**BEFORE AN ARBITRAL TRIBUNAL CONSTITUTED IN ACCORDANCE WITH ANNEX VII TO UNCLOS**

**BETWEEN**

**BARBADOS**

**– and –**

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

---

# REPLY OF BARBADOS

## VOLUME 1

---

**9 June 2005**

## TABLE OF CONTENTS


**CHAPTER 1**

**INTRODUCTION** ..... 1

**Section 1.1** The evolution of this case ..... 4

**Section 1.2** Trinidad and Tobago's strategy to appropriate Barbados' maritime territory ..... 11

**Section 1.3** Trinidad and Tobago's description of the recent negotiations between the Parties and the events leading to the commencement of this arbitration is inaccurate, self-serving and misleading ..... 15

**Section 1.4** Trinidad and Tobago's claim requires a fundamental refashioning of geography ..... 21

**Section 1.5** Trinidad and Tobago's theory of maritime entitlement inverts the maxim that the land controls the sea ..... 24

**Section 1.6** For more than 25 years Barbados and its concessionaires have been active in the maritime area to the north of the median line now claimed by Trinidad and Tobago ..... 26

**Section 1.7** The regional implications of the Parties' claims ..... 30

**CHAPTER 2**

**JURISDICTIONAL ISSUES** ..... 33

**Section 2.1** Trinidad and Tobago's objections as to jurisdiction and admissibility ..... 33

**Section 2.2** Overview of settlement negotiations ..... 35

**Section 2.3** Trinidad and Tobago's theory of the pre-conditions to arbitration ..... 54

**Section 2.4** The requirement of good faith and the doctrine of abuse of rights ..... 62

**Section 2.5** The scope of Barbados' claim ..... 68

**Section 2.6** The Tribunal does not have jurisdiction to address Trinidad and Tobago's claim to extended continental shelf under UNCLOS ..... 73

(A) Trinidad and Tobago's claim to extended continental shelf and its delimitation with Barbados within Barbados' EEZ and beyond was not the subject of negotiation between the Parties and does not form part of the longstanding dispute between them ..... 74

(B) The dispute submitted to the Tribunal did not relate to delimitation of any potential continental shelf entitlement beyond 200 nautical miles of either of the Parties....76

(C) Any delimitation over the continental shelf beyond 200 nautical miles of any State would affect the rights of the international community....76

**Section 2.7** The Tribunal cannot speculate as to the outer limits of the continental shelf....81

**Section 2.8** Barbados has a right to its full EEZ, which includes the water column, the sea-bed and the subsoil, subject to a possible limitation only where it overlaps with any other State's EEZ....82

**Section 2.9** The Tribunal must draw a single maritime boundary in this case....84

**CHAPTER 3**

**THE METHOD OF DELIMITATION....95**

**Section 3.1** The median line is agreed....95

**Section 3.2** The circumstances asserted by Trinidad and Tobago do not justify any median line adjustment....96

(A) International law does not recognise the purported "regional implications" under the so-called "Guinea/Guinea Bissau test" as a relevant circumstance for maritime delimitation....97

(B) Neither geography nor local State practice supports Trinidad and Tobago's arguments for an adjustment tailored to alleged "regional implications"....100

(C) Trinidad and Tobago's mischievous approach, if accepted, would be damaging to international law....102

**Section 3.3** The relevant circumstances asserted by Barbados are recognised by international law and are factually sustainable in the present case....103

**Section 3.4** The 1990 Trinidad and Tobago-Venezuela boundary agreement can have no influence on the present delimitation....104

(A) Trinidad and Tobago recognises that the Trinidad-Venezuela Agreement is not opposable to Barbados or any other third party State....104

(B) Trinidad and Tobago nonetheless seeks to import the Trinidad-Venezuela Agreement into this delimitation....105

(C) Barbados is under no obligation to compensate Trinidad and Tobago for the latter's voluntary cession of its own territory to a third party ..... 107

(D) Trinidad and Tobago is constrained by the principle of *nemo dat quod non habet* ..... 108

(E) The Barbados-Guyana EEZ Co-operation Zone Treaty is consistent with UNCLOS in all respects ..... 108

(F) The Trinidad-Venezuela Agreement can have no influence on this delimitation ..... 109

**CHAPTER 4**

**TRINIDAD AND TOBAGO'S ATTEMPT TO DEFEAT THE MEDIAN LINE IS BASED ON A FICTION OF "PARTIAL ADJACENCY" ..... 111**

**Section 4.1** The Parties are clearly in a situation of coastal opposition ..... 111

**Section 4.2** Isolated islands separated by 116 nautical miles of open water cannot be adjacent and have never been found so ..... 113

**Section 4.3** Trinidad and Tobago's description of the median line being comprised of a Caribbean and an Atlantic sector is irrelevant to maritime delimitation ..... 116

**Section 4.4** Trinidad and Tobago's description of the median line being comprised of a Caribbean and an Atlantic sector is moreover a fiction: the IHO division between the Caribbean Sea and the Atlantic Ocean is well to the west of Trinidad and Tobago's Point A ..... 117

**Section 4.5** Trinidad and Tobago's Point A has been calculated by using contrived and self-serving basepoints ..... 118

**Section 4.6** Even if the Parties could be conceived of as adjacent in part, the equidistance line resulting from that adjacency would run to the south of the median line ..... 120

**Section 4.7** Trinidad and Tobago is not "cut-off" by the median line ..... 122

**CHAPTER 5**

**NEITHER ADJACENCY NOR PROPORTIONALITY JUSTIFIES AN ADJUSTMENT OF THE MEDIAN LINE IN FAVOUR OF TRINIDAD AND TOBAGO ..... 127**

**Section 5.1** Introduction ..... 127

**Section 5.2** Opposition and adjacency are spatial relationships between relevant coasts that generate basepoints ..... 131

**Section 5.3** If anything, Trinidad and Tobago's southeast-looking coastal front produces an entitlement *vis-à-vis* Venezuela, Guyana and Suriname, not Barbados ..... 137

**Section 5.4** Trinidad and Tobago mis-states and mis-applies the principle of non-encroachment ..... 139

**Section 5.5** Trinidad and Tobago has no inherent entitlement to an extended continental shelf that trumps Barbados' rights to its EEZ and extended continental shelf ..... 142

**Section 5.6** Trinidad and Tobago in reality proposes to use "proportionality" as a method of delimitation ..... 143

(A) Disproportionality as a final check on the equitable character of a delimitation arrived at by other means ..... 146

(B) Manifest disproportionality in coastal lengths as a relevant circumstance calling for an adjustment of the median line ..... 149

(C) Identification of relevant coasts ..... 152

(D) Trinidad and Tobago's archipelagic baseline cannot be regarded as a relevant coast ..... 153

(E) Enter the vector ..... 154

(F) Trinidad and Tobago fails to identify Barbados' relevant coasts ..... 156

(G) Trinidad and Tobago's proposed adjustment of the median line is premised on the position of undelimited boundaries with third States and leads to an inequitable result ..... 158

**CHAPTER 6**

**THE PRINCIPLES OF ESTOPPEL AND ACQUIESCENCE IN THE PRESENT CASE ..... 161**

**Section 6.1** Barbados has consistently exercised sovereignty north of the median line ..... 161

**Section 6.2** Trinidad and Tobago has recognised and acquiesced in Barbados' sovereignty north of the median line ..... 165

**Section 6.3** The relevance of estoppel and acquiescence in cases of maritime delimitation ..... 167

**Section 6.4** Trinidad and Tobago is estopped from making any claim to the north of the median line ..... 168

**Section 6.5** Barbados is not estopped from making its claim for an adjustment of the median line to the south ..... 169

(A) Barbados has not recognised Trinidad and Tobago as having jurisdiction in the area of Barbados' claim to the south of the median line ..... 169

(B) Principles of acquiescence and estoppel do not apply in respect of Barbados' claim ..... 173

**CHAPTER 7**

**THE BARBADIAN FISHERIES SOUTH OF THE MEDIAN LINE ARE A RELEVANT CIRCUMSTANCE THAT REQUIRES THE SOUTHWARD ADJUSTMENT OF THE PROVISIONAL MEDIAN LINE ..... 177**

**Section 7.1** Barbadians have fished off the island of Tobago for centuries ..... 177

**Section 7.2** Barbados' fishing communities are dependent on fishing off the island of Tobago ..... 186

**Section 7.3** Trinidad and Tobago is not dependent on fishing in the area claimed by Barbados ..... 192

**Section 7.4** The need to ensure the freedom of Barbadian fisherfolk to continue to exercise artisanal fishing rights indispensable to their livelihood and to Barbados' economy requires an adjustment of the provisional median line ..... 195

(A) Barbados' nationals acquired non-exclusive rights to engage in traditional artisanal fishing, which rights survive the establishment of new maritime zones ..... 196

(B) UNCLOS, general principles of law, customary international law and international human rights law all mandate the survival of traditional artisanal fishing rights notwithstanding reclassification of maritime zones formerly part of the high seas ..... 200

(I) Article 62 of UNCLOS does not purport to terminate acquired artisanal fishing rights or to relegate them to a regime of access subject to the unilateral discretion of the coastal State ..... 201

(II) UNCLOS and principles of general international law support Barbados' claim that artisanal fishing rights constitute a special circumstance that warrants an adjustment of the median line ..... 202

(III) Customary international law and human rights law favour the survival of the traditional artisanal fishing rights of Barbados' fisherfolk ..... 205

(C) Adjustment of the median line to ensure the ability of Barbados' fisherfolk to continue to exercise their rights would be appropriate and consistent with UNCLOS ..... 210

(D) The judgments in *Qatar v. Bahrain* and *Cameroon v. Nigeria* do not cast doubt on the relevance of artisanal fishing rights to maritime boundary delimitation .....212

**CHAPTER 8**

**CONCLUSION AND SUBMISSION.....215**

# CHAPTER 1

# INTRODUCTION

## Section 1.1 Summary of the case

1. The present case arises out of a dispute relating to the delimitation of a single maritime boundary between the exclusive economic zones (***EEZ***) and the continental shelves (***CS***) of Barbados and the Republic of Trinidad and Tobago (***Trinidad and Tobago***) respectively (***the Parties***). A map of Barbados and its neighbours is found at Map 1, attached hereto.

2. As is described more fully in Section 4.1, below, the Parties have been discussing and subsequently negotiating the inter-related issues of delimitation and fisheries for the past 25 years. Most recently, intensive negotiations for the settlement of the two issues took place between the Parties in a total of nine sessions spread over the period 19 July 2000 - 21 November 2003. In the course of these meetings it became clear that no agreement could be reached and the dispute could not be resolved by further negotiation because there was a fundamental disagreement as to the applicable legal method of delimitation. An additional meeting between the Prime Ministers of the Parties took place on 16 February 2004 at which Prime Minister Manning of Trinidad and Tobago stated that the issue of maritime boundary delimitation was intractable. Barbados commenced the present proceedings following that additional meeting.

3. Both Barbados and Trinidad and Tobago are parties to the UN Convention on the Law of the Sea 1982 (***UNCLOS*** or ***the Convention***). Article 293 of the Convention provides that a tribunal such as the Tribunal in the present case shall apply the Convention

and other rules of international law not incompatible with the Convention. The dispute therefore falls to be determined by reference to the Convention and related rules of public international law.

4. The relevant provisions of the Convention are Articles 74(1) (relating to the EEZ) and Article 83(1) (relating to the CS). Both articles provide that delimitation shall be effected by agreement "on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

5. The Convention also provides in both the above-cited articles that, if no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV. Within this Part, Articles 286, 287 and 288, coupled with Annex VII, establish compulsory jurisdiction at the instance of any party. It is on this basis that the present proceedings have been commenced.

6. Barbados believes that the proper method that international law prescribes for determining the boundary in order to achieve the requisite equitable solution is by the application of the equidistance/special circumstances rule. First, a provisional median line must be drawn, every point of which is equidistant from the nearest points on the respective baselines of the Parties. The line so established must then be considered for adjustment if required by any relevant special circumstances. On Map 2, the Tribunal will find the median line between Barbados and Trinidad and Tobago, along with the median lines between the Parties and their other neighbouring States.

7. It is Barbados' submission that, in order to reach an equitable solution in the present case, the western part of the Barbados-Trinidad and Tobago median line must be adjusted

so as to take account of a special circumstance: the fact that Barbados fisherfolk have traditionally fished by artisanal methods in the waters off the northwest, north and northeast coasts of the island of Tobago. This Barbados fishery off Tobago is based principally on the flyingfish, a species of pelagic fish that moves seasonally to the waters off Tobago. The flyingfish is a staple component of the Barbados diet and an important element of the history, economy and culture of Barbados. Barbadians have continuously fished off Tobago during the fishing season to catch the flyingfish, as well as associated pelagic species that prey on the flyingfish. The adjusted median line which gives effect to this special circumstance is shown on Map 3.

8. This necessary adjustment, which moves the line southward for part of its course, is shown on Map 3 as embracing the area coloured green. It is bounded by a line connecting: Point A (which lies at the intersection of the meridian 61° 15' W and the median line between Trinidad and Tobago and Grenada); Point B (which lies at the intersection of the meridian 61° 15' W and the outer limit of the 12 nautical mile territorial sea of Trinidad and Tobago, constructed on the relevant segment of its archipelagic baseline); and Point C (which lies at the intersection of the parallel 11° 08' N and the 12 nautical mile territorial sea limit of Trinidad and Tobago). From Point C the line follows an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad and Tobago at Point D, and then follows the median line to Point E, (the tri-point between Barbados, Trinidad and Tobago and the Co-operative Republic of Guyana (***Guyana***)).

9. Throughout the recent negotiations, Trinidad and Tobago rejected the approach described above (namely, identifying a provisional median line and then determining if any special circumstances require its adjustment). The boundary line proposed by Trinidad and

Tobago in the recent negotiations lies to the north of the median line between the Parties. Trinidad and Tobago also insisted that Barbados recognise the effect of the 1990 delimitation agreement between Trinidad and Tobago and the Bolivarian Republic of Venezuela (*Venezuela*), discussed below, which in part reflects those two States' purported attempt, *inter alia,* to divide between themselves part of Barbados' maritime territory.

**Section 1.2 Outline of the Memorial**

10. This Memorial will be developed as follows:

- Chapter 2 will briefly set out the essential geographical elements of the case;
- Chapter 3 will summarise the relevant historical elements of the case;
- Chapter 4 will discuss the background to the dispute;
- Chapter 5 will describe the law relating to the delimitation;
- Chapter 6 will expound on the special circumstance requiring the adjustment of the provisional median line; and
- Chapter 7 will set out Barbados' conclusion and submission.

11. Barbados does not propose in this Memorial to deal in any detail with arguments that have been expressed by Trinidad and Tobago during the negotiations. It is for Trinidad and Tobago to put its case in this arbitration. Barbados reserves its position in relation to those arguments.

that the Trinidad-Venezuela Agreement is not opposable to Barbados but then seeks to have it applied under the rubric of a purported "regional" special circumstance;[5] introduces a new description of so-called "eastern" and "western", or Atlantic and Caribbean, sectors which it claims somehow divide a continuous and undifferentiated geographical area and are somehow supposed to have major (but unexplained) legal significance;[6] then, without really applying these contrived and eccentric distinctions, proposes a radically different and unprecedented maritime boundary delimitation.[7] In this exercise, Trinidad and Tobago claims that where the Parties, in its view, are in a situation of coastal opposition,[8] a median line is the equitable solution.[9] But to the east of a spuriously selected point referred to as "Point A" (oblivious to its own so-called Atlantic-Caribbean division), Trinidad and Tobago proposes that the boundary should turn sharply to the north of the median line, on the basis of an alleged "adjacency" of the Parties in combination with an alleged relevant factor of a "disparity" in the Parties' east-facing coastal lengths.[10] All this is accomplished with disregard to the geographical facts and, when necessary to bolster the theory, by the invention of others.

13. Happily, the core case before the Tribunal has been somewhat simplified by a significant concession on the part of Trinidad and Tobago. It now accepts the established approach to maritime delimitation required under UNCLOS: first, to identify the median line and, then, to consider whether any relevant circumstances,

---

5 *Ibid.*, paras. 96 and 253.

6 *Ibid.*, paras. 175-183.

7 *Ibid.*, Chapter 7.

8 *Ibid.*, para. 181.

9 *Ibid.*, para. 12.

10 *Ibid.*, paras. 249, 259-260.

require it to be modified in order to achieve an equitable result. As the Tribunal will have noted from the Joint Reports, Trinidad and Tobago repeatedly refused, during all the rounds of negotiations on the maritime boundary and fisheries, to acknowledge that international courts and tribunals apply a median line/relevant circumstances approach to achieve an equitable result in maritime delimitation.[11]

14. If the case has been simplified by Trinidad and Tobago's acceptance of a key principle of the law, it has become more complicated by the lodging of a new and unprecedented claim to an area of sea-bed beyond its 200 nautical mile arc but within Barbados' EEZ; and leapfrogging beyond, to an area of sea-bed outside Barbados' 200 nautical mile limit within Barbados' potential ECS.[12] This radical claim was never raised by Trinidad and Tobago in the Parties' negotiations on the maritime boundary. Nor had this claim appeared on any map presented to Barbados by Trinidad and Tobago. It was newly-made in the Counter-Memorial, as Trinidad and Tobago expressly admits.[13]

15. Trinidad and Tobago's new claim, as presented in the Counter-Memorial, is shown at Map 1. In reality, Trinidad and Tobago's claim is much more complex than the misleadingly simple, if randomly generated, single line shown by Trinidad and Tobago. As Map 2 illustrates, it is a claim that, to the north of the median line, in fact encompasses three different maritime claims in three different maritime areas. Furthermore, although Trinidad and Tobago avoids addressing the issue, given its insistence on the Trinidad-Venezuela Agreement, it must be taken that Trinidad and

11 It also repeatedly refused to acknowledge that the starting point for any delimitation is the identification of a provisional median line. It has now retreated completely from that position and the Parties are *ad idem* on this principle. *Ibid.*, paras. 136 *et seq.*

12 *Ibid.*, Chapter 7(D).

13 *Ibid.*, para. 11

Tobago's claim to maritime territory does not extend south of the line described in that Agreement. As a result, Trinidad and Tobago's three claims to the north of the median line would result in a jigsaw-puzzle delimitation between the Parties that would create five maritime zones using eight delimitation lines. The proposed delimitation that actually results from Trinidad and Tobago's claims is shown on Map 3.

16. Trinidad and Tobago's first claim is in relation to the delimitation of the Parties' overlapping EEZs, including the CS, of course, by way of a single maritime boundary. The delimitation line for this claim is shown on Map 4. It runs from: Point 1 (the tri-point of St. Vincent and the Grenadines, Barbados and Guyana), via Trinidad and Tobago's random "Point A", to Point 2 (the intersection of the azimuth of 088° with Trinidad and Tobago's 200 nautical mile arc). Thereafter, although not shown in the Counter-Memorial, the boundary line of this EEZ claim runs southwards along Trinidad and Tobago's 200 nautical mile arc to Point 5 (the intersection of Trinidad and Tobago's 200 nautical mile arc with the line agreed under the Trinidad-Venezuela Agreement (***the Trinidad-Venezuela Agreement line***) and then back to the median line along the Trinidad-Venezuela Agreement line.[14]

17. Trinidad and Tobago's second claim proposes to divide sovereign rights between the Parties in an area that is agreed by both Parties to be beyond Trinidad and Tobago's 200 nautical mile limit but within Barbados' EEZ.[15] The area concerned in this claim is shown hatched red on Map 5. Trinidad and Tobago proposes to divide the sovereign rights in that area over the sea-bed and subsoil, on the one hand, and the water column, on the other, with Trinidad and Tobago taking the former. The

14 See Memorial of Barbados, Appendix 36, Vol. 3.

15 Counter-Memorial of Trinidad and Tobago, paras. 271 *et seq.*

delimitation line relating to this claim runs from: Point 2 on Map 5 (the intersection of the azimuth of 088° with Trinidad and Tobago's 200 nautical mile arc) to Point 3 on the map (the intersection of that azimuth with Barbados' 200 nautical mile limit). Again, the Counter-Memorial fails to show that the boundary line demarcating this claim necessarily runs southwards along Barbados' 200 nautical mile arc to Point 6 on the map (the intersection of Barbados' 200 nautical mile limit with the Trinidad-Venezuela Agreement line); southwards along the Trinidad-Venezuela Agreement line to Point 5 on the map (the intersection of the Trinidad-Venezuela Agreement line with Trinidad and Tobago's 200 nautical mile arc); and northwards along Trinidad and Tobago's 200 nautical mile arc to Point 2 on the map.

18. Trinidad and Tobago's third claim is shown on Map 6. It consists of an attempt by Trinidad and Tobago to use the present proceedings to secure for itself an ECS even beyond Barbados' EEZ. The delimitation line relating to this claim runs along the azimuth of 088°, between Point 3 and Point 4 on Map 6, to the south, the line described in the Trinidad-Venezuela Agreement and its extension to Point 4, and then the 200 nautical mile arc of Barbados.

19. The intricacies of Trinidad and Tobago's claims do not end there. The wedge created by Trinidad and Tobago's claims would leave part of Barbados' EEZ, including its CS, and ECS separated to the south along with the EEZ Co-operation Zone created by the treaty between Barbados and the Co-operative Republic of Guyana (***Guyana***) (***the EEZ Co-operation Zone Treaty***). Thus, as shown on Map 3 the line between Points 5 and 6 would delimit a boundary between: (1) to the north, an area consisting of a combination of Trinidad and Tobago's sea-bed and subsoil and Barbados' water column and; (2) to the south, Barbados' EEZ including its CS. The azimuth of the

Trinidad-Venezuela Agreement line would delimit a boundary between Trinidad and Tobago's and Barbados' ECSs, on the understanding that Trinidad and Tobago is not claiming to the south of that line.

20. Trinidad and Tobago's new claim attempts to extend its boundary well beyond both its legal and geographical limits and indeed beyond its 200 nautical mile arc, by-passing through Barbados' EEZ and into the high seas beyond. In so doing, Trinidad and Tobago would cut off Barbados from its EEZ and moreover curtail Barbados' ability to claim the potential ECS from the edge of its EEZ to which it is entitled by geography and international law. It is, to put it mildly, an audacious claim.

21. Trinidad and Tobago's new claim is inconsistent not only with its approach in nine rounds of interstate negotiations[16] but also with its prior international agreements,[17] its other conduct *vis-à-vis* Barbados[18] and even its own legislation.[19] Moreover, the new claim does not fall within the jurisdiction of this Tribunal and should be rejected *in limine litis*.[20]

22. Barbados' claim is based on the geography of the region as it exists. Trinidad and Tobago's claim is based on the geography of the region as Trinidad and Tobago wishes it would be. Barbados' claim is based on the application of the relevant law to existing geography in a manner consistent with the rulings of previous courts and tribunals. Trinidad and Tobago's new claim openly asks the Tribunal to refashion

---

16 See below para. 66 *et seq.*

17 UNCLOS.

18 See below Chapter 6.

19 See below para. 324.

20 See, in particular, below Section 2.6.

both geography and international law, including in a way that would subvert Article 76 of UNCLOS.

23. Trinidad and Tobago's ultimate justification for this proposed refashioning of both geography and international law is to provide maritime space to Venezuela. Trinidad and Tobago apparently believes it has begun this initiative, for motives of its own unknown to Barbados, by way of the Trinidad-Venezuela Agreement and insists that Barbados must contribute by giving away sovereignty over Barbados' EEZ and CS. Trinidad and Tobago states in its Counter-Memorial:

> "In this way the contribution made by Trinidad and Tobago to the *salida al Atlantico* of the east-facing mainland coasts of Venezuela (and, in turn and further south, those of Guyana) is maintained."[21]

International law is familiar with rhetorical devices such as the so-called *salida al Atlantico*. Ambitious States have always been able to clothe expansionist ambitions in high-sounding phrases: manifest destiny, *mission civilisatrice*, living space, democratisation, etc.. Common to all of these is the unilateral claim of one State to take from others what rightly pertains to those others, or to impose its will on them, or both. In fact, as will become clear, Trinidad and Tobago's self-described "contribution" to Venezuela's *soi disant* exit to the Atlantic is actually a simple appropriation of the land and maritime territory of nearby States. If this is allowed to be imposed upon third States such as Barbados, it would constitute a violation of fundamental international law, as well as of many rights enshrined in UNCLOS.

---

21 Counter-Memorial of Trinidad and Tobago, para. 257.

## Section 1.2 Trinidad and Tobago's strategy to appropriate Barbados' maritime territory

24. The Trinidad-Venezuela Agreement is not a part of the arbitration. Nor is it subject to the jurisdiction of this Tribunal. The following observations are only to emphasise the irrelevance and invalidity of the Agreement with respect to third States.

25. In 1990, Trinidad and Tobago and Venezuela agreed to partition as between themselves, certain maritime territory. The Trinidad-Venezuela Agreement line demonstrates that their ambitions included maritime territory beyond 200 nautical miles from their coasts. The Trinidad-Venezuela Agreement disregarded the geographical existence of Barbados and Guyana and purported to apportion their maritime territory between Trinidad and Tobago and Venezuela. Map 7 shows this attempted taking for what it is. In its claim, Trinidad and Tobago is seeking nothing less than the Tribunal's assistance in accomplishing its and Venezuela's ambitions to acquire the maritime territory of Barbados and Guyana.[22] Having failed in serial negotiations to pressure Barbados to acquiesce in the consequences of the unlawful agreement,[23] Trinidad and Tobago now hopes to persuade this Tribunal, without regard to its jurisdiction and to the mandate of international law, to force Barbados to do so.

---

22 This taking is based on an agreement that is not opposable to the victims of the appropriation and may well be invalid by virtue of violating a *jus cogens*. See Article 53 of the Vienna Convention on the Law of Treaties which provides, in pertinent part:

"A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

For, indeed, an agreement between two rich and powerful States to annex and divide the territory of a third weaker State can hardly be consistent with the peremptory norms of the international system.

23 See below para. 74.

26. Map 7 shows the estimated extent of ECS that lies beyond Barbados' and Guyana's 200 nautical mile arcs. Superimposed on that map is the Trinidad-Venezuela Agreement line. The Tribunal will undoubtedly note the relationship between the Trinidad-Venezuela Agreement line and Venezuela's land claims against Guyana. Through this arbitration, Trinidad and Tobago is implicitly seeking indirectly to legitimise those land claims, together with the appropriation attempted by the Trinidad-Venezuela Agreement. The current government of Trinidad and Tobago is well aware of the invalidity of this attempted appropriation. At the time of the signing of the Trinidad-Venezuela Agreement, the current Prime Minister of Trinidad and Tobago, Patrick Manning (then Leader of the Opposition) publicly castigated the pact, calling it a "very dangerous course of action".[24] Referring to the idea of Trinidad and Tobago agreeing to Venezuela's maritime ambitions, he emphatically denied that the territory was Trinidad and Tobago's to give to Venezuela. He declared publicly on the record:

> "There are other countries involved, Barbados and Guyana, and Trinidad and Tobago could not unilaterally take any decisions that would lead to granting to Venezuela its request into the Atlantic Ocean."[25]

27. Prime Minister Manning was correct. Trinidad and Tobago has no right to give away to Venezuela what did not belong to it, namely the territory of Barbados. Nor does Trinidad and Tobago have the right to take for itself the territory of Barbados.

28. It is not only the principle *nemo dat quod non habet* that applies here; the Trinidad-Venezuela Agreement was a pact between two States to violate the legal rights of third States. The current government of Trinidad and Tobago is also well aware of

---

24 "Manning: Maritime Treaty on a 'dangerous course'", *The Trinidad Guardian,* 7 November 1990. (Reply of Barbados, Appendix 10, Vol. 2.)

25 *Ibid.*

the illegal effect intended by the Trinidad-Venezuela Agreement on Barbados and Guyana. Again, public statements made by the current Prime Minister of Trinidad and Tobago in 1990 exposed this:

> "The signing by the Prime Minister of Trinidad and Tobago, on a Venezuelan map, done in Spanish and the tabling in the Parliament of Trinidad and Tobago of this map, which clearly identifies Guyanese territory as Venezuelan territory, articulates a new and startling position for Trinidad and Tobago in this matter."[26]

29. By entering into the Trinidad-Venezuela Agreement, he stated at the time, Trinidad and Tobago had prejudiced Barbados and:

> "has given tacit approval to Venezuelan claim to approximately one-third of Guyana's territory".[27]

30. Given this context, the Tribunal will no doubt understand Barbados' alarm when it learned shortly before this arbitration commenced that, at some point after the start of the recent rounds of negotiations in relation to the fishing and maritime delimitation dispute, Trinidad and Tobago had begun to negotiate agreements with Venezuela dealing with their co-operation in exploiting hydrocarbons along the entirety of the Trinidad-Venezuela Agreement line, including possibly into Barbados' EEZ in an area beyond the 200 nautical mile arcs of Venezuela and Trinidad and Tobago.[28] Indeed, reports began circulating shortly before this arbitration commenced that an agreement between those two States had been reached and that hydrocarbon activities pursuant to

---

26 "Manning 'dismayed' at Trinidad and Tobago/Venezuela maritime pact", *The Trinidad Guardian*, 13 June 1990. (Reply of Barbados, Appendix 6, Vol. 2.)

27 *Ibid.*

28 Letter of Intent and Memorandum of Understanding between Trinidad and Tobago and Venezuela "concerning the procedure for unitisation of hydrocarbon reservoirs that extend across the delimitation line", 12 August 2003 (***Unitisation Memorandum of Understanding***). (Reply of Barbados, Appendix 34, Vol. 3.)

it would shortly begin.[29] Trinidad and Tobago has even admitted in its Counter-Memorial that it is currently planning (apparently in disregard of this arbitration and the Tribunal) to commence licensing for exploration and development in the disputed area in "early 2006".[30]

31. The insurmountable problem that Trinidad and Tobago encounters in realising its ambitions is, of course, the law. Venezuela is not a party to UNCLOS (it is, however, party to the UN Charter), but Trinidad and Tobago is a party to UNCLOS. UNCLOS does not allow Trinidad and Tobago to extend its territory as it now claims.

32. Throughout the bilateral negotiations with Barbados, Trinidad and Tobago expressly recognised that Barbados was not bound by the Trinidad-Venezuela Agreement.[31] At the same time, it pressed Barbados to acquiesce in both the Trinidad-Venezuela Agreement and its illegal effects.[32] Barbados consistently refused to do this. This central aspect of the dispute between the Parties was apparently what caused the Prime Minister of Trinidad and Tobago to declare to the Prime Minister of Barbados on 16 February 2004 that the boundary dispute between them was "intractable" and that Trinidad and Tobago was not prepared to negotiate further on it.[33]

---

29 See Diplomatic Note 18/1-1 Vol. 11 from Ministry of Foreign Affairs and Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 19 February 2004. (Reply of Barbados, Appendix 52, Vol. 3.)

30 Counter-Memorial of Trinidad and Tobago, para. 40.

31 See below para. 74.

32 *Ibid.*

33 See below paras. 87-88.

## Section 1.3 Trinidad and Tobago's description of the recent negotiations between the Parties and the events leading to the commencement of this arbitration is inaccurate, self-serving and misleading

33. The unlawful manner in which Trinidad and Tobago put the Joint Reports before the Tribunal has been described in Barbados' letter of 22 April 2005. Barbados awaits a finding by the Tribunal on this matter and it confirms its submissions to date on this issue.

34. Section 2.2 of this Reply describes the recent negotiations between the Parties on the issues of fisheries and delimitation in greater detail. Suffice to say that, when it reads the Joint Reports and the available transcripts[34] of the negotiations provided in Appendices 16, 17, 18, 20, 23, 24, 25, 29, 30, 35 and 36 by Barbados (together, the ***Negotiation Records***), the Tribunal will not recognise in them the account of the negotiations that is contained in the Counter-Memorial. That account is inaccurate, self-serving and misleading. Throughout the negotiations, Barbados acted in good faith and presented positions consistent with international law, some of which have now been accepted by Trinidad and Tobago in its Counter-Memorial. In contrast, throughout the negotiations, Trinidad and Tobago appears to have acted in a manner inconsistent with good faith[35] and presented positions inconsistent with international law.[36]

---

34 At each round of negotiations, the host Party tape recorded – with the knowledge of the visiting Party – the proceedings. Accordingly, Barbados submits the transcripts for the negotiations, which it hosted (24 to 26 October 2000, 30 January to 1 February 2002, 24 to 25 March 2003 and 19 to 21 November 2003). It is curious that Trinidad and Tobago chose to submit the Joint Reports but not transcripts of the tape recordings of the rounds which it hosted.

35 During the negotiations with Barbados, it transpires, Trinidad and Tobago was also negotiating with Venezuela in relation to hydrocarbon production along the Trinidad-Venezuela Agreement line. See discussion of the Unitisation Memorandum of Understanding at Memorial of Barbados,

35. The Negotiation Records confirm, *inter alia*, that Trinidad and Tobago's contention that no dispute existed at the time that Barbados invoked the dispute resolution provisions of Part XV is at best disingenuous. In this respect, it is notable that Trinidad and Tobago referred to this arbitration, in diplomatic notes to Barbados after its commencement, as being in relation to the Parties' inability to agree upon a delimitation.[37] The Negotiation Records also confirm that:

- Trinidad and Tobago's contention that Barbados never submitted a chart that presented its views geographically is at best misleading;[38]

- Barbados never "accepted and recognised" that it had no claim south of the median line;[39]

- Barbados at all times insisted that fisheries were an essential part of the delimitation negotiation;[40]

- Trinidad and Tobago acknowledged that Barbadians had historically fished off the island of Tobago;[41]

---

paras. 92-93. At an even more fundamental level, Trinidad and Tobago consistently refused to explain how the assertion of its ambition, as finally expressed in a proposed boundary that ran 42 nautical miles off the coast of Barbados, could be sustained in law or fact.

36 Throughout the negotiations Trinidad and Tobago took absurd positions in relation to methodology from which it has now resiled in this arbitration. See below Section 3.1.

37 Diplomatic Note No. 324 of 2004 from Ministry of Foreign Affairs, Trinidad and Tobago to Ministry of Foreign Affairs and Foreign Trade, Barbados, 18 February 2004. (Counter-Memorial of Trinidad and Tobago, Vol. 3, No. 89.)

38 See below paras. 77-79.

39 Counter-Memorial of Trinidad and Tobago, para. 313.

40 See below para. 68.

41 See below para. 69.

- Barbados insisted that its traditional fishery off Tobago was a relevant circumstance requiring the provisional median line to be adjusted to the south in order to achieve an equitable result;[42]

- Trinidad and Tobago acknowledged, albeit rejected, that Barbados asserted that this fishing constituted a relevant circumstance requiring the provisional median line to be adjusted to the south;[43]

- both Parties made general references to CS entitlement, but that Trinidad and Tobago repeatedly confirmed that it was not making a claim beyond its 200 nautical mile arc;[44]

- both Parties were negotiating the delimitation of a single, all-purpose boundary for the sea-bed, subsoil and superajacent waters;[45]

- the Parties were in dispute from the outset as to the basic methodology to be used in the delimitation;[46]

- the Parties were in dispute throughout as to whether they were in a situation of coastal opposition or in a situation partly of coastal opposition and partly of

---

42 See below para. 68.

43 See below para. 69.

44 See below para. 70.

45 See below para. 70.

46 Barbados pursued the "median line/special circumstances" methodology, now accepted by Trinidad and Tobago in this arbitration. During the negotiations, Trinidad and Tobago insisted on an "equitable principles – relevant circumstances" formula that was never described with any degree of specificity. See below para. 71.

adjacency;[47]

- the Parties were in dispute throughout about what constituted the relevant coasts;[48]

- the Parties were in dispute throughout about the role of proportionality/disproportionality[49] and about which State's proposal cuts-off which other State from its maritime area;[50]

- Barbados consistently rejected as neither factually nor legally sustainable the criteria proposed as relevant circumstances by Trinidad and Tobago;[51]

- although Trinidad and Tobago recognised it was not opposable to Barbados, the Parties were in dispute throughout as to the relevance of the Trinidad-Venezuela Agreement;[52]

- both Parties made repeated references to arbitration as a viable method of resolving their dispute should the negotiations fail;[53]

- Barbados articulated its position in a manner consistent with its submissions in the Memorial;[54]

- Trinidad and Tobago never explained – other than by vague references to

---

47 See below para. 72.

48 See below para. 72.

49 See below para. 72.

50 See below para. 72.

51 See below para. 73.

52 See below para. 74.

53 See below para. 75.

54 See below para. 77.

equitable circumstances – how its ambition (and finally the line that it sketched and proposed as the boundary) was supported by law or fact;[55]

- the chart shown to Barbados by Trinidad and Tobago, now described by Trinidad and Tobago as a "working copy of a detailed chart", was merely a British Admiralty chart with a hand-drawn line on it that ran some 42 nautical miles off the southeast coast of Barbados;[56]

- Barbados presented Trinidad and Tobago with graphic depictions and verbal descriptions of its views, including as submitted to this Tribunal in the Memorial;[57] and

- Barbados did not break off the negotiations.[58]

36. The record of this arbitration establishes that Barbados invoked the dispute resolution provisions of Part XV following the visit of the Prime Minister of Trinidad and Tobago to Barbados on 16 February 2004. Again, Trinidad and Tobago's description of this event is inaccurate, misleading and self-serving. As described more fully in Section 2.2 of this Reply, it was the Prime Minister of Trinidad and Tobago who broke-off the boundary negotiations, stating that the Parties' positions were "intractable", and told Barbados to proceed with an arbitration if it so wished. The evidence also confirms, *inter alia*, that:

- shortly before the meeting of 16 February 2004, Prime Minister Manning of Trinidad and Tobago made extremely aggressive public statements about the

55 See below para. 77.

56 See below para. 78.

57 See below paras. 78-79.

58 See below para. 80.

Parties' dispute;[59]

- shortly before the meeting, Trinidad and Tobago made public its intention to refer the dispute to third-party resolution outside the UNCLOS regime;[60]

- shortly before the meeting, it came to Barbados' attention that Venezuela and Trinidad and Tobago had recently been discussing, and might have entered into agreements to co-operate in, the exploitation of hydrocarbons located along the Trinidad-Venezuela Agreement line, including possibly into areas belonging to Barbados;[61]

- shortly before the meeting, Barbados learned that Trinidad and Tobago might be planning a round of concession licensing in areas off Tobago that were known to Trinidad and Tobago to be the subject of the current negotiations;[62]

- at the meeting on 16 February 2004, Prime Minister Manning stated that the Trinidad and Tobago Cabinet had already reaffirmed Trinidad and Tobago's commitment to the Trinidad-Venezuela Agreement;[63]

- at the meeting, Prime Minister Manning confirmed that Trinidad and Tobago could not voluntarily enter into any maritime delimitation agreement with Barbados that contradicted the Trinidad-Venezuela Agreement or did not

---

59 See below para. 81.

60 See below para. 81.

61 In fact, this agreement had been accomplished during the latter half of 2003. See discussion of the Unitisation Memorandum of Understanding at Memorial of Barbados, paras. 92-93.

62 In fact, it transpired that this was planned for March 2004. See Diplomatic Note 18/1-1 from Ministry of Foreign Affairs and Foreign Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 19 February 2004. (Reply of Barbados, Appendix 52, Vol. 3 at pp. 676-677.)

63 See below para. 87.

recognise the line that it produced;[64]

- at the meeting, Prime Minister Manning stated: "Are you saying that you are going to take us to an international tribunal? If so, by all means go ahead";[65]

- at the meeting, Prime Minister Manning stated that the maritime delimitation issue was "intractable.";[66]

- Trinidad and Tobago rejected the proposal, made by Barbados at the same time that the dispute resolution provisions of Part XV were invoked, that the Parties still meet on 18 February 2004 to discuss the procedures to be followed under Annex VII of UNCLOS and to enter into "without prejudice" arrangements of a practical nature related to fishing.[67]

## Section 1.4 Trinidad and Tobago's claim requires a fundamental refashioning of geography

37. Trinidad and Tobago's claim requires a fundamental refashioning of geography: it is divorced from the geographical reality of the region in general and the Parties in particular. The land territories of Barbados and Trinidad and Tobago at their closest points are separated by an expanse of approximately 116 nautical miles. Yet Trinidad and Tobago alleges that this area constitutes "confined waters".[68] While pointing out that there are overlapping EEZ entitlements amongst the Parties and their neighbours

---

64 See below para. 87.

65 See below para. 88.

66 See below para. 88.

67 Diplomatic Note 18/1-1-2 from Ministry of Foreign Affairs and Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 16 February 2004. (Reply of Barbados, Appendix 51, Vol. 3.)

68 Counter-Memorial of Trinidad and Tobago, para. 12.

to the west, Trinidad and Tobago ignores the multiplicity of overlapping EEZ entitlements involving the Parties and their neighbours to the south and east.

38. Thus, Trinidad and Tobago declares that the waters to its northeast and east are "open"[69] and claims that "the eastern frontage of Trinidad and Tobago faces unopposed onto the Atlantic".[70] This is simply incorrect. Map 8 shows the multiplicity of overlapping EEZ entitlements in the area referred to by Trinidad and Tobago as "open".

39. Trinidad and Tobago is constrained in its ambitions to maritime territory to its east and northeast by the interposition of Venezuela, Guyana, Suriname and Barbados. The fact that Trinidad and Tobago has voluntarily given up claims to its east under the Trinidad-Venezuela Agreement does not diminish the legal force of those constraints. By the same token, the fact that Trinidad and Tobago has given up its international legal rights to its east (in return for whatever benefits it might have received from Venezuela) does not mean that it has a right somehow to recoup in the north what it has surrendered elsewhere. In fact, the delimitation required by international law, including the adjustment of the median line to the south in order to produce an equitable result, would not impose a deprivation on Trinidad and Tobago. It would actually enable Trinidad and Tobago to achieve more than 190 nautical miles of EEZ entitlement at the tri-point with Guyana. Under the pretence that it is being cut off from its ambitions to the north and northeast, Trinidad and Tobago seeks itself to cut off Barbados from its rights under UNCLOS.

---

69 *Ibid.*, para. 181.

70 *Ibid.*, para. 194.

40. Trinidad and Tobago then defines the relevant coasts for this arbitration as "those that are looking on to or fronting upon the area to be delimited".[71] Trinidad and Tobago asserts that its southeast-facing archipelagic baseline[72] projects into part of the disputed maritime area and therefore constitutes its relevant coast, requiring thereby that the median line shift to the north. A quick glance at any map, however, confirms the inaccuracies of this assertion.

41. Map 9 shows that Trinidad and Tobago's southeast-facing archipelagic baseline faces, not surprisingly, southeast and not northeast into the disputed maritime area. Its frontal projection runs along the northern coast of the South American land mass and into the maritime territories of Venezuela, Guyana and Suriname.

42. For Trinidad and Tobago's southeast-facing archipelagic baseline to project into the relevant area, as the Counter-Memorial asserts, Trinidad and Tobago would have to rotate on its axis by almost 40°. Map 10 shows how geography would have to be distorted to achieve such a frontal projection from this baseline.[73] However, international law does not allow the distortion of geography in order to accommodate the claims of ambitious States.

43. Map 11 shows precisely the distortion required in order that Trinidad and Tobago's land mass could generate a median line that coincided with its current claim line.

---

71 *Ibid.*, para. 187.

72 International law does not support a claim that an archipelagic baseline can be used as a test for manifest disproportionality. See below paras. 301-303

73 Trinidad and Tobago's most blatant attempt to refashion geography is also a humiliating, if defiant, admission that geography does not fit its claims. The introduction of a random north-south "vector" to replace its actual coastline or even its baseline will be discussed further at Section 5.6(E) below.

44. The only part of Trinidad and Tobago's coast that projects frontally into the relevant area is shown on Map 12. This coast is 4.737 nautical miles long and, not coincidentally, it also generates the Trinidad and Tobago basepoints for the median line. Its counterpart is the 10.202 nautical miles of Barbados' coast opposite that also projects frontally into the relevant area.

## Section 1.5 Trinidad and Tobago's theory of maritime entitlement inverts the maxim that the land controls the sea

45. Trinidad and Tobago's claim cannot be understood if analysed from its land territory outward; it inverts the maxim that the land controls the sea. The geographical bases of Trinidad and Tobago's claim are nothing more than spurious creations[74] or refashioned geography.[75] The claim centres on Trinidad and Tobago's ambition for an ECS, which, in Trinidad and Tobago's theory, somehow takes precedence over Barbados' rights to its EEZ; rights under UNCLOS that are subject only to other States' EEZ claims. Thus, in a perversion of UNCLOS, Trinidad and Tobago asserts that it has a right to "its" ECS that Barbados' EEZ cannot cut-off.

46. Trinidad and Tobago entirely avoids addressing Barbados' right to its EEZ that lies beyond the 200 nautical mile arc of any other State. To do so, Trinidad and Tobago's

---

74 Trinidad and Tobago puts great store in its theory of two very distinct maritime spaces between the Parties, requiring a western sector and an eastern sector of the boundary, each with distinct legal principles applying. It describes these as being the Caribbean area and the Atlantic area, based on the International Hydrographic Office (***IHO***) delineation between the Caribbean Sea and the Atlantic Ocean. Closer examination, at Section 4.4 below, reveals that the turning point of the Trinidad and Tobago line is located a significant distance from the point that it describes as the boundary between those two bodies of water.

75 See Section 5.3 below for a discussion of how the coastal projection of the coast proposed by Trinidad and Tobago to be its relevant coast actually projects away from the disputed area by a factor of almost 40°.

theory of delimitation works backward in its application. It involves the following elements: First, as a starting proposition, the theory requires that it must be taken as a given that Trinidad and Tobago has a right to the sea-bed beyond its 200 nautical mile arc that trumps any claim to any category of maritime territory by Barbados. Given that, so the theory proceeds, Trinidad and Tobago's entitlement to ECS beyond its 200 nautical mile arc trumps Barbados' entitlement to ECS beyond its 200 nautical mile arc. Trinidad and Tobago provides no argument to support this conclusion, on which its entire case rests.

47. Second, Trinidad and Tobago argues, given that its "right" to the ECS beyond Barbados' 200 nautical mile arc takes priority over Barbados' right over the same territory, Trinidad and Tobago must therefore also enjoy sovereign rights over the sea-bed and subsoil from Barbados' 200 nautical mile arc back to Trinidad and Tobago's 200 nautical mile arc.[76] If Trinidad and Tobago did not, then its "right" to the ECS beyond Barbados' 200 nautical mile arc could not be upheld because there would be an interruption in the continuity of sovereignty over the sea-bed and subsoil.

48. Third, Trinidad and Tobago's EEZ must extend to its full 200 nautical mile potential limit, so the theory goes.[77] If it did not, Trinidad and Tobago could not claim an ECS under Article 76 of UNCLOS. Because of this, Trinidad and Tobago claims to be entitled to the entirety of its EEZ in an area of its overlap with Barbados' EEZ. Trinidad and Tobago then points to a series of immaterial geographical

76 Counter-Memorial of Trinidad and Tobago, para. 277.

77 *Ibid.*, para. 246.

happenstances,[78] working backward from its 200 nautical mile arc toward the land, that it claims confirm that this "no cut-off" claim is not inequitable.

49. The logic of Trinidad and Tobago's claim is thus that Trinidad and Tobago must be entitled to EEZ up to its 200 nautical mile limit because any EEZ delimitation that fell short of awarding Trinidad and Tobago its full EEZ entitlement would cut it off from "its" sea-bed and subsoil under Barbados' truncated–EEZ, which would in turn as a result cut off Trinidad and Tobago from "its" "full" potential ECS. This theory is the only rationale to support Trinidad and Tobago's claim to cut off Barbados from an area of maritime space that is indisputably part of its EEZ beyond the 200 nautical mile arc of any other State.

50. It is axiomatic that, for maritime delimitation purposes, the land dominates the sea. Trinidad and Tobago has inverted this principle. Rather than the land dominating the sea from the coast outward, Trinidad and Tobago's paradigm is that of a potential ECS claim which dominates an inward retroprojection to the coast. Trinidad and Tobago's ambitions find no support in law and Trinidad and Tobago's claim reflects its recognition of this.

## Section 1.6 For more than 25 years Barbados and its concessionaires have been active in the maritime area to the north of the median line now claimed by Trinidad and Tobago

51. The area to the north of the median line now claimed by Trinidad and Tobago in its Counter-Memorial is one in which Barbados and its concessionaires exclusively have

78 *Ibid.*, paras 248-256.

been active in the context of hydrocarbon exploration for a period of more than 25 years. The activities covered are described below.[79]

52. To date, Barbados' hydrocarbon reserves have proved to be very modest.[80] Barbados' colonial economy was constructed around tobacco and cotton and subsequently sugar, for the better part of three centuries.[81] While still today a significant contributor to the economy, sugar began its centuries-long decline almost as soon as it established its pre-eminence as a crop in the fields of Barbados.[82]

53. Barbados' modern, postwar economy is largely based on a delicate balancing act amongst the vital tourism sector, the increasingly troubled sugar sector[83] and an

---

79 See below paras. 322-323

80 World Trade Organisation, Trade Policy Review Barbados, Report of the Secretariat, WT/TPR/101, 10 June 2002. (Reply of Barbados, Appendix 26, Vol. 2 at p. 377.)

81 Memorial of Barbados, para. 26.

82 "In 1653, a mere seven years after the introduction of the sugar economy, one of the leading sugar planters pointed to the danger which, for three centuries, has been the nightmare of the island: 'This island of Barbados cannot last in an (*sic*) of trade three years longer especially for sugar, the wood being almost already spent, and therefore in prudence a place must be presently thought upon, where this great people should find maintenance and employment." Eric Williams, *From Columbus to Castro: the History of the Caribbean 1492-1969*, Andre Deutsch (1970) p. 115. (Reply of Barbados, Appendix 4A, Vol. 2 at p. 27H.) In 2004, sugar exports accounted for BDS$44.9 million out of exports totalling BDS$336.6 million, approximately 13.3 per cent of Barbados' total exports. Central Bank of Barbados, Economic Review, Vol. XXXI, No. 3, December 2004, at p. 11. (Reply of Barbados, Appendix 53, Vol. 3 at p. 690.)

83 Already facing pressure to reduce production costs, Barbados' sugar industry will suffer from the consequences of the dismantling of the European Union's sugar regime from which it benefited, owing to a recent series of rulings in the World Trade Organisation, which found the EU system to be incompatible with WTO rules. See Central Bank of Barbados Economic Review, Vol. XXXI, No. 3, December 2004, at pp. 24-27. (Reply of Barbados, Appendix 53, Vol. 3 at pp. 691-694.)

emerging services sector.[84] This is in sharp contradistinction with the economy of Trinidad and Tobago, which, historically, was far more diverse and which, today, is buoyed by an expanding energy sector and manufacturing base which takes advantage of the low energy costs available to it.[85] Trinidad and Tobago may complain in this arbitration that geography unfairly constrains the extent of its maritime territory. However, Trinidad and Tobago has geography to thank for its abundant hydrocarbon resources. The maritime territory that it has overflows with hydrocarbon resources, unlike Barbados'. By way of comparison, whereas currently Barbados produces approximately 1,000 barrels per day of oil,[86] in a declining number of wells, Trinidad and Tobago produces almost 125,000 barrels per day with its production expanding.[87] In terms of natural gas, the imbalance is even more striking: Trinidad and Tobago produces significantly more – over four times more – natural gas in one day (2,983 million cubic feet[88]) than Barbados does in an entire year (718 million cubic feet[89]).

54. More significantly, the area now claimed by Trinidad and Tobago to the north of the median line is territory over which Barbados has long exercised sovereign rights and jurisdiction in relation to hydrocarbon exploitation and management. Barbados first

---

84 World Trade Organisation, *Trade Policy Review Barbados,* Report by the Secretariat, WT/TPR/S1101, 10 June 2002. (Reply of Barbados, Appendix 26, Vol. 2 at p. 362.)

85 International Monetary Fund, *Trinidad and Tobago: 2004 Article IV Consultation – Staff Report, Staff Statement; Public Information Notice on the Executive Board Discussion; and Statement by the Executive Director for Trinidad and Tobago*, January 2005. IMF Country Report No. 05/4. (Reply of Barbados, Appendix 55, Vol. 3 at p. 705.)

86 Production Figures, 1994-2004, Ministry of Energy and Public Utilities, Barbados. (Reply of Barbados, Appendix 63, Vol. 3.)

87 Trinidad and Tobago crude oil and natural gas production 2000-2004, Ministry of Energy and Energy Industries, Trinidad and Tobago. (Reply of Barbados, Appendix 54, Vol. 3 at p. 695.)

88 *Ibid.*

89 Table of oil and gas production for Barbados, 1994 to 2004, Ministry of Energy and Public Utilities, Barbados. (Reply of Barbados, Appendix 63, Vol. 3.)

granted a licence that included the area to the north of the median line now claimed by Trinidad and Tobago in 1979.[90] Its concessionaire was a subsidiary of Mobil.[91] In 1996, Barbados granted a new concession over the same area to a consortium comprised of subsidiaries of CONOCO and TotalFinaElf.[92] Trinidad and Tobago was aware of the existence and extent of both these concessions and did not protest them.[93]

55. The area to the north of the median line now claimed by Trinidad and Tobago has been extensively explored by Barbados' concessionaires or energy companies and other entities operating under Barbados' express permission. Map 13 shows such seismic activity in relation to the area in dispute. Barbados and its concessionaires have invested considerable human and financial resources in this area, which appears to be perhaps the one part of Barbados' EEZ that might be prospective. By way of example, from 1996 to 2004, CONOCO and its partner TotalFinaElf spent approximately $65 million on reconnaissance, seismic testing and exploratory drilling under their Barbados concession.[94]

56. From the mid-1990s, the Commonwealth Secretariat began urging its developing State members, such as Barbados, to take steps to protect and manage their resources and other interests in their maritime territory. As part of this initiative, the Commonwealth Secretariat sponsored the United Kingdom Hydrographic Office to

---

90 Geological and Geophysical (offshore) Licence granted to Mobil Exploration Barbados Limited (unsigned copy), 1979. (Memorial of Barbados, Appendix 28, Vol. 1.)

91 *Ibid.*

92 Licence and Concession Agreement between the Government of Barbados and CONOCO Barbados Ltd, 1996 (unsigned copy). (Reply of Barbados, Appendix 13, Vol. 2.)

93 See below Section 6.1.

94 Financial statements for CONOCO Phillips (UK) Ltd – Barbados Branch – Joint Venture for the years ending 31 December 2002 and 2003. (Reply of Barbados, Appendix 38, Vol. 3 at p. 636.)

conduct a technical study of Barbados' basepoints and maritime territory entitlements. That report was produced for Barbados in 1999. In late 2001, Barbados began the process of planning its submission to the Commission on the Limits of the Continental Shelf (***CLCS***) in relation to its entitlement to an ECS. In 2002, Barbados engaged geological and geomorphological experts to begin the laborious and costly process of preparing its CLCS submission. That process is currently ongoing and, of course, relates to all of Barbados' entitlement to the ECS abutting its 200 nautical mile EEZ limit.

**Section 1.7 The regional implications of the Parties' claims**

57. As explained at Section 3.2 below, international law does not recognise "regional implications" as a relevant circumstance for the purposes of maritime delimitation. However, the wider implications of endorsing the expansionist ambitions of larger and more wealthy States against their poorer and smaller neighbours must be faced squarely. If the Tribunal chose to recognise directly or by necessary implication that the Trinidad-Venezuela Agreement line was opposable to third parties, the implications for Barbados and Guyana (including in relation to the latter's land territory) would be grave.

58. As noted above, Trinidad and Tobago's claim, in essence, is that its desire for ECS beyond its 200 nautical mile arc somehow trumps Barbados' rights both within and beyond Barbados' EEZ.[95] As a result of this, so the argument proceeds, Trinidad and Tobago has a right, *inter alia*, to the sea-bed and subsoil of Barbados' EEZ. If this argument were endorsed by this Tribunal, and if it were also applied to Barbados' relationships with its other neighbours, Barbados would be left with almost no CS.

95 See above paras. 45-47.

Map 14 shows what would be the effect of applying Trinidad and Tobago's leapfrog theory within the region. Maps 15 to 18 show what would be the effect of Trinidad and Tobago's theory if applied elsewhere.[96]

59. In contrast to Trinidad and Tobago's claim, the implications of Barbados' claim are benign within the region and beyond. It takes account of local practice and custom in the traditional fisheries of the region. Apart from that, it follows the presumption that a median line solution is equitable.

96 Any such delimitation would be contrary even to the regional practice cited by Trinidad and Tobago in support of its new claim. The regional practice confirms that there is no inherent right to extended continental shelf beneath and beyond the EEZs of neighbouring States. For example, see the France/Dominica delimitation, shown at Counter-Memorial of Trinidad and Tobago, Vol. 1(2), Figure 7.2.

## CHAPTER 2 JURISDICTIONAL ISSUES

### Section 2.1 Trinidad and Tobago's objections as to jurisdiction and admissibility

60. Trinidad and Tobago raises three objections as to jurisdiction and admissibility: (i) that Barbados allegedly failed to comply with purported "pre-conditions" to arbitration under Part XV of UNCLOS;[97] (ii) that Barbados' "claim is inadmissible because it is abusive";[98] and (iii) that, because Barbados' Notification and Statement of Claim framed the dispute in terms of a claim to "a single unified maritime boundary line, delimiting the exclusive economic zone and the continental shelf between it and the Republic of Trinidad and Tobago,"[99] the Tribunal "would lack jurisdiction in respect of any remedy sought by Barbados relating to fishing rights in the exclusive economic zone of Trinidad and Tobago."[100]

61. These objections constitute nothing more than a perfunctory "straw-man". They lack a basis in fact or law, occupying a mere 11 double-spaced pages of text in the Counter-Memorial and including scant reference to (purported) authority. They rely on an incomplete and misleading summary of the records of the negotiations between the Parties — records that Trinidad and Tobago unlawfully submitted in the first place.[101] The Tribunal's jurisdiction to decide the questions submitted to it by Barbados cannot be doubted.

---

97 Counter-Memorial of Trinidad and Tobago, para. 107.

98 *Ibid.*, para. 121.

99 *Ibid.*, para. 131 (quoting Statement of Claim, para. 15).

100 *Ibid.*, para. 135.

101 See Section 2.2.

62. Trinidad and Tobago bases its first objection on a novel interpretation of UNCLOS seemingly designed to transform an entirely clear, unequivocal, and standard treaty obligation to arbitrate into an infinite regress of purported "pre-conditions" to arbitration, the satisfaction of which, according to Trinidad and Tobago, still leaves the obligation to arbitrate subject to the whim of the putative respondent State. This interpretation contravenes the ordinary textual meaning of the provisions at issue "in their context and in light of [UNCLOS'] object and purpose" and in any event would produce "a result which is manifestly absurd or unreasonable."[102]

63. Trinidad and Tobago's second objection is equally implausible. A State's invocation of its right to arbitrate under a treaty after it exhausts the potential for a negotiated resolution can hardly be characterised as an "abuse of right". Indeed, on the facts presented here, Barbados had no choice but to exercise that right and was invited to do so by Trinidad and Tobago. For Trinidad and Tobago to characterise Barbados' claim to delimit a maritime boundary, taking account of a relevant circumstance, as "hopeless" is simply untenable.[103]

64. Trinidad and Tobago's third objection, to the effect that the special circumstance submitted by Barbados falls outside the scope of its Statement of Claim and hence the Tribunal's jurisdiction, both misrepresents Barbados' claim and mis-states the law.

65. These objections will be analysed *seriatim* below.

---

102 Vienna Convention on the Law of Treaties, Articles 31 and 32, 23 May 1969, 1155 UNTS 331.

103 Counter-Memorial of Trinidad and Tobago, para. 121. It also further confirms the futility of further negotiation.

## Section 2.2 Overview of settlement negotiations

66. As a preliminary matter, Barbados would invite the Tribunal to review the history of the negotiations, which Trinidad and Tobago not only unlawfully adduced in the first place but now selectively and misleadingly references to support its jurisdictional objections.

67. Trinidad and Tobago asserts in its Counter-Memorial that Barbados "accepted and recognised" that it had no claim south of the median line.[104] The Negotiation Records show no such thing and Trinidad and Tobago provides no reference to support its assertion. During the first two rounds of negotiations, Barbados rejected Trinidad and Tobago's claims of relevant circumstances requiring the median line to be moved to the north.[105] Barbados did not say that there were no relevant circumstances in its favour to the south of the median line.[106]

68. The Negotiation Records confirm that the Parties were in dispute from the first meeting onward as to the role of fisheries in the delimitation negotiations.[107] At every meeting, starting with the first, Barbados insisted that fisheries were an essential part of the delimitation negotiations.[108] Indeed, following Barbados' suggestion, the

---

104 At paragraph 313.

105 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 161 and 163.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at pp. 186-189.)

106 *Ibid.*

107 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 166-167.) Trinidad and Tobago admits that Barbados consistently linked the issues of the boundary and historical fishing. (Counter-Memorial of Trinidad and Tobago, paras. 74 and 75.)

108 Joint Reports of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 169.) This was mirrored by Barbados' position in what Trinidad and Tobago terms the

negotiations were expanded specifically to encompass the fisheries issue from early 2002.[109] During the negotiations, Barbados maintained that its traditional fishery off the island of Tobago was a relevant circumstance which must be taken into account in adjusting the provisional median line to the south in order to achieve an equitable result.[110]

69. During the negotiations, Trinidad and Tobago acknowledged that Barbadians had historically fished off the island of Tobago, but refused to engage the subject in the context of the delimitation negotiation.[111] Trinidad and Tobago acknowledged, albeit

---

fisheries negotiations. See Joint Report of negotiations of 20 to 22 March 2002. (Reply of Barbados, Appendix 25, Vol. 2 at p. 337.)

109 Letter from Honourable Billie Miller, Minister of Foreign Affairs and Foreign Trade, Barbados to Honourable Knowlson Gift, Minister of Foreign Affairs, Trinidad and Tobago, 16 January 2002. Letter from Honourable Knowlson Gift, Minister of Foreign Affairs and Trinidad and Tobago, 24 January 2002. (Reply of Barbados, Appendices 21 and 22, Vol. 2).

110 For example, the very first paragraph of the Joint Report of the negotiations of 30 January to 1 February 2000 notes that "Barbados' Chief Negotiator welcomed the Trinidad and Tobago Delegation to Barbados and back to the negotiating table for the Fourth Round of negotiations on Maritime Boundary Delimitation *and fisheries* as well as the full range of bilateral matters which both sides had previously agreed would constitute the substance of the discussions." (Reply of Barbados, Appendix 23, Vol. 2 at p. 264.) (Emphasis added). Furthermore, Barbados expressly clarified its view "that all of the issues on the bilateral agenda, including fisheries, were *inextricably linked*, and would therefore need to be dealt with in a holistic manner in the context of the Law of the Sea." *Ibid.*, p. 265 (Emphasis added); see also *ibid.*, p. 273: "The interconnection of the fisheries and boundary issues is underscored by the fact that Trinidad and Tobago's opening position line comes within 42 miles of the coast of Barbados. Barbados finds the idea of having to ask Trinidad and Tobago for permission to fish 42 miles from its own coast to be unacceptable.".

111 See Joint Report of negotiations of 30 January to 1 February 2002, *ibid*; p. 266:

> "The Trinidad and Tobago delegation also indicated that it acknowledged the importance that the Barbados delegation attached to fisheries, but was not in a position at this stage to engage in a general exchange on fisheries."

Indeed, Trinidad and Tobago even sought to delay and obstruct negotiations on a new fishing agreement between the Parties by objecting to the inclusion of two regional experts on a Technical

rejected, "the contention by the Chief Negotiator of Barbados that there are relevant circumstances, including historical rights enjoyed by fishermen that would cause a maritime boundary to be located beyond the equidistance line to Trinidad and Tobago's prejudice."[112] Trinidad and Tobago's assertion that Barbados never articulated this position, that the position had been newly-minted for this arbitration,[113] is therefore no more than rhetorical pretence. Trinidad and Tobago cannot, of course, unilaterally delink the issues of fisheries and the maritime boundary as a matter of law or limit the scope of Barbados' claims.[114]

70. In the negotiations, Trinidad and Tobago spoke generally of its CS entitlement.[115] So, too, Barbados reminded Trinidad and Tobago of Barbados' entitlement to claim any

---

Working Group purely on the grounds that they were Barbadian nationals. The Minister of Foreign Affairs and Foreign Trade of Barbados expressed her dismay at Trinidad and Tobago's obstreperousness in this regard in a letter to the Minister of Foreign Affairs of Trinidad and Tobago on 17 June 2002. (Reply of Barbados, Appendix 27, Vol. 2 at p. 381.) But Trinidad and Tobago's attitude did not change over the next seven months leading the Prime Minister of Barbados to raise his concerns in letters to the Prime Minister of Trinidad and Tobago of 22 January 2003, 9 April 2003 and 9 June 2003. (Reply of Barbados, Appendices 28, Vol. 2 and 31 and 32, Vol. 3.)

112 Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 269.) By the time of the negotiations of 30 January to 1 February 2002, there had still been no movement to a common ground on the location of the Parties' respective EEZs. Wanting to obtain some immediate solution for its fisherfolk, Barbados then suggested that any negotiation of a fishery agreement be only in relation to access to the Parties' territorial seas. This also contradicts Trinidad and Tobago's assertion that the Parties never considered in relation to fisheries that they might be dealing with Trinidad and Tobago seeking access to Barbados' EEZ just off the island of Tobago. *Ibid.*, p. 273.

113 Counter-Memorial of Trinidad and Tobago, paras. 1-2.

114 See *ibid.*, para. 80.

115 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 158.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 184.)

CS extension beyond its unimpeded 200 nautical mile arc.[116] Nonetheless, the Negotiation Records confirm that both Parties represented that they sought the delimitation of a single, all-purpose boundary for the sea-bed, subsoil and superajacent waters.[117] This, of course, is only possible in relation to the area within 200 nautical miles of a State's coast. Furthermore, the line shown on a chart by Trinidad and Tobago to Barbados as representing its preliminary position stopped at Trinidad and Tobago's 200 nautical mile arc and Trinidad and Tobago expressly confirmed that that was the limit of its claim.[118] It was thus clear that the Parties were only negotiating about delimiting the maritime space within the area of their 200 nautical mile overlap.

71. The Negotiation Records demonstrate that the Parties were in dispute from the outset as to the basic methodology to be used in the delimitation.[119] Barbados insisted

---

116 Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 187.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 268-269.)

117 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 158). Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 187.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 248.)

118 See Transcript of negotiations of 19 to 21 November 2003. (Reply to Barbados, Appendix 36, Vol. 3 at p. 600.) The only graphic presented by Trinidad and Tobago during the negotiations was a small sketch on a chart of the region showing an arbitrary and unexplained line running 42 nautical miles off Barbados' coast. This claim line stopped at the 200 nautical mile arc of Trinidad and Tobago and did not enter Barbados' EEZ beyond that point. See Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 270-271.)

119 This contradicts the assertion to the contrary made by Trinidad and Tobago at para. 109 of the Counter-Memorial. For example, see also Transcript of negotiations of 19 to 21 November 2003, where Sir Harold said:

> "I don't want to repeat myself, but the position is that Barbados' position has always been that in delimitation between Trinidad and Tobago and Barbados, the equidistance

throughout the negotiations that the methodology to be applied was to identify the provisional median line and then determine whether any relevant circumstances required it to be adjusted.[120] Up to and including the final round of negotiations, Trinidad and Tobago rejected this methodology and instead proposed that the Parties identify the "area" of dispute and then divide it somehow exactly according to the proportionality of their coastlines (as defined by Trinidad and Tobago).[121] Trinidad

---

principle is the starting point of negotiations. We have always said that. In respect to relevant factors, we have always said what we understand the law to be in relation to relevant factors. Your proposition was that that is not the boundary, that the starting point of negotiation with us is that your position is that your boundary must run within 40 miles of the south coast of Barbados and we said, using your own principles, we will illustrate that using those principles, that a boundary can be constructed in geometrical terms which illustrates that your own principles would lead us to have a boundary of Barbados within 42 miles of Tobago. And that is all that has happened, approximately the same, so therefore we just illustrated to you that the proportionality principle which you espoused, can work the other way in our favour too. That is all, but our position is, the equidistance line is the starting and that is as crystal clear as you can have it. So you know the Barbados position now, I hope." (Reply of Barbados, Appendix 36, Vol. 3, at pp. 601-602.)

120 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 163.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 251.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 268.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 565.)

121 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 162.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 183.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 249.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 270.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 567.)

and Tobago referred to this as the "equitable principles – relevant circumstances rule" methodology.[122]

72. The Negotiation Records show that the Parties disputed from the first round onward whether they were in a situation of coastal opposition or in a situation partly of coastal opposition and partly of coastal adjacency.[123] So, too, the Parties were in dispute about what constituted the relevant coasts,[124] the role of

---

122 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 158.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 248.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 270.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 568.)

123 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 160-163.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at pp. 182, 188-189.) Joint Report of negotiations of 10 to 12 July 2002. (Reply of Barbados, Appendix 20, Vol. 2 at pp. 249, 252.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 268, 270.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 568.)

124 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 160, 164.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at pp. 182, 188.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 248.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 268, 272.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at pp. 567-568) For example, see the Transcript of Proceedings of the Negotiations of 24 to 26 October 2000. Ambassador Sealy said "We also need to work together to arrive at a common understanding of the geographical circumstances of the area. In our first round, we pointed out that we were in some situations, opposite states, and in another way, we were adjacent states. You did not agree or did not appear to agree." (Reply of Barbados, Appendix 18, Vol. 2 at p. 211.)

proportionality/disproportionality[125] and about which State's proposal cut-off which other from its maritime area.[126]

73. Throughout, Barbados consistently rejected as not factually or legally sustainable the criteria proposed by Trinidad and Tobago to be relevant in the delimitation process.[127]

74. The Negotiation Records confirm that from the first round onward, the Parties were in dispute as to the relevance of the Trinidad-Venezuela Agreement.[128] At each meeting, Barbados expressly rejected that agreement.[129] Barbados pointed out that the

---

125 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 159, 160, 163) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at pp. 183, 186.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at pp. 248-249, 252.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 268, 270.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 566.)

126 See references to Joint Reports, above at footnotes 115 and 116.

127 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 161, 163.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at pp. 187-189.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at pp. 251-253.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at pp. 267-268.) Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 565.)

128 This contradicts the suggestion made by Trinidad and Tobago at paragraphs 96 and 97 of the Counter-Memorial that it never insisted on the opposability against Barbados of the Trinidad-Venezuela Agreement. It also contradicts the assertion made by Trinidad and Tobago at paragraph 98 of the Counter-Memorial that Barbados did not object to the Trinidad-Venezuela Agreement until after the third round of negotiations.

129 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at pp. 161 and 164.) Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 187.) Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 252.) Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 268.) For example:

> "As an affected party Barbados' interests should have been taken into account in the negotiations leading to the Trinidad and Tobago/Venezuela Maritime Delimitation

Agreement sought not only to appropriate Barbados' maritime territory, but directly and indirectly to appropriate Guyana's land and maritime territory.[130] At each round, Trinidad and Tobago, despite recognising that it was not opposable to Barbados, nonetheless insisted that Barbados recognise the validity of the Trinidad-Venezuela Agreement and its opposability against Barbados.[131]

75. The Negotiation Records confirm that both Parties made repeated references to arbitration as a viable method of resolving their dispute were the negotiations to fail. Both Parties clearly appreciated that the failure of negotiations would necessitate compulsory dispute resolution, as indicated by, *inter alia*, their express agreement in the first round "that no information exchanged in the course of their negotiations will be used in any subsequent judicial proceedings which might arise unless both parties

---

Agreement. Barbados had not been consulted, therefore, according to international law, it was not bound by the agreement and did not regard its rights to delimit its maritime boundary in accordance with UNCLOS as being in any way circumscribed by that Agreement."

Joint Report of negotiations of 24 to 26 October 2000. (Reply of Barbados, Appendix 17, Vol. 2 at p. 187.)

See also comments of Sir Harold in the transcript of negotiations of 24 to 26 October 2000:

"I think we can agree that we are not bound in accordance with the principles of the Law of the Sea, by any decision that has been taken in that direction as a result of the bilateral negotiations between yourselves and Venezuela."

(Reply of Barbados, Appendix 18, Vol. 2 at p. 215.)

130 *Ibid.*

131 Indeed, Trinidad and Tobago's proposed definition of the "area" to be delimited was advanced in part by reference to the line created by the Trinidad-Venezuela Agreement. Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2 at p. 249). Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 271.)

agree to its use."[132] At the same meeting, Barbados noted that if the negotiations failed, the option of recourse to third party arbitration was available, although Barbados optimistically did not think that it would be required.[133] At the next round, Trinidad and Tobago made veiled threats about the dispute being referred to arbitration. The Joint Reports record Trinidad and Tobago's position:

> "The ICJ and Chambers of the ICJ have cited with approval the equitable principles that Trinidad and Tobago has advanced for consideration by [the Parties]. Trinidad and Tobago pointed out that if the two States needed to refer this matter to a third party, both States would be looking to that corpus of law reflected in those judgments in support of their positions."[134]

76. In the final round, the head of the Trinidad and Tobago delegation stated that, despite all the discussions over four years, the Parties had maintained their incompatible positions "with no movement by either side to take into account any of the arguments

---

132 Joint Report of negotiations of 19 to 20 July 2000. (Reply of Barbados, Appendix 16, Vol. 2 at p. 165.)

133 *Ibid.*, p. 161.

134 Joint Report of negotiations of 24 to 26 October 2004. (Reply of Barbados, Appendix 17, Vol. 2 at p. 184.) See also the comments of Trinidad and Tobago during the negotiations of 19-21 November 2003:

> "The other interesting thing is that today, Trinidad and Tobago's position is that because of the existence of the Venezuela/Trinidad and Tobago Treaty, we have to take that into account as a relevant circumstance in determining a boundary between Barbados and Trinidad and Tobago. That proposition we disagree with. We disagree with that fundamentally because when you were drawing that line, you didn't take our interest into account, but you did recognise that we had interest, because the Treaty specifically says 'it shall not interfere with the rights of third parties'." (Reply of Barbados, Appendix 36, Vol. 2 at p. 598.) This contradicts the assertion to the contrary made by Trinidad and Tobago at paragraph 90 of the Counter-Memorial.

that have been advanced in the past."[135] In response, the head of Barbados' delegation put Trinidad and Tobago on notice:

> "My suggestion is that it would advance the position of the parties in the negotiations if we know all of the positions on all of the points because in these matters in negotiations, if the positions are irreconcilable then we have to use another method of dealing with it".[136]

It is perfectly clear from these and other statements made during the negotiations that both Parties appreciated that adjudication or arbitration of their dispute was inevitable if one of them concluded that agreement could not be secured.

77. The Negotiation Records confirm that Barbados articulated its claim, consistent with its submission to this Tribunal in the Memorial.[137] They also demonstrate that, in contrast to Barbados' presentation of its claim in a legally and technically precise, coherent and comprehensible manner, Trinidad and Tobago never explained – other than by vague references to equitable circumstances – how its ambition (and the line that it finally sketched and proposed as the boundary) was supported by law or fact.[138]

---

135 Transcript of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 36, Vol. 2 at p. 592.)

136 *Ibid.*, pp. 592-593.

137 In the first paragraph of its Counter-Memorial, Trinidad and Tobago claims that during the negotiations it had never been shown a map depicting, or heard Barbados argue in favour of, a delimitation line such as the one set out in the Memorial. This is untrue. Lest there be any doubt, the transcript of the negotiations of 19 to 21 November 2003 confirms that, in response to being shown just such a map by Barbados, Trinidad and Tobago's legal expert, Mr. Gerald Thompson asked the Barbados Delegation "Are you saying that the area to the north-east of Tobago, that the limit of the EEZ there, is a twelve-mile?" *Ibid.*, p. 583. The Barbados Delegation confirmed that that was so, on the basis of the relevant circumstance of Barbados' fishing off Tobago.

138 See Transcript of negotiations of 19-20 November 2003, *ibid.*, at p. 597-598:

> "It is not surprising therefore that you are in difficulty, because it is your principles that have been used to demonstrate the falsity of your propositions. That is the first point.

78. In the Counter-Memorial, Trinidad and Tobago asserts that during the negotiations it "submitted" to Barbados a "working copy of a detailed chart" describing its proposed boundary.[139] In fact, during the negotiations of 10 to 12 July 2001, the Parties agreed to show each other at the next meeting a chart that described visually their opening position.[140] Barbados duly prepared for the next round a chart that showed the detail of the provisional median line as calculated from the Parties' relevant basepoints. For its part, Trinidad and Tobago showed Barbados (but did not allow it to have a copy of) a chart that contained a proposed boundary line on it.[141] This chart, now described by Trinidad and Tobago as a "working copy of a detailed chart",[142] was merely a British Admiralty chart of the region with an ink-pen hand-drawn line on it. Trinidad and Tobago's proposed boundary line appeared to run along the median line from the western tri-point with St. Vincent and the Grenadines until roughly the axis between

---

> The position is that the Barbados view has not changed in any way. In delimitation cases you start with the equidistance line and we believe that the most recent cases reaffirmed this proposition and then as a consequence of other factors, you say, in order to arrive at an equitable solution whether there is reason for shifting that fundamental principle of delimitation because of the inequitability of the result. Now you appear to dispute that proposition. Trinidad and Tobago appears to dispute the proposition that in a boundary line that the vast majority of the jurisprudence indicates quite clearly that you start with the equidistance line, then you say, is this equitable or is it inequitable. You look then at the factors which give rise to its inequitability. That is a fundamental difference between us because you would start, as we understand it, with this concept of disproportionality of our coast line and you say that the first line that comes because of the disproportionality of the coast line, brings me within 40 miles of the south coast of Barbados. We say that is an unwarranted, unjustified and has no legal basis. We say that is what we say. So that is a fundamental difference."

139 Counter-Memorial of Trinidad and Tobago, para. 73.

140 Joint Report of negotiations of 10 to 12 July 2001. (Reply of Barbados, Appendix 20, Vol. 2.)

141 Joint Report of negotiations of 30 January to 1 February 2002. (Reply of Barbados, Appendix 23, Vol. 2 at p. 266.)

142 Counter-Memorial of Trinidad and Tobago, para. 73.

the islands of Barbados and Tobago, after which the line turned abruptly to run some 42 nautical miles off the southeast coast of Barbados up to Trinidad and Tobago's 200 nautical mile arc.[143]

79. At the negotiations of 19 to 21 November 2003, Barbados presented graphic depictions and verbal descriptions of its views on Trinidad and Tobago's claim and on its own positions, including as submitted to this Tribunal in the Memorial.[144] The Trinidad and Tobago delegation expressly recognised the depiction of a boundary line that ran just outside the territorial waters of the northern part of the island of Tobago that reflected the traditional Barbadian fishery.[145] The fact that the Trinidad and Tobago delegation apparently could not fully comprehend Barbados' charts, referring

143 Joint Report of negotiations of 30 January to 1 February 2003. (Reply of Barbados, Appendix 23, Vol. 2 at p. 271.) Trinidad and Tobago was unwilling or unable at that meeting or the next to describe the legal or factual bases to support its claimed boundary line. It had become increasingly clear, as the Negotiation Records show, that Trinidad and Tobago was now spinning out the bilateral negotiations, including directing its negotiating team to refuse to engage reasonably in even the simplest of dialogues. As one example, Trinidad and Tobago refused during the negotiations to recognise the accepted delimitation methodology that it now accepts. Also, for example, at the negotiations of 19 to 21 November 2003, the Trinidad and Tobago Delegation refused outright to say whether it recognised that its 200 nautical mile arc at all points to its north and east fell within Barbados' 200 nautical mile arc. (Reply of Barbados, Appendix 35, Vol. 3 at p. 567 and Appendix 36, Vol. 3, at pp. 599-600.)

144 Joint Report of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 35, Vol. 3 at p. 565.) This contradicts the assertion to the contrary made by Trinidad and Tobago at para. 77 of the Counter-Memorial.

145 See Transcript of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 36, Vol. 3 at p. 583.)

to them as being a bewildering "geometric construction of lines and arcs",[146] is not Barbados' fault.

80. Trinidad and Tobago asserts that the Joint Reports show that Barbados broke-off negotiations.[147] The Joint Reports show no such thing and Trinidad and Tobago provides no reference to support its assertion. The record of this arbitration establishes that Barbados commenced the arbitration, but that it did so following the impromptu visit of the Prime Minister of Trinidad and Tobago and his delegation to Barbados on 16 February 2004, during which he broke-off the boundary negotiations on the basis that the Parties' positions were "intractable" and told the Prime Minister of Barbados to proceed with an arbitration if Barbados so desired.

81. The immediate background to that meeting and the commencement of this arbitration is as follows. By diplomatic note of 26 November 2003, Barbados had proposed that the next maritime delimitation and fisheries negotiations take place in the latter half of February 2004.[148] On 29 January[149] and again on 5 February 2004, Prime Minister Manning made aggressive public statements about the Parties' dispute, such as: "There is the battle and there is the war".[150] He then stated that Trinidad and Tobago intended to refer the dispute outside the UNCLOS dispute resolution procedures, to

146 Joint Report of negotiations of 19 to 21 November 2002. (Reply of Barbados, Appendix 35, Vol. 3 at p. 569.)

147 Counter-Memorial of Trinidad and Tobago, para. 59(1).

148 Diplomatic Note No. IR/2003/327, Ministry of Foreign Affairs and Foreign Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 26 November 2003. (Reply of Barbados, Appendix 37, Vol. 3 at p. 631-632.)

149 "New Line" *Barbados Daily Nation*, 31 January 2004. (Reply of Barbados, Appendix 39, Vol. 3 at pp. 645-646.) "Fishing dispute goes to CARICOM", *BBC Caribbean.com*, www.bbc.co.uk, 2 February 2004. (Reply of Barbados, Appendix 41, Vol. 3 at pp. 650-651.)

150 "Regional Body Won't Arbitrate" *Trinidad & Tobago Express*, 6 February 2004. (Reply of Barbados, Appendix 43, Vol. 3 at p. 653.)

the CARICOM Secretariat.[151] Barbados protested against this,[152] but Prime Minister Manning stated publicly that Trinidad and Tobago "would lodge our statement of case with CARICOM."[153]

82. On 6 February 2004, Trinidad and Tobago provocatively arrested two Barbadian fishing boats off Tobago.[154] Tension between the Parties, already high due to recent Barbadian concerns about Trinidad and Tobago imports, was further exacerbated by the arrests.

83. On 9 February 2004, Foreign Minister Gift of Trinidad and Tobago wrote Foreign Minister Miller of Barbados to propose that the negotiations resume on 26

---

151 *Ibid.*

152 Diplomatic Note No. IR/2004/23 from Ministry of Foreign Affairs and Foreign Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 6 February 2004. (Reply of Barbados, Appendix 44, Vol. 3 at p. 654.) See also "Statement of the Government of Barbados on the status of fisheries negotiations with the Government of Trinidad and Tobago," Ministry of Foreign Affairs and Trade, Barbados, 2 February 2004. (Reply of Barbados, Appendix 40, Vol. 3 at pp. 647-649.) "Barbados: why bring in CARICOM?" *Daily Nation*, 3 February 2004. (Reply of Barbados, Appendix 42, Vol. 3 at p. 652.)

153 "Regional Body Won't Arbitrate" *Trinidad & Tobago Express*, 6 February 2004. (Reply of Barbados, Appendix 43, Vol. 3 at p. 653.) Prime Minister Manning's statements appeared to contradict themselves in places and his intentions were admittedly ambiguous. Nonetheless, they evinced an intention to submit the dispute to third-party resolution, albeit outside the UNCLOS regime.

154 Facsimile from the Trinidad and Tobago Coast Guard to Barbados High Commission, 7 February 2004. (Reply of Barbados, Appendix 45, Vol. 3 at p. 655.) Diplomatic Note No. IR/2004/25 from Ministry of Foreign Affairs and Foreign Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 8 February 2004. (Reply of Barbados, Appendix 46, Vol. 3 at pp. 656-657.) Diplomatic Note 242 from Ministry of Foreign Affairs, Trinidad and Tobago to Ministry of Foreign Affairs and Foreign Trade, Barbados, 9 February 2004. (Reply of Barbados, Appendix 48, Vol. 3 at p. 660.)

February.[155] However, he proposed that they now focus on fisheries only and that the Parties deal with delimitation separately later. Barbados objected to the de-linking of the issues and the proposed delay in delimitation negotiations.[156] Finally, Barbados agreed with Trinidad and Tobago's eventual suggestion that further negotiations be held on 17 February 2004 but only on the condition that Trinidad and Tobago had committed to a single negotiating process in respect of fisheries and maritime delimitation.[157]

84. To Barbados' surprise, on the morning of Sunday 15 February, Prime Minister Manning of Trinidad and Tobago telephoned the Barbados Deputy Prime Minister seeking an urgent meeting in Barbados that same day with Prime Minister Arthur of Barbados.[158] Prime Minister Arthur was not available until Monday morning and so Prime Minister Manning agreed to delay his visit until then.[159]

85. The Government of Barbados was troubled about this sudden, unexplained development.[160] In the previous three months, Barbados had come to learn of activities and positions that Trinidad and Tobago was apparently taking that were inconsistent with good faith negotiations in relation to the delimitation. For example, in December 2003, Prime Minister Manning of Trinidad and Tobago had promised at

---

155 Letter from Honourable Knowlson Gift, Minister of Foreign Affairs, Trinidad and Tobago, to Honourable Billie Miller, Minister of Foreign Affairs and Foreign Trade, Barbados, 9 February 2004. (Reply of Barbados, Appendix 47, Vol. 3 at pp. 658-659.)

156 Diplomatic Note from the Ministry of Foreign Affairs and Trade, Barbados to the Ministry of Foreign Affairs, Trinidad and Tobago, 14 February 2004. (Reply of Barbados, Appendix 49, Vol. 3 at pp. 661-662.)

157 *Ibid.*

158 Affidavit of Teresa Marshall, 1 June 2005. (Reply of Barbados, Appendix 59, Vol. 3 at p. 720.)

159 *Ibid.*

160 *Ibid.*

a CARICOM Heads of Government Caucus held on the sidelines of the Abuja Commonwealth Heads of Government Conference that he would re-submit the Trinidad-Venezuela Agreement to his Cabinet for their review and re-consideration.[161] While Barbados was awaiting the results of this review, it came to Barbados' attention that Venezuela and Trinidad and Tobago had recently been discussing, and might have entered into agreements to co-operate in, the exploitation of hydrocarbons located along the Trinidad-Venezuela Agreement line, including possibly in areas belonging to Barbados.[162] Barbados also came to learn that Trinidad and Tobago might be planning a round of concession licensing in areas off Tobago that were known to Trinidad and Tobago to be the subject of the current negotiations.[163] These actions, combined with Trinidad and Tobago's evident desire to send the dispute to third party resolution outside the UNCLOS framework, caused Barbados further considerable concern.

86. On Sunday 15 February 2004, Barbados was concerned about what Prime Minister Manning's urgent mission might mean in terms of Trinidad and Tobago's future conduct in relation to the dispute.[164] The Government of Barbados felt that it had to contemplate all eventualities, including that Trinidad and Tobago might soon make a

---

161 *Ibid.*

162 Diplomatic Note 18/1-1 Vol. II from Ministry of Foreign Affairs and Foreign Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 19 February 2004. (Reply of Barbados, Appendix 52, Vol. 3 at pp. 676-677.) In fact, this agreement had been accomplished during the latter half of 2003. See Memorial of Barbados, paras. 92-93.

163 *Ibid.* In fact, it transpired that this was planned for March 2004.

164 Affidavit of Teresa Marshall, 1 June 2005. (Reply of Barbados, Appendix 59, Vol. 3 at p. 720.)

declaration under UNCLOS seeking to avoid the application of its dispute resolution provisions.[165]

87. At the meeting on the morning of Monday 16 February 2004, the two Prime Ministers discussed a number of unrelated matters before turning to the issues of fisheries and boundary delimitation.[166] The two Prime Ministers exchanged divergent views on the linkage between fisheries and the delimitation.[167] Prime Minister Manning revealed that the Trinidad and Tobago Cabinet had reaffirmed Trinidad and Tobago's commitment to the Trinidad-Venezuela Agreement.[168] Prime Minister Arthur objected that the Trinidad-Venezuela Agreement was prejudicial to Barbados and Guyana, particularly in supporting indirectly Venezuela's land claim against Guyana.[169] Prime Minister Manning denied any prejudice.[170] On the other hand, he confirmed that Trinidad and Tobago could not voluntarily enter into any maritime delimitation agreement with Barbados that contradicted the Trinidad-Venezuela Agreement or did not recognise the line that it produced.[171] Prime Minister Arthur noted that Barbados had made it clear to Trinidad and Tobago throughout the negotiations that it would not agree to any boundary that recognised the validity of the Trinidad-Venezuela Agreement.[172] He said that Barbados would not do anything to

---

165 *Ibid.*

166 *Ibid.*

167 *Ibid.*

168 *Ibid.*, p. 721. See also Statement of Prime Minister Arthur on relations between Barbados and Trinidad and Tobago, 16 February 2004. (Reply of Barbados, Appendix 50, Vol. 3 at p. 663.)

169 Affidavit of Teresa Marshall, 1 June 2005. (Reply of Barbados, Appendix 59, Vol. 3 at p. 721.)

170 *Ibid.*

171 *Ibid.*

172 *Ibid.* See also Statement of Arthur Prime Minister of Barbados on relations between Barbados and Trinidad and Tobago. (Reply of Barbados, Appendix 50, Vol. 3 at p. 664.)

compromise the rights or interests of Barbados or of Guyana, especially in the context of Venezuela's land claims against Guyana.[173]

88. Prime Minister Manning stated: "Are you saying that you are going to take us to an international tribunal? If so, by all means go ahead."[174] When Prime Minister Arthur referred to the commitment of the CARICOM Conference of Heads of Government to support the territorial integrity of Guyana, Prime Minister Manning responded by stating that the "maritime delimitation issue was intractable".[175]

89. After this exchange, the Trinidad and Tobago delegation departed abruptly, declining to stay for the planned luncheon.[176] The members of the Barbados delegation regrouped immediately and discussed the meeting.[177] They all were struck by Prime Minister Manning's reference to the boundary dispute as "intractable" and by his statement about referring the dispute to international arbitration.[178] It appeared that the scenario that Barbados had feared – that Trinidad and Tobago would take steps rapidly to avoid the dispute resolution provisions of UNCLOS – was coming to pass.

90. Prime Minister Arthur directed the Barbados delegation to evaluate what was needed to invoke the binding dispute resolution procedures of UNCLOS.[179] An emergency meeting of the Barbados Cabinet was convened that afternoon to discuss the

---

173 Affidavit of Teresa Marshall, 1 June 2005. (Reply of Barbados, Appendix 59, Vol. 3 at p. 721.)

174 *Ibid.*

175 *Ibid.*

176 *Ibid.*, p. 722.

177 *Ibid.*

178 *Ibid.*

179 *Ibid.*

morning's meeting.[180] Barbados decided to invoke the dispute resolution provisions under Part XV of UNCLOS with immediate effect. Barbados thus commenced the arbitration on 16 February 2004 by way of a written notification addressed to Trinidad and Tobago accompanied by a statement of the claim and the grounds on which it is based.[181] At the same time, Barbados proposed to Trinidad and Tobago that the Parties still meet as planned on 18 February 2004 to discuss the procedures to be followed under Annex VII of UNCLOS and to enter into "without prejudice" arrangements of a practical nature related to fishing.[182] Trinidad and Tobago rejected this proposal and the meeting that had been scheduled for 18 February 2004 never took place.[183]

91. Given this background, Trinidad and Tobago's contention that no dispute existed at the time that Barbados initiated the arbitration is at best disingenuous. Five years and nine rounds of negotiations unquestionably constitute a reasonable period of time,[184] particularly where one party excludes the other's artisanal fisherfolk from the traditional fishing waters under discussion, with dramatic consequences for their

---

180 *Ibid.* See Statement by Right Honourable Owen Arthur, Prime Minister of Barbados on relations between Barbados and Trinidad and Tobago. (Reply of Barbados, Appendix 50, Vol. 3.)

181 See notice of arbitration and associated notifications. (Reply of Barbados, Appendix 51, Vol. 3 at p. 670-675.)

182 Diplomatic Note 18/1-1-2 from Ministry of Foreign Affairs and Trade, Barbados to Ministry of Foreign Affairs, Trinidad and Tobago, 16 February 2004. (Reply of Barbados, Appendix 51, Vol. 3 at p. 669.)

183 Diplomatic Note No. 324 from Ministry of Foreign Affairs, Trinidad and Tobago to Ministry of Foreign Affairs and Foreign Trade, Barbados, 18 February 2004. (Counter-Memorial of Trinidad and Tobago, Vol. 3, No. 89.)

184 Barbados' conduct is entirely consistent, for example, with Australia's and New Zealand's use of Annex VII of UNCLOS in their fishing dispute against Japan. See *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, 4 August 2000, para. 55.

livelihood.

92. Equally, as has been observed, Trinidad and Tobago's contention that Barbados never saw any map akin to the one submitted in the Memorial showing Barbados' claim is at best misleading.[185] In any event, this is irrelevant to the question of jurisdiction in this case. Trinidad and Tobago clearly understood Barbados' position during the negotiations, as well as the principles of international law on which Barbados relied. Barbados consistently and repeatedly explained that position at each successive negotiating session.

93. Finally, it will be recalled that, at the conclusion of the brief meeting on 16 February 2004, the Prime Minister of Trinidad and Tobago understood that the efforts to secure a negotiated maritime boundary had deadlocked.[186] He made that fact clear to both delegations when he pronounced a key issue "intractable." [187] He told Barbados to proceed with arbitration if it so desired.

## Section 2.3 Trinidad and Tobago's theory of the pre-conditions to arbitration

94. Trinidad and Tobago's idiosyncratic theory of "pre-conditions to jurisdiction"[188] demonstrates the lengths to which it will go to avoid its clear obligation to submit the dispute to arbitration. The facts could not be simpler. After nine rounds of negotiations and many years of effort to reach an amicable settlement, after Trinidad

185 See above para. 77 and footnote 137.

186 See above para. 88.

187 Furthermore, Trinidad and Tobago referred to the arbitration, in diplomatic notes to Barbados after its commencement, as being in relation to "the issue of the inability of both States to conclude" a delimitation treaty. (Diplomatic Note No. 324 from Ministry of Foreign Affairs, Trinidad and Tobago to Ministry of Foreign Affairs and Foreign Trade, Barbados. (Counter-Memorial of Trinidad and Tobago, Vol. 3, No. 89 at p. 1.))

188 Counter-Memorial of Trinidad and Tobago, para. 101.

and Tobago had sought to refer the dispute unilaterally to third-party resolution outside the UNCLOS regime, after the Prime Minister of Trinidad and Tobago had pronounced the central and critical issue "intractable" and invited Barbados to proceed with an arbitration if it so wished, Barbados exercised its rights under Article 286 of UNCLOS.

95. Article 286 provides that "any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section".[189] Section 1, in turn, sets forth the general obligation of State parties to settle disputes peacefully (Article 279); vests the parties with autonomy to select a dispute-resolution mechanism of their choice (Articles 280-281); defers to regional, bilateral or other agreed procedures where such exist (Article 282); gives the parties the option to agree to conciliation; and finally, in the provision that Trinidad and Tobago regards as a bar to jurisdiction here, simply obliges State parties to a dispute to "exchange views" (Article 283). It provides that in the event of a dispute, "the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means".[190] To the extent that this indeed constitutes an added step in the dispute resolution process, which Barbados denies, the facts of the present case confirm that this was met.

96. Relying on this clear and straightforward obligation, which in any event was plainly fulfilled in this case, Trinidad and Tobago argues that the Tribunal's jurisdiction

189 UNCLOS, Article 286. Article 1 of Annex VII provides: "Subject to the provisions of Part XV, any Party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other Party or Parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based."

190 UNCLOS, Article 283(1).

depends "upon (i) the existence of a dispute, and (ii) an exchange of views having taken place regarding settlement by negotiation or other peaceful means".[191] It then faults Barbados for allegedly failing "to demonstrate that the two preconditions to arbitration contained in Article 283 had been satisfied as of 16 February 2004".[192]

97. The requirement that a party to a boundary delimitation include in its first pleading an elaborate anticipatory defence to even the most implausible of jurisdictional objections is unknown to the law and practice of international tribunals. Were it adopted, it would simply add an unnecessary step to the initiation of arbitration and needlessly burden arbitral tribunals. Pleonastic tricks, such as stating an intention to object to jurisdiction as a way of requiring a party to anticipate and argue jurisdiction before a recalcitrant opponent has made its objections, are not worthy of comment. Both Parties' pleadings to date confirm sufficient facts necessary to establish jurisdiction:

> "The Convention also provides in both the above-cited articles [Articles 74(1) and 83(1)] that, if no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV. Within this Part, Articles 286, 287 and 288, coupled with Annex VII, establish compulsory jurisdiction at the instance of any party. It is on this basis that the present proceedings have been commenced."[193]

98. Were there any doubt, the Negotiation Records, let alone the evidence of the Prime Ministers' meeting of 16 February 2004, clearly establish that Barbados fulfilled any and all purported "pre-conditions" to arbitral jurisdiction. On 16 February 2004, a dispute between the Parties concerning the interpretation and application of UNCLOS existed. The contours of that dispute and the legal positions of each Party had been

---

191 Counter-Memorial of Trinidad and Tobago, para. 106.

192 *Ibid.*, para. 107.

193 Memorial of Barbados, para. 5.

clarified by no less than five years of negotiations, which disclose an undoubted "exchange of views" on the issues now submitted for determination by the Tribunal. Neither UNCLOS nor any principle of general international law required more. In the *Land and Maritime Boundary Between Cameroon and Nigeria* case, the International Court of Justice (***ICJ or the Court***) observed that "[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court".[194]

99. Faced with the clear, voluminous evidence of an "exchange of views", Trinidad and Tobago nevertheless offers a novel and highly formalistic theory, that:

> "[t]he process of reaching an agreement on delimitation under Parts V and VI is not to be conflated with the existence of a dispute that is the prerequisite to any application of Part XV. Further, it is not open to a party to decide unilaterally that negotiations pursuant to Articles 74(1) and 83(1) of the 1982 Convention have failed, and to move directly (and without warning) from negotiation under these provisions to arbitration under section 2 of Part XV."[195]

This construction of UNCLOS is factitious. According to Trinidad and Tobago, parties engaged in an extended effort – over five if not 25 years – to resolve their differences on maritime boundary issues by good-faith negotiations must, at a certain point, stop, jointly announce the failure of negotiations under Articles 74(1) and 83(1), and agree to proceed to still further negotiations under Article 283(1), at which point they must re-hash all of their prior negotiations of the previous five, ten or 25 years, lest arbitral jurisdiction fail for want of an "exchange of views".

---

194 *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections. ICJ Reports 1998* 275 at p. 303.

195 Counter-Memorial of Trinidad and Tobago, para. 107.

100. This construction cannot be justified by any good-faith interpretation of the ordinary meaning of the text of UNCLOS in view of the object and purpose of the Convention; it requires a strained and excessively formalistic reading of the relevant provisions and given the needless burdens it would impose on both State parties and Annex VII tribunals, can only be characterised as "manifestly absurd or unreasonable".[196] It would allow one party to subvert Part XV unilaterally, without ever having made a declaration under Article 298.

101. Nor can Trinidad and Tobago cite any judicial or arbitral authority for its strained and formalistic construction, save for an unelaborated reference to three Awards characterised as "implicitly" confirming its argument.[197] Yet none of these decisions supports Trinidad and Tobago's novel theory; quite the contrary, they cast substantial doubt on it. First, in its Order of 27 August 1999 in the *Southern Bluefin Tuna Case (New Zealand v. Japan; Australia v. Japan)*, the International Tribunal for the Law of the Sea remarked that "in the view of the Tribunal, a State Party is *not* obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted".[198] (Emphasis added). It is unclear how this statement supports Trinidad and Tobago's jurisdictional objection. Barbados, after years of negotiations that were recognised by both sides to have been unsuccessful, involving extensive exchanges of views between the parties, quite reasonably concluded "that the possibilities of settlement ha[d] been exhausted." The Tribunal's remark in any event expressly contradicts Trinidad and Tobago's assertion

196 Vienna Convention on the Law of Treaties, Articles 31 and 32, 23 May 1969, 1155 UNTS 331.

197 Counter-Memorial of Trinidad and Tobago, para. 106, footnote 106.

198 Order of 27 August 1999, para. 60. This conclusion was confirmed in the Award on Jurisdiction and Admissibility dated 4 August 2000 by the Arbitration Tribunal subsequently established in the same case under Annex VII of UNCLOS, at para. 55.

that any exchange of views under section 1 of Part XV is a "mandatory" prerequisite to jurisdiction.[199] Second, in its Order of 3 December 2001 in the *MOX Plant Case (Ireland v. United Kingdom)*, the Tribunal likewise confirmed that a party "is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted."[200] Third, in its Order of 8 October 2003 in the *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, the Tribunal reiterated these two holdings,[201] and applied them in a manner contrary to Trinidad and Tobago's contention here.[202] In that case, Singapore had objected to Malaysia's decision "abruptly" to end negotiations,[203] and the Tribunal held that "Malaysia was not obliged to continue with an exchange of views when it concluded that this exchange could not yield a positive result."[204] The Tribunal quoted the ICJ's statement that "neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court."[205]

102. In the absence of any legal authority for its jurisdictional objection, Trinidad and Tobago falls back on a paragraph from the UNCLOS Commentary published by the University of Virginia:

---

199 See Counter-Memorial of Trinidad and Tobago, para. 106, footnote 106.

200 Order of 3 December 2001, para. 60.

201 Order of 8 October 2003, para. 47.

202 *Ibid.*, paras. 47-52.

203 *Ibid.*, para. 43.

204 *Ibid.*, para. 48.

205 *Ibid.*, para. 52 (quoting *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria*, Preliminary Objections, at p. 303).

> "The obligation specified in this article is not limited to an initial exchange of views at the commencement of a dispute. It is a continuing obligation applicable at every stage of the dispute. In particular, as is made clear in paragraph 2, the obligation to exchange views on further means of settling a dispute revives whenever a procedure accepted by the parties for settlement of a particular dispute has been terminated without a satisfactory result and no settlement of the dispute has been reached. In such a case, the parties would have to exchange views again with regard to the next procedure to be used to settle the dispute. There might be further resort to negotiations in good faith, or the parties might agree to use another procedure. This provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned."[206]

The critical part of this citation is the final sentence, which correctly ascribes to the drafters an intention to ensure proper consultations between all concerned parties to a dispute. Nothing in the quotation, however, states or implies any intent to give a recalcitrant party the unilateral right to extend negotiations indefinitely, as proposed in the case at hand, to avoid submission of the dispute to binding third-party resolution.

103. Trinidad and Tobago presents an even more untenable argument, however. It seeks to transform the unilateral right to invoke compulsory jurisdiction under a multilateral treaty into no more than a bilateral negotiation subject to the unilateral veto of one party. According to Trinidad and Tobago, "it is not open to a party to decide unilaterally that negotiations pursuant to Articles 74(1) and 83(1) of the 1982 Convention have failed, and to move directly (and without warning) from negotiations under these provisions to arbitration under section 2 of Part XV."[207] Leaving aside the fact that in its communications with Barbados before and after the commencement of this arbitration Trinidad and Tobago acknowledged that the negotiations over the

---

206 Counter-Memorial of Trinidad and Tobago, para. 106 (quoting *Virginia Commentary*, Vol. V at 29, para. 283.3; internal quotation marks omitted).

207 *Ibid.*, para. 107.

dispute had failed, Trinidad and Tobago offers no authority for this view of UNCLOS. It conflicts with the plain language of Article 286 and Article 1 of Annex VII, both of which speak of the right of "*any* party to the dispute," not "both" or "all" parties to the dispute.[208] (Emphasis added). The right to invoke a compulsory dispute-settlement procedure conferred on State parties to UNCLOS by section 2 of Part XV ("Compulsory Procedures Entailing Binding Decisions") would be no right at all — certainly not a right to compulsory dispute settlement — if it required the *ex post facto* consent of the other State party to the dispute.

104. Trinidad and Tobago's theory, however, goes still further. By its account, even resort to the procedures of Section 1 of Part XV requires the agreement of both parties.[209] Of course, by definition, it takes two States to consult, negotiate or exchange views. It does not, however, take two States to invoke a jurisdictional clause, which, by the plain terms of Article 286, gives "any party to the dispute" the right to submit that dispute "to the court or tribunal having jurisdiction under this section". Trinidad and Tobago seeks to transform the *pactum* in Article 286 into a *pactum de contrahendo*, and, under this theory, no case could be brought unilaterally for resolution by a party.

105. Indeed, Trinidad and Tobago's interpretation would frustrate the object and purpose of Part XV as a whole. Article 298(1) of UNCLOS provides:

> "When signing, ratifying or acceding to this Convention *or at any time thereafter*, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2, with respect to one or more of the following categories of disputes:

---

208 UNCLOS, Article 286 (dispute may "be submitted at the request of any Party to the dispute"); UNCLOS, Annex VII, Article 1 ("any Party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex").

209 Counter-Memorial of Trinidad and Tobago, para. 112.

(a)(i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations . . .". (Emphasis added).

Note that what constitute, in effect, denunciations of jurisdiction under Article 298(1) take effect immediately, while denunciation of UNCLOS as a whole under Article 317 "shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date."[210] As a practical matter, this means that a State which concludes that it must resort to binding third-party dispute resolution under UNCLOS has no choice but to act unilaterally — and, with respect to a State that may well resist arbitration, to act as soon as possible after concluding that further good-faith negotiations will "not yield a positive result."[211] Otherwise, recalcitrant States could simply denounce jurisdictional commitments under Article 298(1) the moment that another State "proposes" arbitration, thereby rendering the compulsory dispute-settlement provisions of Part XV virtually meaningless.

106. In short, Trinidad and Tobago's strained construction of UNCLOS' purported prerequisites to jurisdiction runs contrary to the ordinary meaning of the relevant provisions of its text. In context, it leads to a manifestly absurd and unreasonable result, conflicts with relevant arbitral and judicial precedents, and would, as a practical matter, defeat the very object and purpose of UNCLOS' compulsory dispute-settlement provisions. The Tribunal should reject it.

## Section 2.4 The requirement of good faith and the doctrine of abuse of rights

107. Trinidad and Tobago's objections to jurisdiction and admissibility based on the requirement of good faith raise two related, but equally specious claims: first, that to

210 UNCLOS, Article 317(1).

211 *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, para. 48.

initiate arbitration constitutes an abuse of rights; and second, that Barbados' position in this arbitration is inconsistent with its purported willingness to recognise Trinidad and Tobago's rights to an EEZ claim around Tobago as part of a fisheries settlement package in 1990. Neither withstands analysis and the latter has nothing to do with jurisdiction.

108. Trinidad and Tobago asserts that Barbados' decision to exercise its right to arbitrate under a general jurisdiction clause in a multilateral treaty constitutes an act of bad faith or an abuse of its rights. In general, "an abuse of rights occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage."[212] Simply to state this doctrine is to refute its purported application to Barbados. Barbados invoked its right to arbitrate after years of good-faith negotiations, not arbitrarily, and arbitration does not constitute an injury, still less an injury "that cannot be justified by a legitimate consideration of its own advantage."

109. Barbados has no quarrel with Trinidad and Tobago's assertion that Article 300 of UNCLOS incorporates the general principles of good faith and the prohibition on abuse of rights. Nor does it disagree that those principles apply to a State's conduct

212 *Oppenheim's International Law* (ninth edition, Jennings & Watts, 1992) at p. 407. The quotations from Fitzmaurice, Zoller, and Bin Cheng on which Trinidad and Tobago relies express essentially the same idea. General formulations of the abuse-of-rights doctrine, however, offer little practical guidance, and its application remains controversial. *Oppenheim's International Law* at p. 408. In fact, according to one authority, "no international judicial decision or arbitral award has so far been explicitly founded on the prohibition of abuse of rights." Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements", (2002) 5(17) *Journal of International Economic Law* at p. 69 (quoting Alexandre Kiss, "Abuse of Rights", in *Encyclopedia of Public International Law* 4 at p. 6 (Rudolf Bernhardt ed. 1995)); see also Ian Brownlie, *Principles of Public International Law* (Sixth Edition 2003) at pp. 429-430 (questioning the usefulness of the doctrine and cautioning that it must be exercised with restraint).

under Article 286. But these simple observations do nothing to bolster Trinidad and Tobago's accusations. Barbados did not exercise its right to arbitrate irresponsibly, arbitrarily, capriciously or in a manner "calculated to cause . . . unfair prejudice to the legitimate interests of [Trinidad and Tobago]."[213] It exercised its clear right under a multilateral treaty to resort to compulsory dispute-resolution after exhausting the potential for a negotiated resolution.

110. In *Right of Passage Over Indian Territory*,[214] India objected to the jurisdiction of the Court on a ground similar to that apparently advanced by Trinidad and Tobago here, though not framed in terms of the abuse-of-rights doctrine. Like Trinidad and Tobago, India complained that Portugal filed its claim prematurely, before sufficient diplomatic negotiations and exchanges of views had been carried out, such that, according to India, "no legal and justiciable dispute . . . could be referred to the Court."[215]

> "In particular, the Third Objection is based on the allegation that, although neither Article 36(2) of the Statute nor the Portuguese or Indian Declarations of Acceptance refer directly to the requirement of previous negotiations, the fact that the Application was filed prior to the exhaustion of diplomatic negotiations was contrary to Article 36(2) of the Statute, which refers to legal disputes. It was contended by India that, unless negotiations had taken place which had resulted in a definition of the dispute between the Parties as a legal dispute, there was no dispute, in the sense of Article 36(2) of the Statute, the existence of which had been established in the Application and with respect to which the Court could exercise jurisdiction."[216]

---

213 Counter-Memorial of Trinidad and Tobago, para. 124 (quoting Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* (1953) at pp. 131-132).

214 *Right of Passage (Portugal v. India), Preliminary Objections*, (26 November 1957) *ICJ Reports 1957* 125.

215 *Ibid.*, 148.

216 *Ibid.*

111. The Court rejected this objection, observing that:

> "While the diplomatic exchanges which took place between the two Governments disclose the existence of a dispute between them on the principal legal issue which is now before the Court, namely, the question of the right of passage, an examination of the correspondence shows that the negotiations had reached a deadlock.
>
> It would therefore appear that assuming that there is substance in the contention that Article 36(2) of the Statute, by referring to legal disputes, establishes as a condition of the jurisdiction of the Court a requisite definition of the dispute through negotiations, the condition was complied with to the extent permitted by the circumstances of the case."[217]

112. Here, decades of informal negotiations and exchanges of views, followed by five years and numerous rounds of formal, documented negotiations, clarified the nature of the dispute between the State parties. Trinidad and Tobago's Prime Minister declared a critical issue to be "intractable";[218] and Barbados thereafter reasonably concluded that further negotiations would be unavailing. If the Court in *Right of Passage* found that Portugal did not abuse its right to invoke the Court's jurisdiction based on Portugal's alleged failure sufficiently to exchange views with India and conduct diplomatic negotiations as a means of framing the legal dispute, a *fortiori*, in this case, Barbados' decision to resort to arbitration cannot fairly be characterised as an abuse of its clear right to compulsory dispute resolution under Article 286 of UNCLOS.

113. The real gravamen of Trinidad and Tobago's abuse-of-rights objection appears to be based on the incompatibility between, on the one hand, Barbados' purported "recognition" of Trinidad and Tobago's claimed EEZ in the one-year fishing

---

217 *Ibid.*, p. 149.

218 See above para. 88.

agreement between the Parties concluded in 1990 (***the 1990 Fishing Agreement***)[219] and in the course of certain negotiations, and on the other, its current position in this arbitration.[220] Even if true, this cannot plausibly be deemed an abuse of rights; and in point of fact, it is not true.

114. A fair review of the Negotiation Records establishes that Barbados did not "recognise" Trinidad and Tobago's claimed EEZ;[221] at most, it expressed a good-faith willingness to consider recognising Trinidad and Tobago's EEZ as part of a comprehensive settlement package. Negotiations between States that do not succeed, do not succeed; one of those States may not then cherry-pick provisional proposals on certain points that it finds advantageous and claim that they are binding while rejecting all other parts of the abortive effort at securing a settlement. Furthermore, even assuming *arguendo* that Barbados' statements could be construed as a recognition of Trinidad and Tobago's claimed EEZ, *quod non,* Barbados' decision, after the failure of negotiations, to take a contrary position in this arbitration would not constitute an abuse of right. Barbados' legal arguments do not contravene any obligation owed to Trinidad and Tobago, either by virtue of treaty or general international law.[222]

115. Trinidad and Tobago seeks to manufacture a treaty obligation to recognise its EEZ by pointing to the 1990 Fishing Agreement. In the first place, Barbados cannot refrain

---

219 See below paras. 341-342.

220 Counter-Memorial of Trinidad and Tobago, paras. 126-127.

221 Joint Report of negotiations of 20 to 22 March 2002. (Reply of Barbados, Appendix 25, Vol. 2.) Joint Report of negotiations of 24 to 25 March 2003. (Reply of Barbados, Appendix 29, Vol. 3.) Transcript of negotiations of 24 and 25 March 2003. (Reply of Barbados, Appendix 30, Vol. 3.) Joint Report of negotiations of 12 and 13 July 2003. (Reply of Barbados, Appendix 33, Vol. 3.)

222 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) at pp. 131-132.

from noting that it is supremely ironic that Trinidad and Tobago would point to the 1990 Fishing Agreement as evidence of any alleged concession with respect to maritime boundary delimitation issues. Trinidad and Tobago emphatically insists elsewhere in its Counter-Memorial, including, most significantly, in its biased presentation of the Joint Reports, that the Parties have always regarded fisheries issues as entirely separate and distinct from maritime boundary delimitation issues. Yet it argues that the 1990 Fishing Agreement, a one-year provisional arrangement regarding fisheries access, estopped Barbados from contesting its claimed EEZ. The 1990 Fishing Agreement includes an express preservation-of-rights clause, which, contrary to Trinidad and Tobago's contention, is not limited in scope to issues pertaining to "future fishing in the marine areas of either party."[223] The plain language of Article XI ("Preservation of Rights") clearly covers maritime boundary issues as well:

> "Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its internal waters, archipelagic waters, territorial sea, continental shelf or Exclusive Economic Zone nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent."[224]

116. Moreover, as emphasised in its Memorial, Barbados effectively had no choice but to enter into the 1990 Fishing Agreement:

> "It was a *modus vivendi* which Barbados was constrained to conclude in order to enable the urgent resumption of fishing activities by Barbadian fisherfolk off Tobago, given the crisis situation caused by the arrests. In the absence of the *modus vivendi* that year, many of the fishing communities of Barbados would have faced an imminent loss of livelihood and traditional way of life,

223 Counter-Memorial of Trinidad and Tobago, para. 127.

224 Memorial of Barbados, Appendix 37, Vol. 3 at p. 399.

with multiplying effects through the Barbadian economy."[225]

As an international arbitral tribunal recently held, a party cannot be estopped by an agreement into which it had no choice but to enter.[226]

117. Finally, Trinidad and Tobago argues that Barbados' own legislation operates as an estoppel against its current position. Trinidad and Tobago cannot arrogate to itself the right to interpret Barbados' internal law. As explained further at Section 6.1 below, the Maritime Boundaries and Jurisdiction Act of 1978 creates default principles pending agreement; it does not preclude Barbados from concluding agreements establishing its EEZ other than by the median line. This domestic legislation cannot in any event transform Barbados' international claims in this arbitration into an abuse of rights, that is to say, an exercise of Barbados' sovereign rights in a manner incompatible with any international obligation owed to another State and that causes unfair prejudice to that State.

## Section 2.5 The scope of Barbados' claim

118. Trinidad and Tobago's final jurisdictional objection, which contests the scope of Barbados' claims, is misplaced and, like many other parts of the Counter-Memorial, simply begs the question. Trinidad and Tobago asserts that "Barbados has not claimed, and cannot claim, any remedy relating to fishing rights in the exclusive economic zone of Trinidad and Tobago."[227] As a first observation, Barbados would direct the Tribunal to the Negotiation Records, which directly contradict this

225 Memorial of Barbados, para. 83.

226 *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001, paras. 516-517, 520-521 and 524.

227 Counter-Memorial of Trinidad and Tobago, para. 132.

assertion.[228] But even if the facts were otherwise, Trinidad and Tobago's assertion presupposes the validity of its position as claimed in this arbitration. It assumes, that is, that as a matter of international law the maritime areas in which Barbadian fisherfolk have historically conducted artisanal fishing lie within Trinidad and Tobago's EEZ. But of course, that is a principal question for the Tribunal, *viz.*, whether the long-term artisanal fishing practices of Barbadian fisherfolk in the disputed areas off Tobago constitute a special circumstance requiring an adjustment of the provisional median line, thus ensuring Barbados' fisherfolk their right to artisanal fishing under international law.

119. Inquiries into the existence and relevance of special circumstances warranting or requiring adjustment of the provisional median line is a quintessential step in any maritime boundary delimitation proceeding. Barbados' claim in this regard therefore falls squarely within its Statement of Claim. The ICJ's decision in *Certain Phosphate Lands in Nauru* is not to the contrary.[229] There, the ICJ rejected as beyond the scope of Nauru's application a claim that (i) appeared for the first time in Nauru's Memorial and, moreover, (ii) could not, as a matter of substance rather than form, be deemed "implicit in the application."[230] The judgment provides, in relevant part:

> "[F]rom a formal point of view, the claim relating to the overseas assets of the British Phosphate Commissioners, as presented in the Nauruan Memorial, is a new claim in relation to the claims presented in the Application. Nevertheless, as the Permanent Court of International Justice pointed out in the *Mavrommatis Palestine Concessions* case:

228 See above paras. 114-115.

229 *Certain Phosphate Lands in Nauru (Nauru v. Australia.)*, Preliminary Objections, *ICJ Reports 1992* 240.

230 *Ibid.*, p. 266.

> 'The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.' (*P.C.I.J., Series A, No. 2*, p. 34; cf. also *Northern Cameroon, I.C.J Reports 1963*, p. 28.)
>
> The Court will therefore consider whether, although formally a new claim, the claim in question can be considered as included in the original claim in substance.
>
> It appears to the Court difficult to deny that links may exist between the claim made in the Memorial and the general context of the Application. . . .
>
> The Court, however, is of the view that, for the claim relating to the overseas assets of the British Phosphate Commissioners to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application (*Temple of Preah Vihear, Merits, I.C.J Reports 1962*, p. 36) or must arise 'directly out of the question which is the subject-matter of that Application' (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, I.C.J Reports 1974*, p. 203, para. 72). The Court considers that these criteria are not satisfied in the present case.
>
> Moreover, . . . the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application [and] extraneous to the original claim . . .".[231]

Here, by contrast, Barbados' claims based on artisanal fishing practices cannot be substantively characterised as "extraneous to the original claim." On the contrary, they "arise directly out of the question which is the subject-matter of [Barbados'] Application."

120. Trinidad and Tobago states that "the remedy sought by Barbados is in truth (i) a single line based on a median line and (ii) a statement from the Tribunal as to how the protection of alleged artisanal fishing could be protected by the award of non-

231 *Ibid.*, pp. 265-266.

exclusive fishing rights."[232] Barbados demonstrated earlier how Trinidad and Tobago's tortuous analysis of UNCLOS — in an effort to create an infinite regress of pre-conditions to the exercise of the right to arbitration, which, even then, remains defeasible by the unilateral objection of one party — relies on "implicit" meanings that ignore the clear and unequivocal meaning of the text. Trinidad and Tobago's use of the phrase "in truth" in the above assertion analysing Barbados' Statement of Claim involves a similar distortion.

121. Having established the right under international law of its artisanal fisherfolk to continue to fish in the maritime areas in question, and having demonstrated that this constitutes a valid special circumstance, Barbados requests that the Tribunal adjust the median line to enclose these waters in Barbados' EEZ as the appropriate method for the protection of the rights of its fisherfolk. This is manifestly within the jurisdiction of the Tribunal.

122. As for Trinidad and Tobago's contention that the Tribunal would not be competent to award non-exclusive fishing rights,[233] if it deemed it a necessary part of an equitable solution to a maritime delimitation boundary dispute, Barbados would observe that Article 293(1) of UNCLOS provides that "[a] court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention." Barbados does not request the award of non-exclusive fishing rights, which it had sought and tabled as a possible compromise in the course of the negotiations, because, as the history of the dispute and Trinidad and Tobago's sporadic efforts at exclusion of Barbadian fisherfolk demonstrate, Barbados has ample reason to question Trinidad and Tobago's good faith in this matter. But,

232 Counter-Memorial of Trinidad and Tobago, para. 132.

233 *Ibid.*, paras. 131-135.

that aside, Trinidad and Tobago is incorrect in asserting that such a hypothetical decision would be *ultra vires* the Tribunal's competence. It would not. Nor would such a hypothetical holding be *ultra petita*, falling, as it would, within Barbados' claim.

123. It was Trinidad and Tobago's recent and obdurate interference with the artisanal fishing rights of Barbadian fisherfolk and uncompromising refusal to reach an equitable arrangement that created this special circumstance. Had Trinidad and Tobago simply acknowledged the rights of Barbadian fisherfolk to continue to eke out their humble livelihoods on their modest boats in these waters in the same way that Trinidad and Tobago acknowledged they have done (unimpeded by Trinidad and Tobago until recently) for generations, rather than impeding them with the unsustainable claim that such rudimentary artisanal fishing is industrial and poses a threat to conservation, Barbados would have neither ground nor need to insist on an adjustment of the median line so as to enclose the waters in question in Barbados' EEZ. But States, like individuals, must live with the consequences of their actions. Trinidad and Tobago must live with the special circumstance that its own refusal to accommodate a valid and modest claim of artisanal fisherfolk created.

124. In summary, Barbados' claim of a special circumstance requiring adjustment of the median line so as to enclose waters in which Barbadian fisherfolk have plied their artisanal fishing for generations is an integral part of the maritime boundary delimitation issues raised by this case, and it consequently falls squarely within the Tribunal's jurisdiction.

## Section 2.6 The Tribunal does not have jurisdiction to address Trinidad and Tobago's claim to extended continental shelf under UNCLOS

125. Trinidad and Tobago's claim line invites the Tribunal to delimit a maritime boundary between the Parties up to 200 nautical miles from the basepoints from which Trinidad and Tobago's territorial sea is measured, and beyond along an azimuth of 88° "to the outer limit of the continental shelf as determined in accordance with international law".[234] As noted at paragraphs 15 to 19, above, in doing so, Trinidad and Tribunal is effectively asking the Tribunal to delimit five different maritime zones using eight different boundary lines. This jigsaw-puzzle, shown at Map 3, includes Trinidad and Tobago's claims to three maritime zones to the north of the median line.

126. For the reasons set out subsequently in this section, such a labyrinthine delimitation would be contrary both to practical common sense[235] and to basic rules of the applicable law in this arbitration. However, even if the Tribunal were persuaded to consider effecting such a novel and unfounded delimitation, it would not have jurisdiction to do so.[236] This is because:

(a) Trinidad and Tobago's claim to ECS and its delimitation with Barbados, initially within part of Barbados' EEZ (between points 2 and 3) and then beyond up to the outer limit (between points 3 and 4) was not the subject of negotiation between the Parties and does not form part of the longstanding

234 Counter-Memorial of Trinidad and Tobago, para. (3)(c) at p. 103.

235 Trinidad and Tobago urges the Tribunal to ignore the practical effects to which its proposal would condemn the Parties and the wider region. See Counter-Memorial of Trinidad and Tobago, paras. 272 and 279.

236 Barbados' objection to the Tribunal's jurisdiction to treat Trinidad and Tobago's claim beyond its 200 nautical mile arc can at this stage of the proceedings most effectively be considered by the Tribunal along with Trinidad and Tobago's objections to jurisdiction and admissibility and the Parties' claims on the merits.

dispute between them;

(b) the dispute submitted to the Tribunal did not relate to delimitation of any potential ECS entitlement beyond 200 nautical miles of either of the Parties; and

(c) in respect of that area to the east of Point 3 on Map 3, any delimitation over the ECS beyond 200 nautical miles would affect the rights of the international community.

On each of these grounds, Barbados submits that, in the event that the issue arises, the Tribunal must decline jurisdiction to address Trinidad and Tobago's claim to an ECS, or to delimit any area of maritime space beyond 200 nautical miles from Trinidad and Tobago. Barbados addresses each of these grounds separately below, but reserves its right to return to this question during the oral proceedings.

## (A) Trinidad and Tobago's claim to extended continental shelf and its delimitation with Barbados within Barbados' EEZ and beyond was not the subject of negotiation between the Parties and does not form part of the longstanding dispute between them

127. Article 283(1) of UNCLOS provides:

> "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

128. As Trinidad and Tobago points out in its Counter-Memorial, the basic effect of Article 283(1) is to make the exercise of jurisdiction by an Annex VII tribunal contingent upon: (1) the existence of a "dispute"; and (2) an exchange of views having taken place regarding its settlement by negotiation or other peaceful means.

129. At no point during the course of negotiations between the Parties over the question of maritime delimitation did Trinidad and Tobago put forward any specific claim to ECS beyond 200 nautical miles from its territorial sea baseline. Nor did it raise the question of delimitation between its supposed ECS and the maritime territory of Barbados. In particular, Trinidad and Tobago raised none of these issues during the rounds of maritime boundary negotiations that were conducted between July 2000 and November 2003. The claim line that it submitted to Barbados went within 42 miles of the coast of Barbados, but Trinidad and Tobago confirmed that it stopped at its 200 nautical mile arc.[237] In other words, there was no attempt by the Parties to reach agreement on these issues for the purposes of Article 83 of UNCLOS, since they never came up in discussions between them.

130. Therefore, there was no "dispute" between the Parties in relation to Trinidad and Tobago's supposed ECS, and the delimitation of that area with Barbados, for the purposes of Article 283(1) of UNCLOS as at the date of commencement of this arbitration on 16 February 2004. Nor, of course, had there been any "exchange of views" regarding the settlement of any dispute between the Parties on these issues. The "dispute" between the Parties relates to delimitation of the single maritime boundary between the Parties' CS and EEZ areas within 200 nautical miles of their respective coasts. It was in relation to this dispute that the Parties proceeded to an "exchange of views", as explained above.

131. As a result, neither of the two pre-conditions for jurisdiction set out at Article 283(1) is satisfied in connection with Trinidad and Tobago's supposed ECS, and the delimitation of that area with Barbados' maritime territory. Therefore, even if the

237 Transcript of negotiations of 19 to 21 November 2003. (Reply of Barbados, Appendix 36, Vol. 3 at p. 600.)

Tribunal were somehow persuaded by Trinidad and Tobago's attempt to secure a delimitation extending beyond its 200 nautical mile arc, the Tribunal is not competent to make any determination in connection with these issues.

**(B) The dispute submitted to the Tribunal did not relate to delimitation of any potential continental shelf entitlement beyond 200 nautical miles of either of the Parties**

132. As indicted above, the "dispute" between the Parties relates to delimitation of the single maritime boundary between the Parties' CS and EEZ areas within 200 nautical miles of their respective coasts. It is this dispute that has been submitted at the request of Barbados to the Tribunal for the purposes of Article 286 of UNCLOS.

133. By contrast, there was no "dispute" between the Parties in relation to Trinidad and Tobago's supposed ECS, and the delimitation of that area with Barbados, as at the date of commencement of this arbitration on 16 February 2004. This was for the simple reason that the Parties had never negotiated these issues. Therefore, the submission to arbitration did not relate to them.

134. For this reason also, the Tribunal is not competent to make a determination in connection with any potential ECS beyond 200 nautical miles, whether as regards the existence of any such entitlement or its delimitation.

**(C) Any delimitation over the continental shelf beyond 200 nautical miles of any State would affect the rights of the international community**

135. As explained at Section 2.8 below, any delimitation between Point 2 and Point 3 on Map 3 would clearly violate the sovereign rights of Barbados over its indisputable EEZ under Part V of UNCLOS. Beyond Point 3 (and up to Point 4), any delimitation over the ECS would also engage the rights of the international community and, for

this reason, would be beyond the Tribunal's jurisdiction in this case.

136. It is a fundamental principle of UNCLOS that the sea-bed and its resources beyond the limits of national jurisdiction are the "common heritage of mankind".[238] Thus, Part XI of UNCLOS creates a unique and self-contained legal regime regulating this area of sea-bed and ocean floor, and the subsoil thereof, which is defined under Article 1 as "the Area". No State can claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor may any State or juridical person appropriate any part thereof.[239] Access to the resources of the Area is administered exclusively on behalf of the international community by the International Sea-Bed Authority, which is made up of a number of constituent organs and of which all State Parties to UNCLOS are *ipso facto* members.[240]

137. The dispute that has been submitted to the Tribunal concerns the delimitation of the EEZ and CS between Barbados and Trinidad and Tobago.[241] In other words, the dispute concerns the delimitation of maritime space within the national jurisdictions of the Parties. By definition, pending any final and binding establishment of the limits of the ECS in accordance with the procedures prescribed by Article 76(8) of UNCLOS (in relation to which see further below), the maritime space concerned must fall within 200 nautical miles of each of the Parties. Any delimitation beyond that maritime space would pre-judge the existence and extent of any area of ECS beyond 200 nautical miles of the Parties, within maritime space that would otherwise be "the

238 See Articles 1 and 136 of UNCLOS.

239 Article 137(1) of UNCLOS.

240 Section 4 of Part XI of UNCLOS makes detailed provision about the International Sea-Bed Authority.

241 Paragraph 1 of the Statement of Claim and the grounds on which it is based, dated 16 February 2004. (Reply of Barbados, Appendix 51, Vol. 3 at p. 670.)

common heritage of mankind".

138. It would therefore be beyond the Tribunal's competence in this case for it to delimit any area of ECS beyond 200 nautical miles of either of the Parties pending final and binding establishment of the limits of the ECS in accordance with the procedures prescribed by Article 76(8) of UNCLOS. To do so might prejudice the rights of the international community within that area pursuant to Part XI of UNCLOS in a forum before which it is not a party and will not have an opportunity to make representation.

139. This approach was specifically followed by the Court of Arbitration in the *Saint Pierre et Miquelon* case, which is the only international precedent directly touching upon the question of delimitation beyond 200 nautical miles.[242] In that case, the terms of the Arbitration Agreement between the Parties requested the Court "to carry out the delimitation as between the Parties of the maritime areas pertaining to France and of those appertaining to Canada". The Court determined that it was not competent to carry out any delimitation over the ECS beyond 200 nautical miles of the parties before it. Having noted the terms of the Arbitration Agreement (which are similar to the terms of the dispute referred to the present Tribunal), the Court stated that:[243]

> "Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, not 'between the Parties' but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind.
>
> This Court is not competent to carry out a delimitation which affects the rights of a Party which is not before it. In this connection the Court notes that in

242 *Case Concerning Delimitation of Maritime Areas Between Canada and the French Republic (St. Pierre & Miquelon)*, Court of Arbitration, 10 June 1992, 95 ILR 645.

243 *Ibid.*, paras. 78-79.

> accordance with Article 76, paragraph 8 and Annex II of the 1982 Convention on the Law of the Sea, a Commission is to be set up, under the title of 'Commission on the Limits of the Continental Shelf', to consider the claims and data submitted by coastal States and issue recommendations to them. In conformity with this provision, only 'the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.'"[244]

140. In its Counter-Memorial, Trinidad and Tobago is unable to identify any previous case where an international tribunal has found itself competent to effect a delimitation beyond 200 nautical miles of the parties before it, into an area of ECS. As a result, Trinidad and Tobago is constrained to cite case law confirming the (entirely different and uncontentious) proposition that international tribunals, when faced with a potential tri-point with a third State, "can and do determine the direction of the maritime boundary as between the two States over which they do have jurisdiction", by way of identification of a direction, or azimuth, from a given point.[245]

141. Only in the domestic *Newfoundland-Nova Scotia* arbitration did the tribunal exceptionally find that it had jurisdiction to delimit a maritime boundary between Canadian provinces beyond 200 nautical miles, to the outer edge of the ECS.[246] But it did so only on the basis that the case before it was clearly distinguishable from *Saint Pierre et Miquelon* on two grounds, namely:

---

244 *Ibid.*

245 Counter-Memorial of Trinidad and Tobago, para. 266, citing *Case Concerning the Land and Maritime Boundaries between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), ICJ Reports 1994-2002, Qatar v. Bahrain ICJ Reports 2001* p. 40 and *Eritrea/Yemen (Second Stage: Maritime Delimitation)* 119 ILR 417, Award dated 17 December 1999, paras. 109-110.

246 Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the Limits of their Offshore Areas as defined in 'Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act' and the 'Canada-Newfoundland Atlantic Accord Implementation Act', Award of the Tribunal in the Second Phase, 26 March 2002, para. 2.29. Available at http://www.boundary-dispute.ca/.

(a) the tribunal was domestic in character, with the result that there was no question of any decision which might be opposable to any international processes for the determination of the limits of the ECS; and

(b) delimitation of the ECS was expressly contemplated by the domestic legislation governing scope of the proceedings (a position that was accepted by both parties in that case).

142. Thus, the tribunal commented that:

> "... some reference should be made to the mandate of the Tribunal in terms of the outer limits of the 'offshore areas' to be attributed to the Parties. As already noted, the *Accord Acts* define these areas as extending to the outer edge of the continental margin, a definition that incorporates the provisions of Article 76 of the 1982 *Law of the Sea Convention*. In the present case both Parties accepted that the line determined by the Tribunal should in principle extend out so far, and the Tribunal's jurisdiction clearly permits it to do so. It should, however, be noted that no international tribunal has yet had to delimit to the outer edge of the continental shelf as between adjacent states.
>
> . . .
>
> In the *St. Pierre and Miquelon* case, the Court of Arbitration held it had no jurisdiction to delimit the continental shelf beyond 200 nautical miles, on the ground that to do so would involve the legal position of a third party, the 'international community'... The present Tribunal is in a quite different position: first, in that it is a national and not an international tribunal, so that there is no question of any decision which might be opposable to any international processes for the determination of the outer edge of the Canadian continental shelf; and second, in that all it is called to do is to specify the offshore areas of the two Parties inter se for the purposes of the Accord Acts, which it can do by providing that the line shall not extend beyond the point of intersection with the outer limit of the continental margin as determined in accordance with international law."[247]

143. The exceptional characteristics of the *Newfoundland-Nova Scotia* case that gave the tribunal jurisdiction there to delimit the ECS boundary between two Canadian

247 *Ibid.*, paras. 2.29 and 2.31.

provinces clearly do not apply in the present case. It would be both beyond the scope of the dispute referred to the Tribunal and contrary to the basic principles of UNCLOS for the Tribunal to delimit any areas of ECS beyond 200 nautical miles of either one of the Parties in this case. As well as violating the rights of Barbados over its EEZ in the area beyond the 200 nautical mile arc of Trinidad and Tobago,[248] any such delimitation would also be prejudicial to the rights of the international community in the area beyond the 200 nautical miles of any State (to the east of Point 3).[249]

## Section 2.7 The Tribunal cannot speculate as to the outer limits of the continental shelf

144. The Tribunal cannot speculate as to the outer limits of the CS. Thus, in its Counter-Memorial, Trinidad and Tobago observes that, under Article 76(8) of UNCLOS, the outer limit of the ECS is to be determined by processes involving the Commission on the Limits of the Continental Shelf established under Annex II.[250]

145. Nevertheless, Trinidad and Tobago's claim line, illustrated at Figure 7.5 of the Counter-Memorial, appears to invite the Tribunal to make an indication in its Award as to the extent of the ECS around point 4 on Map 3. Without prejudice to its primary argument to the effect that the Tribunal lacks jurisdiction to delimit any areas of ECS beyond 200 nautical miles of either of the Parties in this case, Barbados would simply observe that, if the Tribunal were to make any indication as to the extent of the ECS in this case in the way proposed by Trinidad and Tobago, this would fundamentally interfere with the core function of the CLCS under UNCLOS.

---

248 To the east of Point 2.

249 In respect of which, see further Section 2.8 below.

250 Counter-Memorial of Trinidad and Tobago, para. 266.

## Section 2.8 Barbados has a right to its full EEZ, which includes the water column, the sea-bed and the subsoil, subject to a possible limitation only where it overlaps with any other State's EEZ

146. As Trinidad and Tobago's Counter-Memorial states,[251] Barbados' proclamation of its EEZ dates back to 1978, with the passing of its Marine Boundaries and Jurisdiction Act. The boundary of Barbados' EEZ established by section 3(3) of that Act is, of course, provisional and cannot prevent Barbados from asserting its claim to the south of the median line in this case, for reasons set out in detail at Section 6.1 below.

147. Pursuant to Article 56(1)(a) of UNCLOS, within its EEZ Barbados enjoys, *inter alia*, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superajacent to the sea-bed and of the sea-bed and its subsoil". These rights are limited only to the extent that there is any overlap between the EEZ of Barbados and the EEZ of another State.

148. There can be no question of prevalence of EEZ rights over CS rights, or *vice versa*. As Trinidad and Tobago acknowledges, the two legal institutions "co-exist".[252] Thus, pursuant to Article 56(3) of UNCLOS, Barbados' rights with respect to the sea-bed and subsoil of its EEZ must be exercised "in accordance with" (not subject to) Part VI of UNCLOS, which regulates the CS.

149. Without prejudice to Barbados' primary argument that there is no special circumstance requiring the median line to be moved north in any sector of the boundary with Trinidad and Tobago, the claim line submitted by Trinidad and Tobago in its Counter-Memorial would violate Barbados' rights by granting Trinidad and

---

251 *Ibid.*, para. 276.

252 *Ibid.*, para. 278.

Tobago sovereign rights over an area of supposed ECS that is co-existent with Barbados' EEZ.[253] As a result, the entirety of Barbados' sovereign rights over the sea-bed and its subsoil within that part of its EEZ would be lost or, at best under Article 56(3) of UNCLOS, would somehow have to be exercised "in accordance with" Trinidad and Tobago's alleged ECS rights within the same area under Part VI.

150. Such an arrangement is unprecedented (and would be unworkable) in the absence of consent between the States concerned (in relation to which see further at paragraphs 152 to 155 below). Indeed, instances of such State consent to apportion EEZ and CS jurisdiction are extremely rare.

151. Thus, for example, the delimitation agreement between France (Guadeloupe and Martinique) and Dominica of 7 September 1987, which is cited extensively by Trinidad and Tobago in its Counter-Memorial in connection with its (misplaced) "regional implications" argument,[254] does not allow for the extension of Dominica's CS beyond its EEZ into the area beyond that forms part of Guadeloupe's EEZ. Rather, Guadeloupe is permitted to exercise its sovereign rights in full throughout the area of its EEZ, much as Barbados is entitled to do in the present case. Consistent with the basic principles of UNCLOS, Dominica does not by virtue of that Agreement have sovereignty over maritime space, whether CS or EEZ, beyond 200 nautical miles of its territorial sea basepoints. This is due to the simple fact that the 200 nautical mile arc of Guadeloupe extends further east into the Atlantic Ocean and thus Dominica's 200 mile limit does not reach the high seas so as to give it any entitlement to an ECS. Even if Trinidad and Tobago's EEZ and CS did extend to 200 nautical miles from its archipelagic baselines (which as a matter of international law, for

253 Namely, the area hatched brown on Map 3 bordered by Points 2, 3, 5 and 6 on that map.

254 See, for example, Counter-Memorial of Trinidad and Tobago, para. 252.

reasons explained in Barbados' Memorial, they do not[255]), Trinidad and Tobago would be in an identical position. In this sense, even Trinidad and Tobago's "regional implications" argument is positively unhelpful to its claim.

152. In claiming sovereign rights over the sea-bed beyond 200 nautical miles from its coast, within an area of Barbados' undisputed EEZ, Trinidad and Tobago is effectively asking the Tribunal to allow its theoretical (and highly speculative) rights to sovereignty over an ECS to trump the undisputed sovereign rights of Barbados over its EEZ. Such an outcome would be incompatible with UNCLOS and State practice and would be utterly artificial.

153. In summary, in the area beyond the 200 nautical mile arc of Trinidad and Tobago but within the undisputed EEZ of Barbados (hatched brown on Map 3), Barbados enjoys sovereign rights under UNCLOS, including rights in relation to the sea-bed and its subsoil, that would be lost in the event that the Tribunal recognised Trinidad and Tobago's claim to the east of Point 2. As a result, even in the utterly unlikely event that the Tribunal were contrary to Barbados' contentions to adjust the median line northwards to the east of Trinidad and Tobago's arbitrary "Point A", it could not do so beyond Point 2 as to do so would violate Barbados' sovereign rights as the only "coastal State" under Part V of the UNCLOS.

## Section 2.9 The Tribunal must draw a single maritime boundary in this case

154. The Negotiation Records are unequivocal in confirming that the Parties have spent years negotiating a single maritime boundary within the area of their overlapping

255 Memorial of Barbados, para. 19.

EEZs.[256] As described at paragraphs 15 to 19 above and illustrated on Map 3, the effect of Trinidad and Tobago's claims to three maritime zones to the north of the median line is to invite the Tribunal to delimit five separate and distinct maritime areas with correspondingly distinct regimes of sovereign rights.

155. There is, of course, no need for the Tribunal to delimit up to 200 nautical miles in the present case, for the reasons explained in the Memorial of Barbados and developed further in this Reply. The Tribunal has in any event no jurisdiction to delimit a maritime boundary beyond 200 nautical miles of either of the Parties. However, even if the Tribunal were minded to delimit a boundary up to and beyond 200 miles and even if it did have jurisdiction to undertake such a delimitation, it would have to reject Trinidad and Tobago's claim and proceed instead to delimit a single maritime boundary. This is because a regime of bifurcated sovereign rights over that area of maritime territory bounded by points 2, 3, 5 and 6 on Map 3, which would have the effect of creating a substantial area of overlap between a truncated EEZ of Barbados (water column only) and the supposed ECS of Trinidad and Tobago, would be inconsistent with UNCLOS and State practice and, what is more, would be utterly unworkable in practical terms.

156. According to Article 293(1) of UNCLOS, the applicable law in this arbitration is UNCLOS, together with other rules of international law not incompatible with UNCLOS. Therefore, the Tribunal must delimit the EEZ and CS boundary between the Parties in accordance with Articles 74 and 83 of UNCLOS. Furthermore, the rights and obligations of the Parties within their respective EEZs and CS areas following the Tribunal's delimitation shall be those set out at Parts V and VI of

256 See above para. 68.

UNCLOS. Trinidad and Tobago's historic account of the development of the international law relating to the CS, dating back to the Truman Declaration in 1945,[257] and its comparison with the more recent concept of the EEZ,[258] are therefore of secondary importance to the contemporary state of international law under UNCLOS. Pursuant to UNCLOS, the legal concepts of the EEZ and the CS exist side by side, with neither taking precedence over the other.[259] If the sovereign rights of coastal States in each juridical area are to be exercised effectively under UNCLOS, each must be delimited within a single common boundary, save in those exceptional cases where the coastal States concerned reach some form of agreement as to the exercise of overlapping rights within a given area of maritime space.

157. The requirement for a single maritime boundary between neighbouring EEZs and CSs under UNCLOS, save in those rare cases where States might reach specific agreement as to the exercise of overlapping rights, is demonstrated, *inter alia*, by the following:

(a) the inter-relationship and overlap between Articles 56 and 77 of UNCLOS. Pursuant to Article 56(1) of UNCLOS, within its EEZ "the coastal State [enjoys, *inter alia*,] sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources ... of the sea-bed

257 Counter-Memorial of Trinidad and Tobago, paras. 273-275.

258 *Ibid.*, paras. 276-277.

259 Thus, Orrego Vicuña observes that:

> "One of the salient characteristics of contemporary law of the sea has been the process of integration between the continental shelf and the exclusive economic zone regimes within the 200 mile area. ... It follows that within the 200 mile area the continental shelf rights cannot any longer be examined separately from the exclusive economic zone claims."

"State Practice and National Legislation relating to the Exclusive Economic Zone, the Continental Shelf and Straits Used for International Navigation: Basic Trends", in R. Wulfrum, ed., *The Law of the Sea at the Crossroads: The Continuing Search for a Universal Regime* (1991), 351 at p. 361.

and its subsoil"; while, pursuant to Article 77(1), in relation to its CS "the coastal State [enjoys] sovereign rights for the purpose of exploring it and exploiting its natural resources";

(b) the fact that, pursuant to Article 56(3) of UNCLOS, the "coastal State's" rights with respect to the sea-bed and subsoil of its EEZ must be exercised "in accordance with" (not subject to) Part VI of UNCLOS, which regulates the CS;

(c) the fact that, in relation to artificial islands, installations and structures, the "exclusive" rights of "the coastal State" under Article 60 (which applies to the EEZ) are repeated *mutatis mutandis* by Article 80 (which applies to the CS). Identical, exclusive rights are manifestly incompatible with separate ownership;

(d) the requirement, under Article 208(1), that coastal States "adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with sea-bed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to Articles 60 and 80"; and

(e) the right of coastal States to "regulate, authorize and conduct marine scientific research" in their EEZ and on their CS under Article 246. This right includes the right of coastal States to withhold consent to the conduct of marine research projects in the EEZ or on the CS in various circumstances under Article 246(5).

158. These provisions of UNCLOS would be unworkable if "the coastal State" in respect of a given area of EEZ were different from "the coastal State" in respect of an overlapping CS, at least in the absence of some sort of *compromis* between the States involved. In particular, exploration and exploitation of natural resources (or the right to decide not to do so), the construction or operation of artificial islands, installations and structures, and the conduct of marine research would be severely constricted by any delimitation whereby CS and EEZ boundaries were separated and thus different States were allowed to operate overlapping jurisdiction over a given maritime area.[260]

159. The requirement for a single maritime boundary between the EEZ and CS under UNCLOS is demonstrated further by the fact that, in all of those cases of maritime delimitation that have been decided to date by courts or tribunals pursuant to UNCLOS (namely, *Qatar v. Bahrain*,[261] *Eritrea/Yemen* and *Cameroon v. Nigeria (Judgment)*), a single boundary has been the result.

160. The requirement for a single maritime boundary between the EEZ and CS under UNCLOS is also supported by the writings of highly qualified publicists. Thus, for example, Churchill and Lowe write:

> "At UNCLOS III there was a feeling that in general it is desirable for continental shelf and EEZ boundaries to coincide, and during the later sessions of the Conference negotiations on delimitation of the continental shelf and EEZ boundaries were conducted together. Not surprisingly, therefore, the wording of the provisions of the Convention on the delimitation of EEZ boundaries, in article 74, is the same, *mutatis mutandis*, as that of article 83 on

260 Indeed, any reading of Articles 74 and 83 of UNCLOS so as to allow for bifurcation of continental shelf and EEZ boundaries in the absence of agreement between the States concerned would, for the reason elaborated in this Section 2.9 be "manifestly absurd" and "unreasonable" for the purposes of Article 32 of the Vienna Convention on the Law of Treaties.

261 *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), ICJ Reports 2001* 40.

continental shelf delimitation."[262]

161. Prosper Weil concludes that the matter of single maritime boundary must be addressed "on the basis of legal principles". He continues:

> "If delimitation had continued to be effected by reference to the physical characteristics of the seabed, it would have been possible to accept that the circumstances to be taken into consideration were not the same in delimiting the shelf and the zone. There would then have been nothing wrong in maintaining that, since the equities are different, the delimitation lines might also be so. But this is not the case, since 'the distance criterion must now apply to the continental shelf as well as to the exclusive economic zone'.[263] This means that there is no longer any legal reason to object to the existence of common norms for the delimitation of the shelf and the zone leading to a single maritime boundary common to both."[264]

162. Orrego Vicuña expresses the position:

> "Since by its very nature the EEZ regime includes the sea-bed and subsoil thereof, a request for its delimitation automatically involves the delimitation of the underlying continental shelf, with the obvious exception of the shelf extending beyond the 200 mile distance."[265]

---

262 Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea*, Third Edition, (1999), at p. 195.

263 Citing *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports 1985*, para. 34.

264 Prosper Weil, *The Law of Maritime Delimitation – Reflections* (1989), at pp. 133-134.

265 "The Contribution of the Exclusive Economic Zone to the Law of Maritime Delimitation", *German Yearbook International Law*, 1988, Vol. 31, at pp. 120-137, at p. 126. See also the following observation by Malcolm Evans, which again supports the concept of a single maritime boundary under UNCLOS:

> "... the continental shelf of State A cannot overlap with the EEZ of State B because it would cause State B to be awarded rights in the sea-bed that its continental shelf jurisdiction vests in State A and its unitary nature makes a 'split' line boundary (i.e. a non-vertical line dividing the sea-bed and water column differently) contrary to the EEZ concept ...
>
> ... It is true that in a delimitation between States situated on the same continental shelf this sets forth the problem rather than solves it, but a crucial factor flows from it. Any EEZ boundary delimitation must follow the continental shelf boundary.

163. Trinidad and Tobago is constrained to recognise that "it is normally convenient and practical to adopt the same delimitation for continental shelf and EEZ".[266] Indeed, Orrego Vicuña comments that:

> "As from 1975 most of the agreements on maritime delimitation refer to the aggregate of maritime jurisdiction."[267]

164. Trinidad and Tobago identifies just three examples of State practice where different boundaries have been agreed in respect of those areas. However, none of those examples is relevant to the Tribunal's task in this case. Two of them (the Torres Strait Treaty between Australia and Papua New Guinea and the Agreement between the United Kingdom, and Denmark and the Faroe Islands) do not purport to delimit EEZ boundaries at all, but rather confine themselves to delimiting separate CS and fisheries boundaries (which do not give rise to the practical difficulties that would be created by separate CS and EEZ boundaries under UNCLOS, as highlighted above). The third, the 1997 Treaty between Australia and Indonesia, which has never entered into force, is made possible only because of the terms of Article 7 thereof, which sets out the States Parties' specific agreement as regards exercise of their concurrent rights in overlapping areas of CS and EEZ. In the absence of such an agreement, the separation of CS and EEZ boundaries would be unworkable.

---

> Where States have determined the continental shelf boundary this is obvious. Though one could divide the water column differently if it were being dealt with separately, because the EEZ grants the same rights over the sea-bed as exist in the continental shelf, the EEZ must follow the course of the pre-existing continental shelf delimitation. *This is also the case when no prior continental shelf delimitation has taken place."* (Emphasis added). Malcolm D. Evans, *Relevant Circumstances and Maritime Delimitation*, (1988), at pp. 55-56.

266 Counter-Memorial of Trinidad and Tobago, para. 279.

267 Orrego Vicuña "The Contribution of the Exclusive Economic Zone to the Law of Maritime Delimitation" at p. 129.

165. Against this background, it is not surprising that Trinidad and Tobago is unable to identify a single case where a court or tribunal has in the past delimited separate boundaries over the CS and EEZ. Indeed, the passage from *Libya/Malta* cited in Trinidad and Tobago's Counter-Memorial,[268] which sets out the uncontroversial principle that "although there can be a continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf", is completely irrelevant to the issue of the single boundary line. That statement does no more than confirm that the legal concepts of the EEZ and CS remain separate and distinct at international law; that coastal States enjoy an inherent right to their CSs while they must claim an EEZ; and that a coastal State's CS can extend further than its EEZ beyond the 200 nautical mile limit. Indeed, in that case, the Court proceeded to delimit a single maritime boundary between Libya and Malta.

166. As for *Jan Mayen*, which is relied upon by Trinidad and Tobago in its Counter-Memorial,[269] this case was of course regulated by a different law from that applicable in the present case (namely, the 1958 Geneva Convention in relation to the Continental Shelf (***the Continental Shelf Convention***) and customary law in relation to the fishery zone). Secondly, the concept of the EEZ, with all its inherent overlap with the CS under UNCLOS, was not at issue in that case. Thirdly, the Court proceeded to delimit a single boundary in any event.

167. In summary, Trinidad and Tobago's misleading portrayal of the case law is a lengthy *non-sequitur*, the only effect of which is to establish that the legal institutions of the

---

268 At paragraph 282.

269 *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway) ICJ Reports 1993* 38 at para. 283.

EEZ and the CS co-exist,[270] perhaps in the hope of camouflaging the fact that it has no basis to support the argument that distinct lines should be drawn for each of the zones in this case. The co-existence of the two legal institutions is one matter; the question of delimiting them is quite another.

168. In its Counter-Memorial, Trinidad and Tobago comments that "it is not for the Tribunal to resolve whatever practical issues might (hypothetically) arise in the future" in the area of overlapping zones that its claim would establish. Rather, it says, "[t]he Tribunal's task is delimitation, not the management of natural resources".[271] Trinidad and Tobago thus appears to invite the Tribunal to ignore the extreme practical difficulties that its claim would create. If the Tribunal were to accept this invitation, serious adverse consequences would result, not only for the future workability of the boundary delimited by the Tribunal and the five zones that would be created by Trinidad and Tobago's claims, but also for the credibility of the UNCLOS regime as a whole and of the dispute resolution procedures established thereunder. If the present arbitration is effectively to settle the dispute that has arisen between the Parties, it must establish a workable solution in the form of a single maritime boundary.

169. For example, the ICJ in the *Gulf of Maine* case, in delimiting a single maritime boundary between the United States and Canada, took account of the "increasingly general demand for single delimitation, so as to avoid as far as possible the disadvantages inherent in a plurality of separate delimitations".[272]

---

270 Counter-Memorial of Trinidad and Tobago, paras. 270-286.

271 At paragraph 272.

272 *ICJ Reports 1984* 246 at para. 194.

170. Commentators have also pointed out the inherent unworkability of overlapping EEZ and CS regimes. For example, Churchill and Lowe describe such an eventuality as "a situation fraught with the potential for conflict",[273] while David J. Attard comments that overlapping EEZs and CSs "can lead to serious problems". David J. Attard concludes that:

> "It is not difficult to envisage the practical advantages of a common boundary, especially with regard to resource-exploitation. In fact, the presumption must be of a coincidental boundary."[274]

171. Orrego Vicuña expresses a similar view:

> "...there is an obvious need to take into account the practical difficulties that would arise from the existence of concurrent jurisdictions for different purposes over the same geographical area, a situation which has clearly influenced the development of [the] trend towards a single maritime boundary."[275]

172. Charney summarises the position as follows:

> "For practical reasons States have favoured a single line in all but the most unusual cases – those in which detailed resource management solutions are crafted."[276]

173. For these reasons, Barbados respectfully submits that the Tribunal should delimit a single CS and EEZ boundary in the present case.

---

273 Robin R. Churchill and A. Vaughan Lowe, *The Law of the Sea* at p. 196.

274 David J. Attard, *The Exclusive Economic Zone in International Law*, (1987) at p. 212.

275 "The Contribution of the Exclusive Economic Zone to the Law of Maritime Delimitation" at pp. 120-137, at p. 124.

276 Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law", 88 *American Journal of International Law* 227 (1994) at pp. 246-247.

## CHAPTER 3 THE METHOD OF DELIMITATION

### Section 3.1 The median line is agreed

174. In its Memorial, as in the negotiations, Barbados relied upon the accepted method for achieving maritime delimitation under the familiar equidistance/special circumstances rule. Although Trinidad and Tobago states that Barbados' discussion of the method "proceeds at a high level of generality",[277] its Counter-Memorial notes that "there is no particular disagreement" on the basic methodology for delimitation.[278] Specifically, Trinidad and Tobago now concedes that "the normal starting point *in any delimitation* is the equidistance or median line".[279] (Emphasis added).

175. Trinidad and Tobago's Counter-Memorial represents the provisional median line at Figure 7.1.[280] Barbados depicts the same line on Maps 7 and 8 of its Memorial. In its Memorial,[281] Barbados states the correct definition of a median line as "one of which every point is equidistant from *the nearest points on the baseline* on either side, the baseline being that from which the breadth of the territorial sea is measured".[282] (Emphasis added). Trinidad and Tobago accepts that an equidistance line is a function of the nearest points on the respective coasts of the Parties.[283] There is thus

277 Counter-Memorial of Trinidad and Tobago, para. 136.

278 *Ibid.*

279 *Ibid.*, para. 144.

280 *Ibid.*, Vol. 1(2) tab 11.

281 At paragraph 20.

282 Cf., e.g., UNCLOS Article 15 which defines the median line in connection with the delimitation of the territorial sea.

283 See Counter-Memorial of Trinidad and Tobago, para. 205. See also *ibid.*, paras. 206 and 208.

both a graphic and conceptual agreement between the Parties regarding the calculation of the median line.

## Section 3.2 The circumstances asserted by Trinidad and Tobago do not justify any median line adjustment

176. Having agreed to the basic methodology for delimitation, Trinidad and Tobago advances a number of special or relevant circumstances requiring adjustment of the median line. Trinidad and Tobago summarises those circumstances[284] as the following:

(a) the supposed disparity in "eastern facing" coastal lengths;

(b) the supposedly eastward projection of the coastlines of both Parties, on which Trinidad and Tobago attempts to base its cut-off theory; and

(c) supposed regional implications under the so-called "*Guinea/Guinea Bissau* test".

None of these circumstances justify any median line adjustment in this case.

177. Circumstances (a) and (b) seek to apply rules of international law relating to maritime delimitation that are clearly inapplicable on the facts of the present case. They will be addressed in Chapters 4 and 5, below, and must be disregarded for the reasons set out there.

178. By contrast, purported circumstance (c) can never, under any scenario, constitute a reason for adjusting the median line. Trinidad and Tobago's arguments under this head are based upon a fundamental misstatement of the law and, in particular, a

284 *Ibid.*, paras. 248-256.

material misunderstanding and misrepresentation of the *Guinea/Guinea Bissau* case.[285] This purported circumstance should be disregarded by the Tribunal for the reasons set out in this Section 3.2.

**(A) International law does not recognise the purported "regional implications" under the so-called "Guinea/Guinea Bissau test" as a relevant circumstance for maritime delimitation**

179. In one more effort to achieve the goal of the Trinidad-Venezuela Agreement[286] and to get its coveted adjustment of the median line in the so-called "Atlantic sector",[287] Trinidad and Tobago invites the Tribunal to invent a new special or relevant circumstance to "take into account the implications for the region as a whole".[288] This new candidate for a special circumstance would require the Tribunal, without regard to the question of the Tribunal's jurisdiction, to make or, at the very least, to predict maritime boundary delimitations between all other States in the region and then to base its decision on those speculations.

180. The supposed authority for this radical proposal is the Award dated 14 February 1985 concerning the delimitation of the maritime boundary between Guinea and Guinea Bissau.[289] However, aside from the fact that *Guinea/Guinea Bissau* remains an

---

285 *Arbitration Tribunal for the Delimitation of the Maritime Boundary between Guinea and Guinea/Bissau*, Award of 14 February 1985.

286 See further Counter-Memorial of Trinidad and Tobago at paras. 251-256. The irrelevance of the 1990 Trinidad-Venezuela Agreement to this delimitation is discussed further at Section 3.5 below.

287 *Ibid.*, para. 246.

288 *Ibid.*, para. 251.

289 This Award was rendered by a three-member arbitral tribunal, many years before the applicable law was settled by ICJ judgments (in 1993, 2001 and 2002), and by the 1999 arbitral award in *Eritrea/Yemen (Second Stage: Maritime Delimitation)* invoked by Trinidad and Tobago in regard of methodology for delimitation. Counter-Memorial of Trinidad and Tobago, paras. 145-149.

idiosyncratic and in many ways an anachronistic decision, it simply does not support Trinidad and Tobago's case, for a number of reasons. First, and most fundamentally, *Guinea/Guinea Bissau* did not establish a "regional implications" test, or any other test, to adjust a provisional median line in the way advanced by Trinidad and Tobago. Indeed, the tribunal even rejected the methodology of delimitation that provides for the drawing of a provisional median line and its adjustment as required by relevant circumstances. Second, the case dealt with a geographical situation which bears no resemblance whatsoever to the case before this Tribunal, for Guinea and Guinea Bissau are coastally adjacent states. Third, *Guinea/Guinea Bissau* was decided on the basis of an 1886 Franco-Portuguese Convention that had defined the land boundary between the two coastally adjacent States. In a Special Agreement in 1983, Guinea and Guinea Bissau agreed "to consider the Convention of 12 May 1886 as *the basic document to pursue the discussions on the maritime boundary delimitation between the two States*".[290] (Emphasis added). Whilst the tribunal held that the Convention did not have exclusive title to determine the maritime boundary between the parties, the tribunal highlighted the parties' acknowledgement that it was the "basic document" for the maritime delimitation.[291] Fourth, another element of the Franco-Portuguese

---

*Guinea/Guinea Bissau* also runs counter to the 1977 Award of the Anglo-French Court of Arbitration and more recent ICJ judgments (*Libya/Malta* and *Gulf of Maine*).

290 Award, para. 1(a).

291 Award, paras. 36 and 40. The third point of agreement between Guinea and Guinea Bissau in their 1983 Special Agreement was:

> "as to the maritime boundary, in view of the differences of opinion and interpretation concerning the Convention of 1886, to submit to an appropriate Arbitration Tribunal, acceptable to both Parties, the interpretation of the Convention and the delimitation of the maritime boundary between the two States." (Award, para. 1(c)).

Indeed, the 1886 Franco-Portuguese Convention was also the basis for the subsequent practice of Guinea and Guinea Bissau in respect of boundary issues in the region, which was central to the

practice concerned sovereignty over coastal islands. France had occupied the island of Alcatraz off the coast of Guinea. According to Guinea Bissau's maritime claim, Alcatraz would be enclaved within Guinea Bissau's maritime territory. It was in this that the *Guinea/Guinea Bissau* tribunal based itself on the "limits" referred to in the Franco-Portuguese Convention to define the starting point and direction of the maritime boundary along the same parallel. It was this context that allowed that tribunal to refer to the regional (but also historical) circumstances related to the boundary.

181. The circumstances of the present case could hardly be more different. The Parties are now agreed that the equidistance/special circumstances rule is the method of delimitation to be used in this case. The Parties are, furthermore, coastally opposite, not adjacent, and are islands separated by 116 nautical miles of maritime space. In the present case, there are no boundary agreements between the Parties or colonial treaties to which they may be linked through State succession; so there is no practice of the Parties or their predecessors based on such agreements at issue. Nor are there any offshore islands or issues of potential enclavement in this case. So, wholly apart from the doubtful continuing validity of the award, there is no legal justification to invoke *Guinea/Guinea Bissau* as even remotely analogous, let alone to consider its so-called "regional implications" test.[292]

---

*Guinea/Guinea Bissau* tribunal's approach to maritime delimitation. That practice included a 1959-1960 agreement for delimitation of the territorial sea and contiguous zone between Guinea Bissau and Senegal.

292 The *Guinea/Guinea Bissau* tribunal in any event recognised that its findings could not be transposed to other scenarios, in the way Trinidad and Tobago now attempts, "since each case of delimitation is a *unicum*". (Award, para. 89.)

182. In addition to the foregoing factors, the *Guinea/Guinea Bissau* decision rested on the entirely hypothetical assumption that other States, or other adjudicators, would fix the neighbouring maritime boundaries as the three arbitrators were presuming to do. If that assumption were to prove wrong, the entire construction of the *Guinea/Guinea Bissau* tribunal for achieving an equitable result would collapse. The boundary thus determined would become, in retrospect, inequitable.[293]

183. The foregoing consideration makes it inappropriate for Trinidad and Tobago to invoke the *Guinea/Guinea Bissau* case as formulating any "test" that may be relevant, let alone mechanically applicable, as Trinidad and Tobago would wish, to the present case.

**(B) Neither geography nor local State practice supports Trinidad and Tobago's arguments for an adjustment tailored to alleged "regional implications"**

184. Trinidad and Tobago suggests that regional implications require a departure from the median line that would have the effect of cutting off Barbados' EEZ and would deprive Barbados of the full benefit of a substantial area of its remaining area of EEZ.

---

293 The tribunal's reasoning in regard to the Guinea/Sierra Leone boundary is illustrative:

> "In the south, as mentioned in paragraph 28 above, Guinea unilaterally fixed a line of delimitation along the parallel of latitude by a decree of 3 June 1964. Sierra Leone has apparently not recognised this delimitation. There is nothing to say whether, in the event of a formal agreement finally being achieved, the line adopted would follow the same direction or a direction more or less favourable to Guinea. However, in its assessment, the Tribunal could not take into consideration a delimitation which did not result from negotiations or an equivalent act in accordance with international law. In that particular case, however, the claimed delimitation was made through a legal act by Guinea alone and, like that made by the same Guinea in the north at the same time, is likely to be the object of unilateral modifications. It necessarily follows that the Tribunal can have only an approximate idea of the zone to be considered, based on an approximate evaluation." (Award, at para. 94.)

Trinidad and Tobago again relies for this proposition on *Guinea/Guinea Bissau*. But neither geography nor local State practice supports Trinidad and Tobago's arguments.

185. Nowhere in the *Guinea/Guinea Bissau* Award is it stated that coastal States should enjoy, in disregard of geographical circumstances, the maximum extent of entitlement to maritime areas recognised by international law, at the entire expense of other States' entitlements.[294] Much less did the *Guinea/Guinea Bissau* Award say that coastal States should enjoy rights over each and every maritime area provided for by the rules of international law, at the entire expense of other States' entitlements.

186. Nor is there State practice in the Caribbean even suggesting a usage in support of Trinidad and Tobago's radical proposal. Trinidad and Tobago is able to cite only one example,[295] that of Dominica, where France agreed to adjust the median lines pertaining to its overseas possession in order to allow Dominica an elongated EEZ. Trinidad and Tobago omits to mention that this adjustment did not allow Dominica's EEZ to "leapfrog" other waters so as to border on areas of high seas and gain access to an area of potential ECS. Instead, the outer arc of Dominica's EEZ is entirely enclosed by the EEZs of the French overseas possessions.[296]

187. Toward the south, Trinidad and Tobago carefully explains that it departed from a median line with Venezuela "in order to allow Venezuela *some maritime zone* out into

294 Cf., e.g., Award, para. 104.

295 Counter-Memorial of Trinidad and Tobago, para. 254.

296 See Figures 1.2 and 7.2 accompanying Counter-Memorial of Trinidad and Tobago, Vol. 1(2), Tabs 2 and 12.

the Atlantic."[297] (Emphasis added). However, Trinidad and Tobago cannot assert that the purpose of the Trinidad-Venezuela Agreement was to allow Venezuela to acquire a corridor extending to 200 nautical miles from Venezuela's coast. As the current Prime Minister of Trinidad and Tobago has recognised, that would have required the concurrence not only of Barbados but also of Guyana, neither of which was sought, let alone given.[298]

188. The Trinidad-Venezuela Agreement is thus no more of a regional circumstance than Dominica's agreement with France for an adjusted EEZ. Both can only operate and be given recognition within the maritime areas that unquestionably belong to each of the parties to those agreements. Each is a single occurrence without the accumulation of other cognate arrangements, which is the *sine qua non* for qualifying as State practice. These lone examples can neither operate nor have any weight *vis-à-vis* third States.

### (C) Trinidad and Tobago's mischievous approach, if accepted, would be damaging to international law

189. Trinidad and Tobago's mischievous attempt to introduce "regional implications" as a special circumstance in the present case, if accepted by the Tribunal, would amount to overturning altogether the carefully and soundly developed legal principles governing maritime delimitation. Maritime delimitation would no longer be subject to concrete geographical fact and law but instead would be swayed by the interests of non-participating third States or nebulous "regional considerations", whose meaning

297 Counter-Memorial of Trinidad and Tobago, para. 253. This is a curious statement, given that Trinidad and Tobago also takes the position that any areas east of the island of Trinidad are already in the Atlantic.

298 See above paras. 26-27.

would vary according to a potentially indefinite number of factors that would be impossible to predict.

## Section 3.3 The relevant circumstances asserted by Barbados are recognised by international law and are factually sustainable in the present case

190. By contrast, as described at Chapter 6 of Barbados' Memorial, traditional artisanal fishing by Barbadian fisherfolk off the coast of Tobago is a special circumstance requiring adjustment of the median line southwards in this case.

191. As described more particularly at paragraphs 134 *et seq.* of Barbados' Memorial, international law recognises traditional artisanal fishing, such as that invoked by Barbados in this case, as a special or relevant circumstance for adjusting a provisional median line for the purpose of delimitation. This is evidenced both by the decisions of the ICJ and international arbitral tribunals, and by the writing of publicists and specialised institutions.[299]

192. In contrast to the strained and unsustainable factual bases invoked by Trinidad and Tobago, there is clear and compelling evidence of traditional artisanal fishing by Barbadian fisherfolk off the coast of Tobago. Trinidad and Tobago has recognised as much in its public statements prior to this arbitration.[300] Both the factual basis for this special circumstance asserted by Barbados and its legal underpinnings will be developed further in Chapter 7 below.

---

299 Memorial of Barbados, footnotes 170-177.

300 *Ibid.*, paras. 122 and 123.

## Section 3.4 The 1990 Trinidad and Tobago-Venezuela boundary agreement can have no influence on the present delimitation

193. The Trinidad-Venezuela Agreement can have no influence on the present delimitation. Trinidad and Tobago effectively acknowledges this but then, by reference to, *inter alia*, purported regional circumstances, seeks to introduce it through the back door as an instrument for dispossessing Barbados.[301]

### (A) Trinidad and Tobago recognises that the Trinidad-Venezuela Agreement is not opposable to Barbados or any other third party State

194. In its Counter-Memorial, Trinidad and Tobago makes extensive reference to the Trinidad-Venezuela Agreement. The agreement purports to include, as part of the maritime area divided between Venezuela and Trinidad and Tobago, a significant proportion of territory falling within 200 nautical miles of Barbados, together with a further area potentially forming part of the Barbadian ECS see Map 3. In the course of the maritime boundary negotiations between Barbados and Trinidad and Tobago between July 2000 and November 2003, Trinidad and Tobago asserted in effect that, even if it wished to acknowledge the claims of Barbados, it was legally prevented from doing so by the terms of the Trinidad-Venezuela Agreement.

195. Of course, the true position at international law, as acknowledged by Trinidad and Tobago for the first time in its Counter-Memorial,[302] is that the Trinidad-Venezuela Agreement cannot in any way affect the rights of Barbados. The legal norm is set out clearly in the leading treatises:

> "A treaty binds the contracting States only, and the Vienna Convention on the Law of Treaties 1969 reaffirms the general rule that a treaty does not create

301 Counter-Memorial Trinidad and Tobago, para. 253.

302 *Ibid.*, para. 97.

either obligations or rights for a third state without its consent: *pacta tertiis nec nocent nec prosunt*".[303]

196. The Trinidad-Venezuela Agreement concedes this on its own terms. Furthermore, it is *res inter alios acta*. Under customary international law as well as, more particularly, Article 34 of the Vienna Convention on the Law of Treaties, "a treaty does not create either obligations or rights for a third State without its consent".

197. Moreover, by virtue of the very terms of the Trinidad-Venezuela Agreement, neither party thereto would have any grounds for complaint if the other were, by reference to international law, to conclude arrangements that were to any extent incompatible with the Treaty. This is acknowledged immediately by Article I of the Trinidad-Venezuela Agreement, which limits its scope to areas "which have been or might be established by the Contracting Parties *in accordance with International Law*".[304] (Emphasis added). Clearly, any maritime area claimed by a party to the Trinidad-Venezuela Agreement by virtue of the agreement insofar as it trespassed upon an area falling under the sovereignty of a third State such as Barbados would not have been claimed "in accordance with international law" for this purpose. This is acknowledged also by Article II(2) of the Trinidad-Venezuela Agreement, which states that "no provision of the present Treaty shall in any way prejudice or limit ... the rights of third parties".[305]

**(B) Trinidad and Tobago nonetheless seeks to import the Trinidad-Venezuela Agreement into this delimitation**

198. Having recognised that the Trinidad-Venezuela Agreement cannot affect the rights of Barbados as a matter of international law, Trinidad and Tobago seeks to rely upon the

---

303 *Oppenheim's International Law*, Ninth Edition (1996), para. 626.

304 Memorial of Barbados, Appendix 36, Vol. 3 at p. 378.

305 *Ibid.*, at p. 380.

Treaty at various points of its argumentation. Thus, for example, Trinidad and Tobago relies upon the Trinidad-Venezuela Agreement (whether expressly or by way of clear implication) in its Counter-Memorial at, *inter alia*:

(a) paragraphs 22, 231 and 251 as part of its "regional implications" argument;[306]

(b) paragraph 232 in the context of its numerical depiction of the so-called "disproportionate effect" of Barbados' claim line;

(c) paragraph 257, where reference is made to the "contribution made by Trinidad and Tobago to Venezuela's *salida al Atlantico*" (of course, if Trinidad and Tobago's reliance upon the Trinidad-Venezuela Agreement in the present proceedings were to succeed, Barbados would also unwittingly and unwillingly have made a 'contribution' to the *salida al Atlantico* when the Trinidad-Venezuela Agreement was signed);

(d) paragraph 264, where Trinidad and Tobago asserts that the Tribunal will have "completed its task" if it delimits a boundary that meets the Trinidad-Venezuela Agreement line, notwithstanding the fact that the median line boundary between Barbados and Trinidad and Tobago continues beyond that line until its intersection with the boundary with Guyana (depicted as point E on map 3 appended to Barbados' Memorial); and

(e) paragraph 270 and Figure 7.4 as part of its geographical depiction of its claim line.

199. The Trinidad-Venezuela Agreement line is also an ever-present feature on the maps produced by Trinidad and Tobago in support of its case. In addition to its Figure 7.4

306 See further paras. 180-184 above.

referred to above, Trinidad and Tobago also highlights the position of the Trinidad-Venezuela Agreement line at Figures 1.1, 1.2, 1.3, 5.2, 5.3, 5.5, 6.1, 7.1, 7.3 and 7.5, as appended to its Counter-Memorial.

200. Given the undisputed fact that the Trinidad-Venezuela Agreement is not opposable to Barbados and cannot in any way affect the rights of Barbados, the Tribunal should disregard Trinidad and Tobago's reliance upon the agreement in its entirety in delimiting the maritime boundary in the present case.

**(C) Barbados is under no obligation to compensate Trinidad and Tobago for the latter's voluntary cession of its own territory to a third party**

201. It may well be true that the Trinidad-Venezuela Agreement represented a legal cession by Trinidad and Tobago of its own maritime territory to Venezuela, insofar as it applies to territory to the south of the median line. Such a conclusion would depend in part upon the precise delimitation of the boundary line that would otherwise apply between Guyana and Trinidad and Tobago. However, even if the Trinidad-Venezuela Agreement does represent in part a legal cession by Trinidad and Tobago of its own territory to Venezuela, Barbados cannot be required to compensate Trinidad and Tobago for this cession. A State is in no way affected by the choice of its neighbour to cede territory to a third State. Such a legal principle would be absurd. Yet this would be the result of Trinidad and Tobago's "regional implications" argument, which turns upon the misplaced assertion that the Trinidad-Venezuela Agreement should have a "domino effect" upon the delimitation of the maritime boundary between Barbados and Trinidad and Tobago.[307]

307 Under such a theory of compulsory domino displacement, if Barbados ceded sufficient of its barren maritime territory in the north of its EEZ to a third Party, it could eventually push its

## (D) Trinidad and Tobago is constrained by the principle of *nemo dat quod non habet*

202. To the north of the median line, the Trinidad-Venezuela Agreement represents a purported "cession" by Trinidad and Tobago to Venezuela of maritime territory belonging to Barbados. In relation to that territory, Trinidad and Tobago is constricted by the well established general principle of law of *nemo dat quod non habet*. Trinidad and Tobago was clearly not competent to cede this territory to Venezuela.

## (E) The Barbados-Guyana EEZ Co-operation Zone Treaty is consistent with UNCLOS in all respects

203. Unlike the Trinidad-Venezuela Agreement, the EEZ Co-operation Zone Treaty does not appropriate the maritime territory of any third State and is consistent with UNCLOS in all respects.[308] The entire area of the co-operation zone falls beyond the 200 nautical mile arcs of any third State, but within the 200 nautical mile arcs of Barbados and Guyana.[309] As a result, the only States with rights to the territory under customary international law and UNCLOS within the co-operation zone are Barbados and Guyana. Barbados and Guyana, as the only States with territorial rights in the area concerned, were fully entitled to enter into the EEZ Co-operation Zone Treaty as part of their lawful exercise of sovereignty.

204. Thus, Article 2 of the EEZ Co-operation Zone Treaty provides:

> "The Parties agree that the Co-operation Zone is the area of bilateral overlap between the exclusive economic zones encompassed within each of their outer limits measured to a distance of 200 nautical miles from the baselines from

---

boundary to the south with Trinidad and Tobago sufficiently far for Barbados to acquire Trinidad and Tobago's oil-rich waters to the east of the island Trinidad.

308 See Memorial of Barbados, Appendix 59, Vol. 3.

309 This is illustrated on Map 6 appended to the Memorial of Barbados.

> which the breadth of the territorial sea is measured, and beyond the outer limits of the exclusive economic zones of other States at a distance of 200 nautical miles measured from the baselines from which their territorial sea is measured."[310]

205. Trinidad and Tobago complains that the EEZ Co-Operation Zone Treaty was foisted on it as a *"fait accompli"*.[311] This complaint is curious indeed, given that the territory in question is not even being claimed by Trinidad and Tobago for itself because of the interposition of the Trinidad-Venezuela Agreement line. The EEZ Co-operation Zone Treaty and the activities undertaken pursuant to it and according to its terms reflect a co-operative effort by two sovereign States to exercise joint jurisdiction peacefully in an area of maritime space that is beyond the jurisdiction of any third State.

**(F) The Trinidad-Venezuela Agreement can have no influence on this delimitation**

206. For the reasons set out above, the Trinidad-Venezuela Agreement can have no influence on the present delimitation. Indeed, the terms of the Trinidad-Venezuela Agreement confirm that it will accommodate a median line delimitation between Barbados and Trinidad and Tobago in accordance with international law.

---

310 *Ibid.*, p. 669.

311 Counter-Memorial of Trinidad and Tobago, para. 26.

## CHAPTER 4 TRINIDAD AND TOBAGO'S ATTEMPT TO DEFEAT THE MEDIAN LINE IS BASED ON A FICTION OF "PARTIAL ADJACENCY"

### Section 4.1 The Parties are clearly in a situation of coastal opposition

207. The *caveat* that geography cannot be refashioned to suit one party's ambitions is a norm applicable to every maritime delimitation. This case is no different. The application of this rule necessarily thwarts Trinidad and Tobago's peculiar perception of the Parties' spatial relationship as one of adjacency. On the contrary, they are clearly in a situation of coastal opposition.

208. Trinidad and Tobago's theory of partial adjacency has two separate consequences. First, it gives Trinidad and Tobago a basis for proposing a radical restructuring of the median line: amputating the median line and replacing a long segment of it with a wholly arbitrary line that happens to suit its aspiration to an ECS (an instant prize of about 27,000 square kilometres of additional maritime domain which in turn appears to contemplate also denying Barbados access to a further 22,300 square kilometres of maritime space south of the Trinidad-Venezuela Agreement line). It necessitates a delimitation of five distinct maritime zones in a jigsaw-puzzle of eight boundary lines, express and implied. The same geographical mischief reappears as the foundation for Trinidad and Tobago's plea for a "proportionality" adjustment, dealt with in Chapter 5.

209. A glance at a map of the region shows plainly that the two small island States face each other, in a situation of coastal opposition, across a large expanse of water in excess of 115 nautical miles. This distance is far greater than the length of the relevant coastlines. It is greater even that the combined length of Barbados' relevant

coastline and Trinidad and Tobago's irrelevant southeast-facing coastline.

210. The entire median line between Barbados and Trinidad and Tobago is generated from the basepoints along the southern coast of Barbados and the small part of the archipelagic baseline running around the northeast tip of Tobago and the much smaller island known as Little Tobago. These two coasts face the disputed area and project frontally onto it, as shown in Map 12. Further to the southwest, behind Trinidad in alignment with the axis of opposition between Barbados and Tobago, is the island of Trinidad, which currently plays no part in generating the median line between the two countries.

211. Trinidad and Tobago admits that the Parties are in a situation of coastal opposition.[312] This admission should be dispositive of the issue. But Trinidad and Tobago's acknowledgement of geographic reality is qualified by the remarkable assertion – crucial to two principal elements of Trinidad and Tobago's claim – that the spatial relationship between the two island States metamorphosises at a certain point to become one of adjacency.[313] As fundamental as this assertion is to its entire case, at no point in the Counter-Memorial does Trinidad and Tobago explain the magic of this purported transformation. No matter which way a map of the region is turned, the two island States come no closer together and continue to face each other across the expanse. Trinidad and Tobago is attempting to refashion geography in an untenable manner.

312 *Ibid.*, paras. 181 and 193.

313 *Ibid.*, paras. 194 and 200.

## Section 4.2 Isolated islands separated by 116 nautical miles of open water cannot be adjacent and have never been found so

212. Trinidad and Tobago is proposing that two islands, separated by a body of water the span of which is greater than their combined claimed relevant coastal lengths, be regarded as adjacent. In so doing, it distorts the plain meaning of the word "adjacent". Adjacency is a spatial relationship which is normally associated with the idea of "proximity". No case law supports the proposition that two distant island States can ever be in a situation of adjacency, in contrast to coastal opposition. Nor has Trinidad and Tobago submitted any evidence of State practice to support its proposition.

213. Trinidad and Tobago seeks to rely on the *Anglo-French*, *Gulf of Maine* and *Qatar v. Bahrain* cases.[314] Those cases are of no assistance to Trinidad and Tobago. Their geographical circumstances are entirely distinguishable from the present case. Trinidad and Tobago's selection of theoretical propositions from the *obiter dicta* in those cases is unaccompanied by any demonstration that they apply to the facts of the case at hand. They fail to legitimise Trinidad and Tobago's claim that the Parties' spatial relationship should be perceived as changing from coastal opposition to adjacency.

214. Each case relied upon by Trinidad and Tobago involved States whose significant land masses had varying spatial relationships at different points along their coasts. In the *Anglo-French* arbitration, two large States were separated by a strip of water (which may properly be spoken of as narrow in relation to those States' overall land masses, and even more so in comparison to the open waters between the relatively small land masses of Barbados and Trinidad and Tobago). A significant length of coastline on

314 *Ibid.*, paras. 177-180.

both sides formed a corridor of some 300 nautical miles between the Parties' land masses. In the west, the land masses ended and the walls of the corridor opened into the high seas of the Atlantic. At that point, as the Counter-Memorial notes, the tribunal in the *Anglo-French* arbitration concluded that it needed to treat the coasts of the parties as being lateral at one point in order to avoid the amplification of minor differences between their coastlines, a risk that does not exist in the present case.

215. In *Qatar v. Bahrain*, the ICJ found a similar abrupt change in physical geography. For most of their lengths, the coasts of Qatar and Bahrain formed a narrow corridor, never more than 24 nautical miles apart. At the northern end, the Parties' land territories ended and the narrow corridor opened up abruptly into the Gulf of Arabia.

216. In *Gulf of Maine*, the ICJ Chamber dealt with two large and contiguous land masses surrounding a bay upon which only the parties to the litigation were littorals. A long, contiguous coastline, interrupted by an indentation, faced the Atlantic Ocean. As in the *Anglo-French* arbitration, the character of the spatial relationship between the coasts of the Parties could be said to change where there was an actual physical change in the relation of the coasts. The Chamber, however, never qualified as adjacent the coasts which it had found ("there can be no doubt"[315], it said) to be opposite coasts. In fact, the Court stressed the continuous character of the outer segment of the delimitation line:

> "it appears beyond question that, in principle, the determination of the path of this segment must depend upon that of the two previous segments of the line, those segments within the Gulf which have just been described and whose path so obviously depended on the orientation of those coasts of the Parties

315 *Gulf of Maine*, at p. 334, para. 216.

that abut upon the waters of the Gulf."[316]

The Chamber added even more expressly:

> "It would be unthinkable that, in that part of the delimitation area which lies outside and over against the Gulf, the dividing line should not follow or continue the line drawn within the Gulf by reference to the particular characteristics of its coasts. If one were to seek for a typical illustration of what is meant by the adage 'the land dominates the sea', it is here that it would be found."[317]

Trinidad and Tobago wishes to superimpose its own interpretation of geography on the findings of the Chamber. In fact, as the excerpts demonstrate, this finding manifestly supports Barbados' position in the instant case.

217. To summarise: in each of the cases relied upon by Trinidad and Tobago, the actual physical relationship between the relevant coasts of the Parties changed along their length: the walls of the corridor of the Channel end, and the coasts of France and the United Kingdom open out like the mouth of a funnel onto the Atlantic Ocean; the walls of the corridor of overlapping territorial seas between the land masses of Bahrain and Qatar end, and the coasts also open out like the mouth of a funnel into the Gulf of Arabia; the direction of the contiguous coastline of the United States and Canada facing out into the Atlantic Ocean indents at one point to form a bay. In the present case, there is no change in the physical relationship between the coasts of Barbados and Trinidad and Tobago. There is no lengthy corridor of land territory between them that at one end opens out like a funnel. The two island States, each

316 *Ibid.*, at p. 246 at p. 337, para. 224. The Chamber then opted for a line perpendicular to the line that closed the Gulf by joining the outermost points of the parties' opposing coastlines.

317 *Ibid.*, para. 226. The Chamber then drew the outer segment of the delimitation line up to "the last point the perpendicular reaches within the overlapping of the respective 200-mile zones claimed by the two States and established from appropriate basepoints on their coastlines." *Ibid.*, para. 228.

with a relatively small landmass, face each other across a significant expanse of sea, with extensive sea on either side of them.

## Section 4.3 Trinidad and Tobago's description of the median line being comprised of a Caribbean and an Atlantic sector is irrelevant to maritime delimitation

218. As noted above, Trinidad and Tobago admits in its Counter-Memorial that Barbados and Trinidad and Tobago are in a situation of coastal opposition.[318] Yet it has conceived the idea that this condition of opposition metamorphosises depending on one's vantage point. Even Trinidad and Tobago does not deny that a person standing between Barbados and Trinidad and Tobago would conclude that the two States are opposite, as long as he were facing west. But if he turned around 180° to face east, Trinidad and Tobago says, he would suddenly conclude that their spatial relation is reversed – he will realise that they should be seen as situated side by side: contiguous. This extraordinary illusion produces an effect on the proper maritime border, Trinidad and Tobago argues, at a mysterious Point A. From this critical location, Trinidad and Tobago argues, the physical and spatial relationship between the Parties is transformed from one of coastal opposition to one of adjacency.

219. This curious Point A may usefully be considered as it is depicted on Map 19. One must ask what it is that has determined the location of Point A. The true answer is that its placement is entirely arbitrary. It evidently represents the maximum claim that Trinidad and Tobago has felt able to put forward. The basis of that claim, so Trinidad and Tobago suggests, is the distinction between the "Atlantic Ocean" and the "Caribbean Sea".[319]

---

318 Counter-Memorial of Trinidad and Tobago, para. 181.

319 *Ibid.*, para. 182.

220. Trinidad and Tobago's reliance on this distinction is based on a definition of nomenclature proposed in 1953 by the IHO. No explanation of the legal relevance of this distinction is offered. Trinidad and Tobago never explains how nomenclature proposed for bodies of water can transform the spatial relationship between islands that are otherwise in situations of coastal opposition. Apparently Trinidad and Tobago seeks to derive some "authority" from this IHO exercise, hinting at the spurious notion that if the IHO made a distinction between the nomenclature of Atlantic and Caribbean in this region (for whatever purpose) then anyone else can also make any number of variations around that distinction – no matter for what purpose. Trinidad and Tobago is certainly not shy about its purpose: the Counter-Memorial declaims baldly that there is an "Atlantic" sector of the median line or relevant area "where the two States are in a position of, or analogous to, adjacent States and are most certainly not opposite."[320] Yet there is nothing about the nature of the Atlantic Ocean (or indeed the Caribbean Sea) that creates unusual perspectives of maritime spatial relationships. Certainly Trinidad and Tobago does not explain what it thinks those unique perspectives might be. The only role of the "Atlantic" is that it is by chance the name given by the IHO to the place where Trinidad and Tobago happens to wish to put its Point A; except that Point A is not located where the two seas (or at least their nomenclatures) are supposed to divide.

## Section 4.4 Trinidad and Tobago's description of the median line being comprised of a Caribbean and an Atlantic sector is moreover a fiction: the IHO division between the Caribbean Sea and the Atlantic Ocean is well to the west of Trinidad and Tobago's Point A

221. If the significance of Point A were that it reflected a change in the spatial relationship between Barbados and Trinidad and Tobago consequent upon the transition from the

320 *Ibid.*, para. 12.

Caribbean Sea to the Atlantic Ocean, as contemplated in the IHO's 1953 definition, then one would expect that the change in the spatial relationship would occur at that point. However, the reference by Trinidad and Tobago to the IHO proposal does not meet this expectation and, in this failure, reveals its subjective and arbitrary character. Map 19 shows the relevant section of the IHO's proposed frontier between the Caribbean Sea and the Atlantic Ocean. It is located some 50 nautical miles to the west of Point A. The Counter-Memorial provides no explanation as to why Trinidad and Tobago fails to implement the logic of its contention by placing Point A right on that border (thus having on one side "Caribbean opposition" and on the other "Atlantic adjacency"). Trinidad and Tobago would have had every incentive to do so, given that it would have added many tens of thousands of additional square kilometres to its claim. The reason it did not do so is obvious from a glance at Map 19. Even Trinidad and Tobago must – and does – admit that at the juncture of the Caribbean and the Atlantic, the Parties are obviously opposite each other.

222. Despite its rhetoric about the significance of the distinction between the Caribbean Sea and the Atlantic Ocean, Trinidad and Tobago itself ignores the IHO's notional boundary line. In other words, in the end, even Trinidad and Tobago recognises that there is no connection between the IHO nomenclature and the spatial relationship of the Parties. Barbados submits that the Tribunal can safely ignore this unsustainable distinction, as well.

## Section 4.5 Trinidad and Tobago's Point A has been calculated by using contrived and self-serving basepoints

223. Having diverted the reader with the IHO nomenclature, the Counter-Memorial then locates Point A some 50 miles to the east of the Caribbean/Atlantic divide along the

median line.[321] Trinidad and Tobago describes Point A as the last point on the median line that is controlled by basepoints on the section of relevant Barbadian coast that is deemed by Trinidad and Tobago to be opposite Tobago.[322] But this statement, too, lacks foundation. The truth is that Trinidad and Tobago's Point A has been calculated by using contrived and self-serving basepoints.

224. The division of the relevant part of Barbados' coast into a segment that is opposite Trinidad and Tobago and another that is adjacent to it is made by Trinidad and Tobago at South Point.[323] From here, asserts Trinidad and Tobago, the "opposite" coast moves westnorthwest towards Bridgetown and the "adjacent" coast moves northeast towards Kitridge point. However, as shown on Map 12, both sections face towards – indeed, project frontally into – the median line. There is no reason to accord them different status as adjacent or opposite other than to further Trinidad and Tobago's argument of adjacency.[324]

225. In reality, the location of Point A is justified neither objectively nor by the purpose stated by Trinidad and Tobago. Figures 5.4 and 7.1 of the Counter-Memorial show that there are other basepoints on the southwest coast of Barbados that produce lines further east, so in this respect Trinidad and Tobago's distinction of Barbados' coasts is factually untenable. In addition, Figure 7.1 of the Counter-Memorial shows that, in constructing its argument, Trinidad and Tobago has chosen selectively to ignore certain of the basepoints on the northeast-facing baseline of Little Tobago island that

---

321 *Ibid.*, para. 238.

322 *Ibid.*

323 See Trinidad and Tobago's Figures 5.4 and 7.1.

324 In fact, a closer examination of the two segments of coast described by Trinidad and Tobago as opposite reveals that, when placed together, the angle between the direction is little more than 80°. One would expect at least an obtuse angle between adjacent coasts, approaching 180°.

actually assist in generating the median line. The reason they have been ignored by Trinidad and Tobago is that they clearly contribute to the construction of the median line to the east of Point A (this further undermining Trinidad and Tobago's arguments, including about the relevant coasts).

226. In summary, Trinidad and Tobago's Point A is a pretence, utilised not because any objective circumstances commend it, but simply because Trinidad and Tobago's proposed adjustment of the median line calls for a turning point. This provides further confirmation that Trinidad and Tobago's line has been engineered backwards, as discussed in Section 1.5, above.

227. Given that Trinidad and Tobago's localisation of Point A is arbitrary and self-serving, without any objective circumstance to commend it, Trinidad and Tobago's argument faces a further difficulty: there is no objective circumstance, therefore, to justify Trinidad and Tobago's choice of its claim line heading east from Point A.

### Section 4.6 Even if the Parties could be conceived of as adjacent in part, the equidistance line resulting from that adjacency would run to the south of the median line

228. Even if Trinidad and Tobago were able to accomplish the impossible and to establish that the Parties at some point become adjacent States, there is no explanation in the Counter-Memorial as to how that adjacency would result in the boundary line proposed in the Counter-Memorial. If Barbados and Trinidad and Tobago were adjacent States, the equidistance line between them could not be calculated by reference to the same basepoints that are used to calculate the coastally opposite median line. Nor could it then be adjusted by reference to a purported "disparity" in the lengths of the adjacent coasts.

229. Map 20 shows the Parties connected as if a single land territory, with the relevant coast being a line drawn between their closest points. Thus, in Map 20, Barbados and Trinidad and Tobago have been joined to create the fictitious island of "B-TT". The boundary between Barbados and Trinidad and Tobago on this island of "B-TT" is shown as the mid-point between Barbados and Tobago. As can easily be seen, the equidistance line that would result from this artificial adjacency between Barbados and Trinidad and Tobago runs for its entire length to the south of the median line that is generated between the Parties' real coasts.

230. There would be no relevant circumstances in this scenario that might warrant moving the equidistance line to the north. The "closing line" connecting Barbados and Tobago to create the artificial adjacency is perfectly straight, so there would be no distortions in the equidistance line calling for correction. The relevant "coasts" for the purposes of such an adjacency delimitation would be the coast of "B-TT". Even if Trinidad and Tobago were entitled to include the entire length of its southeast-facing baseline into the calculation, that would produce only a 2.2:1 difference in coastal length.

231. We have seen that in Trinidad and Tobago's claim the Parties become adjacent, not at the location of a theoretical "closing line", but rather well to the east at Point A. Map 21 shows the Trinidad and Tobago claim line transposed over the delimitation line that would be generated if the Parties were dealt with as adjacent.

232. In Barbados' submission, the Parties are not in a situation where their coastal opposition is transformed at some point into one of adjacency. Should the Tribunal find otherwise, however, the resulting delimitation line must be based on the equidistance line produced in Map 20, subject to the adjustment to the south that

would be required to take into account the relevant circumstance of the traditional artisanal fishery off Tobago.

**Section 4.7 Trinidad and Tobago is not "cut-off" by the median line**

233. Barbados will comment briefly on Trinidad and Tobago's effort to manipulate international law's concern to prevent States from being seriously "cut-off" from the water adjacent to their coasts so as to transform this concern into, in effect, a right to a CS of 200 nautical miles and beyond. The fact is that Trinidad and Tobago is not "cut-off" by the median line so as to engage the concern of international law on this issue. To the contrary, a median line boundary to the east of Trinidad and Tobago's Point A would give Trinidad and Tobago a CS and EEZ extending more than 190 nautical miles, up to the tri-point with Guyana.

234. It is inconceivable that States should enjoy an inherent right to a CS of 200 nautical miles and beyond regardless of the consequence for the EEZ or CS of another State with its own valid claim, as proposed by Trinidad and Tobago. Plainly, a concept of absolute entitlement in cases of coastal opposition of less than 400 nautical miles would be absurd. The legal function of the median line is the ultimate refutation of a claim of absolute entitlement.

235. All the holdings of courts and tribunals on "cut-off" claims refer to the CS or EEZ. None of them refer to a potential ECS claim. Nor do they imply, let alone expresses, the absolute entitlement of a coastal State to a CS out to 200 nautical miles and beyond in cases either of coastal opposition or of another State's claim to the same maritime area. That would naturally be physically impossible. It has been made clear in every arbitral or judicial delimitation that the apportionment of CS as between competing States was conditioned on relevant circumstances and the realms of

possibility. In *North Sea Continental Shelf*, for example, the Court spoke of "taking account of all the relevant circumstances, in such a way as to leave *as much as possible* to each Party...".[325] (Emphasis added). Indeed, in that case, it was physically impossible to give anything approximating to a 200 nautical mile CS to Germany. What the ICJ actually indicated in that case was that Germany should be granted as much shelf as possible in the immediate vicinity of its coastline; indeed, a very modest shelf. The point was clarified in *Guinea/Guinea Bissau*, decided by three of the judges of the ICJ, one of whom had presided the *North Sea* case. In *Guinea/Guinea Bissau*, the tribunal held that "it is necessary to ensure that, as far as possible, each State controls the maritime territories opposite its coasts and in their vicinity."[326]

236. Trinidad and Tobago acknowledges what it calls the "as far as possible" proviso.[327] It acknowledges, as well, the ultimate control of geography, which "is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation."[328] It then concludes its legal discussion on this part of its claim with an unsupported assertion that is either *non sequitur* or a novel twist: "But in respect of coasts with unobstructed access out to the open ocean, the no cut-off principle obtains."[329]

---

325 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports 1969*, para. 101(c)(1).

326 *Guinea/Guinea Bissau*, para. 92.

327 Counter-Memorial of Trinidad and Tobago, para. 160.

328 *Ibid.*, quoting *Cameroon v. Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, para. 295.

329 *Ibid.*

237. If Trinidad and Tobago means by that statement that, with respect to a State facing the open sea with no competing claim by another State interposed in the 200 nautical mile area before it, "the no cut-off principle obtains", it is stating nothing more than a truism. Such a truism is irrelevant to the case before this Tribunal because of the geographical reality that as can be clearly seen on Map 8, Trinidad and Tobago does not have "unobstructed" access out to the open ocean. A number of States, including Barbados, obstruct Trinidad and Tobago's access to out to the open ocean.

238. If, on the other hand, Trinidad and Tobago means by the above-quoted statement that a State which faces the ocean acquires, merely by the fact of having a coastline, an absolute entitlement without regard to the valid claims of other States and that any limitation on that absolute entitlement would violate what Trinidad and Tobago means by the "no-cut off principle", then this proposition is untenable for the reasons stated above. No court or tribunal has ever affirmed such a proposition. Were one to do so, it would signal the end of the methodology of maritime boundary delimitation so laboriously constructed by courts, tribunals and scholars.

239. The phrase "cut-off" is a term of general reference, not a rule of absolute entitlement. It is a general reference to an equitable delimitation that takes account of geographical constraints and the claims of other States in order to ensure that a State will receive EEZ and CS "opposite its coasts and in their vicinity."[330] It is precisely these geographical constraints and claims of other States that Trinidad and Tobago seeks to ignore.

240. In the present case, the Parties' coastlines are separated by 116 nautical miles of open sea. It would therefore be nonsense to speak of a concave coastline in this case, just

330 *Guinea/Guinea Bissau*, para. 92.

as it is nonsense to speak of adjacency between the Parties' coastlines. Trinidad and Tobago would not be enclaved or cut off by a median line boundary with Barbados. The median line, with the required adjustment to the south in the area of Tobago, gives Trinidad and Tobago a CS extending, at the tri-point with Guyana, to more than 190 nautical miles from its relevant baselines. There is no question that Trinidad and Tobago would lose "maritime areas which are unquestionably situated opposite and in the vicinity of [its] coasts".[331] Thus, the adjusted median line described in the Memorial does not constitute a "cut-off" in the sense in which Germany might have suffered a cut-off of its access to the North Sea by the Denmark-Netherlands attempt to apply the median line. That would indeed have provided Germany with a very limited CS. The approach of the Court provided Germany with a larger "equitable" shelf, but it was nonetheless constrained on the east, west and north by the interests of other States. It is abundantly clear that no absolute entitlement to a CS of 200 nautical miles formed any part of the Court's ruling.

241. Barbados respectfully asks the Tribunal to reject Trinidad and Tobago's theory of absolute entitlement and its peculiar reading of the "cut-off" principle.

331 *Ibid.*, para. 103.

## CHAPTER 5 NEITHER ADJACENCY NOR PROPORTIONALITY JUSTIFIES AN ADJUSTMENT OF THE MEDIAN LINE IN FAVOUR OF TRINIDAD AND TOBAGO

### Section 5.1 Introduction

242. Having strained geography to support its theory that the Parties are in part adjacent, Trinidad and Tobago eventually abandons its own argument. In seeking to rely on the coastal lengths of what it asserts are the Parties' relevant coasts, Trinidad and Tobago does not use its actual southeast-facing coastline in deciding the distance that the median line should move to the north. It introduces instead the idea of a north-south vector that has no real link to its adjacency arguments. This is a legal and conceptual *non sequitur* and represents an implicit admission by Trinidad and Tobago of the lack of connection between its adjacency argument and the realities of geography. This will be addressed further in Section 5.6 below. At the outset, however, it is important to recall three relevant cardinal rules acknowledged by both Parties:

(a) delimitation cannot ignore or refashion nature ("[e]quity does not necessarily imply equality"[332]). Relevant circumstances/equitable considerations might be taken into account only to abate any inequitable results that an unadjusted median line might in the circumstances produce;

(b) delimitation should reflect entitlement,[333] and the basis of entitlement is a coastal front. The land dominates the sea. For a coastal front to be legally relevant it must generate a claim to a maritime zone that competes – and so

332 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports 1969*, para. 91.

333 *Ibid.*, para. 96; *Aegean Sea Continental Shelf, ICJ Reports 1978*, 3, para. 86.

overlaps – with an opposing claim by the other relevant State; and

(c) equal division between opposite coasts is inherently equitable and can only be effected by means of a median line.[334] The median line, and equal division, is "a criterion long held to be as equitable as it is simple".[335]

243. The delimitation line proposed in Trinidad and Tobago's Counter-Memorial does violence to each of these rules. This is principally because Trinidad and Tobago grants too large a writ to a supposed "disparity" between the Parties' respective coastal lengths.[336] To the extent that Trinidad and Tobago intends, by using the term "disparity" to import into the delimitation process the idea of disproportionality as a relevant circumstance, Trinidad and Tobago contradicts its own pleadings, which in terms acknowledge that disproportionality is not a method of delimitation.[337] In so doing, Trinidad and Tobago indirectly seeks to expand the limited corrective role that "proportionality" – or, rather, marked disproportionality – has been called upon to play in the settled case-law of international courts and tribunals.

244. For reasons that remain to be explained (and are inexplicable, as described above, on the basis of logic or principle), Trinidad and Tobago proposes to use "proportionality" in this way because, it is said, the coasts of the Parties are not opposite but adjacent. But, as we have seen in Chapter 4, Trinidad and Tobago denies the obvious when it sets out to demonstrate that it is contiguous ("in a relationship of adjacency"[338]) to Barbados. Trinidad and Tobago proceeds on an untenable geophysical premise.

---

334 *North Sea Continental Shelf*, para. 57.

335 *Gulf of Maine*, para. 195.

336 Counter-Memorial of Trinidad and Tobago, para. 249.

337 *Ibid.*, para. 170.

338 *Ibid.*, para. 236.

245. The Counter-Memorial, remarkably, chides Barbados for not having set out in the Memorial the legal framework relevant to Trinidad and Tobago's novel arguments.[339] However, as the Negotiation Records attest, Trinidad and Tobago declined to share with Barbados the details of its legal theories on maritime delimitation. Barbados could hardly have known that Trinidad and Tobago would resile on the question of methodology yet nonetheless rest its case on an alleged "disparity", asking the Tribunal to refashion geography and overturn settled legal doctrines. Barbados structured its Memorial on the well-recognised basis that the relevant coasts are those that generate basepoints. It had no reason to anticipate that Trinidad and Tobago would suggest that the traditional approach generates "confusion" in a single division of overlapping EEZ, compared to Trinidad and Tobago's "simple" jigsaw-puzzle delimitation of five maritime zones.[340] Barbados certainly had no reason to refer to subsidiary concepts of disproportionality, which have no application in the present case.

246. Having upbraided Barbados for not anticipatorily applying Trinidad and Tobago's novel approach, the Counter-Memorial itself does not apply that approach in a rigorously logical and consistent manner. Trinidad and Tobago's difficulty is exposed in a few telling passages. Trinidad and Tobago's Counter-Memorial posits that relevant coasts for the purposes of the "proportionality" test are "those coasts *facing* on to the area to be delimited".[341] (Emphasis added). It goes on to state that coasts

---

339 *Ibid.*, para. 136. It is as though the Counter-Memorial presumes that Barbados' Memorial should have foreseen Trinidad and Tobago's reliance on a refashioning of geography, and so have anticipatorily discussed novel theories of "relevant coasts" and "disparity–cum–disproportionality."

340 *Ibid.*, para. 186.

341 *Ibid.*, para. 151.

should be taken "to project *frontally* in the direction in which they face".[342] (Emphasis added). It concludes that the "relevant coasts are those *looking on to* or *fronting upon* the area to be delimited".[343] (Emphasis added).

247. Despite these clear acknowledgements, Trinidad and Tobago ignores them in its wishful characterisation of its southeast-facing baselines as projecting northeast into the disputed area. The concept of "frontal" is one-dimensional and means precisely what it says: to project in front. Map 9 shows the frontal projection of Trinidad and Tobago's southeast-facing archipelagic baseline as it exists. Maps 10 and 11 show how the geography of Trinidad and Tobago would have to be reconfigured in order to enable its baseline to project frontally on to the disputed area. This is a clear case of attempting to refashion geography to a significant degree.

248. The position that Trinidad and Tobago now wishes to adopt is manifestly at odds with geographic reality. Trinidad and Tobago describes itself as a "coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector".[344] Reality is otherwise:

(a) Trinidad and Tobago's proposed relevant coast does not face east but southeast towards Venezuela, Guyana and Suriname. Even the Counter-Memorial cannot do better than suggest that this coast faces "*more or less* to the east"[345] (emphasis added) and the introduction of the north-south vector later in its argumentation on coastal lengths (see Section 5.6(E) below) underscores Trinidad and Tobago's implicit acknowledgement of this fact;

342 *Ibid.*, para. 152.

343 *Ibid.*, para. 187.

344 *Ibid.*, para. 12.

345 *Ibid.*, para. 197.

(b) as already discussed, the suggested "Atlantic sector" is premised on an arbitrary division of uninterrupted expanses of sea;[346] and

(c) as also already discussed, Trinidad and Tobago's ambition to its northeast is not "unimpeded", but constrained by the CS and EEZ entitlements generated by Barbados' southeastern coast.[347]

249. Furthermore, the assertion of contiguity between the two States bears no sustainable relationship with the submission it seeks to support. In no possible way does this purported contiguity in itself bring about the northward adjustment of the median line for which Trinidad and Tobago contends. In fact, as discussed in Section 4.6 of this Reply, even if one were persuaded to look at Barbados and Trinidad and Tobago as adjacent States, one would draw an equidistance line of delimitation to the south – not the north – of the median line proposed by Barbados (see Maps 20 and 21).

## Section 5.2 Opposition and adjacency are spatial relationships between relevant coasts that generate basepoints

250. In Chapter 5 of its Counter-Memorial, Trinidad and Tobago continues its vain struggle to overcome the imperatives of geography, this time by trying to introduce elaborate and novel distinctions between basepoints and coasts. All of this is crafted to persuade the reader that "the ratio of coastal frontages is determined before a method of delimitation is decided on"[348] so that the relevant coasts for testing for disproportionality are not the coasts that generate the median line, but other more extensive selections of coastline, which Trinidad and Tobago sets out in a crypto-

346 Sections 4.3 and 4.4 above.

347 Section 4.7 above.

348 Counter-Memorial of Trinidad and Tobago, para. 187.

scientific table.[349] All of this ignores the simple fact that opposition and adjacency are spatial relationships between relevant coasts that generate basepoints.

251. Many of the distinctions which Trinidad and Tobago purports to draw are not developed and serve only to obfuscate. In particular, Trinidad and Tobago makes no effort to determine the legally material vantage point, but rather concentrates on identifying the coasts that are "relevant to the delimitation as a whole".[350] There is, however, no legal significance to these words. Maritime delimitation concerns competing entitlements to maritime spaces (in the present case, over the CS and EEZ within 200 nautical miles of the Parties' coasts). In the words of the ICJ Chamber in the *Gulf of Maine* case, delimitation is a:

> "division of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap."[351]

252. The two States' "relevant coastal frontages", to use Trinidad and Tobago's phrase, can only be those that generate competing, overlapping entitlements. Any coastal frontage that produces an entitlement *vis-à-vis* the other State must, by definition, also produce basepoints from which the delimitation line ought to be drawn. A coast is either relevant, in which case basepoints will be located on it, or irrelevant, in which case no basepoints will be located on it. There is no intermediate position, such as suggested by Trinidad and Tobago, of a coast that does not directly command the delimitation line by way of basepoints but is somehow still relevant to the direction of the line.

---

349 *Ibid.*, para. 198.

350 *Ibid.*, para. 186.

351 *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States) ICJ Reports 1984*, para. 195.

253. As already discussed at Section 4.1 above, from the legally relevant vantage point – that bounded by the juxtaposition of their respective coasts on which basepoints commanding the delimitation line are located – the Parties are undeniably opposite each other. To evade this truth, Trinidad and Tobago says that Barbados "silently conflates" the distinction between basepoints and relevant coastal frontage.[352] It illustrates its point with situations in which basepoint-generating features might be discounted or ignored, but without changing or extending the length of the relevant coasts. Trinidad and Tobago's argument is misplaced. The examples it cites do not detract from Barbados' proposition: the selection of a relevant coast is made on the basis that it generates a competing entitlement and therefore commands the delimitation line.[353]

254. As the Court stated in the *Jan Mayen* case:

> "It is appropriate to treat as relevant the coasts between points E and F and between points G and H on sketch-map No. 1, *in view of their role in generating the complete course of the median line* provisionally drawn which is under examination."[354] (Emphasis added).

255. Further, no support may be drawn for Trinidad and Tobago's argument from the *Anglo-French* arbitration, on which Trinidad and Tobago places much reliance.[355] In that case, it will be recalled, France contended that Article 6 of the 1958 Continental Shelf Convention did not control, in respect of the "Atlantic region", CS to the

---

352 Counter-Memorial of Trinidad and Tobago, para. 186.

353 This was indeed the case in *Eritrea/Yemen (Second Stage: Maritime Delimitation)* award, where the issue concerned only the abatement of minor coastal features, not the selection of the relevant coasts.

354 *Maritime Delimitation in the Area Between Greenland and Jan Mayen, ICJ Reports 1993*, para. 67.

355 See Counter-Memorial of Trinidad and Tobago, e.g. at para. 177.

southwest of the two States' respective coasts. In respect of that area – France argued – the two States' coasts were neither opposite (Article 6(1)) nor adjacent (Article 6(2)), but in a relation left undefined in Article 6 (a *casus omissus*).[356] As correctly noted in Trinidad and Tobago's Counter-Memorial,[357] this argument was rejected.[358] The Court of Arbitration held that opposition and adjacency were the only conceivable positions in which coasts may relate to each other. Moreover, opposition and adjacency were to be determined by reference to the two coasts which "abut" the CS under delimitation, "hav[ing] regard to their actual geographical relation to each other and to the continental shelf at any given place along the boundary".[359]

256. It is difficult to see an analogy between the English Channel dividing France and Great Britain (21 nautical miles separate Cap Gris-Nez and Dover) and the 116 nautical mile maritime expanse between Barbados and Trinidad and Tobago. But even if such an analogy could be drawn, it is even more difficult to see its pertinence in the present case. In the *Anglo-French* arbitration, the coasts that were considered to be in a "side-by-side relationship" were doubtless relevant coasts and, accordingly, generated basepoints. Not so here, where Trinidad and Tobago does not propose that any basepoints should be located on its southeast-facing coast or archipelagic line – for reasons that will be explained below and are immediately apparent from Maps 10 and 11. The reason for which the Court of Arbitration considered the UK and French relevant coasts as in part contiguous, rather than opposite, was to allow for limited effect to be given to the Scilly Isles, lying 24 nautical miles off Cornwall. As the

356 *Delimitation of the Continental Shelf (United Kingdom and the French Republic)*, 30 June 1977, 54 ILR 6, para. 90.

357 Counter-Memorial of Trinidad and Tobago, para. 177.

358 54 ILR 6, para. 94.

359 *Ibid.*, para. 94.

Court of Arbitration explained:

> "What the court thinks evident, however, is that the extension seawards of the maritime zones of States, for which the Revised Single Negotiating Text provides, cannot fail to increase the significance of the effects of individual geographical features in deflecting the course of a lateral equidistance boundary between 'adjacent' States.[360]
>
> . . .
>
> As this Court of Arbitration has already pointed out in paragraphs 81-94, the appropriateness of the equidistance or any other method for the purpose of effecting an equitable delimitation in any given case is always a function or reflection of the geographical and other relevant circumstances of the particular case. In a situation where the coasts of the two States are opposite each other, the median line will normally effect a broadly equal and equitable delimitation. But this is simply because of the geometrical effects of applying the equidistance principle to an area of continental shelf which, in fact, lies between coasts that, in fact, face each other across that continental shelf. In short, the equitable character of the delimitation results not from the *legal* designation of the situation as one of 'opposite' States *but from its actual geographical character as such*. Similarly, in the case of 'adjacent' States it is the lateral geographical relation of the two coasts, when combined with a large extension of the continental shelf seawards from those coasts, which makes individual geographical features on either coast more prone to render the geometrical effects of applying the equidistance principle inequitable than in the case of 'opposite' States. The greater risk in these cases that the equidistance method may produce an inequitable delimitation thus also results not from the *legal* designation of the situation as one of 'adjacent' States but *from its actual geographical character as one involving laterally related coasts*.[361] (Emphasis in the original).
>
> . . .
>
> But to fix the precise legal classification of the Atlantic region appears to this Court to be of little importance. The rules of delimitation prescribed in paragraph 1 and paragraph 2 are the same, and it is the actual geographical relation of the coasts of the two States which determine their *application*. What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a 'just' or 'equitable' delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the

360 *Anglo-French* arbitration, para. 96.

361 *Ibid.*, para. 239.

great distance seawards that this shelf extends from those coasts."[362] (Emphasis added).

257. As the Court of Arbitration went on to explain, the Scilly Isles were an "element of distortion ... material enough to justify the delimitation of a boundary other than the strict median line envisaged in Article 6, paragraph 1 of the [1958 Continental Shelf] Convention".[363] In sum, although the same equidistance methodology would be adopted under either Article 6(1) or Article 6(2), the Arbitration Court considered it more appropriate to apply Article 6(2). It did so in order to emphasise the distorting effect of the Scilly Isles controlling a delimitation line extending a long distance westwards and, by like token, to abate that distortion following the judgment in the *North Sea Continental Shelf* case. In other words, the distorting effect of an outlying island of the coastally opposed states led the Tribunal to adapt the equidistance line by reference to the more general language of Article 6(2) of the 1958 Continental Convention.

258. In summary, the *Anglo-French* arbitration teaches that two baseline-generating coastlines may be considered adjacent in order to abate the distorting effects of minor features off those coasts (not at issue in the present case). Adjacency – or for that matter opposition – gives no licence to introduce unprincipled concepts of "proportionality" as in themselves commanding the course of the delimitation line. Indeed, this was an argument considered and rejected in the *Anglo-French* arbitration:

> "It is not therefore, obvious, how or why the coasts within the Channel should ... acquire an absolute relevance in determining the course of the boundary itself in the Atlantic region. Nor is this inconsistency removed by invoking an alleged principle of proportionality by reference to length of coastlines; for the use of the Channel, rather than the Atlantic, coastlines [by France] is still left

362 *Ibid.*, para. 242.

363 *Ibid.*, para. 244.

unexplained."[364]

259. Trinidad and Tobago proffers its ostensible respect for this rule, acknowledging that:

> "[t]he ratio of coastal frontages does not of itself establish the method of delimitation."[365]

Barbados agrees. But having expressed the rule, Trinidad and Tobago's proposed delimitation line fails to obey it. Before examining this, it is useful to examine the geographical context in which Trinidad and Tobago now says that it possesses an eastward-looking coastal front that is relevant to a delimitation with Barbados.

## Section 5.3 If anything, Trinidad and Tobago's southeast-looking coastal front produces an entitlement *vis-à-vis* Venezuela, Guyana and Suriname, not Barbados

260. For Trinidad and Tobago, the salient aspect of this delimitation concerns what it describes as the "east" or "Atlantic" sector.

261. As discussed above at Section 5.3, Trinidad and Tobago does not face on to the area lying to the east of Point A. Merely asserting that Trinidad and Tobago's "eastern" coast is "adjacent" to the area east of Point A does not make it adjacent.[366] Words cannot change a geographical fact. As discussed in Section 5.2 above, it is legally immaterial whether one calls it adjacent or opposite to Barbados if that coast does not produce baselines for the delimitation line (as in Trinidad and Tobago's case it does not).

---

364 *Anglo-French Continental Shelf*, para. 246.

365 Counter-Memorial of Trinidad and Tobago, para. 170.

366 *Ibid.*, para. 239.

262. If anything, Trinidad and Tobago's southeast-facing coastal front produces an entitlement *vis-à-vis* Venezuela, Guyana and Suriname, not Barbados. That this is the case is shown beyond doubt by Map 9. The only way for Trinidad and Tobago to project onto the area to the east of Point A is by breaching the cardinal rule that prohibits any refashioning of nature.[367] As Map 10 illustrates, the frontage necessary for Trinidad and Tobago's alleged projection may only be created by rotating the Trinidad and Tobago archipelago to the north by 40°, using its easternmost point, the St Giles' Islands, as an axis. A projection at such an angle can by no stretch of logic – or equity – be called "frontal", if it may even be called a projection.

263. Trinidad and Tobago's "eastern" projection found its resolution in the Trinidad-Venezuela Agreement. Similarly, the median line proposed by Barbados is inherently unable to cut off Trinidad and Tobago from any maritime area to which its southeast-facing baseline actually projects.[368] To the contrary, and as will now be explained, the areas to which Trinidad and Tobago lays claim by its rotated projection are areas directly fronted by Barbados' southern coast.

---

367 *North Sea Continental Shelf*, para. 91.

368 This conclusion is borne out by the Dominica-France (Guadeloupe & Martinique) maritime boundary agreement (Counter-Memorial of Trinidad and Tobago, Vol. 2(1), No. 5). The length and direction of Dominica's extended EEZ agreed between the parties to that agreement cannot be said to follow any frontal projection of Dominica's coast. To the contrary, such a projection would have led the agreed extension to overlap with the median line tri-point among Guadeloupe, Martinique and Barbados (see Counter-Memorial of Trinidad and Tobago, Vol. 1(2), Figure 1.2). Instead, the parties reached accommodation by drawing the extension well away from that tri-point, avoiding what one commentator would call a "sticky" situation. See C. Lathrop, "Tri-point Issues in Maritime Boundary Delimitation", in *International Maritime Boundaries* Vol. V (David A. Colson and Robert W. Smith, eds.), at pp. 3305-3375, at 3341.

## Section 5.4 Trinidad and Tobago mis-states and mis-applies the principle of non-encroachment

264. Trinidad and Tobago mis-states and mis-applies the principle of non-encroachment as it applies in the present delimitation. In particular, it seeks to portray the region as being congested to the west and empty to the east:

> "To the west, issues of maritime delimitation are dominated by spatial relationships with third States … To the east, there is open ocean."[369]

265. This is patently false. Map 8 shows the overlapping EEZ claims in the region. To the east of Trinidad and Tobago, following the projection of its southeast-facing coast, Trinidad and Tobago is constrained from reaching its full 200 nautical mile EEZ entitlement and any full potential ECS claim by the presence of Venezuela, Guyana and Suriname. This is not an "open sea" to the east of Trinidad and Tobago.[370] To its northeast, Trinidad and Tobago is constrained by Venezuela, Guyana and Barbados.

266. Nor is Barbados situated in an unconstrained situation, as Trinidad and Tobago suggests. To its north, Barbados is faced with claims from St. Lucia and France. To its southeast, Barbados is constrained from reaching its full 200 nautical mile EEZ entitlement, and any full potential ECS claim, by the presence of Trinidad and Tobago, Venezuela, Guyana and Suriname.

---

369 Counter-Memorial of Trinidad and Tobago, para. 181. *Ibid.* para. 202: "To the west, in the confined western or Caribbean sector, the coasts are either opposite or lateral… In the open eastern or Atlantic sector, by contrast, the coastlines of the Parties are much more in a relationship of adjacency."

370 The fact that Trinidad and Tobago ceded part of its entitlement to its east to Venezuela does not entitle it to take Barbados' maritime territory to the northeast. It entered into the pact voluntarily and must be taken to have been sufficiently satisfied by what benefits it received from Venezuela in return.

267. It is therefore wrong to suggest that there is an open maritime area to which Trinidad and Tobago is geographically entitled. It is equally misplaced for Trinidad and Tobago to argue that it is *ex ante* entitled to partake of a share of maritime areas to which it simply does not reach:

> "Moreover the effect of the Barbados claim line is to shelf-lock Trinidad and Tobago despite its coastal frontage of approximately 75 nautical miles directly out into the Atlantic. Barbados thereby claims 100% of the outer continental shelf in the area of overlapping potential entitlements. This is evidently inequitable."[371]

268. This is exactly where Trinidad and Tobago turns the principle of non-encroachment on its head, using it as a sword rather than a shield. It is appropriate to contrast Trinidad and Tobago's position with the proper context of the principle of non-encroachment as formulated by the ICJ:

> "That equitable principles are expressed in terms of general application, is immediately apparent from a glance at some well-known examples: the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, 'equity does not necessarily imply equality' (*ICJ Reports 1969*, p. 49, para. 91), nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice."[372]

269. Trinidad and Tobago's position violates the principles formulated by the ICJ in several respects:

---

371 Counter-Memorial of Trinidad and Tobago, para. 230.

372 *Case Concerning the Continental Shelf (Libya/Malta), ICJ Reports 1985*, 13, at para. 46.

(a) it skates over the fact that a median line with Barbados affords Trinidad and Tobago an EEZ whose eastern extremity lies clearly beyond 200 nautical miles from any point on the coast of the island of Trinidad, which generates the coast that Trinidad and Tobago claims to be the relevant one;[373]

(b) Trinidad and Tobago therefore attempts to invoke, under the cloak of non-encroachment, coasts that manifestly do not abut on the areas to which it lays claim;

(c) in this unfounded attempt to trump geography and its own agreement with Venezuela through the refashioning of nature, Trinidad and Tobago advocates an adjustment of the median line in completely unprecedented terms; [374] and

(d) Trinidad and Tobago does this at the expense of Barbados' entitlement to maritime areas onto which its coast does directly abut. Since, as shown, there are no relevant circumstances to which Trinidad and Tobago may point, its claim amounts to cutting off Barbados' enjoyment of sovereign rights "to the full extent authorized by international law".

---

373 See, e.g., Counter-Memorial of Trinidad and Tobago, Vol. 1(2), Figures 7.4 and 7.5. As mentioned elsewhere, it is facile for Trinidad and Tobago to say it has coastal frontage "directly out on the Atlantic" if it defines the Atlantic as commencing on its shorelines. See Counter-Memorial of Trinidad and Tobago, Vol. 1(2), Figure 5.1.

374 Jurisprudence insists on the limited scale of correction that "relevant circumstances" may justify, always evoking the cardinal rule that there can be no question of refashioning nature. For example, the *Anglo-French* Court invoked this rule five times, at paras. 101, 195, 244, 245, and 248-249. As the ICJ Chamber said in the *Gulf of Maine*, relevant circumstances have a role of "correction" (para. 218), and as the full Court said in *Libya/Malta*, their role is one of "adjustment" (paras. 65, 68, 71-73). The corrections applied in the jurisprudence bear no relation to Trinidad and Tobago's suggested adjustment of the median line.

270. Trinidad and Tobago's eastward projection argument thus overlooks the fact that the coast of the island of Trinidad does not command the median line and does not project beyond the southeastern extreme of the median line. Given this, if, as Trinidad and Tobago argues, that coast were to be taken into account based on some theory of adjacency between Trinidad and Tobago and Barbados, the median line would indeed need to be adjusted to the south.

## Section 5.5 Trinidad and Tobago has no inherent entitlement to an extended continental shelf that trumps Barbados' rights to its EEZ and extended continental shelf

271. This Reply has already made clear in Chapter 2 that the Tribunal has no jurisdiction to delimit between the Parties any portions of ECS. Here, Barbados rebuts the substance of Trinidad and Tobago's argument that an ECS claim somehow constitutes a relevant circumstance requiring an adjustment of the median line, thus in effect trumping Barbados' rights to its EEZ and ECS.

272. As noted above at Section 2.8, Trinidad and Tobago apparently considers that it possesses inherent rights to an ECS, of which it says it would be deprived by a median line. This simply amounts to arguing backwards from a presumed, but ultimately unfounded, entitlement.

273. Trinidad and Tobago cannot claim a right to an ECS unless and until it establishes that it is the relevant coastal State with an entitlement in accordance with Article 76 of UNCLOS. Any such entitlement can only follow as a consequence of a delimitation in accordance with the applicable rules of international law. It cannot be the driving factor to the delimitation process itself.

274. Ironically, Trinidad and Tobago would have no entitlement to an ECS even with the "adjustment" of the median line that it claims. This is because the maximum extension of any EEZ claim by Trinidad and Tobago overlapping with Barbados' EEZ would in any event be enclosed by areas of EEZ that indisputably belong to Barbados.

275. In order to overcome the inconveniences of geography, Trinidad and Tobago advances its claim to an ECS underlying Barbados' EEZ. Trinidad and Tobago's trampling of legal precepts is thereby compounded. Not only does Trinidad and Tobago seek to refashion geography and to compensate for the inequalities of nature. It also seeks to deprive Barbados of its sovereign rights in its acknowledged areas of EEZ "to the full extent authorized by international law".[375] In other words, Trinidad and Tobago seeks to refashion UNCLOS itself.

## Section 5.6 Trinidad and Tobago in reality proposes to use "proportionality" as a method of delimitation

276. A comparison of the respective lengths of the relevant coasts of the States concerned has a role to play in maritime delimitation, as one of the tests of the equitableness of the provisional median line in the form of the criterion of disproportionality. That, however, does not constitute an independent method of delimitation in the way that Trinidad and Tobago would like. The concept of "a reasonable degree of proportionality" was devised as a "final factor" by which to assess the equitable character of a maritime delimitation effected by other means. Professor Brownlie describes this as follows:

> "[P]roportionality is not an independent principle of delimitation (based on the ratio of the lengths of the respective coasts), but only a test of the equitableness *of a result arrived at by other means*. This process of *ex post*

375 See further Section 2.8 above.

> *facto* verification of a line arrived at on the basis of other criteria may take two forms. Exceptionally, it may take the form of a ratio loosely based on the lengths of the respective coastlines. More generally, it takes the form of vetting the delimitation for evident disproportionality resulting from particular geographical features."[376] (Emphasis added in part).

277. Thus, "proportionality" is not a positive delimitation method. This means principally two things. First, "proportionality" cannot by itself produce a boundary line.[377] Secondly, and as discussed in the paragraphs below, "proportionality" does not require proportional division of an area of overlapping claims, because it is not a source of entitlement to maritime zones.[378] As the ICJ had occasion to remark:

> "[T]o use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity, and as a corrective to the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, *it is difficult indeed to see what room would be left for any other consideration.*"[379] (Emphasis added).

278. Yet this is how Trinidad and Tobago proposes to use "proportionality" here. Neither an alleged relation of adjacency nor the principle of non-encroachment can justify Trinidad and Tobago's claim. Trinidad and Tobago therefore turns to "proportionality" to produce the result it desires. This is a function that the disproportionality test cannot perform and, indeed, has never performed in the practice of States or international tribunals.

---

376 Ian Brownlie, *Principles of Public International Law* (sixth edition, 2003), at p. 218 (citations omitted). See to the same effect *Anglo-French* arbitration, para. 100.

377 See, e.g., *Tunisia/Libya, ICJ Reports 1982*, 18, paras. 55-58.

378 "'[P]roportionality' in the delimitation of the continental shelf does not relate to the total partition of the area of the shelf among the coastal States concerned, its role being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity". *Anglo-French*, para. 250.

379 *Libya/Malta*, para. 58; and see to the same effect *Gulf of Maine*, para. 185.

279. Trinidad and Tobago's reliance on coastal ratios quickly dissolves when it is considered that:

(a) The "eastern-facing coastline"[380] of Trinidad and Tobago is not a relevant coastline at all, in that it neither produces baselines contributing to the delimitation line nor projects onto the area to which Trinidad and Tobago lays claim by invoking the disproportionality between that coast and Barbados' hence all of its proposed coastal lengths are legally correct;

(b) Trinidad and Tobago makes a self-confessedly unprecedented claim to use an archipelagic baseline as its relevant coast (before turning to rely on an abstracted vector to generate its coastal length);

(c) Trinidad and Tobago ignores about half of Barbados' coastal length that would be relevant in a valid test of disproportionality; and

(d) Trinidad and Tobago uses "proportionality" to mount a vastly exaggerated claim for an adjustment of the median line to the north.

280. With these points in mind sub-sections (A) and (B) below describe in more detail, and in turn, each of the two limited roles that considerations of disproportionality may play in maritime delimitation. Sub-sections (C) to (G) then go on to describe how Trinidad and Tobago's proposes to use such considerations in a novel way that finds no foundation in the jurisprudence; and how, at any rate, the factual elements that are necessary to make disproportionality an operative concept are entirely absent in this case.

380 Counter-Memorial of Trinidad and Tobago, para. 249.

## (A) Disproportionality as a final check on the equitable character of a delimitation arrived at by other means

281. The first reference to disproportionality appears in the *North Sea Continental Shelf* cases in the context of a final check on the equitable character of a delimitation arrived at by other means.

282. It is important to note the context of those cases. In rejecting the doctrine of a "just and equitable share" to a CS for which Germany contended, the Court enunciated this fundamental principle:

> "The delimitation itself must equitably be effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, – for the fundamental concept involved [continental shelf] does not admit of there being anything undivided to share out."[381]

283. Indeed, in the same judgment the Court went on to accept that in delimitations between opposite coasts – as here – a median line must be an equitable method of delimitation because it is the only method of delimitation,[382] dividing

> " ... equally between the two opposite countries areas that can be regarded as being the natural prolongation of the territory of each of them ..."[383]

---

381 *North Sea Continental Shelf*, para. 20; the terms of which were almost *verbatim* adopted by the Court of Arbitration in the *Anglo-French arbitration*, para. 78. See to the same effect *Libya/Malta*, para. 46, and *Tunisia/Libya*, para. 71, where the ICJ emphasised the principle that CS delimitation is not an exercise in "distributive justice". The *ad hoc* domestic tribunal in the *Nova Scotia / Newfoundland* case clarified that this principle applied equally to all maritime delimitations: *Arbitration between Newfoundland and Labrador and Nova Scotia concerning portions of the Limits of their offshore areas*, Second Phase Award, 26 March 2002, para. 3.20.

382 *North Sea Continental Shelf*, para. 57.

383 *Ibid.*, para. 58. See also *ibid.*, para. 79, where the ICJ referred to treaty practice in delimitations between opposite states; and the extract from the principal ILC report that led to the conclusion of

provided that it ignores

> " ... the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means ..."[384]

284. By contrast, the Court noted, when the same equidistance method is applied not to opposite but to adjacent coasts:

> "The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf."[385]

285. It was in this specific context that the Court envisaged a role for the notion of disproportionality of coastal lengths. In seeking to ensure that particular geographical features in the sea or on the parties' relevant coasts would not unduly ("disproportionally") affect the course of a delimitation line, the Court required that:

> "A *final factor* to be taken account of is the element of a *reasonable degree* of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, – these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions."[386] (Emphasis added).

286. In that case, the Court had already found that although all the parties' respective coasts were "in fact comparable in length", the coasts of Denmark and the Netherlands were "roughly convex" but that of Germany, situated in the middle, was "markedly

---

the Continental Shelf Convention in 1958 quoted in the Separate Opinion of Judge Schwebel in the *Jan Mayen* case, *ICJ Reports 1993*, at p. 122.

384 *North Sea Continental Shelf*, para. 57.

385 *Ibid.*, para. 89(a).

386 *Ibid.*, para. 98; and see *ibid.*, para. 101(D)(3).

concave".[387] As a result of this very particular geographical context,[388] pure equidistance lines brought about a manifestly inequitable result for Germany.

287. The salient point is that, as the Court put it,[389] disproportionality is a "final factor": regard is had to it after all other relevant circumstances – such as unusual features on the parties' coasts, or islets off those coasts – have been accounted for in the drawing of the delimitation line.

288. It is primarily for this reason that, in practice, disproportionality should have no impact on a delimitation line. If all relevant or special circumstances have been duly reflected in the delimitation line, a disproportionality test would simply confirm this, and warrant no correction of the line.[390] Thus, disproportionality operates as a final check on the equitable character of a delimitation line and leads to variation of the line only where the result would otherwise be manifestly inequitable. Thus:

> "[I]t is disproportion rather than any general principle of proportionality which is the relevant criterion or factor."[391]

---

387 *Ibid.*, para. 91.

388 "[I]t was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion ['reasonable degree of proportionality'] in those cases": *UK-French Continental Shelf*, para. 99.

389 See *North Sea Continental Shelf*, para. 98, quoted at para. 285 above.

390 Indeed, the tribunal in the *Nova Scotia / Newfoundland* case refused to apply a proportionality test to confirm the equity of the delimitation: Second Phase Award, paras. 5.17-5.19.

391 *UK-French Continental Shelf*, para. 101. The rest of this paragraph bears repetition (internal citation omitted):

> "The equitable delimitation of the continental shelf is not, as this Court has already emphasized ... a question of apportioning – sharing out – the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares... [I]t is rather a

289. In the same vein, a Chamber of the Court in the *Gulf of Maine* case affirmed that

> "a *substantial disproportion* to the lengths of those coasts [in the relevant area] that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction."[392] (Emphasis added).

290. And, more recently, the tribunal in the *Nova Scotia / Newfoundland* case confirmed that:

> "In outer shelf areas where large spaces are at stake, the *question is not so much one of strict proportionality as a manifest lack of disproportion.*"[393] (Emphasis added).

**(B) Manifest disproportionality in coastal lengths as a relevant circumstance calling for an adjustment of the median line**

291. Where one State's relevant coasts are vastly longer than the opposite State's, this may constitute a relevant circumstance requiring an adjustment of the median line provisionally drawn. The important points are that: first, the comparators must be the relevant coasts; secondly, the difference (or disproportion) between coastal lengths must be very pronounced; and thirdly, the adjustment will be a mere equitable correction and not a withdrawal of the median line towards the shorter coast at a ratio approximating that between the two States' respective coastal lengths. Again, disproportionality is subordinate to the cardinal rule that the purpose of maritime

---

question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf."

392 *Gulf of Maine*, para. 185.

393 *Nova Scotia/Newfoundland*, Award, para. 51.4

delimitation is not to refashion nature.

292. Thus, in the *Libya/Malta* case, the first case where the concept of disproportionality, as described above, was admitted as a relevant circumstance, the two States' opposite coasts were, respectively, 192 miles long (Libya) and 24 miles long (Malta),[394] which translated to a ratio of 8:1. The Court took note of this "very marked difference in the lengths of the relevant coasts of the Parties",[395] which required it to

> "attribute the appropriate significance to that coastal relationship, without seeking to define it in quantitative terms which are only suited to the *ex post* assessment of relationships of coast to area".[396]

293. The resulting adjustment moved the boundary 18 miles within a 183-mile distance between the relevant coasts – a factor of less than ten per cent.

294. The Court had occasion to apply the same methodology in the *Jan Mayen* case. There, the ratio between the Parties' coasts that the ICJ identified as relevant to the exercise was more than 9:1 in favour of the Greenland coast belonging to Denmark.[397] This difference was, in the view of the ICJ, so "striking" that:

> "A delimitation by the median line [without adjustment] would ... involve disregard of the geography of the coastal fronts of eastern Greenland and Jan Mayen".[398]

295. For this reason, the Court considered that:

> "the differences in length of the respective coasts of the Parties are so

---

394 See *Libya/Malta*, para. 68.

395 *Ibid.*, para. 66.

396 *Ibid.*, para. 66.

397 The ratio was 1:9.1 (504.3 kms versus 54.8 kms) or 1:9.2 (534 kms versus 57.8 kms), depending on the precise points used for the calculation; see *Jan Mayen*, para. 61.

398 *Ibid.*, para. 68.

> significant that this feature must be taken into consideration during the delimitation operation";[399]

and that, accordingly:

> "the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen."[400]

296. The Court again made clear that this adjustment would not mean the "direct and mathematical application of the relationship between the length" of the respective coasts.

297. The Court's call for calm rationality is heeded by Barbados at sub-sections (F) and (G) below in taking a step back to analyse the bases on which such an adjustment might operate in the present case. Before doing so, however, it is useful to review briefly two issues that are crucial to the operation of the concept of disproportionality in either of the two ways described above – that is, either as a "final check" on the equitable character of a delimitation already arrived at by other means, or as a "special circumstance" in its own right. These two issues are, first, identification of the Parties' respective relevant coasts for the purpose, and secondly, the method according to which these coasts should be measured. Trinidad and Tobago's identification and measurement of the relevant coasts (which, in the case of Trinidad and Tobago, is not a coast at all but rather its southeast-facing archipelagic baseline) can only be seen as self-serving, for they are divorced from considerations of international law, geography and fairness.

---

399 *Ibid.*

400 *Ibid.*, para. 69. The Court was not, however, willing to follow Denmark in its submission that *Jan Mayen* should, as a result of the adjustment of the median line, be entitled only to the residual maritime zone left after Greenland's coasts had produced the maximum possible 200 nautical mile effect: *ibid.*, para. 70.

## (C) Identification of relevant coasts

298. The identification of the relevant coasts between which to evaluate any disproportion is critical. As the International Court put it in *Libya/Malta*:

> "In order to assess any disparity between lengths of coasts it is first necessary to determine which are the coasts which are being contemplated ..."[401]

299. As already discussed above at Section 5.2, the relevant coasts in this context are the two States' respective coasts that project onto the area of delimitation and so generate competing entitlements to maritime zones. As the judgment in the *Jan Mayen* case demonstrates, the "coastal lengths of the relevant area"[402] are none other than the coasts on which basepoints are located. In the present case, the relevant coasts have been identified at Section 2.3 of the Barbados Memorial and are illustrated in Map 8 attached to Barbados' Memorial.

300. Furthermore, and as will presently be seen, the notion of "coast" in this context does not admit of archipelagic baselines being used in either of the two ways in which disproportionality may operate, as outlined above. As described in the following Section, it certainly does not admit of those archipelagic baselines somehow being used for the actual calculation of any ratio of disproportion, as proposed by Trinidad

---

401 *Libya/Malta*, para. 67.

The Court went on to add:

"The question as to which coasts ... should be taken into account is clearly one which has eventually to be answered with some degree of precision in the context of the test of proportionality as a verification of the equity of the result ... Where a marked disparity requires to be taken into account as a relevant circumstance, however, this rigorous definition is not essential and indeed not appropriate. If the disparity in question only emerges after scrupulous definition and comparison of coasts, it is *ex hypothesi* unlikely to be of such extent as to carry weight as a relevant circumstance." *Ibid.*

402 *Jan Mayen*, para. 65.

and Tobago.

## (D) Trinidad and Tobago's archipelagic baseline cannot be regarded as a relevant coast

301. As already recounted, the Court identified as early as 1969 the following "final factor" in completing a delimitation:

> "... the element of a *reasonable degree* of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, – *these being measured according to their general direction* in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions".[403] (Emphasis added).

302. Trinidad and Tobago says that "[i]t has not been decided whether ... archipelagic baselines are to be treated as coastal frontages ... in determining proportionality or disproportionality".[404] This concession, however, seeks to gloss over Trinidad and Tobago's difficulty. For in fact it is settled that only coasts – not lines – produce entitlements to maritime zones. Thus, the ICJ has stated unequivocally:

> "the element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts."[405]

303. In blatant disregard of the principle that an archipelagic baseline cannot constitute a

---

403 *North Sea Continental Shelf*, para. 98; and see *ibid.*, para. 101(D)(3).

404 Counter-Memorial of Trinidad and Tobago, para. 196.

405 *Tunisia/Libya*, para. 104. The Court stated that "the question is not one of definition, but of proportionality as a function of equity" and "since it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like." *Ibid.* A Chamber of the ICJ reached the same solution in the *Gulf of Maine* case where, for the purposes of a test of disproportionality as a relevant circumstance, it took account of the coasts of the Canadian Bay of Fundy, dismissing an argument that it should be "regarded as a closed bay, considered as though it were sealed off by a straight line": *Gulf of Maine*, para. 31.

relevant coast for the purposes of any argument of disproportionality, Trinidad and Tobago proceeds to use the length of that baseline (some 74.9 nautical miles) in calculating the so-called "disparity of coastal frontages" between the Parties. Trinidad and Tobago's argument proceeds that "[t]he disparity in coastal frontages (on a ratio of 8.2:1 in favour of Trinidad and Tobago) ... indicates the need for a deviation northwards from the median line in order to reach an equitable solution".[406] In other words, with reference to the length of its southeast-facing archipelagic baseline, Trinidad and Tobago alleges that there is a marked disproportionality between the Parties' relevant coasts that constitutes, in its submission, a special circumstance calling for an adjustment of the median line.

**(E) Enter the vector**

304. Despite its reliance on its southeast-facing baseline to establish purported adjacency and then disproportion, Trinidad and Tobago then abandons it when turning to calculate the adjustment that it proposes must result from that purported adjacency and disproportion. Thus, the only length to which Trinidad and Tobago attempts to relate its proposed adjustment of the median line in light of this so-called "disparity in coastal lengths" is the length of a vector, the length of which happens to correspond to the distance – measured along a north-south axis – between the latitude of the northern most point of the southeast-facing baseline and the latitude of the southern-most point of that baseline.[407] The only explanation for this random selection must be that the general direction of Trinidad and Tobago's baseline used in its adjacency and disproportion claims is distinctly southeasterly (see Map 9), and therefore eminently insufficient to justify the northward adjustment of the median line contended by

406 Counter-Memorial of Trinidad and Tobago, para. 239.

407 *Ibid.*, Vol. 1(2) Fig 7.3.

Trinidad and Tobago. By contrast, the north-south vector depicted in Figure 7.3 of the Counter-Memorial faces east. It is significant that Trinidad and Tobago fails to explain the relationship between this random vector, Point A, the IHO frontier between the Caribbean and the Atlantic, and adjacency.

305. The proposed "equitable deviation" on the basis of the north-south vector is illustrated in Figure 7.3 of the Counter-Memorial, where it is explained that the point at which the adjusted line intersects with the outer edge of the EEZ of Trinidad and Tobago (Point B):

> "lies 68.3 n.m. from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana median line, a distance which is comparable to the length of the north-south vector of Trinidad and Tobago's east-facing coastal frontage (69.1 n.m.)."[408]

306. This argument is fallacious. As noted above, a vector is not a coast, and this particular vector manifestly does not follow the direction of the Trinidad and Tobago coastline. Figure 7.3 speaks for itself: that Trinidad and Tobago should feel the need to represent – or rather replace – an allegedly east-facing coastal front by a north-south vector speaks volumes about the true projection of that coastal front.

307. Furthermore, in proposing to swing the eastern terminus of the delimitation line in direct proportion to the length of this vector, Trinidad and Tobago is truly advancing the sort of maximalist claim of which it accuses Barbados.[409] Trinidad and Tobago purports to ignore the jurisprudence that allows adjustment of the median line only exceptionally, in cases of vast disproportionality between the relevant coasts, and

408 *Ibid.*, para. 258.

409 See *ibid.*, paras. 5-6.

even then implements only very limited adjustments to that line.[410] Trinidad and Tobago also fails to compare like with like. A "vectorisation" of Barbados' eastern-facing coast compared to Trinidad and Tobago's vector would result in a coastal ratio of only 4:1.

308. In the result, Trinidad and Tobago's proposed delimitation line seeks to achieve precisely what Trinidad and Tobago initially promised that it would not set out to do, that is, use "the ratio of coastal frontages [as a] method of delimitation".[411]

**(F) Trinidad and Tobago fails to identify Barbados' relevant coasts**

309. What is more, Trinidad and Tobago fails to identify what would be Barbados' relevant coasts if its proposition were to be accepted and applied in the present case.

310. Trinidad and Tobago posits that "relevant coasts are those looking on to or fronting upon the area to be delimited".[412] This proposition, which takes no account of whether the coasts actually command the tracing of a delimitation line, is bound to lead to absurdities.

311. Taking Trinidad and Tobago at its word, the "area to be delimited" would be equivalent to the entire area of overlap as between the respective full 200 nautical mile entitlements of each of the Parties. That overlap is largely depicted in Trinidad and Tobago's Figure 7.4. As can be seen, the area of overlap extends not only to the southwest and southeast of Barbados, but also to its west, north and northeast, all within 200 nautical miles of Tobago. This would mean, according to Trinidad and Tobago's proposition, that the entire coast of Barbados is relevant for comparing

410 See Section 5.6(B) above.

411 Counter-Memorial of Trinidad and Tobago, para. 170.

412 *Ibid.*, para. 187.

relative lengths of coastline. The same is not true of Trinidad and Tobago, since its southern and northwestern coastlines do not produce any EEZ overlap with Barbados.

312. By the foregoing account, the relation between the length of relevant coasts of Trinidad and Tobago and Barbados would be 1:1.4, not 9:1. It is telling, in this respect, that Trinidad and Tobago, after devoting some five pages to expounding the supposed relevance of its southeastern-facing coastline, devotes two short paragraphs to Barbados' coasts, and then only to conclude that one of those coasts is adjacent to, and not opposite, the island of Tobago.

313. Unlike the position adopted by Trinidad and Tobago, Barbados' position is consistent. The only relevant coasts as between the Parties are the ones in frontal opposition, because only those coasts generate baselines controlling the delimitation line. As regards the relative lengths of those coasts, Barbados prevails by a ratio of 2.2:1, whether Trinidad and Tobago's coast is measured by simplified, actual, or straight baseline measurements.

314. As noted above, if a comparison were to be made on the basis of north-south vectors connecting the two most extreme points of the coast of each of the Parties, the ratio would only be 4:1 in favour of Trinidad and Tobago. None of the above ratios, however, reveals a manifest disproportionality in the respective lengths of relevant "coasts" and does not, on any view, constitute a special circumstance requiring minor correction of the median line in the terms of the *Libya/Malta* and *Jan Mayen* cases.

## (G) Trinidad and Tobago's proposed adjustment of the median line is premised on the position of undelimited boundaries with third States and leads to an inequitable result

315. As mentioned above, the ICJ and other international tribunals have consistently held that disproportionality operates principally as a final test in maritime delimitation once all other relevant circumstances have been considered and reflected in a delimitation line.

316. As also described above, Trinidad and Tobago's use of "proportionality" converts this *post hoc* test into a principal method of effecting a delimitation. The result advanced by Trinidad and Tobago[413] is therefore contrary to principle.

317. Trinidad and Tobago's proposal based on proportionality suffers from a further, fatal, defect: it is premised on a delimitation not only as between the Parties, but also as between each of the Parties and third States, namely, France (Martinique), St. Lucia and St. Vincent and the Grenadines (in the case of Barbados) and St. Vincent and the Grenadines and Grenada (in the case of Trinidad and Tobago).[414] In particular, in order to make sense of its proposal, Trinidad and Tobago assumes that Barbados' EEZ entitlement *vis-à-vis* France (Martinique), St. Lucia and St. Vincent and the Grenadines will be resolved entirely along a median line as between Barbados and each of those third States.

318. This assumption by Trinidad and Tobago contradicts its own position *vis-à-vis* Barbados. It is difficult to believe that, if Trinidad and Tobago really believed its argument, it would not consider that it would apply to Barbados' other delimitation. As noted above, if all Barbados' boundaries were delimited according to Trinidad and

413 *Ibid.*, para. 259.

414 *Ibid.*, Vol. 1(2), Figure 7.3.

Tobago's proposed formula, Barbados would have almost no maritime territory (see Map 14).

319. Trinidad and Tobago's assumption also renders its proportionality proposal, i.e., a 51/49 split of the overlapping area between it and Barbados, fallacious. The proposal rests on the false premise that those third State maritime boundaries will be defined in the way that Trinidad and Tobago wishes or assumes. The Tribunal clearly cannot make the same assumption in fulfilling its task. Trinidad and Tobago's proposed adjustment of the median line would therefore lead to an inequitable result.

## CHAPTER 6 THE PRINCIPLES OF ESTOPPEL AND ACQUIESCENCE IN THE PRESENT CASE

### Section 6.1 Barbados has consistently exercised sovereignty north of the median line

320. Barbados has regularly exercised sovereignty over the entire area of Trinidad and Tobago's claim to the north of the median line since 1978. This exercise of sovereignty has been continuous and it has not been contested by Trinidad and Tobago. Indeed, as illustrated below, Trinidad and Tobago has consistently recognised and acquiesced in Barbados' exercise of sovereignty in the area. Such recognition and acquiescence gives rise to an estoppel as a matter of international law that prevents Trinidad and Tobago from now asserting any legal claim over maritime territory to the north of the median line.

321. Barbados' exercise of sovereignty over the maritime area to the north of the median line has taken a number of forms. First, Barbados' domestic legislation asserts a clear and consistent claim to sovereignty to the north of the median line, with which Trinidad and Tobago's belated claim to the north of the median line is patently incompatible. Its Maritime Boundaries and Jurisdiction Act of 1978 (***the 1978 Act***) provides that, in the absence of any agreed EEZ boundaries with its maritime neighbours, the outer limit of Barbados' EEZ is the median line.[415] Since 1978,

---

415 Specifically, section 3 of the 1978 Act provides as follows:

"(3) (1) There is established, contiguous to the territorial waters, a marine zone to be known as the Exclusive Economic Zone having as its inner limit the boundary line of the seaward limit of the territorial waters and as its outer limit a boundary line which, subject to subsection (3), at every point is a distance of 200 miles from the nearest point of the baselines of the territorial waters or such other

Barbados has enacted a wide range of domestic legislation, the total effect of which is to provide comprehensive State regulation of all forms of activity within the area up to the median lines with Trinidad and Tobago and with Barbados' other maritime neighbours.[416]

322. Second, Barbadian sovereignty in the area up to the median line has been manifested by way of the hydrocarbon activities in which it or its licensees or those acting with its permission have been engaged. The first seismic work in the area now claimed by Trinidad and Tobago to the north of the median line took place in 1974. The scope

---

distance from the nearest point of those baselines as the Minister responsible for Foreign Affairs, by order, prescribes.

(2) An order made under subsection (1) is subject to affirmative resolution, and shall be judicially noticed.

(3) Notwithstanding subsection (1), where the median line as defined by subsection (4) between Barbados and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the Zone shall be that fixed by agreement between Barbados and that other State; but where there is no such agreement, the outer boundary limit shall be the median line.

(4) The median line is a line every point of which is equidistant from the nearest points of the baselines of the territorial waters, on the one hand, and the corresponding baselines of the territorial waters of any adjacent or opposite State as recognised by the Minister, on the other hand.

(5) An agreement enter into pursuant to subsection (3) shall be laid before Parliament, and shall be judicially noticed."

(Memorial of Barbados, Appendix 26, Vol. 2, at pp. 283-284.)

416 Such domestic legislation has included:

(a) The Shipping Act 1994 (Reply of Barbados, Appendix 11, Vol. 2.), which regulates, *inter alia*, the use of small commercial vessels and diving activities, and the effect of shipping activity on the marine environment, including in the area now claimed by Trinidad and Tobago to the north of the median line; and

(b) The Fisheries Act 1993 (*Ibid.*, Appendix 12, Vol. 2.), which provides for the management and development of fisheries within Barbados' EEZ, including in the area now claimed by Trinidad and Tobago to the north of the median line.

and extent of exploration activities conducted since 1974 in the area now claimed by Trinidad and Tobago to the north of the median line is illustrated on Map 13.[417]

323. As described in Barbados' Memorial,[418] in November 1979, immediately after the passing of the 1978 Act, Barbados granted a geological and geophysical seismic licence to Mobil Exploration Barbados Limited. This gave Barbados' licensee the exclusive right to, *inter alia*, conduct a geological and geophysical examination of the sea-bed up to the median line with Trinidad and Tobago, including in the area to the north of the median line now claimed by Trinidad and Tobago.[419] Barbados granted a new licence and concession over the same maritime space to CONOCO Barbados Limited in 1996 (***the 1996 Concession***).[420]

324. Third, the Barbadian Coastguard has been patrolling the area up to the median line with Trinidad and Tobago for more than 20 years. Those patrols have been for the purposes of both national defence and security and prevention of illegal fishing contrary to the Fisheries Act 1995.[421]

325. The clear and consistent assertion of Barbadian legislative jurisdiction over all of the maritime space to the north of the median line stands in stark contrast with the absence of any such assertion of jurisdiction under the domestic laws of Trinidad and

---

417 The exploratory activities shown on Map 13 are indicative but are not necessarily complete.

418 At Section 3.5.

419 See Memorial of Barbados, Appendix 28, Vol. 2, No. 28 (recitals).

420 Reply of Barbados, Appendix 13, Vol. 2. The area covered by the 1996 Concession extended up to the full length of the median line with Trinidad and Tobago, as shown on maps extracted from a report of Barbados' concessionaire to the Government of Barbados on the petroleum potential of offshore Barbados (1998). (Reply of Barbados, Appendix 63, Vol. 3.)

421 Affidavit of Lieutenant-Commander David Dowridge, para. 3. (Reply of Barbados, Appendix 58, Vol. 3 at pp. 715-716.)

Tobago in the area to the south of the median line. Trinidad and Tobago's Archipelagic Waters and Exclusive Economic Zone Act of 1986 (***the 1986 Act***) makes no claim to any particular area of maritime space, preferring to leave the question of determination of the EEZ boundary with Barbados (and Trinidad and Tobago's other maritime neighbours) to subsequent agreement.[422] It is thus not surprising that Barbados has been silent as to the reach of Trinidad and Tobago's maritime boundary legislation, since this of itself presents nothing objectionable to Barbados' claim against which to protest. Indeed, Barbados' claim in the present proceedings is in no way incompatible with Trinidad and Tobago's 1986 Act, in contrast to the incompatibility between Trinidad and Tobago's claim and Barbados' 1978 Act.

326. However, when Trinidad and Tobago did make its first attempt to assert sovereignty over the maritime space claimed by Barbados to the south of the median line, by way of its offer for tender of deep water hydrocarbon blocks off the coast of Tobago in 1996, 2001 and 2003, Barbados was quick to protest.[423] Equally, as explained in its Memorial, Barbados took immediate steps to counteract the illegal arrests of Barbadian fisherfolk fishing off Tobago in 1989 (in the form of the 1990 Fishing Agreement *modus vivendi*) and again between 1994 and 2004.[424]

---

422 Section 15 of the 1986 Act provides:

> "Where the distance between Trinidad and Tobago and opposite or adjacent States is less than 400 nautical miles, the boundary of the exclusive economic zone shall be determined by agreement between Trinidad and Tobago and the States concerned on the basis of international law in order to achieve an equitable solution."

(Counter-Memorial of Trinidad and Tobago, Vol. 4, No. 5 at p. 5.)

423 See Memorial of Barbados, paras. 89-91.

424 See *ibid.*, paras. 80-88.

## Section 6.2 Trinidad and Tobago has recognised and acquiesced in Barbados' sovereignty north of the median line

327. At no time has Trinidad and Tobago protested against Barbados' public claim to sovereignty over the entirety of the area to the north of the median line in its domestic legislation. In particular, at no time has Trinidad and Tobago protested against the provisions of the 1978 Act.

328. Similarly, at no time before June 2001, nearly a year after the commencement of the boundary delimitation negotiations between the Parties, did Trinidad and Tobago protest in relation to the hydrocarbon activities of Barbados and its licensees in the maritime space to the north of the median line now claimed by Trinidad and Tobago, which had been ongoing for well over 20 years.[425] This is notwithstanding the fact that Barbados had kept Trinidad and Tobago informed of those activities, in accordance with the 1979 Memorandum of Understanding on Matters of Co-operation (***the MOU***) between Barbados and Trinidad and Tobago that the two countries would co-operate in respect of all aspects of the hydrocarbon industry.[426]

329. In contrast, Barbados has always protested against the recent hydrocarbon activities of Trinidad and Tobago in the area to the south of the median line that it claims.[427] To Barbados' knowledge, at no time have private entities faced with these consistent warnings by the Government of Barbados, taken up Trinidad and Tobago's offers of

425 Diplomatic Note No. 1048, Ministry of Enterprise Development, Foreign Affairs and Tourism, Trinidad and Tobago to Ministry of Foreign Affairs and Foreign Trade, Barbados, 8 June 2001. (Memorial of Barbados, Appendix 49, Vol. 3 at pp. 613-615.)

426 See *ibid.*, para. 75.

427 *Ibid.*, paras. 89-91.

concessions in that area.[428]

330. Nor has Trinidad and Tobago at any time protested against Barbados' other exercises of sovereignty in the area to the north of the median line.

331. Indeed, it appears to have been the constant working assumption of the authorities of Trinidad and Tobago until at least 2003 that the maritime boundary between Barbados and Trinidad and Tobago followed the median line throughout its course. Thus, for example, a 2003 report of the Fisheries Division of the Trinidad and Tobago Ministry of Agriculture, Land and Marine Resources included a map showing a median line boundary between the two States.[429] Barbados does not, of course, agree with the boundary illustrated in that document in that it fails to recognise Barbados' sovereignty to the south of the median line, but it is another example of Trinidad and Tobago having publicly recognised Barbados' jurisdiction to the north of the median line. In addition, the Coastguard of Trinidad and Tobago has never made any assertion whatsoever of jurisdiction to the north of the median line in the area now claimed by Trinidad and Tobago.[430]

---

428 See *ibid.*

429 Elizabeth Mohammed and Christine Chan A Shing, "Trinidad and Tobago: Preliminary Reconstruction of Fisheries Catches and Fishing Effort, 1908-2002". (Memorial of Barbados, Appendix 58, Vol. 3 at p. 659)

430 Affidavit of Lieutenant-Commander David Dowridge, para. 4. (Reply of Barbados, Appendix 58, Vol. 3 at p. 716.)

## Section 6.3 The relevance of estoppel and acquiescence in cases of maritime delimitation

332. The doctrines of estoppel and acquiescence are closely linked in international law.[431] The jurisprudence of international courts and tribunals shows beyond dispute that both concepts can be decisive of questions of title to territory in certain, albeit narrowly defined, circumstances. Indeed, Judge Sir Hersch Lauterpacht expressed the view that "the absence of protest may" in itself become a source of legal right in as much as it is related to – or forms a constituent element of – estoppel or presumption.[432] In other circumstances, evidence of acquiescence, particularly over a prolonged period, can constitute weighty evidence of sovereignty over territory.[433]

333. In the *Fisheries* case (*United Kingdom v. Norway*)[434], the United Kingdom sought to object to Norway's delimitation of its North Sea coastline. The Court observed that the United Kingdom had been silent for more than 60 years about the long-standing Norwegian delimitation and, as such, had acquiesced in the state of affairs. The United Kingdom's "prolonged abstention" was held by the Court to "warrant Norway's

---

431 See, for example, Ian Brownlie, *Public International Law*, p. 152; I. MacGibbon, "The Scope of Acquiescence in International Law" (1954) 31 BYIL 147; D.W. Bowett, "Estoppel Before International Tribunals and its Relation to Acquiescence" (1957) 33 BYIL 176; R. Jennings, *The Acquisition of Territory* (1963), pp. 41-51.

432 *British Year Book of International Law*, Vol. XXVII, 1950, pp. 395-396, cited by Judge Ajibola in his Separate Opinion in the *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *ICJ Reports 1994* 6, at pp. 77-78.

433 An example of estoppel having had a decisive effect in a case before the PCIJ was the *Case Concerning the Legal Status of Eastern Greenland* (1933 PCIJ Series A/B No 53). In that case, a statement by the Norwegian Minister of Foreign Affairs on behalf of his government, which had been consistent with the Danish claim over Greenland, was found by the Court to constitute an engagement obliging Norway to refrain from occupying any part of Greenland which in effect was tantamount to an estoppel.

434 *ICJ Reports 1951*, at p. 116.

enforcement of her system against the United Kingdom".[435]

334. In the *Temple of Preah Vihear* case,[436] Thailand's failure to object to a map that had been produced in 1908 and which showed the disputed area as falling on Cambodia's side of the land boundary had the effect of compelling Thailand to accept the boundary concerned. The Court held that:

> "... an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese [i.e. Thai] authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset ac potuisset.*"[437]

## Section 6.4 Trinidad and Tobago is estopped from making any claim to the north of the median line

335. In the present case, Trinidad and Tobago has never protested against, but rather effectively acquiesced in Barbados' continuous and open exercise of jurisdiction over all of the maritime space to the north of the median line. In particular, Trinidad and Tobago made no objection to the terms of Barbados' maritime boundary legislation, its licensed hydrocarbon exploratory activities, and Barbados' award of hydrocarbon concessions in 1979 and 1996. The circumstances called for some reaction by

---

435 *Ibid., p.* 139.

436 *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 15 June 1962, ICJ Reports 1962*, at p. 6.

437 *Ibid.*, p. 23. A number of international arbitrations have recognised the decisive role to be played by estoppel and acquiescence in the context of disputes over title to territory. For example, in the *Delagoa Bay* arbitration, Portuguese sovereignty was upheld with reference to its continued claims without any objection or protest on the part of Austria or the Netherlands, (1888-1889) B.F.S.P. 691. See also the *Guatemala/Honduras Boundary* arbitration, (1993) Vol. 2 RIAA 1322; the *Grisbadarna* arbitration between Sweden and Norway, (1961) Vol. 11 RIAA 147; and, of course, the *Island of Palmas* case, (1928) Vol. 2 RIAA 829.

Trinidad and Tobago, within a reasonable period of the 1970s seismic exploration, the 1978 Act and the 1979 and 1996 Concessions, if it wished to object to Barbadian sovereignty over the area. Trinidad and Tobago did not do so for well over 20 years, during which time substantial reliance was placed, both by Barbados and its private concessionaries, upon its failure to object.

336. In particular, the various activities that were conducted notoriously and to Trinidad and Tobago's knowledge by Barbados' concessionaires and licensees specifically within the area now claimed by Trinidad and Tobago to the north of the median line called for an immediate reaction by Trinidad and Tobago, if it considered that it had asserted any sovereign rights over that area. In these circumstances, Trinidad and Tobago must be held to have acquiesced with Barbados' sovereignty to the north of the median line, and is now estopped from making a belated claim to sovereignty over that area.

## Section 6.5 Barbados is not estopped from making its claim for an adjustment of the median line to the south

337. By contrast to Trinidad and Tobago's acquiescence, Barbados has not acquiesced with any of the recent (and limited) purported exercises of sovereignty by Trinidad and Tobago in the area of traditional fishing off the northwest, north and northeast of Tobago. As a result, Barbados cannot be estopped from making its claim for an adjustment of the median line to the south.

### (A) Barbados has not recognised Trinidad and Tobago as having jurisdiction in the area of Barbados' claim to the south of the median line

338. In its Counter-Memorial, Trinidad and Tobago makes reference to the supposed "many instances where [...] Barbados has recognized Trinidad and Tobago's rights in

respect of the areas that Barbados now claims."[438] These instances essentially concern the contexts of hydrocarbons and fisheries. However, even a cursory examination of the facts demonstrates that Barbados never recognised Trinidad and Tobago as exercising any form of sovereignty in the area concerned.

339. In the context of hydrocarbons, Barbados' protests against Trinidad and Tobago's recent – and only – activities in the area of Barbados' claim to the south of the median line have been consistent and unambiguous.[439] It is true that the licence granted by Barbados to Mobil Exploration Barbados Limited in 1979 extended only up to the median line between Barbados and Trinidad and Tobago, consistent with the working outer limits of Barbados' EEZ provided by the 1978 Act (in respect of which, see further sub-section (B) below). However, this is no way constitutes "recognition" that the area to the south of the median line falls within the EEZ of Trinidad and Tobago, any more than the 1978 Act has this effect. Equally, the single piece of correspondence concerning a seismic programme to be undertaken by Barbados' licensee in 1998 around the coast of Tobago cannot have such an effect.[440] That correspondence did no more than recognise the truism that "any data acquired in the areas under [Trinidad and Tobago's] jurisdiction, is the property of Trinidad and Tobago".[441] At no point does that correspondence purport to establish the parameters of those areas falling within Trinidad and Tobago's jurisdiction.

340. In the context of Barbados' exploitation of fisheries off Tobago, it has already been established that the 1990 Fishing Agreement was no more than a short-term *modus*

438 Counter-Memorial of Trinidad and Tobago, para. 41 and Appendix A.

439 See Memorial of Barbados, paras. 89-91.

440 See Counter-Memorial of Trinidad and Tobago, paras. 292-296.

441 Memorial of Barbados, Appendix 44A, Vol. 3 at p. 552A.

*vivendi* which Barbados was constrained to conclude in order to facilitate the urgent resumption of fishing activities by its fisherfolk off Tobago, following the crisis situation caused by the arrests by Trinidad and Tobago in 1989.[442] It is notable also that the 1990 Fishing Agreement makes no attempt to identify the maritime boundary between the two States, simply because this was not required in order to achieve the specific objective of that Agreement.[443] Even if it did, any attempt to rely on the terms of the Agreement as a means of influencing delimitation of maritime boundaries between the Parties would be defeated by the plain terms of Article XI of the 1990 Fishing Agreement, which reads:

> "Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its internal waters, archipelagic waters, territorial sea, continental shelf or Exclusive Economic Zone; nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent."[444]

341. Trinidad and Tobago tries to bolster its argument in relation to the 1990 Fishing Agreement by reference to certain *travaux preparatoires*, in particular, two draft fishing agreements respectively dated 1986 and 1988.[445] These drafts simply confirm the meaning of the 1990 Fishing Agreement described above and are not capable of determining a contrary meaning.

---

442 See Memorial of Barbados, paras. 80-85.

443 Indeed, Trinidad and Tobago acknowledges that it does not define the limits of the Parties' EEZ: Counter-Memorial of Trinidad and Tobago, para. 53(3).

444 See Counter-Memorial of Trinidad and Tobago, Vol. 2(1), Annex 7.

445 See *ibid.*, paras. 49-52.

342. In further support of its arguments surrounding the 1990 Fishing Agreement, Trinidad and Tobago attempts to rely[446] on the records of negotiations for a new agreement held between March 2002 and November 2003 as part of the rounds of maritime boundary and fishing negotiations between the Parties.[447] But again, those subsequent attempts to conclude a fishing agreement relating to the traditional fishing by Barbadians off Tobago have served precisely the same purpose as the 1990 Fishing Agreement. In addition, the draft fishing agreement proposed by Barbados in 2003 contained, as its Article 16, a preservation of rights clause identical to Article XI of the 1990 Fishing Agreement.[448] The statement of Trinidad and Tobago's position annexed to the relevant report reads:

> "It was agreed that the Agreement should include a provision indicating that the Fishing Agreement should in no way affect the Parties respective maritime jurisdictional claims."[449]

343. At no time, whether in the course of bilateral fisheries negotiations between Barbados and Trinidad and Tobago, or in the course of negotiations at the CARICOM level in respect of regional co-operation in fisheries matters, has Barbados in any way acknowledged that the area it claims to the south of the median line falls within the sovereignty of Trinidad and Tobago.

344. In the same way, the various warnings that were given by Barbados to its fisherfolk following the sporadic arrests by Trinidad and Tobago in 1989 and between 1994 and 2004, do not constitute recognition that the area south of the median line claimed by

---

446 Barbados has made the point fully elsewhere that it is improper for Trinidad and Tobago to rely on those negotiations. See Barbados' letter to the Tribunal dated 22 April 2005.

447 See Counter-Memorial of Trinidad and Tobago, paras. 79-89.

448 Joint Report of negotiations of 24 to 25 March 2003. (Reply of Barbados, Appendix 29, Vol. 3 at p. 411.)

449 *Ibid., p.* 399.

Barbados is part of Trinidad and Tobago's EEZ. In the first place, the initial warnings given by Barbados to its fisherfolk did not extend to the entirety of the traditional fishing area to the south of the median line. These extended only to the territorial waters of Trinidad and Tobago, on the natural assumption that Barbadian fisherfolk remained free to fish in the waters beyond 12 nautical miles from the coast of Tobago, as they had always done.[450] In the second place, those warnings were designed for one practical purpose, namely, to give notice to the fisherfolk that, if they continued at that time to fish in a certain area off Tobago, they risked arrest by the authorities of Trinidad and Tobago. The fact that this risk extended northwards towards the median line does nothing to legitimise the arrests that took place in the area claimed by Barbados to the south of the median line.[451]

**(B) Principles of acquiescence and estoppel do not apply in respect of Barbados' claim**

345. Trinidad and Tobago did not seek to exercise any form of overt jurisdiction over the maritime space to the south of the median line in the area claimed by Barbados until 1996. Barbados has issued persistent protests against Trinidad and Tobago's recent offers for tender of deep water hydrocarbon blocks off the coast of Tobago made since that time. The absence of any prolonged claim to sovereignty by Trinidad and Tobago over the area in question, the absence of any domestic legislation in Trinidad and Tobago to that effect, and Barbados' prompt protests against the more recent activities by Trinidad and Tobago in the area, lead to the inevitable conclusion that

450 Affidavit of Lieutenant-Commander David Dowridge, para. 7. (Reply of Barbados, Appendix 58, Vol. 3, at pp. 716-717.)

451 Indeed, it is notable that the risk of arrest has never extended to the north of the median line, which is consistent with the fact that Trinidad and Tobago has consistently recognised Barbados' sovereignty in this area.

Barbados has not "acquiesced" in any respect to Trinidad and Tobago's claim in the area concerned.

346. Barbados' claim over maritime space to the south of the median line also cannot be prejudiced by the terms of its domestic legislation in the form of the 1978 Act. The reference to a median line boundary in that legislation is provisional. It represents Barbados' minimum claim in the context of its maritime boundaries as a whole.

347. The 1978 Act was designed to allow Barbados, as a matter of domestic law, to exercise certain rights in, and jurisdiction over, a particular maritime area at a time when Barbados had yet to agree maritime boundaries with any of the five States with whom it shares such a boundary (namely Martinique, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago and Guyana). In these circumstances, the 1978 Act can be seen as nothing more than an uncontentious and temporary assertion of sovereignty and jurisdiction over a particular piece of maritime territory pending resolution of the precise boundaries with each of its neighbouring States.

348. The 1978 Act was passed four years before UNCLOS was signed in 1982, and 16 years before UNCLOS entered into force. Until UNCLOS entered into force, there was no compulsory procedure for the resolution of disputes concerning the EEZ boundaries between States.

349. Barbados' domestic legislation cannot, as a matter of international law, create any rights of estoppel for Trinidad and Tobago. Trinidad and Tobago has been well aware for some time of Barbados' interests and concerns in the area claimed by Barbados to the south of the median line, as noted above.

350. Domestic legislation cannot, as a matter of international law, prejudice the artisanal fishing rights of Barbadian fisherfolk in their traditional grounds off Tobago. Nor can it be determinative of Barbados' sovereignty and jurisdiction as a matter of international law.

## CHAPTER 7 THE BARBADIAN FISHERIES SOUTH OF THE MEDIAN LINE ARE A RELEVANT CIRCUMSTANCE THAT REQUIRES THE SOUTHWARD ADJUSTMENT OF THE PROVISIONAL MEDIAN LINE

351. In its Counter-Memorial, Trinidad and Tobago asserts that Barbados' claim to the south of the median line on the basis of the special circumstance of the traditional artisanal fishery off Tobago is "unsustainable in fact and law."[452] However, the Counter-Memorial almost entirely omits to analyse the facts and devotes scant attention to the relevant law. In this Chapter 7, Barbados responds in detail to Trinidad and Tobago's assertion. Sections 7.1, 7.2 and 7.3 address the factual issues raised by the Counter-Memorial. Section 7.4 then reaffirms that, in law, the overriding need to preserve the artisanal fishing rights of Barbadian fisherfolk requires an adjustment to the provisional median line. In summary, the Barbadian fisheries south of the median line are well-established and require the adjustment claimed by Barbados in its Memorial and reproduced at Map 22.

### Section 7.1 Barbadians have fished off the island of Tobago for centuries

352. In its Counter–Memorial, Trinidad and Tobago invents what it calls an "inescapable fact", that: "Barbadian fishermen have been fishing in the waters now claimed by Barbados only since the late 1970s. There was no Barbadian fishing in the waters off Tobago before then."[453]

353. The Tribunal need only re-visit the detailed historical account set out at Section 3.4 of Barbados' Memorial in order to reject this bold assertion by Trinidad and Tobago.

---

452 Counter-Memorial of Trinidad and Tobago, paras. 208-223 and Appendix B.

453 *Ibid.*, para. 315.

Records of Barbadian fishing off Tobago date back to the first half of the 18th Century, when both British and French colonial records make reference to the practice.[454] Specifically, those records show that fishing sloops (or schooners) from Barbados were engaged in fishing around Tobago at that time.[455]

354. The premise on which the "inescapable fact" asserted by Trinidad and Tobago is based is said to be simple: "before the late 1970s Barbadian flying fish fishermen did not have the long-range boats and other equipment to enable them to fish in the area now claimed by Barbados."[456] But the long-range boats and the preservation methods that were necessary for Barbadians to fish off Tobago have been available for centuries. Again, the Tribunal need do no more than review the undisputed evidence referred to at Section 3.4 of Barbados' Memorial to appreciate that Barbadian fisherfolk had the necessary boats and equipment by 1724 at the very latest.[457] Trinidad and Tobago's entire argument questioning the credibility of Barbadian references to the traditional fishing grounds off Tobago is predicated upon a manifest disregard of the historical record.

355. There is good reason why there is less documentary evidence of continued fishing off Tobago between the early 19th Century and the mid-20th Century than there is before that time. The entirety of the relevant maritime area effectively became a British colonial lake in 1814.[458] It is not coincidental that direct evidence of the fishing activities of Barbadians off Tobago became scarce around that time. But it would be astonishing if, as soon as the fishing grounds off Tobago became subject to British

454 Memorial of Barbados, para. 56.

455 *Ibid.*, paras. 56 and 57.

456 Counter-Memorial of Trinidad and Tobago, para. 315.

457 Memorial of Barbados, para. 56.

458 *Ibid.*, paras. 28, 32 and 58.

administration in common with the waters off Barbados, Barbadian fisherfolk who had been fishing in the area for at least 90 years had suddenly stopped doing so.[459] Nor is it coincidental that, in the very year that Trinidad and Tobago gained independence from Britain and, for the first time in over 150 years, Barbados and Trinidad and Tobago in effect became two separate and independent States, the documentary record of Barbadians fishing for flying fish off Tobago re-commenced.[460]

356. The connections between the islands of Barbados and Tobago became far stronger under unified British rule in the period after 1814. In particular, given the shortage of timber on Barbados, and of flying fish in the waters around Barbados at certain times of the year, maritime traffic between the two islands was frequent. Schooners would travel from Barbados to the island of Tobago (often referred to by British officials at the time as a "Barbados out island"[461]), where both timber and flying fish (during the season) were abundant.[462] The people of Barbados and Tobago were allowed by the British to pass freely between the two islands and their respective waters.[463] A regime

---

459 As paragraph 56 of the Memorial of Barbados illustrates, the earliest records of Barbadian fishing off Tobago date back to 1724.

460 Memorial of Barbados, para. 61.

461 Co 321/20/19 report of official tour of inspection of Tobago, Grenada, St. Vincent and St. Lucia, 1878. (Reply of Barbados, Appendix 1, Vol. 2 at pp. 1-5.)

462 See, for example, 1749 treaty between the French Governor of Martinique and the British Governor of Barbados, November 1749. (Memorial of Barbados, Appendix 5, Vol. 2 at p. 42.) Proclamation to the Right Honourable Sir Thomas Robinson, Principal Secretary of State for Southern Provinces. (Memorial of Barbados, Appendix 9, Vol. 2 at pp. 53-56.)

463 See treaty concluded between French Governor of Martinique and British Governor of Barbados, which provided, *inter alia*, "the subjects of both Nations shall be permitted to frequent the island of Tobago, there to wood, water and fish..." (Memorial of Barbados, Appendix 5, Vol. 2 at p. 42.)

of free (and undocumented) movement between the islands remained in place until they were separated following independence in the 1960s.[464]

357. It is commonplace for historians and anthropologists to rely on oral traditions to establish the historical record of preliterate societies or illiterate strata of literate societies.[465] To refuse to do so would condemn these peoples to historical oblivion. In the same way, when seeking to establish historical fact it is entirely appropriate for international tribunals to have regard to oral evidence of folk traditions. Trinidad and Tobago is therefore wrong to assert, as it does in its Counter-Memorial, that "it would be unusual for an international tribunal... to place any weight" upon the oral testimony of Barbadian fisherfolk. The reason for this is simple: not everything that has occurred in history is documented. This is especially the case in relation to small scale artisanal activities conducted by illiterate fisherfolk in areas of no concern to a remote colonial administration. The oral testimony of Barbadian fisherfolk does no more than fill in the documentary gap between the records of the 18th Century and the records of the latter half of the 20th Century.

358. In fact, there is widespread historical evidence to confirm that Barbadian fisherfolk did have the "long-range boats and other equipment" to enable them to fish off Tobago between the 18th Century and the latter half of the 20th Century, and did in fact do so throughout that period. Trinidad and Tobago's case to the contrary is based upon the erroneous assumption that this fishing was undertaken by the small sailing craft that made up the Barbadian day fishing fleet during this period.[466] In this respect, Trinidad and Tobago imputes to Barbados an argument that it does not make.

---

464 *Ibid.*

465 Indeed, much of the works on the history of Africa rely heavily on local oral traditions.

466 See, for example, Counter-Memorial of Trinidad and Tobago, para. 318(4).

Barbados does not seek to suggest that those craft were capable of travelling between Barbados and Tobago to fish during the traditional fishing season off Tobago from November to February and from June to July. Small sailing craft were no more capable of doing so during the 19th and 20th Centuries than they were during the time of Stephen Charnock's fishing expeditions to the area in 1724.[467] Rather, as the historical record shows in relation to the Charnock incident, the fishing that was undertaken by Barbadians off Tobago prior to the introduction of motorised craft in the early 1950s[468] was carried out from fishing schooners (or sloops).

359. There was regular schooner traffic between the British colonial islands of Tobago and Barbados throughout the 18th, 19th and early 20th Centuries. It was the Barbadian schooner fleet to which the Caribbean historian, Karl Watson, was referring when he wrote:

> "Of all the English speaking West Indian islands during the colonial period, Barbados had the most developed fishing industry. Whereas the other islands concentrated their efforts on inshore or reef fishing, Barbados from as early as the seventeenth century, employed a fleet of ocean going vessels which engaged in fishing for pelagic or deepwater species."[469]

360. It is well documented that Barbadian schooners regularly travelled far further afield than Tobago to fish during the early part of the 20th Century.[470] Thus, from the early 1930s records began of Barbadian schooners fishing off the coasts of Guyana,

---

467 See Memorial of Barbados, para. 56.

468 See below para. 361.

469 Robert Poole, "The Beneficent Bee: or Traveller's Companion-Part 2", (edited by Karl Watson) (2001) Vol. XLVII *Journal of the Barbados Museum and Historical Society*. (Memorial of Barbados, Appendix 48, Vol. 3 at p. 583.)

470 See, for example, the report of Herbert Brown, *The Sea Fisheries of Barbados* (1942). (Counter-Memorial of Trinidad and Tobago, Vol. 5, No. 1 at pp. 18-20.) Diplomatic Note No 9244 Vol. 1 to the Commission of European Communities, Ministry of External Affairs, Barbados, 20 October 1977. (Reply of Barbados, Appendix 5, Vol. 2 at pp. 28-34.)

Suriname and even, on occasion, Brazil. The distances travelled by those vessels to fish before returning to Barbados with their catch were far greater than the distances travelled by those fishing in the traditional fishing grounds off Tobago around that time. The contemporaneous records are slim because, as with those schooners fishing off Tobago, the crews were illiterate and did not keep logs of their locations and activities. But some records do exist of the South American fishery because of its international nature at that time, in contrast with the fishery off Tobago, which remained within the area of British colonial rule in the southern Caribbean at that time.

361. Trinidad and Tobago's repeated references to evidence that relates exclusively to the day fishing fleet of Barbados between the early 19th and mid 20th Centuries is therefore highly misleading since it completely ignores the co-existing long-range schooner fleet operating out of Barbados throughout that period.[471] Barbados would not dispute that the small vessels of the day fishing fleet stayed close to shore and did not venture near the coast of Tobago. That fishing ground was reserved for the ocean-going schooners, which had the characteristics and equipment necessary to fish in that area, just as they had done since at least the early 18th Century.

362. Widespread motorisation of the Barbadian fishing fleet took place in the early 1950s following the destruction caused by Hurricane Janet.[472] The colonial administration sought to safeguard the livelihoods of the fisherfolk by offering them financial assistance to replace their damaged boats with new motorised vessels.[473] These

471 See, for example, Counter-Memorial of Trinidad and Tobago, para. 318.

472 D. W. Wiles, *Mechanisation of Barbados Fishing Fleet*, 16 February 1959, at pp. 1-2. (Reply of Barbados, Appendix 2, Vol. 2 at pp. 7-8.)

473 *Ibid.*, p. 7.

further enhanced the ability of Barbadian fisherfolk to travel to Tobago to fish for flying fish and other pelagic species. Those Barbadian vessels that were documented as fishing off Tobago around the time of the independence of Trinidad and Tobago in 1962 were motorised fishing vessels.[474]

363. As regards Trinidad and Tobago's reference to the "other equipment" necessary to enable the Barbadian fisherfolk to fish in the traditional fishing ground off Tobago, Barbados understands this to relate to the methods used to preserve fish on the journey back to Barbados.[475] Again, with blatant disregard of the historical record showing Barbadian fishing in the area around Tobago as far back as the early 18th Century, Trinidad and Tobago submits that it was only with the introduction of the ice boats that Barbadian fisherfolk had the means to fish there.[476] This argument is predicated upon two fundamentally wrong assumptions: first, that ice was not used by Barbadian fisherfolk as a means of preserving their catch prior to the advent of the ice boats; and second, that Barbadian fisherfolk did not use other means of preserving fish caught off Tobago before the widespread use of ice.

364. As regards Trinidad and Tobago's first assumption, it is well documented that ice was available in Barbados as early as the 18th Century, when large vessels would travel down to the island carrying ice from New England and Canada.[477] Ice was available

---

474 Memorial of Barbados, para. 61.

475 Trinidad and Tobago does not appear to question the fact that Barbadians clearly had the means to catch flying fish prior to the 1970s. This is unsurprising given the evidence of consistent use of gill nets to catch flying fish from Barbados dating back to Arawak Indian times: see Memorial of Barbados, paras. 44-52.

476 Counter-Memorial of Trinidad and Tobago, para. 325.

477 "Ice houses in Barbados", *The Bajan*, May 1964. (Reply of Barbados, Appendix 4, Vol. 2 at p. 25.) In this respect, paragraph 65 of Barbados' Memorial is not intended to stand for the

in Barbados throughout the 19th Century and on a constant basis from 1837 when the first ice house was established.[478] A further ice house was established by Mr Dudley P. Cotton in Bridgetown in 1894,[479] which was taken over by the Goddard family in 1924.[480] Those Barbadian schooners that travelled to the coast of South America from the 1930s onwards used ice from Goddards' ice house to store their catch on the voyage back to Barbados. In addition to the use of ice, fish were also kept in sea water,[481] which would have had the effect of reducing the rate of putrefaction and beginning the preservation of the fish before it was gutted and kept on ice for transportation back to Barbados.

365. As regards Trinidad and Tobago's second assumption (disregard of the use of other methods of fish preservation),[482] this appears to have flowed from an apparent misunderstanding of Barbados' reference in its Memorial to the salting and pickling of flying fish caught off Tobago prior to the use of ice on board Barbadian fishing boats.[483] Barbados does not contend that flying fish were salted or pickled on board fishing boats at sea prior to transport back to Barbados. Such an exercise would have been impractical, given the need to gut and dry the fish before it was salted or pickled. In all the circumstances as explained in Barbados' Memorial[484] and in this Reply,[485] it

---

proposition that ice was only used to preserve fish caught off Tobago following the advent of the ice boat.

478 *Ibid.*

479 *Ibid.*

480 *Ibid.*

481 Once caught, the fish were kept wet and in the shade, before they were gutted and kept on ice. See Annette Bair, *The Barbados Fishing Industry*, Geography Department, McGill University, Publication No. 6, June 1962, at pp. 25-26. (Reply of Barbados, Appendix 3, Vol. 2 at pp. 23-24.)

482 Counter-Memorial of Trinidad and Tobago, para. 318.

483 Memorial of Barbados, para. 65.

484 *Ibid.*, paras. 58-61.

is hardly surprising that no documentary evidence exists of the precise method used to store fish transported back from Tobago before the introduction of ice in the early part of the 20th Century.

366. A variety of possible storage methods was available and used by the Barbadian fisherfolk to preserve their catch. Precisely how they did so, of course, is immaterial to the question of whether they fished there, which is established as a historical fact to have been the case as of the early 18th Century.

367. Trinidad and Tobago submits that only in the 1970s, with the introduction of the ice boats to the Barbadian fishing fleet, did Barbadian fisherfolk acquire the means to start fishing off Tobago.[486] In summary, this submission completely ignores:

(a) the operations of the Barbadian fishing schooner fleet off Tobago dating back to at least the early 18th Century;

(b) the availability of ice in Barbados from the 18th Century onwards and the documented use of ice for the storage of fish caught by Barbadian boats and schooners by the 1930s;

(c) the availability and use of other storage methods for fish caught off Tobago;

(d) the public recognition by government ministers and officials from Trinidad and Tobago that Barbadians have traditionally fished in the waters off Tobago;[487]

(e) the effect of widespread motorisation of the Barbadian fishing fleet in the

485 Above paragraphs 347-349.

486 See, for example, Counter-Memorial of Trinidad and Tobago, para. 341.

487 Memorial of Barbados, paras. 122 and 123.

early 1950s; and

(f) the fact that, as soon as documentary evidence re-commenced following the independence of Trinidad and Tobago in the early 1960s, Barbadian fisherfolk were recorded as fishing from Tobago for flying fish in the traditional fishing ground and as introducing Tobagonians for the first time to the technique for catching flying fish[488] (a fish that, as Trinidad and Tobago admits, was never caught by the people of Tobago before then[489]).

368. Barbadians have had the "long-range boats and other equipment" necessary to fish in the traditional fishing ground off Tobago since no later than the early 18th Century. They have done so consistently for at least 300 years. Trinidad and Tobago's conjecture is unable to displace the historical record.

## Section 7.2 Barbados' fishing communities are dependent on fishing off the island of Tobago

369. Trinidad and Tobago states in its Counter-Memorial that "Barbados greatly exaggerates the economic importance to it of fishing for flying fish".[490] On the contrary, it is difficult to exaggerate the importance of fishing to Barbados, an economic activity that provides employment for up to 6,000 people, equating to nearly five per cent of the working population of approximately 140,000.[491] Equally, it is difficult to exaggerate the importance of flying fish to that section of the population, since over 90 per cent of Barbados' fisherfolk are directly reliant upon the

488 *Ibid.*, paras. 61 and 72.

489 See *ibid.*, para. 72.

490 Counter-Memorial of Trinidad and Tobago, para. 335.

491 Memorial of Barbados, para. 41.

flying fish fishery for their livelihoods.[492] And of course, these figures do not take account of the estimated 18,000 dependants of those reliant upon the flying fish fishery for their livelihoods, nor the broader social and cultural importance of continued access to the resource in Barbados, "the land of the flying fish".[493]

370. Trinidad and Tobago estimates that the contribution of all fisheries to Barbados' GDP in 1998 was "only" $12 million.[494] In fact, the most recent figure available indicates that, in 2003, the contribution of all fisheries to Barbados' GDP was $18.8 million (which represents a fall from $20.7 million in 2001).[495] That may not seem like a great amount to a wealthy government like Trinidad and Tobago, but for a sector of the population of Barbados that lives on narrow economic margins, the importance of this sum of income must not be underestimated. This is especially so in an economy where unemployment rates are currently running near 10 per cent.[496]

371. In any event, the true value of the fishery to Barbados, after account is taken of the value of Barbadian fish vendors, processors, and the onward sale of fish to the consumer by supermarkets and restaurants or by way of export, is around five times the value of fish at the moment that they are landed (i.e. around $94 million in

---

492 *Ibid.*, para. 53.

493 In respect of which, see further Memorial of Barbados, para. 54.

494 Counter-Memorial of Trinidad and Tobago, para. 336.

495 Table headed "GDP – Selected Industry, (Current Prices) 2001-2002 NON-SUGAR AGRICULTURE", Government of Barbados, Statistical Department (Reply of Barbados, Appendix 64, Vol. 3 at p. 731.)

496 In December 2004 the average unemployment rate in Barbados was 9.8 percent of the total workforce. Central Bank of Barbados, Economic Press Release, *Review of the Economy for the First Three Months of 2005*, at pp. 1, 3. (Reply of Barbados, Appendix 57, Vol. 3 at pp. 707, 709.)

2003).[497] It is only once account is taken of this critical "value adding" process that the true importance of the fisheries to the 6,000 people that they employ can be appreciated. For a wealthy state like Trinidad and Tobago to accuse Barbados of "exaggerating" the importance of a $94 million resource to the 6,000 people who depend upon it for their livelihoods, and to their 18,000 dependants, is quite unreal. Presumably such views reflect the assumption that came with a rich abundance of natural resources, of which Barbados is conspicuously lacking.

372. Insofar as the importance of the traditional fishery off Tobago to the Barbadian fishing communities is concerned, this has been recognised in the past by members of the Government of Trinidad and Tobago. Thus, in 2001 the Minister of Enterprise Development, Foreign Affairs and Tourism of Trinidad and Tobago, in a letter to the Minister of Foreign Affairs and Foreign Trade of Barbados, confirmed that he was aware that "the people of Barbados have a special interest in the conclusion of a fishing agreement with Trinidad and Tobago.[498]

373. However, it is the fishing communities themselves who are best placed to describe the importance of the traditional fishing off Tobago, since there are no official figures identifying the precise proportion of fish caught in that area during the relevant season, from November to February and from June to July. The fisherfolk of Barbados are not required to provide details of where they catch their fish to the Barbadian, or any other, authorities. Thus, the 15 affidavits of Barbadian fisherfolk,

---

497 R. Mahon, C. Parker, T. Sinckler, S. Willougby and J. Johnson, *The Value of Barbados' Fisheries: a preliminary assessment*, Fisheries Division, Ministry of Agriculture and Rural Development, Barbados, June 2005. (Reply of Barbados, Appendix 60, Vol. 3 at p. 725.)

498 Letter from Mervyn Assam, Minister of Enterprise Development, Foreign Affairs and Tourism, Trinidad and Tobago, to Honourable Billie Miller, Minister of Foreign Affairs and Foreign Trade, Barbados. (Reply of Barbados, Appendix 19, Vol. 2 at p. 243.)

appended to the Memorial of Barbados,[499] must be treated as the most credible and reliable form of evidence of the contemporary importance of the traditional fishery off Tobago to the Barbadian fishing communities, particularly given the absence of any specific evidence from Trinidad and Tobago to the contrary. Those affidavits are consistent in their appraisal of the catastrophic effect that loss of the fishery would have, particularly during the first three months of the fishing season when fish are scarce in the waters around Barbados.[500]

374. The oral testimony of the Barbadian fisherfolk is supported by that of the President of the Barbados National Union of Fisherfolk Organisations, Angela Watson. She has stated that the fisherfolk of Barbados "could not survive and provide for their families" without continued access to the traditional fishery off Tobago, particularly during the months of November to February and June to July.[501] It is supported also by the scientific evidence that was produced by Barbados in its Memorial.[502]

375. The oral testimony of the Barbadian fisherfolk is supported further by the results of a survey conducted by the Fisheries Division of the Barbadian Ministry of Agriculture and Rural Development in the first half of 2005, which demonstrates the dependence of the fisherfolk upon the fishery off Tobago.[503] In particular, the survey demonstrated that, out of a sample representing approximately 17 per cent of the

499 At Appendices 69-78, 84-87 and 90.

500 See, for example, Memorial of Barbados, para. 66.

501 Affidavit of Angela Watson. (Memorial of Barbados, Appendix 91, Vol. 4 at pp. 965-966.)

502 Memorial of Barbados, paras. 67-68.

503 Ministry of Agriculture and Rural Development, Fisheries Division, Barbados, "Summary of the results of an on-the-spot survey of fishermen conducted by the Fisheries Division of the Ministry of Agriculture and Rural Development 19-20 May 2005", 3 June 2005. (Reply of Barbados, Appendix 61, Vol. 3 pp. 727-728.)

Barbadian ice boat fleet, more than 80 per cent fished off Tobago.[504]

376. Finally, if further evidence were needed, the importance of the traditional fishery off Tobago to the Barbadian fishing communities has been demonstrated over the current fishing season by the fact that Barbadian fisherfolk have continued to fish in the area notwithstanding the persistent risk of illegal interception, arrest and prosecution by the authorities of Trinidad and Tobago. This was shown by the recent survey, which reveals that 25 per cent of those ice boats polled had fished off Tobago during the present season.[505] Indeed, if it were not for the fact that the present fishing season has been a poor one throughout the region, as has happened from time to time throughout history for as yet unexplained reasons, this proportion probably would have been even higher.[506]

377. All in all, the dependence of the Barbadian fishing communities upon the traditional fishery off Tobago is indisputable. Without it, the communities concerned would suffer severe economic disruption and, in some cases, a complete loss of livelihood. This is particularly the case due to the fact that the Barbadian economy, because of its lack of natural resources[507] and relative isolation, does not have great resilience and therefore could not absorb the levels of unemployment that the loss of the traditional fishery off Tobago would cause.

---

504 *Ibid.*, p. 727.

505 *Ibid.*, p. 727.

506 "Concern over the future of the fishing industry", *The Barbados Advocate*, 25 April 2005. (Reply of Barbados, Appendix 56, Vol. 3 at p. 706.) Central Bank of Barbados, Economic Review, Vol. XXXI, No. 3, December 2004, at p. 3. (Reply of Barbados, Appendix 53, Vol. 3 at p. 682.)

507 See above Section 1.6.

378. In the survey of fisherfolk conducted in the first half of 2005, more than two-thirds of the fisherfolk polled received all of their income from fishing activities. That income was, in 90 per cent of cases, below US$750 per month (well below the Barbadian national average monthly income). The fisherfolk live on narrow margins and their livelihoods depend upon uninterrupted access to the traditional fishing grounds off Tobago, which are so critical to them during the early and late parts of the fishing season.

379. The artisanal nature of the Barbadian fishing off Tobago is self-evident. There has been no "recent and rapid shift from small scale artisanal to larger scale commercial operations" as alleged by Trinidad and Tobago in its Counter-Memorial.[508] Rather, recent years have witnessed no more than a natural progression of fishing techniques used by Barbadian artisanal fisherfolk in their traditional fishing activities. As technology has advanced, this has taken the form, first of all, of motorisation in the early 1950s, and, subsequently, of simplified ice storage.

380. In contrast, it has been reported that Trinidad and Tobago, for a fee of US$30,000 per week, regularly opens up its ports to Taiwanese industrial fishing vessels.[509] As of 1999, it would appear that there were at least 48 such vessels operating out of Port-of-Spain.[510] Each of these vessels is reported to be worth some US$1.5 million to US$2.5 million and is said to be capable of storing up to 300 tonnes of fish at a

508 Paragraph 342.

509 "Taiwanese deny drag net fishing charges", *Trinidad and Tobago Guardian*, 15 August 1990. (Reply of Barbados, Appendix 9, Vol. 2.)

510 Letter from National Fisheries Co. (1995) Ltd to the Permanent Secretary, Ministry of Agriculture, Land and Marine Resources, 20 September 1999 (with attachment). (Reply of Barbados, Appendix 14, Vol. 2 at pp. 142-146). More recent figures of the level of Taiwanese fishery in Trinidad and Tobago are not publicly available, and the port used by Taiwanese vessels in Port-of-Spain is subject to tight security.

time.[511] This compares with a total fish catch of the entire Barbadian artisanal fleet (comprising all boat types) of 2,500 tonnes, and an average annual catch of flyingfish in Barbados of 1,500 to 2,000 tonnes.[512] The industrial Taiwanese fishing vessels have been reported in the international press as allegedly engaging in "destructive" drift net fishing and receiving subsidised fuel and other benefits at Trinidad and Tobago ports.[513] In these circumstances, it is ironic that Trinidad and Tobago seeks to draw attention to the economic scale of the Barbadian fisherfolk's activities in their small ice-boats.[514]

## Section 7.3 Trinidad and Tobago is not dependent on fishing in the area claimed by Barbados

381. In its Counter-Memorial, Trinidad and Tobago accuses Barbados of "wrongly dismissing the significance of [fishing for flying fish] to Trinidad and Tobago".[515] Barbados does not dispute that fishing for flying fish plays an important role in some of the small fishing communities of Tobago (even Trinidad and Tobago does not seek to assert that the fishery is of any importance to the island of Trinidad). Barbados is intimately linked with the introduction of that fishery to the people of Tobago. The exploitation of flying fish in Tobago began in the 1960s, when Barbadian fisherfolk

511 "Times hits Taiwanese drift net fishermen in Tobago", *Trinidad Guardian*, 15 August 1990. (Reply of Barbados, Appendix 8, Vol. 2.)

512 Memorial of Barbados, para. 53 and FAO Fishstat statistics, Landed catches (Tonnes) by species for Barbados 1950-2002 (extracts), Memorial of Barbados, Appendix 52, Vol. 3.

513 "Large drift nets move to Atlantic", *New York Times*, 14 August 1990. (Reply of Barbados, Appendix 7, Vol. 2.) "Times hits Taiwanese drift net fishermen in Tobago", *Trinidad Guardian*, 15 August 1990. (Reply of Barbados, Appendix 8, Vol. 2.)

514 Counter-Memorial of Trinidad and Tobago, paras. 336-340.

515 *Ibid.*, para. 335.

introduced the people of Tobago to the technique for fishing and boning flying fish.[516] Since then, the Tobago day boat fishery has expanded slowly, but its potential has been limited by the continued low consumer demand for flying fish on the island and in Trinidad.[517]

382. The crucial point, however, which is ignored completely by Trinidad and Tobago in its Counter-Memorial, is that the overwhelming proportion of fishing vessels that fish out of Tobago remain to this day small boats powered by outboard motors. As the United Nations Food and Agriculture Organisation (***FAO***) noted as recently as 2000, these boats are involved exclusively in day fishing for flying fish and other species (particularly reef fish, which are in high demand in Tobago) close to the Tobago shoreline.[518] In other words, those boats do not fish in the traditional fishing grounds of Barbados, which lie more than 12 nautical miles off shore.

383. Trinidad and Tobago's own Department of Marine Resources and Fisheries has confirmed that the majority of fishing by Tobagonians is undertaken with small vessels using outboard motors and without cold storage facilities, clearly making it difficult for Tobagonian fisherfolk to fish much further than 12 nautical miles off shore.[519]

384. This fundamental feature of the Tobagonian fishing fleet is confirmed by the oral

---

516 Memorial of Barbados, paras. 61 and 72.

517 *Ibid.*, para. 72.

518 FAO Fishery Country Profile: Trinidad and Tobago (2000). (Memorial of Barbados, para. 69.)

519 A. Thomas, A. Potts, E. Nichols and F. Mukhida, *National Report of Trinidad and Tobago: Pelagic and Reef Fisheries – Tobago*, 2000 Caribbean Pelagic and Reef Fisheries Assessment and Management Workshop, Working Document: CFRAMP_PRFA/2000-11, at p. 114, 117. (Reply of Barbados, Appendix 15, Vol. 2 at pp. 147, 150.)

testimony of the many Barbadian fisherfolk who fish in the traditional fishing area.[520] It is confirmed also by the testimony of Angela Watson, President of the Barbados National Union of Fisherfolk Organisations.[521]

385. More importantly, it has been confirmed by the statements of Trinidad and Tobago's fishing officials during the course of negotiations with Barbados over renewal of the 1990 Fishing Agreement. Thus, during the negotiations of 24 to 25 March 2003, Trinidad and Tobago proposed that the approved fishing area should be the area off the north coast of Tobago outside 12 nautical miles, together with a two mile buffer zone, "to prevent any difficulty or competition for resources between the artisanal vessels of Tobago and the larger ice boats of Barbados."[522]

386. Indeed, as the statements of these Trinidad and Tobago officials show, the fact that Tobagonian fisherfolk fish almost exclusively within 12 nautical miles of Tobago formed the essential rationale behind the creation of the so-called "closed area" under the 1990 Fishing Agreement. Within that area, Trinidad and Tobago insisted that Barbadians should not be allowed to fish since this was where the fisherfolk of Trinidad and Tobago do their fishing. Barbados did not oppose the creation of the "closed area" in the 1990 Fishing Agreement since its traditional fishing ground was located further off shore.

387. The Barbadian fisherfolk and their Tobagonian counterparts fish in different areas of maritime space on either side of the Trinidad and Tobago 12 nautical mile limit.

---

520 See, for example, the affidavit of Anthony Brathwaite, cited at para. 70 of the Memorial of Barbados.

521 Memorial of Barbados, para. 71.

522 Joint Report of negotiations of 24 to 25 March 2003. (Reply of Barbados, Appendix 29, Vol. 3 at p. 397.)

Indeed, although Trinidad and Tobago asserts that the Tobagonian fishery extends up to 30 nautical miles from shore (which is still 28 nautical miles from the median line even at its closest point to Tobago),[523] the vast majority of Tobagonian fisherfolk stay within five or six nautical miles of the shore line.[524]

## Section 7.4 The need to ensure the freedom of Barbadian fisherfolk to continue to exercise artisanal fishing rights indispensable to their livelihood and to Barbados' economy requires an adjustment of the provisional median line

388. Barbados established in its Memorial that the traditional artisanal fishing practices of its fisherfolk constitute a special circumstance requiring adjustment of the median line. In the present Section, Barbados will address Trinidad and Tobago's counter-arguments on the law. These may be broken down into four assertions: first, that Barbados could not acquire fishing rights by virtue of the long and continuous artisanal fishing practices of Barbadian nationals in waters near Tobago because those waters formerly "had the status of high seas and . . . were *res communis*";[525] second, that UNCLOS requires that habitual fishing rights acquired by one State or its nationals in waters that become part of another State's EEZ be accommodated by a regime of access rather than by adjustment of the median line;[526] third, that the circumstances in *Jan Mayen* can and should be distinguished from those here;[527] and finally, that "recent decisions have suggested that historic activity . . . could be relevant to delimitation only if they led to, or were bound up with, some form of

523 Counter-Memorial of Trinidad and Tobago, para. 339.

524 See affidavit evidence referred to at Memorial of Barbados, paras. 70 to 76 and FAO Fisheries Country Profile: Trinidad and Tobago (2000) referred to at Memorial of Barbados, para. 69.

525 Counter-Memorial of Trinidad and Tobago, para. 212.

526 *Ibid.*, paras. 212-214.

527 *Ibid.*, paras. 215-218.

recognition of territorial rights on the part of the State concerned."[528] These will be addressed *seriatim* below.

**(A) Barbados' nationals acquired non-exclusive rights to engage in traditional artisanal fishing, which rights survive the establishment of new maritime zones**

389. Trinidad and Tobago's first tactic is to deny, in two sentences unsupported by any authority, the rights at issue, that is, the artisanal fishing rights acquired by Barbadian nationals by virtue of their traditional and consistent practices over many years. Trinidad and Tobago states:

> "Prior to the establishment of the EEZ in 1986, the waters concerned had the status of high seas and their fisheries resources were *res communis*. It follows that even if Barbadian fishing vessels did fish in those waters, that fact did not give Barbados any sovereign rights in those waters."[529]

Barbados does not disagree with the first sentence. But the second sentence does not "follow" for, under international law, States or their nationals may acquire non-exclusive rights in areas formerly part of the high seas, which, by virtue of the intertemporal principle, survive the creation of new maritime zones.

390. International law establishes distinct modes for the acquisition of exclusive and non-exclusive rights. A State acquires exclusive rights chiefly by virtue of its actions or those of agents authorised to act on its behalf. Acquisition of an exclusive right generally requires the use by a State or its nationals of the territory or resource in question, coupled with the exclusion, at times by force, of other States and their nationals from access to that territory or resource. Non-exclusive rights, by contrast, can be acquired by modes that do not involve the exclusion of other States. Non-

528 *Ibid.*, para. 219.

529 *Ibid.*, para. 212.

exclusive rights are chiefly acquired by the use or exploitation of a resource or territory by individuals who need not be acting with authorisation from their State or to the exclusion of other States.

391. Sir Gerald Fitzmaurice aptly explained that:

> "[w]hereas claims to exclusive rights founded on the acts of individuals can only be maintained if the individuals were authorized, either in advance, or *ex post facto* by the adoption and ratification of the acts, such would not appear to be the case where all that is involved is a claim to possess, and to be entitled to continue to enjoy, rights of a non-exclusive character. Thus if the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available to its fishing vessels (of course on a non-exclusive basis) – so that if another country asserts a claim to that area as territorial waters, which is found to be valid or comes to be recognised, this can only be subject to the acquired rights of fishery in question, which must continue to be respected."[530]

Fitzmaurice supported this formulation by reference to certain general principles of law and the *Anglo-Norwegian Fisheries* judgment.[531] He observed that if international law permits a State to acquire title by prescription or historical claim to waters formerly *res communis*, then other States, whose nationals had historically used those waters, logically could acquire non-exclusive rights to specific uses, such as fishing, in them.[532]

392. Hence, contrary to Trinidad and Tobago's assertion, non-exclusive uses of waters formerly part of the high seas can, over time, create rights under international law that

---

530 Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law", (1953) 30 BYIL 51.

531 *Fisheries Case (United Kingdom v. Norway)*, (Separate Opinion of Judge Alvarez) at pp. 116, 150, 153.

532 Fitzmaurice, at "The Law and Procedure of the International Court of Justice, 1951-54.", p. 51.

will be deemed sufficiently durable to survive a change in the legal regime governing the area. Furthermore, because of the limited character of such non-exclusive rights, the threshold for their acquisition is lower. Fitzmaurice wrote:

> "Whereas in the case of a claim to sovereignty over land territory (which involves a claim of exclusive right), a State must act *à titre de souverain* through authorized persons or, within limits, persons whose acts are subsequently adopted and ratified, this is not so where what is in question is a claim to retain a right to exploit a maritime area – for such a right, being universal and non-exclusive, no authority to exercise it is needed by any individual so far as international law is concerned, and by the exercise of the right on the part of its nationals a State may acquire a vested right in respect of a particular area to its continued exploitation by the nationals of that State."[533]

A State that asserts an acquired, non-exclusive right in waters formerly part of the high seas on the basis of long use by some of its nationals need not, then, marshall evidence of its *effectivités à titre de souverain.* It need only establish that its nationals have for a sufficient period of time been exercising their non-exclusive rights in those waters.[534]

393. The evidence submitted by Barbados amply suffices to show that its nationals have historically and consistently fished by artisanal methods in the waters off the coast of Tobago. They thereby acquired non-exclusive rights to engage in traditional artisanal

---

533 *Ibid.*, p. 53.

534 In this regard it is crucial to bear in mind the distinction between private, traditional activities, on the one hand, and State practice, on the other. A demonstration of State practice can establish historic title, which is exclusive, but that demonstration requires proof of governmental action or *effectivités*. By contrast, a demonstration of private, traditional activities can establish a non-exclusive right that inures to an intergenerational, functional group and that authorises its members to access or use a resource in another State. International law establishes a high threshold of proof for historic title precisely because, once title vests, one State gains sovereignty over a Part of the *res communis*, and all other States and their nationals lose any right to benefit from the use or exploitation of the resources located there. Because non-exclusive, acquired rights neither entail such exclusivity nor limit the rights of the remainder of the international community, the quantum of activity that must be established is much lower.

fishing in those waters. The fact that these waters formerly "had the status of high seas"[535] bolsters Barbados' claim, for it is fully consistent with the nature of the artisanal fishing rights asserted by Barbados.

394. International law does not, of course, attempt to establish with mathematical precision the amount of time required for a non-exclusive right to vest. The time requirement depends on a variety of factors, including the nature of the right at issue, the continuity of the practice and its significance to the State in question. Fitzmaurice simply referred to a "long period."[536]

395. The ICJ's jurisprudence offers further guidance. In *Right of Passage Over Indian Territory*, the Court attached considerable significance to the unbroken practice of the users of the right of passage, and it found "a century and a quarter" to be a sufficient period of time for the right in question to accrue.[537] However, the *Right of Passage* case involved prescriptive rights in territory that were adverse to the territorial sovereign, features that made the requirement of a relatively long period of time understandable. The case before the Tribunal involves non-exclusive rights to artisanal fishing in an area formerly part of the high seas. The length of time required for such rights to vest is therefore considerably shorter.

---

535 Counter-Memorial of Trinidad and Tobago, para. 212.

536 Fitzmaurice "The Law and Procedure of the International Court of Justice", at 51. A study prepared by the Secretariat of the United Nations at the request of the International Law Commission properly recognised that "the existence of such a title is to a large extent a matter of judgement. A large element of appreciation seems unavoidable in this matter..." (*Juridical Regime of Historic Waters, Including Historic Bays*, Study Prepared by the Secretariat, U.N. Doc. A/CN.4/143, 9 March 1962, para. 187.)

537 *Right of Passage Over Indian Territory (Portugal v. India) (Merits)*, at p. 40.

396. In fact, in more recent decisions, which dealt specifically with claims to acquired fishing rights in areas formerly part of the high seas, the ICJ has shifted from a temporal test, which looks only at how long the rights have been exercised, to a test which considers the consequences, economic and otherwise, for the individuals who have traditionally exercised those rights, were they to be terminated abruptly.[538] Here, as demonstrated above, it is difficult to overstate the contemporary importance to Barbadian fisherfolk of artisanal fishing off the coast of Tobago.

**(B) UNCLOS, general principles of law, customary international law and international human rights law all mandate the survival of traditional artisanal fishing rights notwithstanding reclassification of maritime zones formerly part of the high seas**

397. Trinidad and Tobago next argues that the artisanal fishing rights of Barbadian nationals should not be considered a special circumstance, warranting adjustment of the median line, because Article 62 of UNCLOS, in its view, contemplates that States will accommodate habitual fishing rights in their EEZs by regimes of access rather than by adjustments to the relevant delimitation lines.[539] In the first place, this argument lies ill in the mouth of a State that refuses to provide such a regime of access. Had Trinidad and Tobago simply offered in good faith to ensure Barbadian fisherfolk continued access to its claimed EEZ, Trinidad and Tobago would not have aggravated the special circumstance that now requires an adjustment of the median line. But wholly apart from the equities, Trinidad and Tobago's position is incorrect

538 See *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*.

539 Counter-Memorial of Trinidad and Tobago, paras. 212-214. In fact, as set forth below, even this qualified assertion is misleading, for Article 62(3) concerns access to the *surplus* of living resources in a coastal State's EEZ "[w]here the coastal State does not have the capacity to harvest the entire allowable catch." UNCLOS, Article 62(2).

as a matter of law. The text of UNCLOS, construed in light of general principles, customary law, and international human rights law, clearly supports Barbados' claim that artisanal fishing rights survive the conventional reclassification of maritime zones formerly part of the high seas; and, as demonstrated in the following subsection, in the present case these rights require an adjustment to the EEZ of another State.

### (I) Article 62 of UNCLOS does not purport to terminate acquired artisanal fishing rights or to relegate them to a regime of access subject to the unilateral discretion of the coastal State

398. Much of Trinidad and Tobago's legal case depends on "implied" meanings that reverse the quite clear purpose of provisions and decisions. Thus, while Trinidad and Tobago concedes that Article 62 "is not . . . before the Tribunal in the present proceedings," it nonetheless argues that it terminates the acquired, artisanal fishing rights of Barbadian nationals by implication.[540] By its terms, Article 62 does not purport to deal with artisanal fishing rights, and it would be remarkable if a comprehensive treaty such as UNCLOS were construed to terminate indispensable economic rights by implication, not to speak of economic rights whose protection is required by human rights conventions.

399. Article 62(3) concerns access to the surplus of living resources in a coastal State's EEZ, "[w]here the coastal State does not have the capacity to harvest the entire allowable catch."[541] In those circumstances UNCLOS instructs the coastal State to take into account all relevant factors, including, *inter alia*, "the need to minimise economic dislocation in States whose nationals have habitually fished in the zone," and to make agreements with other States, particularly those "whose geographical

---

540 Counter-Memorial of Trinidad and Tobago, para. 214.

541 UNCLOS, Article 62(2).

situation makes them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their populations."[542] Such States, according to Article 70(1), "have the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same subregion or region."[543]

400. Article 62 does not, in other words, apply in the present circumstances. The issue is not Barbados' right to a fair share of the surplus of Trinidad and Tobago's allowable catch; it is Barbados' right to an adjustment of the maritime boundary in view of the need to preserve the artisanal fishing rights of certain Barbadian nationals that would otherwise be denied by Trinidad and Tobago.

### (II) UNCLOS and principles of general international law support Barbados' claim that artisanal fishing rights constitute a special circumstance that warrants an adjustment of the median line

401. Part V of UNCLOS does not directly address the survival of traditional artisanal fishing rights.[544] The text nonetheless discloses solicitude for such rights, and insofar as it provides guidance, supports Barbados' claim. In accordance with Article 293(1), principles of general and customary international law apply in the present arbitration insofar as they are "not incompatible" with UNCLOS. Accordingly, unless the text

---

542 *Ibid.*, Article 70(2).

543 This is, however, a relatively soft right – indeed, more of a *pactum de contrahendo* than a right – particularly given the absence of any meaningful enforcement mechanism (see *ibid*, Article 297).

544 By reference to the interpretive principle *inclusio unius est exclusio alterius*, it might be argued that because UNCLOS does not expressly mention traditional artisanal fishing rights, it implicitly excluded them. But it would only be appropriate to invoke that principle were the issue here *prospective* rights; it is hardly likely that the drafters meant to abrogate existing rights by implication.

expressly indicates otherwise, UNCLOS should be construed consistently with the intertemporal principle, which requires that a treaty be interpreted "in the light of general rules of international law in force at the time of its conclusion."[545] Applying that principle here compels the conclusion that Barbadian nationals' pre-existing rights to engage in artisanal fishing off the coast of Tobago survive the entry into force of UNCLOS. Insofar as UNCLOS mentions or alludes to such rights, the text strongly supports their survival, and as set forth below.

402. First, UNCLOS indicates that boundary regimes must be adjusted to take account of historic rights. Article 15 of UNCLOS suspends the default rules for delimitation of the territorial sea for two contingencies: first, historic title, and second, "other special circumstances." The latter, Barbados submits, include acquired, non-exclusive rights Those rights may require an adjustment to the otherwise applicable maritime boundary where, as here, they would be terminated in the absence of such an adjustment.

403. Second, the provisions of UNCLOS that govern archipelagic States recognise the survival of traditional artisanal fishing rights. Article 47(6) provides that "[i]f a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters . . . *shall continue and be respected*" (emphasis added); Article 51(1) provides that "an archipelagic State shall respect existing agreements with other States and *shall recognise traditional fishing rights* and other legitimate activities of the immediately

545 See, for example, *Oppenheim's International Law*, 1281, and the Island of Palmas arbitration (*Island of Palmas (Netherlands v. United States* p. 829).

adjacent neighbouring States in certain areas falling within archipelagic waters." (Emphasis added). Both of these provisions require continuation of pre-existing, non-exclusive rights in areas formerly part of the high seas that are now, by virtue of UNCLOS, subject to the sovereignty of a coastal State.

404. Third, Part V of UNCLOS, prescribes only the rights *pro futuro* of other States in the EEZ; it does not address how the EEZ affects pre-existing rights. Professor David J. Attard observes that in the EEZ context:

> "[t]o exclude their relevance [of historic fishing rights] would seem to go contrary to the EEZ's rationale and development, as well as the drafting history of its regime as found in the 1982 Convention. It should be remembered that the weight given to such considerations is dependent on the other considerations which characterize the area. It would therefore seem that such recognition represents a safeguard which ensures that, even when an equitable solution fails to give due recognition to such considerations, they will continue to be respected."[546]

405. It would be wholly inappropriate to construe UNCLOS to terminate by implication the traditional artisanal fishing rights of Barbadian nationals. To do so, it would be necessary to show, first, that as a matter of international law, significant economic rights can be terminated by implication notwithstanding that a complex, multilateral treaty simply does not mention them in the relevant section; and second, that as a matter of fact, the States party intended that valuable economic rights acquired by their nationals be terminated by implication. Neither of these assertions can be sustained. To the contrary, as a general principle of international law, acquired rights survive unless explicitly terminated, and nothing in UNCLOS or its *travaux* suggests that States intended to surrender acquired rights not specified in the text.

546 David J. Attard, *The Exclusive Economic Zone in International Law* (1987) 268-69.

406. In comparable circumstances, the *Eritrea/Yemen* Tribunal concluded that the traditional fishing regime pertaining to Eritrea and Yemen was not qualified by the maritime zones specified under UNCLOS and hence did not depend, either for its existence or for its protection, upon the drawing of an international boundary by the Tribunal.[547] Equally, here, the traditional artisanal fishing rights acquired by Barbadian nationals over time survive the creation of a new conventional boundary pursuant to UNCLOS.

### (III) Customary international law and human rights law favour the survival of the traditional artisanal fishing rights of Barbados' fisherfolk

407. Customary international law and international human rights law require that new maritime zones created by UNCLOS do not abrogate pre-existing artisanal fishing rights. Artisanal rights, which must be distinguished from historic rights, often received preferential treatment in the past and now receive a particular solicitude in international law because of its modern emphasis on the rights of individuals.

408. The concept of traditional artisanal fishing appears in numerous contemporary treaties; it has been employed by the FAO;[548] and most recently, it has been explicitly defined as a matter of international law. In the *Eritrea/Yemen* arbitration, the Tribunal explained:

> "[T]he term artisanal is not to be understood as applying in the future only to a certain type of fishing exactly as it is practised today. 'Artisanal fishing' is used in contrast to 'industrial fishing'. It does not exclude improvements in powering the small boats, in the techniques of navigation, communication or in the techniques of fishing; but the traditional regime of fishing does not extend to large-scale commercial or industrial fishing nor to fishing by

547 *Eritrea/Yemen (Second Stage: Maritime Delimitation)*, paras. 109-10.

548 FAO 24/95 ADB-ERI.4, 27 February 1995.

nationals of third States in the Red Sea, whether small-scale or industrial."[549]

409. In the lexicon of international law, then, artisanal fishing denotes traditional fishing, which, while perhaps commercial, is neither large-scale nor industrial. Traditional artisanal fishing, as the *Eritrea/Yemen* award and a review of pertinent treaty practice make clear,[550] need not be primitive. Traditional artisanal fishing may be undertaken for commercial purposes and the harvest placed in the stream of commerce. Finally, traditional artisanal fishing rights generally cannot be transferred internationally. That is to say, such rights may be transferable within the beneficiary State's national community (as they must, if they are to survive over time) but not with members of other States. In sum, traditional artisanal fishing may be broadly conceived as akin to an irrevocable licence available to certain members of a functional, intergenerational group, defined cumulatively in terms of nationality, occupation, and prior exploitation of the resources of a specific maritime region.

---

549 *Eritrea/Yemen Arbitration (Second Stage: Maritime Delimitation)*, para. 106.

550 See, e.g., Treaty Between the Government of the Republic of Honduras and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Delimitation of the Maritime Areas Between the Cayman Islands and the Republic of Honduras, 4 December 2001, preamble. and Annex B, para. 3 (affirming the Parties' common "wish[]... to take account of the traditional interests of the Cayman Islands in certain fisheries in areas appertaining under this Treaty to the Republic of Honduras" and therefore agreeing that traditional Artisanal fishing, as defined in Annex B, "may continue . . . in the exclusive economic zone of the Republic of Honduras... in accordance with existing patterns and levels"); Australia-Papua New Guinea: Treaty on Sovereignty and Maritime Boundaries in the Area Between the Countries, 18 December 1978, Article 1(1)(1), (1979) 18 ILM 291, 293 (defining traditional artisanal fishing); see also Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in 1 *International Maritime Boundaries* 75 (Jonathan I. Charney & Lewis M. Alexander eds. 1993).

410. Because traditional artisanal fishing rights accrue to fisherfolk as individuals, and not merely as nationals of a State, contemporary international law evinces a reinforced concern for their survival notwithstanding the conventional reclassification of areas formerly part of the high seas.[551]

411. In the *Eritrea/Yemen* arbitration, the Tribunal explicitly confirmed that customary international law provides for the survival of traditional artisanal fishing rights, where, as here, former areas of the high seas fished by one State's nationals will be enclosed by the sovereign waters of another State. *Eritrea/Yemen* involved competing territorial claims to sovereignty over islands in the Red Sea and the maritime boundary delimitation between Eritrea and Yemen. The Tribunal, comprised of, among others, several former judges and presidents of the ICJ, awarded certain critical islands to Yemen. But the Tribunal observed that:

> "the conditions that prevailed during many centuries with regard to the traditional openness of southern Red Sea marine resources for fishing, its role as means for unrestricted traffic from one side to the other, together with the common use of the islands by the populations of both coasts, are all important elements capable of creating certain 'historic rights' which accrued in favour of both parties through a process of historical consolidation as a sort of '*servitude internationale*' falling short of territorial sovereignty. Such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea.
>
> . . .
>
> This traditionally prevailing situation reflected deeply rooted cultural patterns leading to the existence of what could be characterized from a juridical point

551 When the United Kingdom and Honduras established the maritime boundary between the Cayman Islands and Honduras, the State parties explicitly recognised the traditional fishing rights of Cayman Island vessels, providing for the protection of artisanal fishing for red snapper and grouper "in the area of Misteriosa and Rosario Banks located in the exclusive economic zone of Honduras . . . in accordance with existing patterns and levels." *Ibid.*, Annex B, para. 1.

> of view as *res communis* permitting the African as well as the Yemeni fishermen to operate with no limitation throughout the entire area and to sell their catch at the local markets on either side of the Red Sea. Equally, the persons sailing for fishing or trading purposes from one coast to the other used to take temporary refuge from the strong winds on any of the uninhabited islands scattered in that maritime zone without encountering difficulties of a political or administrative nature."[552]

Hence, in the first phase, the Tribunal emphasised that its award of "is not inimical to, but rather entails, the perpetuation of the traditional fishing regime in the region," and therefore, that "[i]n the exercise of its sovereignty over these islands, Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men."[553]

412. In the second phase, the Tribunal held that "the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen."[554] That regime, the Tribunal explained, "entitles both Eritrean and Yemeni fishermen to engage in artisanal fishing around the islands which, in its Award on Sovereignty, the Tribunal attributed to Yemen,"[555] and in paragraph 107, the Tribunal specified the contours of the regime to ensure "that the entitlements [will] be real and not merely

---

552 *Eritrea/Yemen Arbitration (First Stage: Territorial Sovereignty and Scope of Dispute)*, 9 October 1998, paras. 126, 128 (Permanent Court of Arbitration 1998), (2001) 40 ILM 900, at pp. 920-921.

553 *Ibid.*, para. 526.

554 *Eritrea/Yemen Arbitration (Second Stage: Maritime Delimitation)*, para. 101.

555 *Ibid.*, para. 103.

theoretical."[556] The Tribunal expressly rejected the view that UNCLOS had implicitly terminated this traditional regime.[557]

413. The *Eritrea/Yemen* awards constitute clear evidence of a customary international law rule preserving traditional artisanal fishing rights in formerly *res communis* maritime areas that have been or will be reclassified under UNCLOS. That is the case here. Barbadian nationals traditionally fished in certain waters off the coast of Tobago, which were formerly *res communis* but which will henceforth be subject to the UNCLOS regime. By virtue of their longstanding fishing practices, Barbadian nationals acquired a non-exclusive right to continue to fish in these waters, and contemporary international law requires that this right be protected. Where, as here, one State adamantly refuses to grant a regime of access to artisanal fisherfolk, the law requires their rights to be protected by means of an adjustment to the maritime boundary.

414. As Barbados emphasised in its Memorial, because artisanal fishing rights vest in individuals as individuals, not merely as State nationals, these rights cannot be "decreed, waived or negotiated out of existence by State action."[558] In the *Eritrea/Yemen* arbitration, the Tribunal explained with reference to traditional fishing rights:

> "There is no reason to import into the Red Sea the western legal fiction – which is in any event losing its importance – whereby all legal rights, even those in reality held by individuals, were deemed to be those of the State. That legal fiction served the purpose of allowing diplomatic representation (where the representing State so chose) in a world in which individuals had no opportunities to advance their own rights. It was never meant to be the case

556 *Ibid.*, para. 107.

557 *Ibid.*, para. 109.

558 Memorial of Barbados, para. 126.

however that, were a right to be held by an individual, neither the individual nor his State should have access to international redress."[559]

If acquired rights cannot be terminated by implication, *a fortiori*, neither can human rights.

415. As Barbados emphasised in its Memorial, fishing rights are a form of property under international rights law and, because artisanal fishing rights vest in individuals, these rights cannot be "decreed, waived or negotiated out of existence by State action."[560] The force of such rights is reinforced where, as here, it has an undoubted effect on the rights to work and subsistence of the population affected.[561] Barbadian fishermen cannot be excluded abruptly from maritime zones that they have long fished, destroying their sole means of subsistence.

**(C) Adjustment of the median line to ensure the ability of Barbados' fisherfolk to continue to exercise their rights would be appropriate and consistent with UNCLOS**

416. Trinidad and Tobago effectively concedes, as it must, that international law protects traditional artisanal fishing rights, but it argues that UNCLOS and international jurisprudence treat these rights only as grounds for a "regime of *access*".[562] (Emphasis in original). Trinidad and Tobago's argument is simply incorrect as a matter of law: while artisanal fishing rights can be preserved by a right of transboundary access for the non-exclusive exploitation of fish resources, a regime of access is by no means the sole method contemplated by international law. To the

559 *Eritrea-Yemen (Second Stage: Maritime Delimitation)*, para. 101.

560 Memorial of Barbados, para. 126.

561 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Articles 6, 8 993 UNTS 3 (rights to work and subsistence).

562 Counter-Memorial of Trinidad and Tobago, para. 213.

contrary, where, as here, a State refuses to permit limited transboundary access, traditional artisanal fishing rights constitute a special circumstance warranting adjustment of the provisional median line.

417. As Barbados indicated in its Memorial, decisions of the ICJ, international arbitral awards, and eminent publicists concur that access to fishing resources can constitute a special circumstance requiring adjustment of the provisional median line.[563] The relevant question, as the Court explained in *Jan Mayen*, is "whether any shifting or adjustment of the median line, as fishery zone boundary, [is] required to ensure equitable access to the . . . fishery resources for the vulnerable fishing communities concerned."[564] If that possibility applies to an area of overlapping claims, as in *Jan Mayen*, it applies equally, if not *a fortiori*, in the context of traditional artisanal fishing rights exercised in an area formerly part of the high seas.

418. Here, even applying the more stringent test set forth in *Gulf of Maine*, which asks whether an adjustment to the median line is required to avoid "catastrophic repercussions for the livelihood and economic well-being of the population,"[565] Barbados' claim should prevail. To establish the line of delimitation in disregard of the traditional artisanal fishing rights of Barbadian nationals would devastate the

---

563 Memorial of Barbados, para. 134. Substantial State practice supports the proposition that vested traditional artisanal fishing rights can require an adjustment to the median line under some circumstances. In no fewer than seven instances, traditional fishing has directly influenced the delimitation method and course of the boundary line. See Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations", in 1 *International Maritime Boundaries* 75, 81-84.

564 *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, para. 75.

565 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States)*, para. 237.

artisanal fishing communities of Barbados, as well as Barbados' economy as a whole. Barbados' reliance on flying fish, as the evidence adduced above demonstrates, is unique in the Caribbean.

419. Trinidad and Tobago's effort to distinguish *Jan Mayen* is therefore unavailing.[566] As in *Jan Mayen*, the affected population here relies critically on access to the fishing resources at issue. *Jan Mayen* did not, as Trinidad and Tobago proposes reading it, suggest that an adjustment would only be appropriate where the affected population is "almost wholly dependent on fishing."[567] Even if it did, this standard would clearly be met in the present case. Moreover, as the facts clearly establish, Trinidad and Tobago's *de minimis* interest in the fisheries resources at issue cannot be equated with Barbados' critical dependence on them; and relates in any event to a different maritime area within 12 nautical miles of the coast of Tobago. An adjustment of the median line appears to be not only appropriate, but the only way to ensure the protection of the rights of Barbados's fisherfollk.

### (D) The judgments in *Qatar v. Bahrain* and *Cameroon v. Nigeria* do not cast doubt on the relevance of artisanal fishing rights to maritime boundary delimitation

420. Trinidad and Tobago obliquely posits that "recent decisions have suggested that historic activity, whether in the form of fishing activities or other forms of resource exploitation, could be relevant to delimitation only if they led to, or were bound up with, some form of recognition of territorial rights on the part of the State concerned."[568] The ICJ's decisions in *Gulf of Maine* and *Jan Mayen*, and the award in *Eritrea/Yemen*, the precedents most directly on point, contain no hint of such a novel

566 Counter-Memorial of Trinidad and Tobago, para. 217.

567 *Ibid.*

568 *Ibid.*, para. 219.

requirement. Nor does either of the precedents cited by Trinidad and Tobago support this proposition.

421. It is true that in *Qatar v. Bahrain* the ICJ declined to consider Bahrainian pearl fishing a special circumstance.[569] But the nature of Bahrain's claim in that case differed vastly from Barbados' claim here. First, the evidence in *Qatar v. Bahrain* established that "the pearling industry [had] effectively ceased to exist a considerable time ago."[570] Second, Bahrain did not claim, still less establish, that its fisherfolk relied on pearl fishing such that the failure to adjust the maritime boundary to preserve their ability to continue to engage in pearl fishing would entail dramatic economic consequences for either the State or its fisherfolk. Finally, Bahrain based its argument on an asserted exclusive right to exploit the pearling banks, a claim rejected on the facts by the Court. Barbados, by contrast, asserts an acquired, non-exclusive right, on behalf of its nationals with its attendant lower threshold of proof. The only other purported authority for Trinidad and Tobago's assertion that "fishing activities . . . could be relevant to a delimitation only if they led to, or were bound up with, some form of recognition",[571] *Cameroon v. Nigeria,* involved oil concessions; it has no relevance to the special circumstance of traditional artisanal fishing.[572]

---

569 *Qatar v. Bahrain*, paras. 235-36.

570 *Ibid.*, para. 236.

571 Counter-Memorial of Trinidad and Tobago, para. 219.

572 *Cameroon v. Nigeria*, para. 301.

## CHAPTER 8 CONCLUSION AND SUBMISSION

In conclusion, for the reasons set out in this Reply and in the Memorial, and reserving the right to supplement these submissions,[573] Barbados responds to the submissions of Trinidad and Tobago as follows:

(1) the Tribunal has jurisdiction over Barbados' claim as expressed at Chapter 7 of the Memorial and that claim is admissible;

(2) the maritime boundary described with precision at Chapter 7 of the Memorial is the equitable result required in this delimitation by UNCLOS and applicable rules of international law;

(3) the Tribunal has no jurisdiction over Trinidad and Tobago's claim beyond its 200 nautical mile arc; and

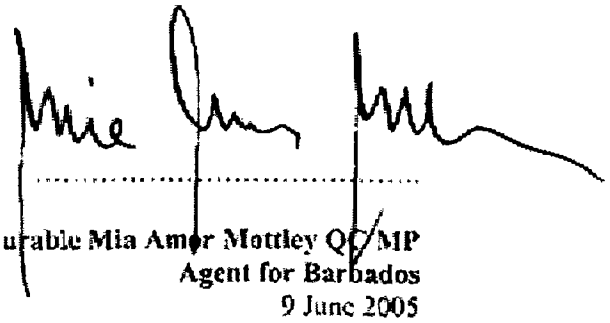
(4) notwithstanding jurisdiction and admissibility, the delimitation proposed by Trinidad and Tobago represents an inequitable result. Being thus incompatible with UNCLOS and the applicable rules of international law, it must be rejected in its entirety by the Tribunal.

---

573 For this purpose, Barbados recalls the terms of the Permanent Court of Arbitration's letter to the Co-Agents for the Parties dated 20 September 2004, wherein it was stated that the Tribunal had noted, *inter alia*, Barbados' concerns about the asymmetry in the procedures for written pleadings, as expressed at the meeting of 23 August 2004 and in its subsequent letter dated 10 September 2004, and Trinidad and Tobago's response; and that the Tribunal reaffirmed that, upon completion of the second round of written pleadings, if there is any asymmetry in the claims advanced or in the pleadings, the Tribunal will address that asymmetry. (Reply of Barbados, Appendices 52A, B and C, Vol. 3.)

Barbados accordingly affirms its claims as expressed in its Memorial and repeats its request that the Tribunal determine a single maritime boundary between the EEZs and CSs of the Parties that follows the line there described.

Signed:



**The Honourable Mia Amor Mottley QC MP**
**Agent for Barbados**
9 June 2005