this is a large scale commercial
26 industry? We say it is because that is how it is being
27 viewed. Of course there is a question as to who owns
28 these vessels. Supposing you have a vessel which looks to
29 us, it is not hugely exciting, it does not look like a

1 massive factory ship, but supposing one person owns many
2 of these vessels, then it starts to look like a large
3 scale commercial operation. It starts to look much less
4 like an artisanal fishery. At tab 48 I put in a new
5 document. This is one of the many other contemporaneous
6 reports that we have not yet taken you to orally. This is
7 a 1989 status report which was prepared by Trinidad and
8 Tobago's fisheries division in 1989, so that is prior to
9 the 1990 Fisheries Agreement. This is essentially
10 Trinidad and Tobago gathering information at the time of
11 the 1990 Fishing Agreement. I would like you to look at
12 the paragraph starting two-thirds of the way down in this
13 extract. There is reference there to the landings of
14 flying fish and dolphin fish and this is speaking
15 specifically with regard to Barbados. "In Barbados the
16 landings of flying fish and dolphin fish constitute
17 approximately 80 per cent of national landings annually.
18 Capture of these species was traditionally done by day
19 boats". The Tribunal is now familiar with that term.
20 "Until the late 1970s", the Tribunal is now becoming very
21 familiar with that date. "When two distant water vessels,
22 iceboats, with mechanical electronic equipment and
23 increased ice storage initiated the new trend in the
24 Barbados fishery. Prior to this time Barbadian vessels
25 operated off the coast of Barbados and not off Tobago.
26 The new type of vessel allowed fishing beyond a single
27 day, four to 14 days, and greater distance from the coast.
28 Between 1979 to 1988 the number of these vessels
29 increased from two to 75." This is all very familiar

1 stuff. I am not taking you to this document to see this
2 from yet a different contemporaneous author, but to make a
3 slightly different point. "The fishery resources around
4 Barbados cannot economically sustain the operation of
5 these vessels, forcing the operators to exploit the
6 resources occurring off other eastern Caribbean countries,
7 notably in the triangle between Grenada, Trinidad and
8 Tobago and Barbados. A number of these vessels are owned
9 by corporate interests in Barbados." That is why I have
10 taken you to this document, because it shows that this is
11 not just a question of a single fisherman with a single
12 fishing boat and therefore you can take this as being
13 traditional artisanal activity, even though the boats have
14 got a bit larger, even though the boats now have large ice
15 storage on board; no, something quite different is
16 happening. Mr Parker in his 2001 report actually notes
17 that only about 8 per cent of the vessels are owned by the
18 fishermen that operate them. It is quite different to the
19 impression that Barbados is trying to give you. The
20 reference for that is Counter Memorial volume 5, exhibit
21 24, page 13.

22 Mr President, last week I took you to the report
23 prepared by two of Barbados' own experts, Mr Hunte and Ms
24 Oxenford, which said that the fisheries are moving from
25 small-scale artisanal towards large-scale commercial
26 operations. We have actually put that in at tab 49 of the
27 Judges' folder. There is no need for you to turn to it
28 now if you do not wish, because I took you to it last

1 week. That is 1989 that they are charting this move from
2 small scale to large scale.

3 Also a document that we have not taken you to,
4 Judges' folder tab 50, is another document by Trinidad and
5 Tobago's Fisheries Division, a lady called Elizabeth
6 Mohammed, writing in 1997. You will see half way down the
7 page that she discussed the introduction of the ice boats.

8 Here she is talking about Tobago's ice boats, a subject
9 of which you have obviously heard nothing from Barbados,
10 because Barbados wishes to give you the impression that
11 Trinidad and Tobago does not exploit the EEZ resource
12 beyond its 12 mile territorial sea. She says that between
13 1993 and 1997 six ice boats are known to have operated in
14 the Tobago drifting fishery. Ice boats are semi-
15 industrial vessels capable of staying out at sea for up to
16 eight days at a time. "Semi-industrial" - and semi-
17 industrial is precisely the same characterisation that we
18 see again in a later Trinidad and Tobago report of 2002
19 that Barbados relies on (exhibit 58 of Barbados Memorial)
20 which again I took you to last week. For that reason it
21 is not in the Judges' folder. But there the description
22 "semi-industrial" is given in relation to Barbados' ice
23 boat fleet. It is Barbados' semi-industrial ice boat
24 fleet. So for these reasons we say that, no, this is not
25 a traditional artisanal fleet at all where fishermen are
26 owning and operating their own vessels. That is the
27 exception. This is a large-scale operation. This is a
28 semi-industrial fleet.

1 Mr President, I now move on to look at the so-called
2 second core fact of Barbados' case. This is catastrophe.
3 The catastrophe theory.

4 The first and, in a sense, the easiest proposition is
5 that, of course, this catastrophe is self-induced. The
6 complaint that Sir Henry made and it was also made by
7 Professor Reisman was that Trinidad and Tobago had never
8 proposed a meaningful regime of access. We say that that
9 is just simply unsustainable. I am not going to take you
10 through the evidence again, as I took you through much of
11 it yesterday, and I think that Professor Greenwood will be
12 picking up on this point in his remarks later this
13 afternoon, but you will recall Barbados' own statement of
14 2nd February 2004 when it says that the negotiations are
15 going well. There is no hint there that there are any
16 irreconcilable difficulties; no hint in the draft
17 fisheries agreement that I took you to yesterday that
18 there are irreconcilable differences.

19 Other points made by Sir Henry. We had said in the
20 first round, "Hang on a second, why can you not produce an
21 expert report or something to substantiate this impending
22 catastrophe?" And it was said, "Oh well, we cannot do an
23 expert report, we cannot get the data, the fishermen will
24 not tell us where they catch their fish". Well, Mr
25 President, that, it is submitted, is no answer at all.
26 Where a state is seeking to gain a huge swathe of maritime
27 territory on the basis of an alleged catastrophe, it must
28 come to the Tribunal with an expert report and, if it
29 could come to the Tribunal with an expert report, it would

1 have done. The simple fact is that there is no
2 catastrophe. There are some affidavits by fishermen which
3 in different shades of language describe different shades
4 of impact, but that is all there is before you. If
5 Barbados had put in an expert report, no doubt we would
6 have put in an expert report in response. But Barbados
7 has not undertaken that step and I submit that it is
8 because it could not.

9 3.30

10 To look at a few of the figures that have been banded
11 about, Sir Henry said that fishing employees make up 10
12 per cent of the workforce. And that does sound like lot.

13 Then, of course, according to Professor Reisman the
14 figure was 6 per cent. It sounds like a bit less.
15 According to Barbados' Memorial at paragraph 41, and this
16 is in your Judges' folder at tab 51, the figure is in fact
17 approximately 4.2 per cent. So not 10 per cent, not 6 per
18 cent, but, in fact, 4.2 per cent approximately. Of
19 course, this is the figure for the whole maritime sector.

20 It is not the figure just for the flying fish and
21 associated species fishery. This is the whole maritime
22 sector, 4.2 per cent are employed.

23 So really one has to cut through the elements of
24 exaggeration here, the sort of it was this big, to get to
25 the hard figures. Another important hard figure is that
26 the GDP as a percentage for the whole fisheries sector -
27 again this is the whole fisheries sector - is 0.6 per
28 cent. So how huge is this? How significant is this for
29 Barbados' GDP? We do not know the precise figure.

1 Barbados has not told us. But we know that it is less
2 than 0.6 per cent. Again, these hard figures do not point
3 to a catastrophe.

4 Another interesting - I cannot quite characterise it
5 as a fact, but a factor that came out of Professor
6 Reisman's speech on Tuesday was that the catastrophe was
7 based on the fact that 60 vessels were not being allowed
8 access to Trinidad and Tobago's EEZ. So just 60 vessels.

9 It does not sound like a lot. I am not sure quite where
10 that figure has come from. It is the figure that is
11 mentioned in the November 2003 draft fishing agreement,
12 the Tribunal will recall, so maybe it comes from there.
13 But does a limitation on the areas that 60 vessels have
14 been fishing illegally since 1986 constitute a
15 catastrophe? That sounds to me like a very, very unlikely
16 proposition.

17 Mr President, I move now to Barbados' third core
18 submission which is on non-exploitation of the EEZ by
19 Trinidad and Tobago. This was something of a special
20 subject for Mr Fietta, because he felt that he was on
21 slightly stronger ground and, again, he said that Trinidad
22 and Tobago is missing the point. They are putting all
23 this evidence before you that shows that there is a real
24 importance to them of their traditional artisanal fishery,
25 but it is only a traditional artisanal fishery that goes
26 up to the 12-mile limit and no further.

27 We say that, with respect, Mr Fietta is missing the
28 point. It is interesting that we are both making
29 submissions by reference to the same document which is the

1 2000 FAO report on Trinidad. I am specifically dealing
2 with fisheries. This is at tab 52 of your bundle. If I
3 could ask you to turn to page 4 of this document, you will
4 see why we are fishing vessels passing in the night at the
5 moment. At the top under "state of the industry", we see
6 the FAO report saying "the inshore artisanal fisheries
7 resources are considered to be very heavily fished to the
8 point of being over exploited, while the offshore
9 resources, although under exploited by national vessels,
10 are under some threat from illegal fishing". That is
11 really the key point here. We do not contest the fact
12 that there are more Barbadian ice boats than there are
13 Trinidad and Tobago ice boats. There are. Barbados has
14 got 190 and we have around ten. That is a significant
15 difference, but, nonetheless, as this FAO report shows,
16 there are Tobagonian fishermen fishing in the EEZ. We do
17 have ice boats and what we also have is a very heavily
18 fished area within 12 miles of the coast which is in
19 danger of being over exploited. Now, Trinidad and Tobago
20 wishes to pursue its development of this very important
21 resource. It is a very important resource, and Barbados
22 no longer seems to take issue with this, very important
23 for Tobago, but the resource is dwindling within 12 miles
24 and Trinidad and Tobago inevitably will wish to develop
25 further, and is developing further, and Barbados is saying
26 that, no, you are not allowed to because we got there
27 first, because we got there 20 years earlier. We submit
28 that that is a very poor argument.

1 Mr President, I move now to deal briefly with the
2 issue of recognition. I have already addressed yesterday
3 Robert Volterra's arguments concerning the 1990 fishing
4 agreement, at least so far as concerns interpretation.
5 There is just one other point that I would like to pick up
6 on, which is the attempt to down play the 1990 fisheries
7 agreement on the basis that it was an agreement that
8 Barbados somehow entered into in some form of duress. It
9 was said by Mr Volterra that Barbados only entered into
10 the 1990 agreement because it was desperately seeking a
11 way to stop Trinidad and Tobago from arresting and
12 harassing its artisanal fisherfolk. Professor Crawford
13 has been talking this morning about refashioning
14 geography. This is a very nice example of Barbados
15 refashioning history. The negotiations for the 1990
16 fishing agreement started in 1986, i.e. the year that
17 Trinidad and Tobago declared its EEZ - nothing surprising
18 about - that and they continued for four years until
19 1990. There was never any suggestion by Barbados at the
20 time that Trinidad and Tobago was harassing or unlawfully
21 arresting Barbados' artisanal fishing folk. There is a
22 passage in our Counter Memorial that deals specifically
23 with this allegation as paragraphs 50-52 of our Counter
24 Memorial. I will not go through the details now, it has
25 not been challenged.

26 Also a rather obvious point is that although this is
27 a throwaway remark we entered into the 1990 fishing
28 agreement but we did not really want and we only did it
29 because you were harassing us. Of course there is no

1 attempt whatsoever to try and situate that throwaway
2 remark in the context of the Vienna Convention on the Law
3 of Treaties, no attempt to slot it in so that it could be
4 said that somehow this was a treaty entered into pursuant
5 to coercion or one of the other provisions such that it
6 could be seen as an invalid agreement. Nothing of that
7 nature at all.

8 I move on to the issue of arrests. Arrests are
9 important because this is the lawful exercise by Trinidad
10 and Tobago of a right to police its EEZ and it is a lawful
11 exercise that is not opposed by Barbados.

12 Mr Volterra admitted, it has to be said somewhat
13 through gritted teeth, that during two periods of crisis a
14 number of warnings did advise the fisherfolk of Barbados
15 not to venture south of the median line, and it is true
16 that a number of warnings did refer to the waters of
17 Barbados as being to the north of the median line. So
18 what happens when Trinidad and Tobago arrests a Barbadian
19 vessel? Instead of there being a protest by Barbados,
20 "You are acting unlawfully, how can you be arresting
21 Barbadian vessels in Barbados' EEZ", no, quite the
22 opposite. Barbados tells its fishermen do not go beyond
23 the median line because Barbados' waters stop at the
24 median line.

25 Mr Volterra goes on to say, Well, yes, of course we
26 did say that, but this only happened once or twice and the
27 relevant statements were not made by the Ministry of
28 Foreign Affairs, they were only made by the Ministry of
29 Agriculture, so they do not really count. Well, that is

1 an argument which could best be described as untenable,
2 but to satisfy Mr Volterra I put another example into the
3 judges' folder where there is a clear recognition of
4 Trinidad and Tobago's sovereignty to the south of the
5 median line made by Barbados' Ministry of Foreign Affairs,
6 so we switch gear to the gear that Mr Volterra wants us to
7 be in. This is tab 53 of the judges' folder, and this is
8 a document which precedes the 1990 fisheries agreement.
9 It is tab 53. It is a note from the Barbados High
10 Commission in Port-of-Spain dated 20th May 1988. It is
11 very important because it is covering the gap between
12 1986, when Trinidad and Tobago introduces its 1986 EEZ
13 Act, and 1990 when the fishing agreement is made. It just
14 shows you what is happening in the meanwhile.

15 "The Ministry of Foreign Affairs presents its
16 compliments to the Ministry of Foreign Affairs and
17 International Trade of Trinidad and Tobago and has the
18 honour to refer the latter to yesterday's discussion which
19 inter alia included the proposed Fishing Agreement between
20 Trinidad and Tobago and Barbados. The Ministry of Foreign
21 Affairs of Barbados now submits to the Ministry of
22 External Affairs the following which would form the basis
23 for new and continuing relations between the two
24 countries.

25 "(i) Barbados recognises the rights of Trinidad and
26 Tobago over her territorial sea and Exclusive Economic
27 Zone." Well, that is about as good a recognition I think
28 one can get.

29 3.45

1 "(ii) It accepts the fact that Trinidad and Tobago
2 cannot satisfy its total fishery needs from the waters
3 under the control of Trinidad and Tobago". Well, that is
4 important, too, because that completely undermines
5 Barbados' third core fact, because that is saying that,
6 oh, we recognise that you have the need also to be fishing
7 beyond the 12 miles.

8 "(iii) Notwithstanding (ii) above, Barbados would
9 greatly appreciate if the government of Trinidad and
10 Tobago would consider increasing the number of fishing
11 boats from 10 to 15 so as to permit Barbadian fishermen to
12 fish in these waters". And so on.

13 There is nothing hugely relevant to take you to on
14 the next page. Perhaps paragraph ix, "The Minister of
15 Foreign Affairs is optimistic that the Minister of
16 External Affairs and International Trade will address
17 these issues with the urgency and sincerity that both
18 Ministers consider to be important".

19 There we are. We have shown you Ministry of
20 Agriculture. Now we have shown you Ministry of Foreign
21 Affairs. That, of course, leads into again a very clear
22 recognition that is found in the 1990 fishing agreement
23 itself.

24 Two other minor points to sweep up on recognition,
25 the Tribunal will recall the document that we put in at
26 Judges' folder at tab 54 which is a report of a 1994
27 meeting, April 1994, between Trinidad and Tobago's
28 Minister of Foreign Affairs and Mr Da Silva of the High
29 Commission for Barbados. This is the report on the

1 meeting following the arrest by Trinidad and Tobago of
2 certain Barbadian vessels.

3 As I showed you last week, this shows Barbados in no
4 sense protesting at the arrest, recognising that the
5 arrest was lawful but asking Trinidad and Tobago as
6 something of a favour, because of the need to maintain
7 friendly relations, not to forfeit the vessels of the
8 fishermen concerned.

9 Mr Volterra asked you to reject this on the basis
10 that it was a self-serving unilateral record. That was
11 the first time you had heard that submission. I think in
12 a way it was directed at Sir Arthur, because Sir Arthur
13 had asked a question of this document, was it a joint
14 report or not? To which I said that it is Trinidad and
15 Tobago's record. It has never been suggested that it is
16 inaccurate.

17 It is now not really suggested that it is inaccurate.
18 There is no evidence whatsoever, there is no basis for
19 doing so. You are asked to dismiss it as self-serving and
20 unilateral. Of course, it is unilateral. It is made by
21 Trinidad and Tobago. Is it self-serving? Why on earth
22 would it be self-serving? This is simply a record of a
23 meeting eleven years ago, long, long before this
24 litigation. Here is somebody who is just simply taking a
25 record of a meeting with the Barbadian High Commissioner.

26 There is no purpose in it being self-serving. It says
27 what it is said and there is no basis whatsoever of
28 challenging it.

1 Another last point on recognition of Trinidad and
2 Tobago's EEZ to the south of the median line. Mr Volterra
3 took you to the first round of maritime negotiations. You
4 will see there is an extract of tab 55 of the judges'
5 folder. What he did was take you to the last sentence on
6 the penultimate paragraph. He said to you, "Look at this.
7 Look at what Trinidad and Tobago is doing. It is
8 misquoting what our position was at this meeting".
9 Barbados did not recognise any special circumstances as
10 put forward by Trinidad and Tobago which would justify a
11 deviation from the median line position. So he says, "Ha,
12 Trinidad and Tobago has been twisting things. It is not a
13 question of our not recognising any special circumstance
14 at all, it is just those put forward by Trinidad and
15 Tobago". I invite you, Mr President, members of the
16 Tribunal, to read the paragraph in full, particularly in
17 fact the preceding sentence. "Essentially, the Barbados
18 position is that the principle of equidistance would be
19 the most equitable way of determining a boundary between
20 the two countries. Indeed, this principle is enacted in
21 the Marine Boundaries and Jurisdiction Act (1978)". That
22 is Barbados' Act which it now seeks to shy away from, so
23 far as concerns the position south of the median line.
24 "Barbados considered that the relevant coastlines were
25 opposing coastlines and not adjacent coastlines as
26 proposed by Trinidad and Tobago. Barbados therefore
27 proposed a 'median line' solution for arriving at a
28 boundary". Our position is good. As of the first round,
29 Barbados' position was that it wanted a median line all

1 the way through. It was not advocating any special
2 circumstances at all. You can see that that point
3 continues at the bottom of this extract, because then
4 Barbados is taking the position that the median line
5 should go all the way to a tri-point with St Vincent and
6 the Grenadines. Unfortunately, we have not put the
7 paragraph in at the beginning of the following page, but
8 that is the point that is then made.

9 Mr President, I move briefly on to hydrocarbon
10 activities and then turn to the questions raised by the
11 Tribunal.

12 Hydrocarbon activities. There is a rather peculiar
13 spat about the map that was attached to Barbados' letter
14 of May 1998, seeking permission to carry out seismic work
15 to the south of the median line. We have submitted the
16 map which is at tab 56 of the Judges' folder. Mr Volterra
17 took the rather strange position that, in fact, this map
18 was not an authentic map. If I can just quote his exact
19 words, "It seems just too coincidental that there also
20 appears to be an unrelated sketch superimposed on to this
21 map that just happens to coincide with Trinidad and
22 Tobago's current claim in this arbitration. You can see
23 the line heading off what seems to be an 88 azimuth from a
24 point A. It just appears to be and there is no
25 explanation for this at all. Now, Mr President, Barbados
26 submits that this map must be rejected as inauthentic and,
27 at the very least, without proper provenance".

28 Well, you can see I hope from the map on your screen
29 that that is a bizarre submission, because it has nothing

1 whatever to do with our point A. It has nothing
2 whatsoever to do with the 88th degree azimuth. What those
3 areas are, as could be deduced from rather minimal
4 forensic study, is shown on page 1 of this fax, where you
5 can see Conoco saying, "As requested, please find
6 accompanying map showing our seismic programme outline and
7 the two lines in Trinidad's waters."

8 So it is as clear as day that this map came from
9 Conoco who was of course Barbados' licensee. You can see
10 that the map from the fax marks is of the same date as the
11 Conoco fax. No basis whatsoever for saying it is
12 unauthentic. This is the map with the original May 1998
13 letter. Barbados did not include a map, Trinidad and
14 Tobago sought a map and the map came from Conoco. It
15 shows the seismic areas for which Barbados was requiring
16 permission.

17 Mr President, I come to the questions for the parties
18 that were raised by the Tribunal at the close of last
19 Friday's hearing. The first of these concerned the
20 locations at which Barbados flying fish vessels were
21 apprehended by Trinidad and Tobago since 1970. We have
22 put a map into the judges' folder for you at tab 57 which
23 shows the various locations. There are gaps in this
24 because it does not show arrests, for example, in 1989 and
25 1994 but it gives you the basic area and in fact there is
26 no great difference between the parties on this map.
27 Barbados put in a very similar map and of course you would
28 not expect there to be any great difference on this
29 matter. That is question 1A.

1 Question 1B was the areas north of the median line
2 where flying fish are normally to be found before and
3 after their migration to waters south of the median line.

4 Barbados in its response to this focused on its affidavit
5 evidence and also for the very first time they referred to
6 their expert report prepared for the purpose of this
7 litigation which is at tab 88 of Barbados' Memorial. I
8 would like to take you to pages 19 and 20 of this report
9 which is in the judges' folder, which actually shows that
10 the Tribunal's question is based on a misconception. This
11 is a misconception that Barbados is keen to propagate, but
12 the question assumes a migration from Barbados essentially
13 to Trinidad and Tobago. It is not the evidence at all.
14 You can see that from paragraph 36 of this report,
15 Barbados' expert report, where the authors describe a
16 tagging exercise that they carried out before this
17 litigation in the mid 1990s and half way down paragraph 36
18 you can see they are recording inter-island movements
19 between most of the islands, flying fish moved from waters
20 off Dominica south towards Grenada south and St Lucia,
21 from waters off Barbados in all directions to waters off
22 Dominica, Martinique, St Lucia, Grenada and Tobago, and
23 from waters off Tobago to waters off Grenada, Barbados and
24 St Lucia. To see that pictorially if I could ask you to
25 turn to the next page which is the map or diagram of the
26 experts.

27 This is worth focusing on for a short while. It is
28 still tab 58 and it looks like this. This map is worth a
29 first look so far as concerns this Tribunal because it is

1 Barbados' expert map and they have not taken you to it.
2 What this shows so far as concerns Barbados you can see
3 the tagging study shows the flying fish around Barbados,
4 not going south but in fact going primarily in a north
5 westerly direction to St Lucia. If you go down to Tobago
6 and you see the other area or one of the other areas where
7 tagging has taken place, you see a shift of the flying
8 fish from Tobago to Barbados. This is quite the opposite
9 of what your question presumed to be the case. Barbados'
10 own evidence showing a migration during the season from
11 the south to the north.

12 4.00

13 PROFESSOR LOWE: Can I just ask a question of clarification
14 on that, and we will read the relevant passage of the
15 report but you may know the answer immediately. What is
16 the significance of the point from which the fish migrate,
17 is that where they simply happen to have been tagged or is
18 it a spawning ground or what?

19 MR WORDSWORTH: They are obviously selected tagging sites.
20 As to whether they are spawning grounds I am not sure that
21 they are but I can deal with that on the hoof if I could
22 have a copy of the relevant annex. Volume 4 of Barbados'
23 Memorial. Mr President, members of the Tribunal, on the
24 page preceding the page we put into the Judges' folder,
25 there is a description of the tagging study, studies of
26 fish movements rely heavily on tagging studies since most
27 fish cannot easily be viewed, and then there is a
28 description of the type of tags that are used. But it

1 does not seem to specify precisely why the tagging
2 locations were chosen.

3 PROFESSOR LOWE: If I could direct you to another sentence
4 which may trigger the recollection or the thought. In
5 paragraph 38 it starts with the sentence "the study was
6 not designed specifically to detect consistent directional
7 patterns of movement and none were apparent". In the
8 light of that I wonder what the map shows.

9 MR WORDSWORTH: You mean effectively is it worth anything at
10 all. The answer to that is why would we on the Trinidad
11 and Tobago side in fact be particularly bothered by that.
12 It is Barbados' case that there is a pattern of movement
13 of the flying fish from north to south. The expert
14 evidence on the basis of this map points to quite the
15 opposite, but what the expert evidence does not say is
16 that there is a movement north to south.

17 I have to say that that particular sentence is a
18 rather bizarre sentence, because it goes directly against
19 paragraph 37 which is the preceding paragraph, where as I
20 understand it the authors are saying that although there
21 are a low percentage of recaptures this is a significant
22 percentage, this is something that you can deduce, make
23 inferences from, and they suggest that this type of
24 movement is likely to be typical of individuals in the
25 population.

26 Perhaps it may be the answer is essentially what this
27 study shows is something which is neutral, flying fish
28 were clearly travelling in northerly, southerly, easterly
29 and westerly directions with some fish moving from one

1 country to another whilst others were doing the reverse.
2 For example movement was detected from Barbados to Tobago
3 and vice versa. So that implies that the case before you
4 is one of migration from north to south according to
5 Barbados, and that case is not supported by its own expert
6 evidence.

7 Question 1C raised by the Tribunal which is the area
8 south of the median line where during the appropriate
9 seasons there are typically large concentrations of flying
10 fish. Barbados' response to this was the flying fish to
11 the north and north west of Tobago in and outside the 12
12 mile limit, and it referred to their map of arrests as
13 being a sort of concentration of the flying fish. I think
14 what we would add to that is the picture again from their
15 expert report, which is the next two pages in the Judges'
16 folder, where you see Fig 1 which shows relative
17 abundances of adult flying fish recorded by visual survey,
18 and then on the next figure overleaf you see relative
19 abundance of juvenile flying fish. That gives you sort of
20 further indications as to where the flying fish are
21 located to the south of the median line.

22 Mr President, the fourth question you asked, question
23 1D, the areas south of the median line where Barbadian
24 fisherfolk have since 1970 made most of their catches of
25 flying fish. This is primarily, of course, a question for
26 Barbados and Barbados was fairly reluctant to give you any
27 information, but they said, again, north and north west of
28 Tobago, as confirmed by the pattern of arrests that they
29 put in the figure before you. They are now looking at

1 this arrest pattern to show you where the fish are and to
2 show you where the fish are being caught, which is perhaps
3 amusing to the extent that their position, of course, last
4 week was that there was no pattern of arrests at all,
5 whereas they now seek to make use of that pattern.

6 Mr President, there is one outstanding question that
7 I would like to turn to very briefly. I apologise that I
8 have overrun. This is Professor Lowe's question which is
9 as follows. Could you say something about the way in
10 which the boundaries of zone A were drawn to the east of
11 those areas and how it came about that, on the basis of
12 the pattern of fishing, zone A has the shape that it has?

13 You have got a three-page answer in from Barbados. One
14 and a half pages of which give Barbados' response to that
15 question. It has very little indeed to say in response to
16 that response. In paragraph 4, Barbados says that the
17 claim line shown on map 3 of Barbados' Memorial, that is
18 its claim line, the famous bird with the beak, was drawn
19 on the basis of the factual data in this evidence. I
20 simply draw to your attention that the factual data to
21 which Barbados is referring here is one or two comments by
22 its fishermen referring to fishing to the north and north
23 west and not east of Tobago and also the Oxenford report,
24 of which I have just shown you extracts, which by no means
25 could help you in drawing the rather extravagant beak that
26 is Barbados' claim in this arbitration.

27 Mr President, members of the Tribunal, that brings my
28 remarks to a close. There is something that I can hand up
29 with your leave, which are copies of our further response

1 to the question raised by Professor Orrego that I dealt
2 with to a degree yesterday evening.

3 Mr President, thank you very much for listening.
4 Issues of fact are not always the most amusing issues that
5 come before international tribunals. Thank you all.

6 THE PRESIDENT: Thank you so very much, Mr Wordsworth. Shall we
7 now adjourn for coffee until twenty-five after.

8 **(Short Adjournment)**

9 THE PRESIDENT: Please, Professor Greenwood.

10 PROFESSOR GREENWOOD: Thank you, Mr President. When I was a bar
11 student, I was told that the art of the advocate is to
12 keep your Tribunal's interest when you speak on a Friday
13 afternoon. At 4.30 on a Friday requires the very greatest
14 of the art of the advocate, so I will do my best. I can
15 however offer you some good news on two scores. The first
16 is that there will be nothing more to go in the Judges'
17 folder. The folders are now closed. The rain forests
18 have suffered enough. The second thing is to say that
19 mine will be the last speech apart from the Attorney
20 General's closing submissions.

21 My task is to respond to the legal arguments relating
22 to the western sector, most of which have been deployed by
23 Professor Reisman.

24 Mr President, at the outset, we say that it is
25 essential to keep in mind two fundamental points which
26 have already been mentioned but which do require
27 repetition. The first is that, in the western sector, we
28 are dealing with an area where it is common ground between
29 the parties that the maritime spaces lie between the

1 coasts rather than off them, therefore, the median line is
2 not only the starting point but it is also the normal
3 finishing point, and that a powerful case is needed to
4 justify a departure from the median line.

5 That much is common ground, for example, between Mr
6 Paulsson and myself; whether it is common ground between
7 Mr Paulsson and some of the other members of his
8 delegation, I leave for him to decide rather than
9 commenting myself.

10 But we would say that a particularly powerful case is
11 going to be necessary for a departure from the median line
12 as radical as the one for which Barbados contends that
13 would give 84 per cent of the area in question to
14 Barbados.

15 Secondly, Mr President, although this part of the
16 case has turned on arguments about fish, the western
17 sector is not just about fish, arguably it is not even
18 primarily about fish, there are other resources, actual
19 and potential, in that area. I will just show you one
20 final map on this point, if I may. It appears at tab 31
21 of today's Judges' folder. This is a composite map. The
22 beak is one that you have seen many times before.
23 Superimposed upon it are concession areas and blocked
24 areas from map number 4 in Trinidad and Tobago's Counter
25 Memorial. The critical point is twofold. First of all,
26 that the pink blocks up in the right-hand corner which
27 clearly overlap very significantly with the beak claimed
28 by Barbados are areas where Trinidad and Tobago considers
29 there is at least hydrocarbon potential and it has put

1 these blocks up for tender. There were not any tenders
2 for them, partly because of the current dispute, but it
3 would be Trinidad and Tobago's intention to tender again.

4 There is certainly a belief that continental shelf
5 resources may well be there. Secondly, the grey areas -
6 and you see a little group of them bunched down at the
7 bottom end of the beak - those are areas which even in
8 1987 had existing production sharing contracts.

9 Mr President, it is very important to keep in mind
10 that this is an area which by the late 1970s there was no
11 contest about it being part of Trinidad and Tobago's
12 continental shelf. Barbados did not contest that at the
13 time. It has not sought to contest that proposition when
14 it has been put to it in these hearings.

15 What we say, Mr President, is that in drawing up a
16 single maritime boundary the Tribunal cannot simply look
17 at the arguments about fish. It has to take account of
18 all the special circumstances. That includes all relevant
19 factors here, including the continental shelf rights, the
20 continental shelf resources. In this respect, Mr
21 President, this case is completely different from Jan
22 Mayen where, with the exception of the capelin stock,
23 there were no other resources in the area. Capelin was
24 what the case was about.

25 Mr President, Barbados' case for an adjustment of the
26 median line depends entirely on fish or, to be more
27 precise, it depends upon the traditional rights of its
28 fishermen to access to a species of fish in this area -
29 claimed traditional rights. The question for the Tribunal

1 is whether the rights and interests claimed by the
2 Barbados fishing industry are sufficient to justify what
3 amounts to not an adjustment but a complete abandonment of
4 the median line, which also has the effect of handing
5 Barbados all the other continental shelf and exclusive
6 economic zone rights in the area. We say that Barbados'
7 arguments have come nowhere near justifying such an
8 extraordinary result.

9 I want to make one point quite clear. In his second
10 round speech, Mr Fietta said, on day 5, page 52, "Only one
11 of the parties in this case, Barbados, submits the
12 proposed delimitation line of the other, Trinidad and
13 Tobago, would be radically inequitable". Mr President,
14 that is absolutely wrong. We have said all along that the
15 proposed boundary line submitted by Barbados, the beak
16 that goes around most of the island of Tobago, is indeed
17 radically inequitable. This is not a case where, as he
18 puts it, only one state is making an assertion of that
19 kind.

20 Mr President, Mr Wordsworth has already demonstrated
21 to you just how threadbare the Barbadian case is on the
22 facts. I want to look as briefly as I can at the legal
23 aspects and show you that it is just as deficient there.

24 Let us begin by considering what exactly is the
25 nature of the rights on which Barbados relies. We know
26 that it has nothing to do with historic waters. Barbados
27 has expressly disavowed that. Professor Reisman on Day 5
28 at page 58. We know that it is not about effectivities
29 south of the median line. There have not been any.

1 Barbados has never sought to argue that there are, and it
2 has never really sought to deny that until at the very
3 earliest 2002 it had never sought to put forward any kind
4 of claim to the EEZ south of the median line in the
5 western sector.

6 Nor is it claiming traditional exclusive rights. In
7 the answer to Professor Lowe, the long answer that was
8 handed in yesterday, at page 26 you will find this
9 statement. "Barbados is not claiming adjustment of the
10 median line on the basis of an exclusive right, but rather
11 as a special circumstance caused by the obstruction of the
12 enjoyment of a non-exclusive right which is founded upon
13 the traditional artisanal activities of its fisherfolk in
14 the waters concerned off Tobago." That echoes what was
15 said in Barbados' Reply. I quote from paragraph 123 of
16 the Reply. "It was Trinidad and Tobago's recent and
17 obdurate interference with the artisanal fishing rights of
18 Barbadian fisherfolk and uncompromising refusal to reach
19 an equitable arrangement that created this special
20 circumstance".

21 Mr President, that is of vital importance. Barbados'
22 entire case turns on this assertion, that there was an
23 uncompromising refusal by Trinidad and Tobago to reach an
24 equitable arrangement. On Barbados' own terms, there was
25 no such uncompromising refusal. There is no special
26 circumstance and, in the words of the same paragraph,
27 "Barbados would have neither the ground nor need to insist
28 on an adjustment of the median line so as to enclose the
29 waters in question in Barbados' EEZ".

1 That way of putting the case was confirmed by
2 Barbados in its second-round speeches. Of course, it has
3 two very important significances. First of all, it shows
4 you that Barbados is, in fact, conceding that in the
5 ordinary course of things, the shelf and waters in that
6 area south of the median line would pertain to Trinidad
7 and Tobago. In other words, it is accepting that, in
8 principle, prima facie, this is Trinidad and Tobago's
9 shelf and Trinidad and Tobago's EEZ. Otherwise there
10 would be no point in putting its argument the way in which
11 it has done.

12 That of course accords with Barbados' own practice
13 until 2002 and arguably even later than that. It also
14 accords with the way Barbados has framed its legal
15 reasoning in these pleadings, where it draws very heavily
16 on Sir Gerald Fitzmaurice. Fitzmaurice's thesis in that
17 article from the 1950s is built around three elements. I
18 cite them as adapted by Barbados to its argument in this
19 case. Principle 1: "Before the waters in question became
20 part of the EEZ, while they were still high seas,
21 Barbadian fisherfolk had established a non-exclusive right
22 to fish there".

23 The second principle: "That right survived the
24 proclamation of the EEZ so that it became a right,
25 opposable to Trinidad and Tobago, to be granted access to
26 those fishing grounds.

27 Principle 3: "A denial of that right constitutes a
28 special circumstance which warrants adjustment of the
29 median line".

1 That leads on to the second significance in the way
2 that Barbados puts its case. It means that even putting
3 that case at its highest, assuming every other proposition
4 of law and fact in Barbados' favour, Barbados' case stands
5 or falls on whether there has been a denial of that right
6 of access, that claimed right. In asking that question,
7 we need to consider what is the content of the right
8 claimed. We know that it is not exclusive. Others were
9 as entitled to fish in those waters as the Barbadians
10 were. It cannot be a sovereign right, because it was
11 originally vested in individuals. It cannot be an
12 unlimited right. In other words, a right to access on
13 whatever terms the fishermen themselves demand, however
14 unreasonable. We know that, because the whole concept of
15 an exclusive economic zone is based around a delicate
16 balance of rights and responsibilities for the coastal
17 state. For example, under Article 56, 1(a) of UNCLOS, the
18 coastal state has a right, one might perhaps say it was a
19 responsibility, too, of "conserving and managing the
20 natural resources". That right and responsibility is
21 further developed in Article 62 which speaks of the duty
22 to promote the optimum utilisation of the living
23 resources, without prejudice to the conservation
24 provisions of Article 61.

25 Obviously, if there is a conservation or stock
26 management problem in a particular EEZ area, speaking now
27 hypothetically rather than in relation to any particular
28 waters, whatever non-exclusive right of access might have
29 survived into the EEZ area, and just assuming for the

1 moment that there is such a right and that it can survive
2 in the way Barbados is suggesting, it must be subject to
3 those obligations on the coastal state properly to manage
4 and conserve the living resources. It cannot possibly be
5 the case that the rights pre-existing, non-exclusive
6 rights for fishermen are converted in the EEZ area into a
7 right to fish the stock dry within five years,
8 irrespective of anybody else's concerns, irrespective of
9 the maritime environment. It is simply impossible that
10 that should be the case.

11 Put at its highest, it could only be a right of
12 access on reasonable terms, terms that take account of
13 other considerations, such as conservation, stock
14 management, the rights of other fishermen and so on.

15 4.45

16 I would also mention in this context the provisions
17 of Article 56, paragraph 1(b) of UNCLOS, which provides
18 jurisdiction for the coastal state over the maritime
19 environment, in particular dealing with matters such as
20 pollution. You have heard a lot about what the two
21 countries depend upon. One thing that Barbados and Tobago
22 have very much in common is a heavy dependence upon
23 tourism and the prime tourist areas in Tobago are on the
24 Caribbean coast. So a massive pollution 12 miles out to
25 sea would have horrific effects on the economy of Tobago,
26 but it is suggested that that is something that has
27 nothing to do with Trinidad and Tobago in law at all, that
28 would be a matter that would be vested entirely in
29 Barbados' jurisdiction to deal with.

1 Given that it is clear that the coastal state must be
2 entitled to impose reasonable limits on the activities of
3 fishing vessels, even if one accepts the non-exclusive
4 rights thesis, the question then becomes, has Barbados
5 shown - it is clear that the burden of proof is on
6 Barbados - that Trinidad and Tobago has unreasonably
7 refused access? Has there been in the words of the Reply,
8 an uncompromising refusal to reach an equitable
9 arrangement? Mr President, there is not a shred of
10 evidence before this Tribunal that would entitle you to
11 make a finding that there has been such an uncompromising
12 refusal. This point was raised in round one. What was
13 said about it in round two? Almost nothing. The nearest
14 that Barbados came to dealing with this issue, and it is
15 the closest it has ever come to dealing with it, is the
16 comment of Professor Reisman (day 5, page 11) "The
17 problem", he said, "was and is that Trinidad and Tobago's
18 terms were not acceptable to Barbados. Barbados believed
19 that the terms did not meet its minimum requirements and
20 entitlements". But that is not proof of anything, with
21 the greatest of respect. Moreover, the question is not
22 whether this was a deal acceptable to Barbados - and I
23 will come in a minute to just how unacceptable it might
24 have been - the question is whether it was a deal that was
25 manifestly unreasonable. That is a rather different
26 standard. Barbados is not the sole judge of what is
27 reasonable and states involved in negotiations often take
28 different views on this point. What exactly was wrong
29 with the terms being offered by Trinidad and Tobago,

1 which one can see in the draft fishing agreement put
2 forward by Barbados, with Trinidad and Tobago's
3 amendments, that is appended to the report of the final
4 round of fisheries negotiations? Mr Wordsworth took you
5 to it this morning. I am not going to go back there as
6 time is pressing. But it is in volume 2, part 2 of the
7 Trinidad and Tobago Counter Memorial. In tab 2 (v).

8 Trinidad and Tobago have accepted by this stage
9 Barbados' demand that up to 60 boats from Barbados should
10 be licensed to fish in the waters off Tobago. The 1991
11 agreement provided for a maximum of 40. While Trinidad
12 and Tobago's opening position was 30, Barbados' opening
13 position was 60. So Barbados demanded 60, Trinidad and
14 Tobago offered 30 and Trinidad and Tobago compromises on
15 60, exactly what Barbados was asking for. And exactly the
16 figure that Professor Reisman mentioned in his speech in
17 the second round. I quote it yesterday. 60 Barbadian
18 iceboats with crews of three to five fishing in these
19 waters are not going to interfere with anybody else's
20 rights. 60 boats is exactly what Trinidad and Tobago was
21 offering.

22 There is no evidence in the record of an obvious
23 dispute about the licence fee. The season in which boats
24 from Barbados were to be permitted to fish was obviously a
25 matter of difference between the two countries, but it is
26 plain that each had shifted its position to move closer to
27 the other. The area within which fishing was to be
28 permitted was a bone of contention, largely because
29 Barbados took the position that until the maritime

1 boundary was sorted out it was impossible to stipulate
2 what the area was to be. But there is no evidence in the
3 record to suggest that Trinidad and Tobago was trying to
4 deny Barbadian fishermen access to the main fishing
5 grounds, the area where the arrests have taken place,
6 which is clearly the main area of interest and the only
7 one that Barbados is seriously pressing upon you, as its
8 answers to Professor Lowe's questions made clear.

9 Mr President, the existence of an unreasonable denial
10 on the part of Trinidad and Tobago is an indispensable
11 element of Barbados' case. The burden of proof is upon
12 Barbados. Has it satisfied you that Trinidad and Tobago
13 was engaged in an uncompromising refusal to reach an
14 equitable arrangement? If it has not satisfied you of
15 that then Barbados' claim in the western sector has to
16 fail for at least three reasons. First of all there
17 simply would not be any interference with the rights of
18 its fisherfolk, which is the whole basis of the Barbadian
19 claim. The right if it exists at all is a right of access
20 on reasonable terms. If there is no uncompromising
21 refusal of reasonable terms there has been no interference
22 with that right.

23 Secondly it would fail because Barbados cannot show a
24 catastrophic consequence if there has been a willingness
25 on Trinidad and Tobago's part to reach an equitable
26 arrangement. The only catastrophic consequence for
27 Barbados' fishing industry would be the result of the
28 Barbadian government's refusal of the terms offered by
29 Trinidad and Tobago. Barbados' fisherfolk might well have

1 a complaint against the government of Barbados; that is
2 their affair and the government of Barbados' problem. It
3 is not something for which Trinidad and Tobago can take
4 the blame. To talk about a self induced catastrophe in
5 this context in an inter state dispute has to refer to a
6 catastrophe induced by the government of the other party.

7 Thirdly, Mr President, there has simply been no
8 special circumstance. The special circumstance that
9 Barbados is claiming which it has been very coy about
10 defining until the last round, the special circumstance is
11 the denial. No denial, no special circumstance, no
12 grounds for an adjustment to the median line. That is the
13 way my learned friend have put their case. They cannot
14 alter it now. It is simply not enough, Mr President,
15 members of the Tribunal, for Professor Reisman to say
16 Trinidad and Tobago's terms were not acceptable to
17 Barbados. That is the only evidence you have been
18 offered. It is simply not enough.

19 And it is more than just a burden of proof point. It
20 is necessary to ask three substantive questions here.
21 First of all was there a reasonable prospect of agreement
22 between the two states? Barbados' Ministry of Foreign
23 Affairs thought so; two weeks before they broke off
24 negotiations on the fisheries agreement they issued a
25 press statement talking about the considerable progress
26 that had been made, and Ms Marshall when this was put to
27 her in cross-examination admitted that at the meeting
28 between the two Prime Ministers she remembered something
29 of the kind being said by Prime Minister Manning to Prime

1 Minister Arthur about how they could reach agreement on
2 fisheries in advance of resolving the dispute on the
3 maritime boundary. So whether you accept that the
4 maritime boundary dispute was described as intractable or
5 not the fisheries agreement, the fisheries issue, was not
6 intractable at all and it has never been suggested by
7 Barbados on the basis of any contemporary evidence that it
8 was.

9 The second question; would the terms offered by
10 Trinidad and Tobago have constituted an unreasonable
11 denial? We say on the basis of the evidence that the
12 answer to that is plainly No. The burden is on them to
13 show that they were unreasonable, but we say burden of
14 proof aside, the answer is perfectly clear.

15 Thirdly the vitally important question; if Barbados
16 had to accept the terms offered by Trinidad and Tobago
17 with no further negotiation at all would the acceptance of
18 those terms have produced a catastrophe in the Barbadian
19 fishing industry? Of course they would not, Mr President,
20 and there has been not a jot of evidence from that side to
21 suggest otherwise. They have not even addressed the
22 question. Those witness statements are all about the
23 effects of a total ban, they are not about the effects of
24 fishing off Tobago on the terms being offered by the
25 government of Trinidad and Tobago.

26 Mr President, members of the Tribunal, unless those
27 points can be overcome Barbados' case in the western
28 sector cannot succeed even on its own terms. We say that
29 Barbados has simply not discharged the burden placed upon

1 it and we ask you to find that Barbados has failed to
2 discharge its burden first of all of establishing as Mr
3 Wordsworth put it this morning, the existence of
4 traditional artisanal fishing off Tobago, but quite
5 separately even if there was such traditional artisanal
6 fishing Barbados has failed to discharge the burden of
7 establishing the existence of an unreasonable denial of
8 access.

9 I could rest the case there and you might well feel
10 that it would be desirable that I should given the
11 lateness of the hour, but for completeness sake let me
12 also add that Barbados' case would fail on a host of other
13 grounds as well. Length of time, and I will take them
14 fairly quickly.

15 The answer put in rather late in the day to Professor
16 Lowe's question about how long do you need for historic
17 traditional or habitual fishing rights. First of all
18 Barbados accepts that habitual fishing is not enough. So
19 that one we can forget for the moment. Page 29 of their
20 lengthy answer. In relation to traditional and historical
21 fishing they say the test is flexible in international
22 law, it has to take account of all the relevant
23 circumstances. But they say "what can be said with
24 confidence is that the temporal requirement for creation
25 of a non-exclusive right is not as demanding as that
26 applicable in the case of exclusive rights required by way
27 of prescription" Mr President, just in passing, members
28 of the Tribunal might feel that there is something faintly
29 circular about that. A non-exclusive right can be created

1 faster than an exclusive one. A denial of a non-exclusive
2 right becomes a special circumstance which justifies
3 exclusive rights over the zone in question. It is the
4 legal equivalent of those Marks and Spencer's instant
5 meals which are prepared for you in advance and all you
6 have to do is shove them into the microwave. Now that I
7 live a bachelor life for part of the week in London I am
8 deeply in debt to Marks and Spencer's instant meals. But
9 they do not work, Mr President, as a juridical
10 proposition. They do not have the nutritional value. My
11 wife maintains they do not have the nutritional value for
12 me in other respects either. But the answer about how one
13 has to take account of flexibility and the relevant
14 circumstances also marks Barbados' ambivalence about the
15 way they put their own argument. We have had in effect
16 three different varieties of the traditional fishing
17 argument. Variation 1 as pleaded traditional, going back
18 over the centuries they say, but it does not have to go
19 back over the centuries. We started with 200 or 300
20 years. By the time we get to the answers to the questions
21 put in last night it seems that 20 years might be
22 sufficient. Tradition comes quickly in Barbados it would
23 appear. We say that first of all the word traditional and
24 the word historic for that matter suggests that you have
25 to go back a considerable time, and we would say at the
26 very least tradition takes more than a generation. My
27 learned friends in their answer to Professor Lowe refer to
28 the Fisheries Jurisdiction case, 38 years of fishing
29 activity, actually 38 years of stable fishing activity in

1 the case of Germany and rather more than in relation to
2 actual fishing, and a good 50 years at least for the
3 United Kingdom. They say there is no suggestion in
4 Fisheries Jurisdiction that that was marginal, that that
5 just satisfied the test. Mr President, there is no
6 suggestion in Fisheries Jurisdiction that that comfortably
7 satisfied it and was well in excess of what was required
8 either. It was simply a proposition of fact, 50 years or
9 thereabouts was enough. They are not really now relying
10 on 50 years.

11 Secondly we say that those traditional fishing
12 practices have got to predate the arrival of the exclusive
13 economic zone.

14 5.00

15 That is an inherent part of the Fitzmaurice argument;
16 the non-exclusive fishing rights have to grow up before
17 the change in status which they are said to effect. They
18 cannot grow up afterwards. So what is necessary is 50
19 years or more of traditional fishing practice before the
20 proclamation of the exclusive economic zone by Trinidad
21 and Tobago in 1986.

22 There is more even than that. Fitzmaurice's argument
23 turns on the notion that people who practice fishing or
24 whatever in a particular area when they are free to do so
25 and everybody understands they are free to do so, should
26 not be prejudiced by the unforeseen arrival on the scene
27 of a new legal regime. But we know that Barbados'
28 introduction of iceboats stems from the very end of the
29 1970s. That will only give them at maximum about seven or

1 eight years before Trinidad and Tobago proclaims its
2 exclusive economic zone. That is plainly not enough. But
3 what was happening in those seven or eight years? Were
4 people assuming that the high seas regime was going to go
5 on forever? of course they were not; The notion of the
6 EEZ was already well established by the late 1970s, even
7 though Trinidad and Tobago had not yet proclaimed one.
8 And no Barbadian could have been in any doubt about that,
9 because Barbados' own legislation claimed an exclusive
10 economic zone in 1978, about the same time as the first
11 ice boats arrive on the scene. Lastly, Mr President,
12 surely, for these purposes, traditional artisanal fishing
13 has got to be on a substantial scale. There has to be a
14 fair amount of it. Two ice boats introduced in the late
15 1970s, a gradual increase in their number during the early
16 1980s. That does not come anywhere near the practice
17 necessary to show traditional artisanal fishing. That is
18 variation number one.

19 Then we come to variation number two, canvassed by
20 Sir Elihu Lauterpacht in his closing submissions, and also
21 advanced by Barbados in its written answer to Professor
22 Lowe. I will quote from that answer. "Barbados contends
23 that the circumstances of this case demonstrate that the
24 fishery concerned would, even if it had been established
25 for some 20 years, as in Jan Mayen, still be sufficient to
26 have generated traditional fishing rights in Barbados".
27 Mr President, what circumstances in this case demonstrate
28 that extraordinary proposition? Certainly nothing that
29 Barbados has put before you. How can 20 years generate

1 traditional fishing rights? They did not do so in Jan
2 Mayen. Jan Mayen is not a case about traditional fishing
3 rights. Which period of 20 years, before or after the
4 creation of the exclusive economic zone? After, it would
5 appear. Certainly, that is what Sir Eli was suggesting.
6 As far as he was concerned, the years between the
7 introduction of the first ice boats and the statement of
8 claim being filed by Barbados in these proceedings would
9 be quite enough, thank you. Well, they will not. During
10 this period those waters have been declared to be EEZ by
11 Trinidad and Tobago. During the course of the calendar
12 year 1991 you have a fishing agreement under which
13 Barbadian fishermen could not have built up any new rights
14 for the precise reason that there is Article 11 there
15 which my learned friends have quoted to you ad nauseam
16 during these proceedings. As for most of the rest of the
17 period, any fishing that is done is illegal under the law
18 of Trinidad and Tobago and fishermen have been arrested
19 and prosecuted for violating Trinidad and Tobago's laws.
20 Illegal activity of that kind does not build up
21 traditional artisanal fishing rights either.

22 Lastly, Mr President, we have the Fietta approach.
23 Variant three. Now, Mr Fietta in his submission said of
24 Barbados' three core facts, we do not actually need to
25 prove the first core fact. That is what prompted my
26 remark yesterday, two out of three ain't bad. Taken to
27 its logical conclusion, what does Mr Fietta's proposition
28 mean? Provided that Barbados can show, first of all, that
29 denial of access to these fishing grounds would cause

1 serious hardship in Barbados, and, secondly, Barbadians
2 being allowed to fish there will not cause serious
3 hardship in Tobago. That is enough. You do not have to
4 have any past practice of Barbadian fishing there at all.

5 This is in reality the redistribution argument that Sir
6 Eli so very cleverly described as a commonplace and
7 suggested that it was ripe for reconsideration.

8 You have lots of resources, we need those resources,
9 you have enough already, so the maritime boundary should
10 be changed to take account of that.

11 Mr President, if anything is clear in the law of the
12 sea, it is the proposition that reasoning is not
13 acceptable. It has never been accepted by any of the
14 courts or arbitration tribunals that have decided these
15 cases and it has been repudiated whenever it has been
16 raised. That is the proposition that one has to start
17 from.

18 Mr President, I would just say a word about the test
19 of the evidence that Barbados puts before you. The
20 reference to Barbados' own reports which Barbados have
21 been so reluctant to show the Tribunal and produced the
22 extraordinary comment that Trinidad and Tobago was somehow
23 acting meanly in putting Barbados' officials' words before
24 you when Barbados had no opportunity to cross-examination
25 its officials here to find out what they really meant.
26 But Barbados has cross-examined its officials, I assure
27 you. Barbados' officials who wrote those reports, if they
28 are still alive, will, I am sure, have been asked by the
29 Government of Barbados whether there was not perhaps a

1 chance that maybe the might have been mistaken. And, if
2 they had been mistaken, we would have heard about that, Mr
3 President, believe me.

4 The point about this is that it is no good counsel
5 for Barbados saying, "Look, take the word of the
6 fishermen. They go out there in their boats. They know.
7 These officials don't". What is being claimed here are
8 sovereign rights of Barbados. It may be that those
9 sovereign rights are said to be derived from non-exclusive
10 rights vested in the individual fisherfolk, but in these
11 proceedings between two states in a claim for a single
12 maritime boundary by Barbados, Barbados is asserting
13 sovereign rights. When a state does that, it cannot
14 simply brush aside what its own organs of Government have
15 said in public, especially when they have said it not
16 once, not in a casual remark to the newspaper, but time
17 and time and time again in one study after another. That
18 is evidence against interest, Mr President, and we say
19 that it is absolutely compelling evidence.

20 Let me turn from that to the catastrophe issue. Mr
21 Wordsworth has shown you that there is simply no evidence
22 to sustain that, but let me just say a word or two about
23 what is the test which has to be applied, the legal
24 standard. Now, in approaching the question of what is the
25 relevant standard, we say that it is necessary to start
26 with the emphatic and unanimous rejection by international
27 tribunals of the redistribution theory. Somehow you can
28 pray in aid the maritime spaces to redress the economic
29 injustices of the land. Precisely what you cannot do.

1 Once one starts from that proposition, we say that it has
2 to be the standard laid down in the Gulf of Maine case, of
3 an economic catastrophe, in order to vary a single
4 maritime boundary. It is not enough to have some more
5 limited test of economic difficulty. Sir Eli said in a
6 very colourful way, "Where did this catastrophe test come
7 from? Plucked out of thin air by the chamber in the Gulf
8 of Maine case". It was not plucked out of thin air in the
9 Gulf of Maine case. It is actually cited by the
10 International Court of Justice a whole generation earlier.
11 Thirty three years earlier in the Anglo/Norwegian
12 Fisheries case. That historical line to it is picked up
13 in the Eritrea/Yemen award. Gulf of Maine, Eritrea/Yemen,
14 Anglo/Norwegian, they all point, Mr President, in the
15 direction of a catastrophe test, not some lower standard
16 of economic difficulty or economic hardship.

17 Mr President, what about Jan Mayen? Jan Mayen has
18 nothing whatever to do with the hardship and catastrophe
19 issue at all. The Jan Mayen case was completely different
20 from the case before this Tribunal. The Jan Mayen case
21 has to be seen in the context of a disparity in coastal
22 lengths between the two territories that was vast. If
23 there is a disparity in coastal lengths here, it is in
24 favour of Trinidad and Tobago, not in favour of Barbados.

25 Jan Mayen was an uninhabited territory with a couple of
26 dozen scientists on it and nothing else. Greenland had a
27 population of 55,000, very substantially dependent on
28 fishing. Here you have Barbados with 250,000 people,
29 Tobago with 55,000 and Trinidad and Tobago as a whole with

1 a million and a quarter. There were no other resources in
2 the area in the Jan Mayen case. And the location of the
3 capelin stocks was such that it was really one particular
4 segment of the area between the median line and the 200-
5 mile arc from the Greenland coast that was particularly
6 significant. That is not the case here. One of the
7 problems with the flying fish is that they appear to fly
8 wherever they feel like and they do not fly in the same
9 places every year. There is nothing equivalent to the key
10 zone in the Jan Mayen case.

11 Lastly, Mr President, the legal appraisal of
12 Barbados' third core fact that Tobago has no interest in
13 the fishing resources in this area. Mr President, let us
14 start from substance. Trinidad and Tobago has a great
15 deal of interest in the resources of the continental shelf
16 and the exclusive economic zone all around the island of
17 Tobago. The "no Tobagonian interest" argument carefully
18 sweeps to one side anything to do with the continental
19 shelf, the seabed, the subsoil and, indeed, any of the
20 fish there, other than flying fish and the dolphins that
21 prey on them. All the other resources that there might be
22 an interest in are just quietly shoved under the carpet.

23 Secondly, Mr President, as a matter of a legal
24 standard, it is not enough to show that at this particular
25 moment in time Tobagonian fishermen fish mainly within the
26 12-mile territorial sea. The FAO report that Mr
27 Wordsworth took you to today, which is in Barbados'
28 submissions, as an attachment to Barbados' Memorial, shows
29 graphically that the fish stock within the 12-mile area

1 off the coast of Tobago is in danger of exhaustion, is in
2 danger of depletion, and that, if the Tobagonian fishing
3 industry is to have a future, it has to go outside that
4 area. Barbados is going to prevent it having any chance
5 of doing that. But, when one talks about exclusive
6 economic zone rights, Mr President, it is not just what is
7 being done at the moment that matters, the resources of
8 the EEZ are also all about the potential for future
9 development of a territory. In fact, Mr President, that
10 is very largely why we have an EEZ in the first place,
11 because coastal fishing stocks were becoming depleted to
12 the point that it became necessary for states to look
13 further and further out to sea from their coasts. It also
14 ignores the significance of tourism and other industries.

15 I have mentioned that briefly.

16 Mr President, the fact of the matter is that no court
17 or tribunal changed with a maritime boundary delimitation
18 case has ever varied the single maritime boundary between
19 two inhabited territories on fisheries grounds alone. Let
20 alone varied it to the sort of extent that Barbados is
21 claiming here. No court or tribunal has ever deprived an
22 inhabited territory of almost all exclusive economic zone
23 and continental shelf other than in enclave cases, like
24 the Channel Islands in the Channel Continental Shelf
25 arbitration. And what a controversial arbitration award
26 that was. There is no enclave here.

27 Thirdly, Mr President, no court or tribunal has ever
28 treated fisheries as prevailing all other considerations

1 when there is reason to believe that there are other
2 resources at issue in the area in question.

3 Lastly, Mr President, no court or tribunal has ever
4 handed jurisdiction over pollution in an area 13 miles
5 from the coast of one state to the authorities of another
6 state more than 60 miles away at its closest point. None
7 of this has ever been done before, Mr President, and we
8 say there is absolutely no justification for doing it in
9 this case. The proper way of protecting whatever
10 interests fishermen of all nationalities have in the
11 flying fish fishery off Tobago is by means of access
12 within a regime where the coastal state, Trinidad and
13 Tobago, as required by UNCLOS, manages and conserves the
14 living resources properly. That is precisely what
15 Trinidad and Tobago offered to Barbados and there is not
16 the slightest reason to think that it was an unreasonable
17 offer or that it would have caused a catastrophe for
18 fishing communities in Barbados. As the learned Agent of
19 Trinidad and Tobago will make clear in his closing
20 submissions, Trinidad and Tobago remains willing to
21 negotiate such a regime of access today.

22 Mr President, that is what I wanted to say about the
23 western sector. Will you please just allow me five
24 minutes on jurisdictional questions? I apologise for
25 taking time over this. It should have been dealt with by
26 Mr Wordsworth yesterday, but, of course, we did not get
27 the response from Barbados to Professor Lowe's questions
28 until too late to enable us to deal with it yesterday.

1 This hefty document, 31 pages long, contains the
2 answers to three questions. The second question I have
3 already dealt with, about habitual and traditional
4 historic fisheries. I would like to start with the third
5 answer on Article 297.3(a) of UNCLOS.

6 This goes to whether the Tribunal has jurisdiction to
7 award Barbados not an adjustment of the median line but a
8 regime of access, invented by the Tribunal on the hoof, it
9 had not been given any indication by Barbados of what it
10 might want. In fact, Barbados has never put forward a
11 claim of this kind. It just made clear that it would not
12 be too unhappy if you were to give it to it anyway. It
13 stamps on this issue throughout these proceedings as being
14 that of somebody standing under the mistletoe at
15 Christmas, hoping to be kissed, rather than somebody who
16 is willing to actually go out and make a claim properly.

17 Mr President, where are they going to get standing
18 under the mistletoe waiting to be kissed? Is anyone going
19 to come up and oblige them? Well, Mr President, we say
20 that unfortunately they cannot. Mistletoe, it has to be
21 remembered, Mr President, as Mr Volterra smiles broadly,
22 is of course poisonous if it is taken in the wrong way.
23 Article 297.3(a) says this. "Disputes concerning the
24 interpretation or application of the provisions of this
25 Convention with regard to fisheries shall be settled in
26 accordance with section 2, except that the coastal state
27 shall not be obliged to accepted the submission for such
28 settlement of any dispute relating to its sovereign rights
29 with respect to the living resources in the EEZ or their

1 exercise, including its discretionary powers for
2 determining the allowable catch, its harvesting capacity,
3 the allocation of surpluses to other states and the terms
4 and conditions established in its conservation and
5 management laws and regulations".

6 Mr President, according to Barbados, the dispute in
7 the western sector was caused by the uncompromising
8 refusal of Trinidad and Tobago to reach an equitable
9 arrangement for access by Barbadian fishermen. Suppose
10 that Barbados had chosen to commence proceedings against
11 Trinidad and Tobago to achieve a regime of equitable
12 access. This Tribunal would not have had jurisdiction to
13 hear that case. Article 297.3(a) is as clear as crystal
14 on that point. What answer does Barbados offer? It says
15 that, well, first of all, fascinatingly, you can get
16 around this problem because of Article 293.1. Article
17 293.1 of the Law of the Sea Convention says that a
18 tribunal must apply the Convention and other rules of
19 international law that are not incompatible with it. Mr
20 President, quite how that gets around the problem of 297.3
21 is a mystery to me. 297.3 is a provision of the
22 Convention which Article 293, paragraph 1 directs this
23 Tribunal to apply. So plainly there is a clear renvoi
24 there from 293, general provision, to 297, a more specific
25 one.

26 5.15

27 The second part of the answer is this. 297.3(a) only
28 applies where the claiming state recognises that the
29 waters in question are part of the EEZ of the defending

1 state. So those who drafted at great time and difficulty
2 Article 297.3(a) might as well have saved themselves the
3 time and effort. It is very easy to get round. Instead
4 of bringing an action saying that you are unreasonably
5 denying access to my fishermen and we want you to give us
6 that access, what you do instead is that you say that you
7 are unreasonably denying access to my fishermen. That
8 creates a special circumstance which entitles me to have
9 the whole of the area that you claim as your EEZ. I can
10 have that dispute adjudicated upon by a Part XV tribunal.

11 And, by the way, you can give me as my remedy something I
12 am not asking for, something I would not be entitled to
13 bring before you as a dispute, but you can give it to me
14 anyway. If that is the law, Mr President, the law really
15 is an ass, as Dickens put it. It is not an ass, Mr
16 President. It is a perfectly coherent jurisdictional
17 scheme in Part XV. Barbados is seeking to drive a coach
18 and four through it by a mixture of alchemy, if one can
19 mix one's metaphors on this, and a reasoning that is
20 frankly untenable, to put it at its most charitable.

21 Then, Mr President, there is the answer to Professor
22 Lowe's first question. The interim response lasts for
23 something like 25 pages. Mr President, when members of
24 the Tribunal read this answer, I am sure that they will
25 find it very educational when they read it. We certainly
26 did. They might like to keep in mind what the question
27 was, because that disappears from view on about page 2.
28 Could you summarise for the assistance of the Tribunal the
29 precedents that there are for tribunals that are being

1 asked to delimit boundaries, giving remedies other than
2 the delimitation of a boundary - tribunals that have been
3 asked to delimit boundaries, giving remedies other than
4 the delimitation of a boundary. It is not it is true
5 limited to maritime boundaries, but given the context in
6 which the question was asked we assume that Professor Lowe
7 had maritime boundaries primarily in mind, if not
8 exclusively so.

9 But what are the precedents that Barbados has given
10 to you? It gives you six precedents. Eritrea/Yemen. Not
11 surprising that they make a lot of Eritrea/Yemen. When
12 you read the ten pages or so of quotations and argument
13 about what the Tribunal in Eritrea/Yemen meant keep in
14 mind the comment of Barbados in relation to Trinidad and
15 Tobago's response to a question posed by Professor Orrego,
16 which was also delivered yesterday. It makes the point
17 there that what Barbados accuses Trinidad and Tobago of
18 trying to do is to introduce additional pleading that goes
19 beyond the scope of the question asked. Keep that test in
20 mind, Mr President, members of the Tribunal, and you might
21 like to have that passage in the comment open when they
22 read the response by Barbados to Professor Lowe's
23 question. Eritrea/Yemen, a case that was indeed about
24 delimitation of a boundary and delimitation of a boundary
25 was what the Tribunal gave. The dispositive mentions
26 nothing else at all. It is true that there is a
27 substantial passage in the award which refers to access to
28 fisheries, but the dispositive, the remedies granted, no
29 mention of it at all.

1 Fisheries jurisdiction, hardly a boundary case in any
2 event, Mr President. Qatar/Bahrain, a boundary case but
3 one that contains no remedy remotely comparable with what
4 is at issue here. The Advisory Opinion on the Western
5 Sahara. Members of the Tribunal might have been a little
6 surprised to find an Advisory Opinion on the Western
7 Sahara in an answer about Tribunals that have been asked
8 to delimit boundaries. They might be even more surprised
9 to find a UN General Assembly Resolution that put the
10 questions to the court described as the equivalent of an
11 arbitration agreement between Spain and Morocco. They
12 would be even more surprised when they re-read the
13 Advisory Opinion and its comments about the eastern
14 Carelia case and why this was not a dispute between two
15 states. Morocco might be a little surprised to find a
16 reference to its prayer for relief in that case. I do not
17 recall that in an Advisory Opinion you ever get a prayer
18 for relief by anyone, not least because of course there
19 are not any parties in an advisory proceeding.

20 Mr President, the Advisory Opinion on Western Sahara
21 as about as much relevance to this case as the Advisory
22 Opinion on Nuclear Weapons where part of the answer given
23 by the Court raised an issue that had not been canvassed
24 by any of the states making submissions and which was only
25 tangentially relevant to the question put to the court.

26 Then we have the Eritrea/Ethiopia Boundary Commission
27 decision on a land boundary where movement of people
28 across the boundary was taken cognisance of by the

1 Tribunal to the extent that that was necessary to deal
2 with the issues of boundary delimitation.

3 Lastly, Mr President, the Rights of Passage case.
4 That is no more a boundary case than the Advisory Opinion
5 on the Western Sahara, though it has the advantage of at
6 least being a case between two parties which Western
7 Sahara is not. The remedy sought in Rights of Passage was
8 not surprisingly a right of passage. The remedy granted,
9 a right of passage. It just was not granted to quite as
10 many people as the claimant state had originally
11 contended.

12 So, Mr President, six cases, three of which have
13 nothing to do with boundaries at all, one of which is
14 about a land boundary rather than a maritime one, none of
15 which involved the grant of a remedy remotely comparable
16 to the remedy which Barbados dare not ask you for but is
17 hoping that you are going to give it. Strangely in this
18 long document there is no mention at all of the decisions
19 of the International Court of Justice in Tunisia/Libya,
20 Libya/Malta, the Gulf of Maine, Jan Mayen, Guinea/Guinea
21 Bissau or Cameroon/Nigeria. Or the arbitration awards in
22 the Channel Continental Shelf case, St Pierre and Miquelon
23 or Newfoundland/Nova Scotia, all of which had the
24 advantage of actually being about maritime boundaries, Mr
25 President, and one might have thought they were more
26 helpful to the Tribunal in dealing with this issue than
27 cases like Western Sahara. But clearly we take too
28 limited a view on this.

1 Mr President, the answer to Professor Lowe's question
2 is very simple. The powers of the Tribunal to grant a
3 particular remedy are determined by the instrument which
4 confers jurisdiction on that Tribunal. If this Tribunal
5 has any jurisdiction at all that jurisdiction is derived
6 from Part XV of UNCLOS. There has never been a Part XV
7 UNCLOS Tribunal decision on a maritime boundary matter.
8 But when there is it will be subject to Article 297
9 paragraph 3A. That precludes bringing before such a
10 Tribunal a fisheries dispute seeking a fisheries remedy
11 alone, and just as it precludes bringing that case it
12 precluded a Tribunal seized of a maritime boundary issue
13 from granting the remedy which could not have been applied
14 for in the first place

15 Mr President, that concludes my submissions, and as
16 it is my last speech you will be pleased to know may I
17 take this opportunity of thanking you and your colleagues
18 for the courtesy and attention that you have shown me
19 throughout and invite you to call upon the learned
20 Attorney General of Trinidad and Tobago to make our
21 closing submissions.

22 THE PRESIDENT: Thank you so much, Professor Greenwood. Mr
23 Attorney General, please.

24 THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO: Thank you,
25 Mr President, members of the Tribunal. It falls to me to
26 make some closing remarks before formally presenting the
27 submissions on behalf of Trinidad and Tobago. You will be
28 happy, no doubt that I will attempt not to repeat the
29 legal arguments that have been ably made by counsel for

1 Trinidad and Tobago, or to take you again over any of the
2 troubled issues which are before you; rather at this hour
3 and literally in the evening of the case I propose to deal
4 with a number of matters of record, matters which concern
5 either the actual relations between Trinidad and Tobago
6 and Barbados or the CARICOM region more generally and
7 which have been relied on by Barbados as a basis for
8 criticising Trinidad and Tobago.

9 Mr President, I should begin by stating that I am a
10 Caribbean person. I appear before you as the Attorney
11 General of Trinidad and Tobago. But I speak as a
12 Caribbean person. Before taking office as Attorney
13 General of Trinidad and Tobago I taught at the Faculty of
14 Law at the University of the West Indies for 15 years. 15
15 years during which I travelled extensively throughout the
16 Caribbean, to every Caribbean territory, from Beef island,
17 that is part of the British Virgin Islands in the north,
18 to Belize in the west, and to Barbados in the east. Over
19 the past fortnight, I have looked at a host of maps
20 purporting to show as tiny specks islands where people I
21 know and count as friends live, work and raise their
22 children, and I cannot sit without correcting the record,
23 so please permit me a few minutes of your time.

24 I think that a reality check is in order. First I
25 turn to the relations between the parties. I should start
26 out by saying that these relations are generally good.
27 Whatever impression members of the Tribunal may have
28 gathered from some of the allegations which have been
29 repeated here during the past fortnight, however hard this

1 litigation has been, I am not going to play tit for tat on
2 such matters, but I do want to make a general remark about
3 relative resources and a specific one about the so called
4 catastrophe thesis.

5 As to the general a word on the relative resources.
6 On Tuesday the Attorney General, the Agent for Barbados,
7 continued the rhetoric of the first round about how small
8 Barbados is, how much smaller than Trinidad and Tobago it
9 is, how little oil it has, how much it depends on the
10 flying fish as part of its traditional cuisine. Mr
11 President, members of the Tribunal, the equitable
12 delimitation of a maritime boundary is as you are of
13 course well aware a matter of law and should not be
14 determined by the socio-economic conditions of the
15 parties. In any event in terms of economic and social
16 development Barbados ranks 30th in the United Nations
17 Development Programme's Human Development Index of 2005
18 while Trinidad and Tobago ranks 57th. In addition
19 Barbados' annual GDP per capita in 2003 was US \$15,720,
20 whereas Trinidad and Tobago's was US \$10,766.

21 I recognise that these facts are irrelevant to
22 maritime delimitation, but Barbados kept referring to them
23 this week and the record has to be set straight.

24 Mr President, members of the Tribunal, Barbados
25 argues, and I turn now to the specific, the catastrophe
26 theory. Barbados argues that there will be a catastrophe
27 of consequences if its fishermen are denied access to the
28 marine and submarine areas off Tobago claimed in its
29 pleadings. This will not only, it is said, affect a

1 number of fishermen but will also have negative effects on
2 the rest of its economy.

3 Mr Wordsworth has already dealt with this claim, but
4 it should be pointed out that the fisheries constitute
5 less than one per cent - 100th - of Barbados' GDP. That
6 represents its total fishing effort. The flying fish
7 sector would be a part of that one per cent - 100th of its
8 fishing industry. The flying fish harvested off Tobago is
9 an even smaller part.

10 Mr President, there would be no catastrophe if
11 Barbados' vessels were denied access to the waters off
12 Tobago. The way for Barbados to obtain such access is to
13 negotiate it. Something we were always ready to do until
14 the fisheries negotiations were broken off by Barbados. I
15 say again in peremptory fashion that we are still prepared
16 to negotiate a fisheries access agreement with Barbados.
17 In the meantime, individuals, Barbadians and others, who
18 wish to apply for individual licences under our
19 archipelagic waters and exclusive economic zone
20 legislation will be entitled to have their application
21 considered on the merits. I should add only that there
22 has been no catastrophe in the 15 years since the last
23 fisheries agreement was formally put in place by the
24 parties. In addition, there has been no catastrophe in
25 the 20 months since these proceedings were first
26 initiated, even without provisional measures having been
27 obtained before this Tribunal. Again, Mr President, a
28 reality check is needed here.

1 What in effect Barbados seeks is an exclusive
2 proprietary process solution at Trinidad and Tobago's
3 expense to meet the demands of its burgeoning fishing
4 fleet and at the expense of a resource which the available
5 scientific evidence suggests is currently almost fully
6 fished. Although it purports to rely on Part V of UNCLOS,
7 its solution is actually inconsistent with Part V, which
8 is predicated on responsible overall management of the
9 marine living resources by the coastal state. It was not
10 until after these proceedings were commenced that Barbados
11 actually claimed to have sovereign rights - sovereign
12 rights, Mr President - on the basis of this alleged
13 traditional artisanal type fishery, 12 miles off the coast
14 of Tobago. Yet in the 1990 fishing agreement, and its
15 subsequent fishing negotiations for a new fishing
16 agreement to access Trinidad and Tobago's exclusive
17 economic zone, it had explicitly accepted that it was not
18 its EEZ. The regime for management of fisheries in the
19 exclusive economic zone under the 1982 Convention was
20 carefully negotiated. The relevant provisions are clear
21 in giving the coastal state both rights and
22 responsibilities and in limiting the scope of third party
23 review by reference to Article 297.3(a) of the Convention.

24 If you come to the conclusion, as we submit you must,
25 that Trinidad and Tobago is the coastal state with these
26 rights and these responsibilities, please we would ask you
27 do not subvert the fisheries management arrangements of
28 Part V of the Convention by reference to the works of Sir
29 Gerald Fitzmaurice or the alchemy of Professor Reisman.

1 The evidence on both sides suggests that this resource,
2 seasonally variable as it is anyway, is being almost fully
3 exploited. There is no basis to grant Barbados non-
4 exclusive fishing rights, a practice that it would then no
5 doubt seek to assert against the other states in which the
6 flying fish range, including Grenada, St Vincent and the
7 Grenadines, St Lucia, Dominica and Martinique, where the
8 estimated catches for 1998 were from a low of 34 metric
9 tonnes for Grenada to a high of 302 metric tonnes for
10 Martinique. The reference for that is Oxenford, which is
11 in your bundle.

12 The present claim is, in effect, an end run around
13 Part V of the Convention and we respectfully submit that
14 the Tribunal should give this no weight. Again, a reality
15 check is what is required.

16 As I said, when I opened the case for Trinidad and
17 Tobago, there were and are reasonable solutions to the two
18 distinct problems which are at the top of our bilateral
19 agenda, maritime boundaries and fisheries access. I
20 repeat that both solutions are as available now as they
21 always were, but they have distinct solutions to distinct
22 issues. One of those issues, that of maritime boundaries,
23 may be within your jurisdiction, depending on how you rule
24 on the points made by Mr Wordsworth as to jurisdiction and
25 admissibility. The other, fisheries access, certainly is
26 not. It is to be resolved by agreement between the
27 parties. In fact, in the Barbados fisheries management
28 plan 2001 to 2003, it is said that Barbados will determine
29 preferred areas of fishing access agreements, will assess

1 the costs and benefits of access to different areas
2 through fishing industry consultations and will negotiate
3 fishing access agreements with neighbouring states for
4 areas where fish are abundant. It is not said there that
5 Barbados will claim the whole of the waters around Tobago.

6 "Negotiate not appropriate" is the term mercifully used
7 in the Barbados plan. In that respect, Barbados has
8 exceeded in these proceedings its own fisheries management
9 plan. Moreover, Barbados' proposals for a common
10 fisheries policy and regime is now receiving the attention
11 of the Caribbean regional fisheries mechanism at the level
12 of CARICOM in which Trinidad and Tobago participates
13 actively. What is going on before you in relation to
14 fisheries can, we submit, be dealt with properly within
15 the context of the common fisheries policy regime at the
16 level of the Caribbean community.

17 Mr President, members of the Tribunal, I turn to
18 Trinidad and Tobago's relations with members of the
19 Caribbean community.

20 I turn specifically to the regional dimension and to
21 Barbados' claims that Trinidad and Tobago is in this
22 respect some sort of regional maverick in its relations
23 with members of the Caribbean community.

24 Mr President, members of the Tribunal, again a
25 reality check is in order. We have been told that the
26 Trinidad and Tobago/Venezuela 1990 delimitation treaty has
27 strained relations between Trinidad and Tobago and the
28 rest of the Caribbean community. This is quite untrue.
29 This agreement was negotiated over 17 years and eventually

1 signed in 1990 in the full glare of local, regional and
2 international publicity. The then High Commissioner for
3 Barbados in Trinidad and Tobago, His Excellency Mr Frank
4 Da Silva, is on record as stating that the Ministry of
5 Foreign Affairs of Barbados was well aware of the
6 conclusion of the agreement. That was in 1990. The
7 agreement was registered with the United Nations in 1991,
8 together with an accompanying exchange of notes. Yet
9 Barbados made no protest until the maritime boundary
10 delimitation negotiations began in July of 2000, ten years
11 after the fact.

12 Contrast this with the conclusion in secret,
13 somewhere in this city, perhaps, when these very
14 proceedings were in contemplation by Barbados and Guyana
15 of their so-called Exclusive Economic Zone Co-operation
16 Treaty in December of 2002. It is instructive also to
17 recall that Guyana also made no protest over the 1990
18 Trinidad and Tobago/Venezuela delimitation treaty until
19 January of 2002. Mr President, for the record, Trinidad
20 and Tobago affirms and supports the territorial integrity
21 of Guyana as is manifested in its annual endorsement of
22 and support for CARICOM's position on this matter at the
23 CARICOM Heads of Government meetings. It is not good
24 enough for my learned friend, the Agent for Barbados, to
25 say that, because Trinidad and Tobago has signed a treaty
26 with Venezuela, it has turned its back on Guyana and other
27 CARICOM member states, generally. When the record of
28 these proceedings comes out there will be a shock at the
29 level of CARICOM at precisely this fact. There is, in

1 fact, no conflict between the 1990 Trinidad and
2 Tobago/Venezuela delimitation treaty and our firm support
3 for Guyana on the matter of its sovereignty and
4 territorial integrity. This was made plain in the
5 exchange of notes that accompanied the ratification of the
6 treaty. Again, a reality check is in order.

7 Still on our CARICOM relations, Barbados also accuses
8 by reference to a map containing the words "Aves Island"
9 of supporting Venezuela in its maritime claims against a
10 number of CARICOM members over giving full effect to that
11 feature. Again, there is no truth in this suggestion,
12 which has never been made outside of these proceedings.
13 Whether you call it Aves Island or Bird Rock, under the
14 1982 Convention a rock is an island and under Article
15 121.3 such a rock cannot generate maritime zones beyond 12
16 nautical miles. Indeed, that is precisely what our
17 graphics show.

18 5.45

19 While the 1990 agreement was signed by the then Prime
20 Minister of Trinidad and Tobago, later President of the
21 Republic, Mr Arthur, and R Robinson, it will be recalled
22 that one year earlier, in 1989, Mr Robinson proposed at
23 the level of CARICOM, and CARICOM agreed, to the
24 establishment of the CARICOM single market and economy.
25 The CSME which is the most radical transformation of the
26 CARICOM region contemplated yet is to come into being on
27 1st January 2006. Trinidad and Tobago, Jamaica and
28 Barbados have already been declared CSME compliant, as
29 part of an accelerated programme for the deepening of the

1 economic integration process in the region. Trinidad and
2 Tobago's leadership in the Caribbean community began
3 before the conclusion of the 1990 Trinidad and
4 Tobago/Venezuela delimitation treaty and it continues to
5 this day.

6 Earlier this year, Port-of-Spain seated and
7 inaugurated the Caribbean Court of Justice, which is
8 intended to adjudicate upon CSME disputes and at some
9 future date is intended to replace the Privy Council as a
10 final court of appeal for the countries of the region.

11 Trinidad and Tobago's support and commitment to other
12 initiatives whether bilaterally or multilaterally within
13 CARICOM is well known even beyond the region. We remain
14 committed to the integration of the Caribbean region
15 through the instrumentality of CARICOM.

16 Trinidad and Tobago has provided financial and
17 economic assistance within our modest means to our CARICOM
18 neighbours through a variety of mechanisms, including
19 capital market activities, direct foreign investment, debt
20 relief and direct bilateral assistance. We have also
21 provided extensive hurricane relief. Our soldiers are
22 invariably the first on the ground in the aftermath of
23 disasters in the region. As well as assistance to the
24 private sector in CARICOM to strengthen the export
25 capability of our partners in CARICOM, we have provided as
26 an energy exporter through our petroleum stabilisation
27 fund, which is made available to all CARICOM countries,
28 to the tune of some \$300 million per annum, a tremendous
29 sacrifice to us. And this without any conditionality.

1 Every year to every CARICOM state as long as the prices
2 for gas and oil remain above a certain level.

3 Mr President, members of the Tribunal, these are
4 hardly the activities of a regional renegade and, again, a
5 reality check is in order.

6 There is, however, one genuine regional implication
7 to which I must refer. This Tribunal has already been
8 made aware of a study conducted during the period 1988 to
9 1989 by Oxenford and others, Barbadian scientists. The
10 only study of this kind thus far in the region and one
11 which we are happy to rely on, shows the large proportion
12 of tagged flying fish moving from Barbados to St Lucia.
13 Subject to Professor Lowe's comments as to relevance, can
14 one expect therefore that Barbados would in time be making
15 a claim to St Lucia in the context of a possible maritime
16 delimitation negotiation that the boundary between those
17 two countries should be drawn so as to take into account
18 the location of flying fish between those two countries?
19 The reality is that flying fish is to be found throughout
20 the region. Martinique, St Lucia, Dominica, Grenada, St
21 Vincent and the Grenadines and, yes, off Tobago. Whatever
22 the migratory patterns which have, we maintain, been
23 entirely unsupported by the evidence might show, if this
24 Tribunal accepts the argument that the boundary between
25 Trinidad and Tobago and Barbados in the Caribbean sea or
26 the western sector should be adjusted to take account of
27 the alleged traditional artisanal type flying fish
28 fishery, what happens to the flying fish fishery in Tobago
29 when this resource is over fished off Tobago? Barbados'

1 ice boats will still be in a position to access other
2 fishing grounds in the eastern Caribbean while Tobago's
3 truly artisanal type fisherfolk will be left without any
4 means of sustenance from their own traditional artisanal
5 type fishery in Trinidad and Tobago's jurisdictional
6 waters off Tobago and will be denied the right to continue
7 to develop their fishery sector. Again, a reality check
8 is in order.

9 Mr President, members of the Tribunal, the Honourable
10 Attorney General for Barbados in her closing remarks
11 emphasised how important this case is for her country.
12 She emphasised the importance to Barbados' development of
13 the fishery resources off Tobago, as well as the
14 hydrocarbon resources of the outer continental shelf,
15 resources which she testified that Barbados believed to
16 exist. But what about Tobago's continued development and
17 its maritime entitlements? It will be recalled that
18 Barbados' case is about exclusive control in both the
19 Caribbean and Atlantic sectors. In the Caribbean sector,
20 it seeks exclusive control to the south of the median line
21 over both fish and hydrocarbons. In the Atlantic sector
22 exclusive control over the outer continental shelf from
23 which Trinidad and Tobago is to be entirely excluded. As
24 we have shown and these per cent figures have not been
25 denied, Barbados claims 84 per cent of the maritime area
26 to the south of the median line in the Caribbean sector
27 and in the Atlantic sector it claims 58 per cent of the
28 area of overlapping EEZ claims and 100 per cent of the
29 area beyond that. The total Barbadian maritime claim is

1 an area of 68,500 square nautical miles. This is almost
2 five times what Trinidad and Tobago would have been
3 entitled to on the basis of equidistance, even if we had
4 agreed an equidistance line boundary with Venezuela.
5 Never in the history of maritime delimitation has what
6 Barbados presents as a relevant coastline of less than ten
7 nautical miles had such attractive power. Moreover, it is
8 not just the present claim against Trinidad and Tobago.
9 It is what it implies to our brothers in CARICOM. If you
10 uphold Barbados' fisheries claim here, it could make very
11 similar claims to a habitual fishery against its western
12 neighbours. Moreover, its claim to continental shelf in
13 the east and north east, as well as in the south east, are
14 enormous. It claims a natural prolongation of this
15 continental shelf on the northern border of Trinidad and
16 Tobago's truncated continental shelf. The implications of
17 these exorbitant claims have been spelled out by counsel
18 and I will not repeat them.

19 Mr President, members of the Tribunal, I am rushing
20 to the end of my contribution. Trinidad and Tobago is
21 confident that you will find these claims to be
22 inequitable and unjustified. We did not object to the
23 admissibility of this claim because we had any doubts
24 about this Tribunal or about our case. Rather we objected
25 on the principal basis that a state should not be
26 confronted in proceedings under Part XV of the 1982
27 Convention with a maritime claim which had never
28 previously been presented to it on which there had never
29 been an exchange of views. This is not consistent with

1 the spirit of negotiation as a primary means to resolving
2 disputes between sovereign states. How could there have
3 been an exchange of views on a claim which was first
4 handed over in Barbados' Memorial? The effect of these
5 proceedings has been to cause Barbados to make ever wider
6 claims while we have produced a revised and more limited
7 version of the claim line we put forward on paper in the
8 negotiations, all of them resting on essentially the same
9 principle. We firmly believe that Barbados should not be
10 privileged in jurisdictional any more than in substantive
11 terms by putting forward what is on its face an exorbitant
12 claim, one which cuts off Tobago from all maritime areas
13 to the west, north and east, leaving it a territorial sea
14 enclave. That is why I made the undertaking I did in my
15 opening remarks. We fully respect the underlying
16 jurisdiction of this Tribunal, but we believe, likewise,
17 that Barbados should be held to the commitments contained
18 in Article 283. This is in substance a sea grab to oil,
19 gas and fish. Trinidad and Tobago seeks the protection of
20 the law.

21 Mr President, members of the Tribunal, before I read
22 these submissions, may I thank the Tribunal and the
23 Registry staff for their courteous assistance throughout
24 these proceedings, as well as to the transcript writers
25 for their efficiency and attention to detail. I should
26 also extend thanks to the legal and technical teams of
27 both parties who have all, I know, worked exceptionally
28 hard to present their respective cases to the Tribunal.

29 6.00

1 For the reasons given in our written pleadings and in
2 the present oral hearings, Mr President and members of the
3 Tribunal, Trinidad and Tobago respectfully requests the
4 Tribunal to, one, decide that the Tribunal has no
5 jurisdiction over Barbados' claim and/or that the claim is
6 inadmissible. Two, to the extent that the Tribunal
7 determines that it does have jurisdiction over Barbados'
8 claim and that it is admissible, to reject the claim line
9 of Barbados in its entirety. Three, to decide that a
10 maritime boundary separating respective jurisdictions of
11 the parties is determined as follows: (a) to the west of
12 point A, located at 11 degrees 45.80 minutes north, 59
13 degrees 14.94 minutes west, the delimitation line follows
14 the median line between Barbados and Trinidad and Tobago
15 until it reaches the maritime area falling within the
16 jurisdiction of St Vincent and the Grenadines; (b) from
17 point A seawards the delimitation line is a loxodrome with
18 an azimuth of 88 degrees extending to the outer limit of
19 the EEZ of Trinidad and Tobago; (c) further the
20 respective continental shelves of the two states are
21 delimited by the extension of the line referred to in
22 paragraph 3(b) above, extending to the outer limit of the
23 Continental Shelf as determined in accordance with
24 international law.

25 Mr President, members of the Tribunal, these are the
26 submissions of the Republic of Trinidad and Tobago.

27 THE PRESIDENT: Thank you so much, Mr Attorney General.

1 Now we have come to the end of these proceedings and I
2 wish to say that it has been an enormous privilege and
3 pleasure for the members of the Tribunal to hear them.

4 I want to congratulate the Agents and counsel of both
5 sides for their surpassing presentations. I said some
6 days ago when Barbados concluded its that the lucidity and
7 cogency of its presentation required congratulations and
8 that I had no doubt that it would be matched by a like
9 presentation of the counsel of Trinidad and Tobago, and
10 that expectation has been very fully justified.

11 The Tribunal wishes to thank the Agents and counsel
12 as well for the answers to the multiple questions that
13 have been asked and so rapidly and ably answered.

14 I wish to thank too the members of the supporting
15 teams of the parties for their Herculean labours and for
16 the excellence of the images and the briefing books and
17 the like; to thank the members of the Registry of the
18 Permanent Court of Arbitration; the court reporters, our
19 hydrographer and the hydrographers of the parties all for
20 the excellence of their assistance.

21 It is possible that the Tribunal may have further
22 questions still and if we do we shall pose them in the
23 course of the next week.

24 The parties may wish to consider whether or not they
25 want to make the pleadings public at this juncture or at
26 some later juncture or not at all; it is within their
27 power to decide but they may wish to discuss that between
28 them and notify their decision to the Registry.

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May I recall that the Tribunal will tender a reception for the agents and counsel for this evening beginning at 6.30 or maybe a few minutes after considering the hour now at the Athenaeum, not the Hotel but the Club, which is at 107 Pall Mall and we look forward very much to seeing you there. The reception will be in the Garden Room which is downstairs in the Club.

Thank you so much again and we look forward to seeing you shortly.

We stand adjourned.

(The Arbitration was adjourned)
