The Peace Palace
The Hague
The Netherlands

Thursday, 6th July 2005
DAY ONE

GUYANA
and
SURINAME

BEFORE:

THE ARBITRAL TRIBUNAL:

H.E. Judge Dolliver NELSON (President)
Professor Thomas FRANCK
Professor Hans SMIT
Professor Ivan SHEARER
Dr. Kamal HOSSAIN

PCA REGISTRY
Ms Bette Shifman - Registrar
Mr Dane Ratliff - Assistant Registrar

PROCEEDINGS

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THE PRESIDENT: First of all, I must welcome all of you to the Hague on this important dispute. We have a timetable, as you know, but before I would just like to make one point that here we are dealing with two poor developing countries, which must be borne in mind. Secondly, I myself coming from the region must remind this tribunal that Latin America has had a glorious history with respect to successful arbitration. It is one of which Latin America should really be proud.

As I said I will be extremely brief, but I would like to go into what Latins call "in media res" as quickly as we can. We have not much time. I would like to raise a point on the tidying up process. There are interns who are here, who have taken an oath of confidentiality, to help merely with the proceedings in the tribunal.

As you know, today, 7th July 2005, we are dealing with the matter of access to documents. On Friday, 8th July 2005, we will be dealing with the issue entitled "Need for hearing on Suriname's preliminary objections".

I have here Guyana, 11 am to 12.30 pm. Does the Agent of Guyana want to say anything?

SIR SHRIDATH RAMPHAL: Mr President, Members of the Tribunal, let me start by extending Congratulations to you. I am saying this on behalf of both parties and I know that I do so on behalf of all of us on your recent re-election to the ITLOS Bench. It is a most handsome tribute to you personally, as it is to the tribunal as a whole, whose credentials you have so substantially helped to establish since its initial creation. Let me also welcome to the
tribunal in place of Mr Allan Philip, whose loss we all so sadly mourn, Professor Ivan Shearer, who we have welcomed, I know, on paper, but with whom we are interacting on the tribunal for the first time. We trust, Professor Shearer, that you will find your membership of the tribunal professionally stimulating and personally satisfying. We pledge to you, as we have done earlier to your colleagues on the tribunal, Guyana's commitment to assisting the tribunal in all appropriate ways and discharging the task that the parties have together entrusted to you, the task, as we see it, of settling once and for all the maritime boundary between Guyana and Suriname.

With these very brief initial remarks to the tribunal on behalf of Guyana, I should try to convey and explain how we come to these hearings today and tomorrow and how we propose to present Guyana's perspectives to you. My colleagues here with me are Mr Paul Reichler of the Washington firm of Foley Hoag, Professor Philippe Sands of University College of London and Matrix Chambers, Professor Nico Schrijver of Leiden University, Dr Payam Akhavan of McGill University and Sarah Altschuller of counsel.

We are of course very pleased to be before the tribunal and to be once again in the company of our colleagues from Suriname and, of course, for all this at this most pleasant time of the year in the Hague. But I would be less than candid with the tribunal if I did not convey at the same time Guyana's disappointment and indeed Guyana's concern that we are here at all at this time for
the purposes that bring us here. When 12 months ago we settled our rules of procedure and agreed the schedule for written pleadings leading to a decision of the tribunal we were really quite confident of the smooth unfolding of that sequence. It was important to Guyana that it should unfold without obstruction or interruption. So great is the mischief from which Guyana seeks relief, as I hope to illustrate more fully tomorrow when we deal with the matter of Suriname's application to suspend the agreed proceedings on the merits.

In July 2004 we settled the tribunal's rules of procedure on a basis which we were confident would eliminate structural road blocks and, of course, we ensured that the tribunal itself was enabled to determine all matters before it consonant with that road map. Yet here we are today discussing with the tribunal obstructions to progress actually encountered and the formal application for the suspension of proceedings. We of course indicated in those days to the tribunal and to Suriname that Guyana would not seek interim measures as a preliminary matter but go forward on the agreed schedule. We have sought to do so. We have sought to do so despite impediments, filing our memorial on time, save for a brief extension occasioned by Guyana's floods. However, instead of reciprocity we have found a pattern of studied impediments to progress from the other side and we have found delays in the tribunal's disposal of them. Of course, we do not complain about the resort to tactical approaches, but tactics must be seen for what they are
and, of course, they must always be legitimate.

In the matter of Guyana's access to documents the Tribunal in its letter of 19th January 2005 urged the parties "to find a solution that gives the parties equal access to colonial archives and their contents in the public domain, while at the same time recognising that each party may have a legitimate interest in the non-disclosure of information that does not relate to the present dispute or which for other valid reasons would be regarded as confidential." Guyana specially accepted this proposed resolution of the issue, and said so unequivocally in our reply of 1st February to the Tribunal.

On the 7th February 2005 the Tribunal reiterated the hope expressed in your 17th January letter "that this issue may be resoled in the spirit of good faith and equality of arms that both parties have affirmed and which is incorporated in Articles 5 and 6 of Annex and Article 7 of the Tribunal's rules on procedure." I think it is fair to say, members of the Tribunal, that Guyana has pursued this path, both in relation to the specifics of documents that have been sought and in relation to suggestions for machinery for review of the documents by the Tribunal itself with the assistance of the parties or even of independent counsel. But our every effort and resolution through a spirit of good faith and equality of arms was met by Suriname with a steadily rising level of intransigence.

Guyana first raised this matter in November 2004. We
were preparing our memorial. As a result of Suriname’s lack of cooperation Guyana was obliged to file its memorial on the 22nd February without having the benefit of that equality of arms, to which the Tribunal itself alluded.

Suriname's response on the 9th March to this extremity was the suggestion that Guyana's request be held in abeyance until after Suriname's counter memorial.

That was on the 9th March. Two months later, on the 13th May, Suriname announced to the Tribunal its intention to file proceedings in relation to the preliminary objection and to request that proceedings on the merits be suspended.

Members of the Tribunal, this sequence of events tends to link the two issues which will engage the Tribunal today and tomorrow, and to link them in ways which are worrisome in the context of that spirit of good faith which, as the Tribunal reminded the parties, is incorporated in Article 5 and 6 of Annex 7 and in Article 7 of the Tribunal's rules of procedure. Today, Mr President, and members of the Tribunal, my colleague Paul Reichler will present our more detailed arguments for an end to Suriname's obstruction of Guyana's and indeed of the tribunal's access to documents that may be relevant to the administration of justice in the case. Professor Schrijver will be available to supplement his presentation. Tomorrow Professor Philippe Sands will present our principal arguments against Suriname's attempt to postpone agreed proceedings on the merits through a
preliminary challenge on jurisdiction which Guyana considers wholly inseparable from the merits of the case and which Guyana also considers to be calculated to induce delay and so to impede the administration of justice in the matter. Dr Akhavan and I will be available then to supplement Professor Sand's presentation.

At the end of our hearings tomorrow it is my hope, Mr President and members of the tribunal, that you will make then or shortly thereafter an appropriate order of the kind Guyana seeks, one that enables access to documents that are genuinely relevant to the matters on which the tribunal needs to pronounce while respecting, of course, every legitimate interest of Suriname, an order that fulfils the aspirations for equality of arms that is the hallmark of true international jurisprudence. I hope also that the tribunal will then ensure that there is no suspension of proceedings on the merits of the dispute before the tribunal by providing again every opportunity within those already scheduled proceedings for Suriname to raise appropriate issues of jurisdiction and admissibility. The tribunal can be assured of Guyana's full co-operation to such ends. Tomorrow, today, of course, and here after. Good administration of justice under Annex 7 of UNCLOS requires, we believe, no less.

Mr President, members of the tribunal, I thank you for this initial opportunity to make these opening remarks. I turn over Guyana's presentation to you on this matter to my colleague, Paul Reichler.

Thank you.
THE PRESIDENT: Thank you very much, Sir Shridath Ramphal, and I will give the floor to Mr Paul Reichler.

MR REICHLER: Mr President, members of the tribunal, I would like to begin by echoing Sir Shridath's words of congratulations to you, Mr President, on your re-election to the ITLOS tribunal and also to reiterate Sir Shridath's words of welcome to Professor Shearer. We are indeed honoured by your presence among us and your participation in this already august tribunal.

As you indicated, Mr President, the reason we are here today is to address Guyana's request for an order that would require Suriname to withdraw its objection to Guyana's access to documents in the archives of the Dutch Foreign Ministry. The origin of these proceedings today can be found in the tribunal's letter to the parties dated 2 May 2005 in which the tribunal indicated to the parties its decision to hold the hearing in The Hague during this week and, in particular, requested that the parties address "the power of the tribunal to make the requested order". Accordingly, I will begin my presentation this morning with the issue raised by the tribunal in its letter of 2 May, that is whether it has the power to issue the order that has been requested by Guyana. It is my intention to demonstrate that it is really beyond question that the tribunal does have such power.

I will then proceed to a second question, whether in the circumstances of this case the tribunal should exercise the power that it unquestionably holds and issue an order that would result in Guyana obtaining access to
the documents to which its access has thus far been blocked by Suriname. It will be my purpose to show that fundamental fairness, equality of arms in international legal proceedings, the rights of the parties to make a full presentation of their case and, in fact, the duty of the tribunal to establish the relevant facts, all require that the tribunal exercise its power and issue the necessary order to facilitate and permit access to these relevant documents.

Finally, I will address a third question which is can the tribunal assure that both parties enjoy access to the relevant documents at issue and at the same time protect against disclosure of information that does not relate to the present dispute or which for other valid reasons should be regarded as confidential. The answer to this question is most definitely in the affirmative as well and I will proffer the conclusion of these opening remarks this morning the elements of a proposed order that in Guyana's view accomplishes all of these legitimate objectives.

Turning to the first matter to be addressed, the power of the tribunal, it is worth nothing that both parties agree that the tribunal's power emanates from UNCLOS Annex 7 and specifically articles 5 and 6 of Annex 7, and from the rules of procedure adopted by the tribunal and the parties a year ago, specifically article 7, sections 1 and 2, and article 11, section 2. I will begin my discussion of the tribunal's power by focusing on those provisions. I promise not to tarry long here since both
annex 7 and the rules of procedure are very well known to
the members of the tribunal, but I do think that it is
worth underscoring a few key fundamental points. First,
it is worth recalling that article 5 of annex 7 states
that unless the parties to the dispute agree otherwise the
tribunal shall determine its own procedure, assuring to
each party a full opportunity to be heard and to present
its case - "assuring to each party a full opportunity to
be heard and present its case". It also bears emphasis
that article 6 of annex 7 provides that the parties to the
dispute shall facilitate the work of the arbitral
tribunal. "They shall facilitate the work of the arbitral
tribunal and, in particular, in accordance with their law
and using all means at their disposal - "using all means
at their disposal" - they shall provide it with all
relevant documents, facilities and information - "using
all means at their disposal the parties shall provide the
tribunal with all relevant documents, facilities and
information". Thus, under these articles taken together
(articles 5 and 6 of annex 7) it is the tribunal's duty to
assure that each party has a full opportunity to be heard
and to present its case and it is the obligation of each
party to facilitate the work of the tribunal, including by
using all means at its disposal to provide the tribunal
with all relevant documents, facilities and information.

Gentlemen, while there is much more to be said, these
article alone provide all the power the tribunal needs to
assure Guyana a full opportunity to present its case by
holding Suriname to its obligation to use all means at its
disposal to provide relevant documents and information. In this case the relevant documents located in the Dutch archives, whose access Suriname has wilfully blocked to know valid purpose other than the tactical objective of keeping them hidden from Guyana and of course the Tribunal.

Indeed, far from requiring Suriname to use all means at its disposal which the Tribunal is empowered to do, the Tribunal in order to accomplish the objectives now before it, need only order Suriname to take the relatively ministerial step of notifying the Netherlands that it withdraws its objection to Guyana's access to the documents at issue here. That is all that is required for the documents to be provided, and for Guyana to enjoy its right to fully present its case to the Tribunal. Just as it is within the Tribunal's right to order Suriname to facilitate the work of the Tribunal by using all means at its disposal to provide documents to the Tribunal it is certainly well within the power of the Tribunal to order Suriname to take the modest step of notifying the Netherlands that it no longer objects to Guyana's access to these documents.

In its written pleading of 13 June to which this is our first opportunity to reply Suriname actually agrees that the Tribunal draws its power from Annex 7 Articles 5 and 6 as well as from the rules of procedure, Articles 7.1 and 7.2. Again the Tribunal is already familiar with the rules of procedure so I will not dwell on that, but it is worth emphasising nonetheless that under Article 7.1 the
Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality, at any stage of the proceedings, and each party is given a full opportunity to be heard and present its case. Significantly the rule gives the Tribunal broad power to conduct the arbitration in the matter it considers appropriate. The only limitations are it must assure equal treatment of the parties, which the order proposed by Guyana is intended to accomplish, and it must assure that each party is given a full opportunity to present its case. Again that is the purpose of Guyana seeking this proposed order.

Article does confirms that the Tribunal is empowered to issue the order that has been requested, especially as have indicated its purpose is to ensure equality of treatment and the right of a party to fully present its case without interference by the other party.

Article 7.2 of the rules specifically incorporates into the rules Article 6 of annex 7. This emphasises the importance the parties and the Tribunal place on Article 6 with respect to these proceedings. Thus the rule says the parties shall facilitate the work of the arbitral Tribunal in accordance with Article 6 of annex 7 of the Convention.

Suriname too in its written pleading cites and quotes Article 7.2 as a source of the Tribunal's power. This is at paragraph 4.1 page 7 of Suriname pleading of 13 June. Suriname goes on immediately following its quotation of Article 7.2 of the rules, at the beginning of the next paragraph which is paragraph 4.2 of the pleading, in the
following manner: "The question now before the Tribunal is what is the precise scope of the obligation of the parties", quoting expressly from Article 7.2 "to facilitate the work of the Tribunal". Suriname posits the question: what is the scope of the obligation of the parties to facilitate the work of the Tribunal. This question which as I have said is drawn from the language of Article 7.2 is a proper one, but it is not a difficult one to answer. The answer is provided in Article 7.2 itself. As I read a few moments ago Article 7.2 requires the parties "to facilitate the work of the Tribunal in accordance with Article 6 of Annex 7 to the Convention."

So the answer to Suriname's question "What is the scope of the parties' obligation to facilitate the work of the Tribunal" is this. The parties must facilitate the work of the Tribunal in accordance with Article 6 of Annex 7, and Article 6 of Annex 7 requires the parties to use all means at their disposal to provide it with all relevant documents and information.

The requirement to provide the Tribunal with all relevant documents and information is expressly part of and plainly within the scope of parties' obligation to facilitate the work of the Tribunal, under both Article 6 of Annex 7 and Article 7.2 of the rules of procedure.

Suriname does not take a contrary position, at least not in its written pleading of 13 June. Rather it says only in paragraphs 4.3 and 4.4 page 8 of that pleading that the obligation of the parties "to facilitate the work of the Tribunal is an obligation owed to the arbitral
Tribunal, it is not an obligation owed by one party to another". Guyana agrees. The parties obligation to use all means at its disposal to provide the Tribunal with all relevant documents and information is an obligation owed to the Tribunal. A fortiori the Tribunal has the power to invoke the obligation that is owed to it, and to demand that a party fulfil its obligation by using all means at its disposal to provide such relevant documents and information as the Tribunal might require. Specifically so that the Tribunal might carry out its responsibilities, responsibilities which expressly include as I stated previously assuring equality of treatment and a full opportunity for each party to present its case.

Suriname appears to agree with this conclusion. Its logic would seem to be inescapable in any event. At paragraph 4.5, page 8 of its written pleading, Suriname states "it is Suriname's position that under the rules governing this arbitration the tribunal in principle has the power to request that one of the parties makes available to it a particular document or documents in its possession that the tribunal considers to be relevant to the dispute over which it has jurisdiction". Let me repeat that. This is Suriname stating that the tribunal has the power to request that one of the parties make available to it a particular document or documents in its possession that the tribunal considers to be relevant. Guyana welcomes this statement. It puts the parties in agreement that under the rules of procedure that govern this arbitration the tribunal indeed has the power to
require the parties to make relevant documents available
to it. In the circumstances of this case, as I have
already indicated, all the tribunal need to do to
accomplish this result is to require Suriname to notify
The Netherlands that it has withdrawn its objection
blocking Guyana's access to the Foreign Ministry's
archives. This is a less intrusive order than one
requiring Suriname to produce relevant documents itself,
an order which in any event Suriname has conceded is
within the tribunal's power to issue.

To be sure, and to be fair, Suriname has attempted to
read some limits into the tribunal's power to order a
party to produce relevant documents. Suriname asserts,
for example, at paragraph 4.5, that the tribunal's order
to a party that it produce relevant documents "should be
related to one or more specific documents" and that it
"should indicate the reasons why those documents are
considered to be (potentially) relevant".

While it is to be anticipated that the tribunal would
be as specific as the circumstances allow in identifying
the documents to be produced and it is also to be
anticipated that where the relevance of required documents
is not readily apparent it would explain its basis for
requiring them especially if requested to do so by one of
the parties. There is nothing in the rules of procedure
or in annex 7 or elsewhere in the Convention that would
require the tribunal to exercise in this manner its
acknowledged power to require the production of documents
by the parties. And Suriname has cited no authority
whatsoever for such a limitation on the tribunal's power. Having accepted that annex 7 in the rules of procedure fully establish the tribunal's authority to order the parties to produce relevant documents, Suriname cannot now invent limitations on that power that are not themselves sourced in annex 7 or the rules that govern this arbitration.

In any event, the bottom line is perfectly clear. Under articles 5 and 6 of annex 7 and under article 7.1 and 7.2 of the rules of procedure, the tribunal plainly has the power to require the parties to fulfil their obligation to use all means at their disposal to provide the tribunal with all relevant documents, facilities and information and direction has acknowledged this. Moreover, under article 11.2 of the rules of procedure, "The arbitral tribunal may take all appropriate measures to establish the facts". "All appropriate measures" would certainly include ordering the parties to produce such documents and other information as the tribunal may deem necessary to establish the facts. I am sure that some of you are well aware that this rule 11.2 is identical to the rules of the International Chamber of Commerce pursuant to which arbitral tribunals have, in fact, in many cases ordered parties to produce documents deemed necessary by the tribunal to establish the facts.

In any event, it would certainly appear that the appropriate measures to establish the facts provided for in article 11.2 would include the power of the tribunal to order the parties to produce such documents and other
information as the tribunal may deem necessary to establish those facts. Suriname's written pleadings is noticeably silent on the subject of article 11.2, by the way.

While the power of the tribunal to issue the order requested by Guyana is clearly established by annex 7 of the rules of procedure, it is worth spending a few minutes reviewing the powers of other international courts and arbitral bodies to gain a better understanding of what powers are considered customary and necessary for the proper functioning of the tribunal. It will be seen through such a review that the prevailing practice, indeed the near universal practice, is that international courts and arbitral tribunals are fully empowered to order parties to produce such documents or other evidence or information as the tribunals deem relevant to a proper determination of the facts or necessary to assure the fairness of the proceedings and the equality of arms.

Here are some prominent examples. I need not remind President Nelson of the rules of ITLOS itself, Article 77, located at tab 13 of the folder of documents which Guyana has provided today, but just for clarity's sake, article 77 of the ITLOS rules of procedure, paragraph 1, "The tribunal may at any time call upon the parties to produce such evidence or to give such explanations as the tribunal may consider to be necessary for the elucidation of any aspect of the matters in issue or may itself seek other information for this purpose".

Article 49 of the statute of the International Court
of Justice (tab 16) "The Court may even before the hearing begins call upon the agents to produce any documents or to supply any explanations; formal note shall be taken of any refusal".

Professor Rosenne's duly respected treatise on the practice of the International Court provides - and I apologise for citing to and including in our folder an older version of the treatise, but Dr Rosenne has assured me that in substance there has been no change - but in the treatise section that we have provided at tab 12, Dr Rosenne writes, "Among the provisions which enable the court to make its own enquiries is Article 49 of the statute by which even before the hearing begins the court may call upon the agents to produce any document or supply any explanation". Professor Rosenne goes on to cite four cases in which article 49 was invoked in this manner, including the well-known Corfu Channel case. These are included in the excerpt from Professor Rosenne's treatise located at tab 12 of Guyana's folder.

To the same effect the rules of the Permanent Court of Arbitration (tab 17) and particularly article 24 - I will not take the tribunal's time by reading every one of these, but this is authorisation under the rules for the tribunal to require the parties to produce relevant documents.

The WIPO rules, particularly article 48 (tab 19) are to the same effect. The London Court of International Arbitration rules, article 22.1(e)(tab 20). Again, the arbitral tribunal may order the parties to produce
documents. Again, the rules of the American Arbitration Association, article 19(3) (tab 21). Am I going too fast here or is this the proper pace to be going through the rules of the other tribunals? I will assume that it is proper because I am told either to hurry up or to slow down.

ICSID. Interestingly, ICSID article 33 provides that the parties may request that the tribunal may order the production of evidence. Pursuant to this provision, ICSID tribunals have regularly ordered States parties to ICSID proceedings to produce relevant documents. Excerpts from decisions and orders in three such cases are included in Guyana’s folder at tab 26. Two of these cases involve Mexico and a third involves an order with respect to production of documents by the United States. I apologise this third case is erroneously cited in our written pleading on 13th June as Monda v Mexico. It is actually Monda v the United States of America. It is located at tab 26, as are the other two orders in the case that are properly cited as being against Mexico.

Another relevant example is from the rules of the Bank for International Settlement, particularly article 9 of the BIS rules (tab 22). This is worth a little specific attention because article 9 of the BIS rules is strikingly similar to article 7.1 of the rules of procedure in this case. Article 9 provides that “the tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the
proceedings each party is given the full opportunity of presenting its case". As I have indicated, this is virtually identical to Article 7.1 of the rules of procedure that govern the present arbitration and under its terms the Bank has been ordered regularly to produce documents requested by an opposing party and ordered by the tribunal. Three typical orders to this effect are located at tab 25 of the Guyana folder.

There are many more examples, in fact, but they really are not necessary. It should be plain from the ones that I have cited that international courts and arbitral tribunals generally are empowered to order parties to produce documents deemed relevant by the tribunal in order to establish the facts to assure equality of the parties, equality of arms, equality of treatment and to assure that each party is afforded a full opportunity to plead its case. This tribunal is no exception. It is fully empowered by the rules of procedure and by annex 7 to order Suriname to produce relevant documents obtained from the Dutch archives or to order the less burdensome task of simply removing this objection to Guyana's access to the documents issue.

The power of the tribunal is thus well established. Accordingly, I would now like to turn to my second topic which is whether the tribunal should exercise that power in the circumstances of this case. In connection with this topic, whether the tribunal should exercise its acknowledged power, there are three fundamental points that I would like to make. Each of these points is
undisputed or fully established by the presentations the
parties have made to the tribunal prior to today.

The three points are: (1) the files to which Guyana
seeks access contain documents that are relevant to this
dispute and important to its resolution; (2) Suriname has
had full access to all of these files and all of the
documents within them and, further, it has used documents
from these files as evidence in these proceedings already;
(3) Suriname has wilfully blocked Guyana's access to the
files. But for Suriname's actions, Guyana would have
enjoyed equal access.

The first of these facts is that the files to which
Guyana sought access contain documents that are relevant
and important to this case. This is obvious from the
titles of the files which are listed in Guyana's letter to
the tribunal of 14 February 2005 and this letter, which I
am sure you are familiar with, is for convenience sake
located at tab 2 of your arbitrator's folder. Just
looking at page 3 of that letter, and I will not consume
your valuable time by reading at length from this
document, but if we can just take a look at the first
items here listed on page 3 - and, by the way, the indices
to these files are publicly accessible, which is how we
were able to learn the titles of the files. Of course,
the reason that these indices are publicly available is to
facilitate public access to the files. Under the first
heading, items, Code 3 legal affairs, etc, British
Guyana/Suriname boundary arrangement, part 1. Netherlands
oversees parts of the kingdom, territorial waters in
Continental Shelf, part 1. The next file Territorial waters in Continental Shelf, part 2. The next file, "Territorial waters in Continental Shelf Great Britain. They sound pretty relevant to me.

The next group, inquiries, Netherlands legal position territorial water. Advisory Committee public international law questions, report territorial sea.

Next one, boundary arrangement Guyana/Suriname, part 2. Boundary arrangement, Guyana/Suriname, part 3.

I think that these file titles speak for themselves as to the relevance of the documents contained therein or the undeniable fact of the likelihood, the high potentiality that they are relevant documents when bearing these names.

There really is no dispute between these two parties about the fact that these files do contain relevant and important documents. Suriname admits this in its written pleading of 13 June. I would refer the tribunal to paragraphs 2.3 to 2.5 at pages 4 and 5 of the 13 June pleading. To be sure, Suriname claims that not all of the documents in these files are relevant to the present dispute. It claims that some of those that are relevant should not be produced for other reasons. I will deal with these objections later, but for present purposes it is admitted by Suriname that there are relevant documents in the files to which Guyana seeks access. Suriname cannot and does not deny this.

The second fundamental and undisputed point is that Suriname has had full access to all of the files and all
of the documents sought by Guyana. This, too, is expressly admitted by Suriname. Paragraph 3.2 of Suriname's 13 June pleading at page 6 states that "the Netherlands Ministry of Foreign Affairs has provided Suriname full access to the restricted archives". Not only that but Suriname has taken full advantage of its full access to the archives to which it has blocked Guyana's access. And it has taken full advantage of its full access by using documents from these very archives that it has prevent Guyana from seeing in the preparation of its written submission on preliminary objections. Suriname has incorporated some of these documents from these files that Guyana is not allowed to see into the very text of its preliminary objections pleading and it has annexed others to the pleading. By Suriname's own admission at least three documents incorporated into its formal preliminary objections application were found by Suriname in the archives to which Suriname has denied Guyana access. Not only that but these documents are among those most heavily relied on by Suriname in the framing of its objection to the tribunal's jurisdiction, including one map or a portion of a map found in one of the files sought by Guyana that is identified as figure one in Suriname's written pleading. Indeed, it is on the basis of this map and accompanying explanatory document, also found in the Netherlands archives, that Suriname bases its very contention that the land boundary terminus is disputed. How can it be fair or consistent with the principle of equality of Suriname to utilise documents
from the files of a third party to which it has wilfully denied Guyana access? Suriname's use of such documents highlights the fact, as I have mentioned earlier, that the files to which Guyana seek access contain relevant documents and important documents. Suriname itself has identified these documents from these files as important. How can Suriname contend that the documents are not relevant or important when Suriname has not only used them itself but relied heavily upon them?

The third well-established point that I want to emphasise is that but for Suriname's objection the Netherlands would have granted Guyana's request for access to the archives. This point cannot be seriously disputed. In fact, the Dutch Foreign Minister, Dr Bot, made it clear to the Dutch Parliament that the reason Suriname refused Guyana's request was solely because of Suriname's objection. I am sorry, I misspoke. Dr Bot made it clear to the Dutch Parliament that the reason he, as Foreign Minister of Suriname ... I think that I am a little tongue tied on this point, but I am going to get it out, I promise you. That the reason Dr Bot refused Guyana's request for access to the documents, Dr Bot acting in his capacity as Foreign Minister of the Netherlands, refused Guyana's request for access to the Netherlands' documents was solely because of Suriname's objection. That was the only reason he gave. His remarks to the Parliament are included at tab 9 of Guyana's folder. Both in the original Dutch and an English translation. In relevant part this is what he said. "On 7 December 2004 in
response to my request for its opinion, the Government of Suriname declared that it objected to Guyana being given the opportunity to inspect files. Also in view of the historical and special bilateral relationship between the Netherlands and Suriname - "in view of the historical and special bilateral relationship between the Netherlands and Suriname" - and in view of the lack of obligation under international law, I decided not to allow Guyana to inspect files". The position of the Dutch Government to deny Guyana access to the relevant archives because Suriname objected to such access was reiterated in the Foreign Ministry's letter to Professor Schrijver of 22 December 2004. This letter is found both in original Dutch and English translation at tab 4 of your folder. In that letter, the Ministry of Foreign Affairs cited Suriname's objection and explained "considering the public interest of making the relevant files available to the public, on the one hand, and the interest of good relations with Suriname, on the other, I regard the latter as more important. I therefore refuse your request".

Suriname does not deny that it insisted that the Dutch government deny Guyana's request for access to the Foreign Ministry's archives; nor does it deny that the Dutch government complied with this request. However, at the same time Suriname claims that the files are "restricted", implying perhaps that they might not have been made available to Guyana even if Suriname had not intervened to thwart Guyana's access to them. This is a proposition that simply cannot be sustained. In the first
place, as indicated, the Dutch government informed the
Parliament and informed Professor Schrijver that the sole
reason for its refusal of Guyana’s request was Suriname’s objection.

Second, in the past the Ministry of Foreign Affairs
has routinely granted public access to the very files at
issue in this case. We are aware that this was done on at
least three such occasions which we are bringing to the
attention of the Tribunal. Two of these occasions are
cited in Guyana’s written pleading of 13 June at footnote 43. These are also in the folder at tab 28. These are
published studies of the historical relations between the
Netherlands and Suriname which indicate from the list of
files consulted that the authors were given access to the
same Foreign Ministry archives to which Guyana’s access
has been blocked. Since that submission on 13th June we
have identified a third historical study which likewise
benefited from the authors’ access to the archives in
question. The latter study is by Gurt Ustendi and Ingar
Clinkers. In English translation it is entitled
Tightening Kingdom Bonds, the Dutch De-colonisation
Policies in the Caribbean, 1940-2000. It is published by
Amsterdam University Press in 2001. Thus Suriname cannot
show that these archives are in any way "restricted". In
fact the only one whose access to them has been restricted
is Guyana, and that is because of Suriname’s actions.

Suriname has suggested that for purposes of this
arbitration the archives should be treated as belonging to
Suriname itself, but Suriname has given no plausible
reason why the Tribunal should do this. In word as well as deed Suriname has made it plain that the archives belong to the Netherlands and not to Suriname. For example at paragraph 3.5 page 6 of Suriname's written pleading of 143 June Suriname writes "It should be noted that should Suriname not object to the Netherlands giving Guyana access to some or all of the files, the ultimate decision whether or not to do so would still rest with the Netherlands government." I am quoting from Suriname here, "the ultimate decision whether or not to do so would still rest with the Netherlands government". How then can Suriname argue that the Tribunal should consider the files as belonging to Suriname. The Dutch harbour no such allusions. Dr Bout, the Foreign Minister, told the Parliament that (and this is from a different portion of the same statement to Parliament which is in the arbitrators' folders) "The Netherlands did not want to take a decision on access to the archive files without first consulting Suriname, even though the final decision on making available Netherlands' archives from the pre-independence period rests with the Netherlands." - "Even though the final decision on making available Netherlands' archives from the pre-independence period rests with the Netherlands".

Suriname appears to base its argument on ownership of relevant files in the Dutch archives. In a letter received in 1979 from the Dutch Prime Minister on the eve of Suriname's independence promising that newly independent Suriname would be given access to the archives
held by the Netherlands in the Hague. But promising to
another access to one's documents is an attribute of
ownership, not a surrender of them. Certainly the Dutch
government never took or accepted the position that its
archives belonged to Suriname. The Foreign Minister's
recent statement to Parliament confirms this.

In summary, it either is not or cannot be disputed
that (1) the files to which Guyana seeks access contain
relevant and important documents; (2) that Suriname has
had full access to these files and has used documents from
them as a key element in the presentation of its case thus
far; and (3) Suriname has intervened with the Dutch
government to prevent Guyana from enjoying equal access to
the documents, and it is for this reason that Guyana has
not enjoyed equal access to the documents or equal
treatment or equality of arms.

Indeed it is readily apparent that but for Suriname's
actions Guyana would have enjoyed access to the documents
on an equal basis with Suriname in the same manner in
which Suriname acknowledges that it has enjoyed access to
the archives in the United Kingdom on an equal basis with
Guyana.

It is therefore undeniable that as a result of
Suriname's actions Guyana has been prejudiced in the
presentation of its case before this Tribunal. It has
been forced to file its memorial without access to the
relevant documents, even though it first brought this
matter to the attention of the Tribunal in November 2004
and first requested and ordered in December 2004. And it
has been forced to respond at these hearings to Suriname's petition for a suspension of the proceeding on the merits without access to the documents, even as Suriname's petition is heavily relied on. This plainly amounts to a negation of equality of arms, a denial of equality of treatment and a rejection of Guyana's right to make a full presentation of its case. Put simply Suriname has deliberately denied Guyana access to relevant documents that might be helpful to it in the presentation of its case or in the refutation of Suriname's case. For tactical advantage Suriname has created a situation in which it has been free to choose selectively from the Dutch historical records and present only those documents which out of context might appear to support its case.

Of course Suriname cannot be expected voluntarily to introduce to the Tribunal relevant documents that it came across in the Dutch archives that harm its case or strengthen Guyana's. Unless Guyana is permitted to access these files these documents will never see the light of day, and will certainly not be brought to the attention of the Tribunal. Such a result would not only be unacceptably prejudicial to Guyana, but it would also impair the Tribunal's function of finding the facts. As a matter of equity and fundamental fairness and the proper administration of justice Suriname's deliberate prevention of Guyana's and the Tribunal's access to relevant documents should not be allowed to stand. Accordingly given the power of the Tribunal under Annex 7 and the rules of procedure, which I have already discussed, it is
imperative that the Commission exercise its power and prevent a manifest injustice from being perpetrated. In fact it is already too late for that, an injustice has already been perpetrated by Suriname with prejudicial effects on Guyana even at this stage of the proceedings. The Tribunal must not allow this state of affairs to continue. It should order Suriname to withdraw its objection to Guyana's access to the archives of the Netherlands Foreign Ministry.

I come now to the third and final part of my presentation this morning. I trust I have shown in the first two parts that the Tribunal was fully empowered to issue the order that Guyana requested and that enforcement of the rules of procedure, fundamental fairness and the proper administration of justice require that the Commission exercise its power to issue such an order.

What remains to be discussed is the content of the order that should be issued. As far as the content of the order is concerned Guyana is guided by the views already expressed by the Tribunal in its letter to the parties dated 17 January 2005. In that letter with which you are undoubtedly quite familiar but which for your convenience is included at tab 1 of Guyana's folder, the Tribunal had this to say: "The Tribunal would like to emphasise to both parties the importance of good faith cooperation and equality of arms in international legal proceedings. Not only do these concepts underlie fundamental principles of international law, they are laid down specifically in the instruments governing the present arbitration". The
letter then cites Articles 5 and 6 of Annex 7, and
Articles 7.1 and 7.2 of the rules of procedure as I did
previously, and the letter refers specifically to the
obligation of the parties to "facilitate the work of the
arbitral Tribunal and provide it with all relevant
documents, facilities and information".

Resuming the text of the letter "It is with these
principles in mind that the Tribunal would like to urge
the parties to find a solution that gives the parties
equal access to colonial archives and their contents in
the public domain while at the same time recognising that
each party may have a legitimate interest in the non-
disclosure of information that does not relate to the
present dispute or which for other valid reasons should be
regarded as confidential".

Mr President and members of the Tribunal, as Sir
Shridath Ramphal reported Guyana made every effort to
reach a solution along these lines with Suriname. But it
became clear that Suriname's position on access to the
documents was immutable. Suriname would not countenance
any access by Guyana to any of the files in the Dutch
archives. This position was made plain in writing to the
Tribunal and to us on several occasions by Suriname's
representatives. Only an order from the Tribunal would
cause Suriname to change its position. Accordingly it
remains for the Tribunal to establish by order the
solution that it encouraged the parties to adopt

Specifically the order should in Guyana's view require
Suriname promptly to notify the Netherlands of the withdrawal of its objection to Guyana's access to the specific files in Guyana's letter to the Tribunal of 14 February 2005, which I cited a few moments ago, as well as other files from which Suriname has already extracted documents that it has used or will use as evidence in this case. To the extent that Suriname believes that particular documents in any of these files are either unrelated to the present dispute or for any other reason should be kept confidential these documents could be removed from the files; that is the order could provide that these documents could be removed from the files and produced directly to the Tribunal for the Tribunal's determination as to whether they should be accessible or not.

As part of the order a document review process could be established, and should be, based on the precedent established by the arbitral Tribunal in the OSPAR arbitration between the Republic of Ireland and the United Kingdom. In this procedure documents claimed by Suriname to be either unrelated to the present dispute or otherwise deserving of confidentiality would be reviewed in the Hague at the offices of the PCA Secretariat by the Tribunal or its designee and by independent counsel for each of the parties who would be required to sign confidentiality agreements. Counsel would attempt to reach agreement on accessibility of each of the documents subject to this procedure, failing which the Tribunal or its designee, after hearing the positions of counsel,
would make the determination as to whether it should be accessible or not. In this manner the legitimate interests of both parties and the objective set by the Tribunal in its letter of 17 January 2005 could be fairly and expeditiously achieved.

Such a procedure would accommodate Suriname's principal concerns about Guyana's access to the documents. First, that many of the documents are not related to the present dispute but to a separate land boundary dispute between the two states; and second that there may be reasons other than lack of relevance for treating some documents as confidential. The procedure we are proposing would assure that non-relevant documents and others deserving of confidentiality as determined by the Tribunal or as agreed by the parties would remain outside Guyana's purview.

The procedure that Guyana is proposing would also accommodate Suriname's concern that the files to be accessed be identified with appropriate specificity. Fortunately the index to the files is, as I have said, publicly accessible at the Dutch Foreign Ministry, and Guyana has been able to identify the specific files to which it requires access. These are set forth as indicated in Guyana's letter to the tribunal on 14th February 2005? In addition, as Suriname itself has acknowledged in its recent pleading of 13 June, Guyana should not enjoy access to any files from which Suriname has drawn documents and introduced them as evidence in this case, in so far as access to such files may be
necessary for Guyana to respond effectively to the
evidence introduced by Suriname or to put it in proper
context.

We do not understand Suriname to continue to insist,
as it did in the past, in correspondence with the
tribunal, that Guyana be required to identify every
specific individual document to which it seeks access.
For Suriname to maintain such a position would be most
cynical. It would create what we in the US would call a
classic Catch 22 situation. That is when someone sets up
a situation, when someone sets up pre-conditions that are
intended to be and are, in fact, impossible for another to
fulfil, this is considered bad faith. How can Guyana
possibly be expected to identify specific individual
documents when it has been denied access to the files and
has therefore never been able to see the documents itself?
How can Suriname insist that such a requirement be
imposed on Guyana when it is Suriname itself through its
objection to the Dutch Government that has made it
impossible for Guyana to specifically identify particular
documents and has made it impossible for Guyana to satisfy
the requirement which Suriname would have the tribunal
impose? Thus we are pleased that it no longer appears
that Suriname is insisting on this cynical requirement.
IN any event, if Suriname's objective is to avoid a
fishing expedition, that objective would be a reasonable
one, but there are other legitimate ways to accomplish it
and these are already incorporated into the order Guyana
is proposing. First, the order would apply to and permit
access only to files that Guyana has already specifically identified in this 14 February letter to the tribunal as well as files from which Suriname extracts documents that it introduces into evidence. From the titles of these files and, of course, from the fact that Suriname would have extracted documents and used them as evidence in the case, it is plain that Guyana has not embarked on a fishing expedition but that Guyana has limited its request to those documents that are very likely to contain relevant documents. It has limited its request to those files that it is very likely to contain relevant documents.

Secondly, the proposed order gives Suriname the right to object to Guyana's access to any specific document from these files that is not related to the present dispute or is otherwise deserving of confidentiality. No fishing expedition has been launched and no fishing expedition is possible under the very provisions of the order which Guyana is proposing.

Suriname's final objection is to any order that would allow Guyana access to documents relating to the merits of the present dispute, at least at this time. According to Suriname - I am quoting again from its pleading of 13 June - "at this stage the tribunal is only competent to request that the parties make available to it specific additional documents that it considers relevant to and necessary for it to decide preliminary objections, ie whether there is an unsettled dispute concerning the location of the land boundary terminus and documents that may be relevant to
and necessary for decision with respect to the question of admissibility of submissions 2 and 3 of Guyana”.

Guyana welcomes Suriname's agreement that the tribunal is empowered to require the parties to produce relevant documents. However, Guyana disagrees that the tribunal's power is presently limited to requiring only the production of documents related to the jurisdictional inadmissibility objections raised by Suriname.

In the first place, the mere filing of preliminary objections by Suriname does not under the rules of procedure governing this arbitration automatically suspend the proceedings on the merits or deprive the tribunal of its acknowledged power to order the production of documents relevant to all aspects of the dispute, merits as well as jurisdiction. Under the rules that govern these proceedings, Suriname is required to request that the tribunal suspend the proceedings on the merits while it deliberate on the preliminary objections and it is for the tribunal to decide whether to grant Suriname's request or not. Until such a request is granted, the tribunal's authority to order production of documents relating to the merits is undisturbed and indisputable. Moreover, as my distinguished colleague, Professor Sands, will demonstrate tomorrow, there is absolutely no justification whatsoever for suspending the proceedings on the merits pending a determination of the preliminary objections. This is because among other reasons Suriname's jurisdictional argument is not exclusively of a preliminary character, but is instead inextricably linked to the merits of the
dispute and cannot possibly be resolved without a
consideration of the merits. Thus it would be a manifest
injustice and waste of resources to suspend proceedings on
the merits and to spend six months to a year on
preliminary objections only to come to the inevitable
collection that they must be joined to the merits in any
event. I will leave this argument with Professor Sands,
but, as far as my own presentation is concerned, there is
no reason for the tribunal's order on access to the
documents to be restricted to documents pertaining only to
the issues of jurisdictional and/or inadmissibility as
Suriname suggests, rather the order should cover access
not only to these documents but also to documents relevant
to the merits of the dispute.

Mr President, members of the tribunal, this concludes
my presentation for this morning, unless there are
additional questions or any questions that any of you
would like to put to me. I thank you for your kind
attention. It truly is an honour to appear before you.

THE PRESIDENT: Before you leave, Judge Shearer would like to
pose a question to you.

JUDGE SHEARER: I thank you, Mr President. I understand your
argument, Mr Reichler, that you take the position that the
archives to which you want access belong to the
Netherlands and not to Suriname, but subject to resolving
that, does your argument depend on the archive material
belonging to a third party? I ask you a hypothetical
question. Would your argument be the same were Suriname
never to have been a colony or part of another country?
If it had been at all relevant times an independent sovereign state, would your argument about access to materials be the same? Sort of part two of that question is that it follows on from that that in paragraph 14 of your written observations of 13th June this year, you give an example of the kind of documents to which you want access and it seems to me that the missing piece, if you like, is evidence by a document to which you do access but it raises the question whether there must be more to be found if only one had access to that full file. You give that as one example, but you do not give any other examples. I am just wondering whether you do have other examples of that kind and whether this is the sort of thing to which Professor Petrochilas's book to which you referred at paragraph 32 is giving. In other words, I am trying to find out whether there is some way in which we can more specifically identify particular documents to which you want access rather than to files that simply have a general title. Thank you, that is my questions.

MR REICHNER: Thank you very much. Let me take them one at a time and by the time I get to the second one I might ask for a summary again.

I believe, Professor Shearer, that your first question was whether our argument depends upon the fact that the archives at issue are owned by and belong to the Netherlands.

JUDGE SHEARER: That is right.

MR REICHNER: Put it this way, we are not suggesting that in the ordinary circumstances that one party may take compulsory
discovery from another party in a proceeding of this type. That is not what we are contending nor is it anything that the tribunal is being asked to order or even remotely to consider. The fact is that we are talking about the property of the Netherlands; that is very clearly established, the Netherlands considers these documents, these archives to be its own property. Under general international law, I would submit, as reflected, for example, in the Restatement of Foreign Relations Law, third edition, section 209 (tab 11) it makes it very plain that in the case of the separation of part of the state from another state, as in the case of decolonisation, however we view Suriname's independence, whatever its constitutional status prior to independence, Suriname argues that it was not a colony but it was an integral part of the kingdom of the Netherlands. Even so, when a state is formed from the integrity of another state and assumes independence the property that is located with the metropolitan power does not succeed to the successor state or entity or portion of the former state, whether that new state was created from the kingdom of the Netherlands, from a part of the kingdom of the Netherlands or whether it was hypothetically a colony that was given its independence. What would succeed to the new state, in this case Suriname, would only be that property including files, records, archives that were located in Paramaribo, for example. Under general international law as well as under the Dutch interpretation of who owns this property, these archives, they most definitely belong to the
Netherlands. For that reason, of course, we are not
asking for any order directed at the Netherlands, which is
not a party to these proceedings, but what Suriname has
done is it has violated its commitment to facilitate the
work of the tribunal to work in good faith co-operation,
it has deliberately, undeniably, blocked Guyana's access
to these documents by insisting that the Netherlands not
allow Guyana to have access. That being the case, what is
required and all that is required is an order to Suriname
that it fulfil its obligations by withdrawing its
objections. In any event, the alternative is that
Suriname has acknowledged in their pleadings that they
have had full access to all of the files and all of the
documents and they have copied them. They have used some
of them in their pleadings. Suriname could just as well
be ordered by the tribunal to produce relevant documents
that it has copied or obtained from the files of the
Netherlands. Beyond this, even in the case of documents
which originated in Suriname in Paramaribo, or for that
matter in George Town, Guyana, if the tribunal were to
believe that there were documents in the possession of
Suriname, even those that originated in its own files or
in the possession of Guyana that originated in its own
files, while neither party would have the right to compel
discovery from the other, the tribunal would certainly
have the authority to require either party or both parties
to produce relevant documents from their own files, if it
deemed such documents important to its mission of finding
the facts or for equality of the parties or to give both
parties a full opportunity to present their case. I suppose I have come full circle here and I hope that I have at least addressed your question properly, but in the end it really makes no difference whether the documents were, as is very clear, and remain the property of the Netherlands or whether we are talking about documents that belong to Suriname, either because they copied them or otherwise. The tribunal would certainly have the power to issue the order. The appropriateness of issuing the order, however, is certainly affected. This is the second question I address. The appropriateness and the necessity for the order and the manifest justification for the issuance of the order is based on the fact that certainly in large part that these are Dutch documents to which Guyana would very easily have had access if Suriname had not interfered with that process, interposed an objection and blocked Guyana from obtaining evidence which Suriname is now using against Guyana. That circumstance plainly is within the jurisdiction of the tribunal to remedy and I suggest that the facts which are undeniable call out for the remedy.

As I feared I would, I have lost your second question.

JUDGE SHEARER: The second part of the question was how specific need one be? You give a good example, I think, of a specific document to which you desire access in paragraph 14 of your written observations, but I wonder whether it is enough. The list of files that are held by the Netherlands Foreign Ministry which have just general
titles about maritime delimitation, would that be sufficiently specific, whether you have precedents that allow access to those general sort of categories. That is why I mentioned Professor Petrochilas's book. He does seem to be saying that you really need to have very good reasons and be quite specific about the documents to which you require access, and not to open up a kind of general voyage through all the documents that might be there.

MR REICHLER: Thank you for repeating the question for me. In the first place the reason that we are able to identify this document by way of example with some degree of specificity is because Suriname extracted it from the files and used it and relies upon it very heavily in their submission on preliminary objections. So we know that document exists because that is one of two or three to which Suriname has revealed to us through the process of presenting its arguments on preliminary objections. Certainly it would be desirable, if it were possible, that a party seeking access to documents, be as specific as possible. Specific as possible in identifying the documents to which it seeks access. There is no question but that that should be the case, that Guyana should be as specific as possible in identifying the documents. But in these circumstances I think it is plain that Guyana is being as specific as possible. These are documents that it would have had access to and it would be able to defend the admissibility or use of relevance of all of these documents but for the fact that Suriname has blocked Guyana's access.
By virtue of the fact that these documents are
normally as we have shown available to the public - and as
further evidenced by the fact that the file titles are
publicly available, Suriname could not keep the file
titles from us - we were able to get file titles and I
would submit that those file titles show that we are not
on a fishing expedition. That we have limited our request
to files that have titles that indicate high likelihood of
relevant documents, and that Suriname admits in their
pleadings that there are relevant documents included among
these files.

The rule that Professor Petrochilas is stating I do
not think one should read that as in the negative, in the
sense that unless you can provide specifics on particular
documents your request should be denied. Clearly it is
the preferable case, the preferred case, and it is the
appropriate approach to require a party to be as specific
as possible.

Here is a situation for the circumstances we have
already been through, and of which I think we are all
aware, that Guyana is being as specific as possible. It
cannot be more specific because Suriname has blocked it,
has prevented it from doing so, and therefore to hold
Guyana to a higher standard of specificity would be
manifestly unfair.

My final words to answer your question, and I am
aware of the passage of time but I do want to do justice
to Professor Shearer's question if I may have another one
minute, is what is the purpose of such a rule; what is
the purpose of the principle which is quoted in the text of Professor Petrochilas. It is to prevent a fishing expedition. It is to prevent imposing hardship or burdens on another party or on the Tribunal by having a scatter shotgun type approach to a request in the hopes that somewhere out there – what we American lawyers routinely do in pre-trial discovery; I am sure you have been vexed by us many time in the past in the way we frame our pre-trial discovery request, to try to encompass anything conceivable that might be relevant. That is the practice in the United States, it is not a good one and I do not recommend it and I certainly do not recommend it here. Nor is it what we are suggesting the Tribunal adopt. The purpose of Professor Petrochilas is talking about is preventing a fishing expedition. We have prevented a fishing expedition here, it is possible to do that in designing the rule in a way that permits this screening procedure so that anything that is not relevant or for other reasons should not be accessible to Guyana will be screened out and we will not see it. That provides protection to Suriname and at the same time without imposing unrealistic and I would say unfair obligations on Guyana to be more specific when it is Suriname itself that has prevented Guyana from being able to satisfy such a requirement.

Thank you, Mr President, and Honourable members of the Tribunal, for your indulgence and I am grateful to you for allowing me to complete my answer to Professor Shearer.
THE PRESIDENT: Thank you very much, Mr Reichler, especially for your prompt oral response.

PROFESSOR SMIT: Mr Reichler, I think in relation to the remedy asked if I were a Minister in the Dutch government that is addressed this question I might well come back and say in the first instance we denied compliance with the request because Suriname requested it, but Suriname now tells us that I should not deny the request on that basis, but that I should evaluate that request on its merits, and I have decided that since the documents are also in the possession of Suriname we will not produce them. Then we are back to where you started, and it would be a very attractive solution politically for the Dutch, because they would not have to take a position that they know is not agreeable to Suriname. Then we are back to where we started, namely whether this Tribunal can order Suriname to produce the documents that you seek.

Secondly on the question of specificity the question is who is going to determine whether these documents are material and, to use an American term, discoverable, because they may be material in the sense that they are probative, but they are still not discoverable because they are part and parcel of the internal deliberations of the Dutch government at the time these questions were addressed to them. Who is going to make that decision? Are you going to make that decision after you have looked at the documents, or is the Tribunal going to make that decision, or is Suriname to make the decision? Those I see to be the crucial questions to be addressed by the
Tribunal at this stage again.

MR REICHLER: If I may answer Professor Smit's question?

THE PRESIDENT: The time is going. I was wondering whether we have a written response from you.

MR REICHLER: Mr President, I would strongly prefer to answer here and now.

THE PRESIDENT: OK.

MR REICHLER: If Professor Smit requests a further written response I will be happy to do it. But I would be prepared to answer the question straight now.

THE PRESIDENT: Please do so.

MR REICHLER: As to the first question, what if the Dutch Foreign Minister denies the request, I do not think that is something that we should presume. It is appropriate for all the reasons that I have stated, certainly the Tribunal has the power to issue the order and for the reasons I have suggested I believe it is manifestly clear that the interests of justice require that such an order be issued. I do not think we should presume that the Dutch Foreign Minister will then turn around and say "I am going to find other reasons". There is no reason to presume one way or the other what the Dutch Foreign Minister will do. In fact it is very plain that the Dutch were prepared to make these documents available until Suriname said do not do it. If Suriname is now under an instruction from the Tribunal to withdraw its objection the Dutch Foreign Minister might very well just as easily, and I would submit even more easily, decide now I can give the documents to Guyana because Suriname is under
instruction. This is what this distinguished arbitral body which is meeting in the Hague and has its Secretariat here, has ordered in the interests of justice, and it is the policy of the Dutch government which it generally is to facilitate and support the peaceful resolution of disputes, and to support international arbitration which is one of the reasons that this country has become the capital of international arbitration. But even so, there is no reason for us to speculate. There is just as good an argument one way or the other and I submit that the Tribunal should perform its function and leave it up to the Dutch Foreign Minister to do his job.

PROFESSOR SMIT: But you are speculating, you speculate that if Suriname withdraws its objection the Dutch government will comply. I am just suggestion that it may well be possible that the Dutch government will not supply. Why should we issue an order on the basis of your speculation rather than on some other speculation?

MR REICHLER: Why should you not issue an order on the basis of your speculation rather than on some other speculation?

MR REICHLER: Why should you not issue an order on the basis of your speculation, because your speculation ...

PROFESSOR SMIT: No, we should issue an order that can properly be directed to the parties. That is what I suggest.

MR REICHLER: There is an alternative. I understand the question better. I would submit that it is a less onerous task to impose on Suriname to merely ask them to withdraw their objection. However, it is certainly within the power of the tribunal, and I believe that I did mention
this in the course of my presentation, to order Suriname
to produce, subject to the same procedure with the same
protections that we are seeking - and I will come to that
question in a moment - to produce all the documents that
it acknowledges that it copied from the Dutch Foreign
Ministry. So, if there is a fear or a concern on the part
of the tribunal that it may issue an order, Suriname
complies with the order but then the fulfilment of the
objective is frustrated by the Dutch Government, there is
an alternative and the order can be issued in the
alternative. The order can be issued to Suriname to
withdraw its objection, but in the event the Dutch
Government for reasons of its own still refuses access,
that Suriname should make available to the tribunal all
such documents as it copied from the archives of the
Foreign Ministry. That would certainly be a way to avoid
any frustration or waste of time.

As far as the other issue, you have asked who is
going to make the decision and you said, "Are you going to
make the decision?" And that is an easy one. The answer
is, no, I am not going to make a decision nor have I
proposed that. What I have proposed on behalf of Guyana
is that the same procedure be followed that was followed
in the OSPAR arbitration and was followed, I believe, to
the satisfaction of the parties. Truly, in that case
there was certainly a smaller number of documents
involved. It does impose on the time of the tribunal or
its designee and the parties if there are a larger number
of documents, but the fact that there may be a larger
number of documents is a question of resource. It is not
a question of justice. To deny Guyana access to documents
to which it should have access, not all the documents, but
the documents to which it should have access, because
there is a plurality or some significant number of them,
only multiplies the injustice of the denial. It is not
Guyana’s fault that there may be some number, some dozens
of relevant documents that are important to these
proceedings and that should be made accessible. Whatever
number there is, if they are relevant and if they are
important to the proceedings, both parties should have
equal access to them. Some cases are larger than others.
Some cases have more documents than others. This may or
may not be one of them. That should not govern the
deliberations of the tribunal, because whatever the number
of documents there is an effective procedure for making
the decision.

I have said that the decision would be made by the
tribunal or its designee. The specific procedure that we
are proposing is that the documents be reviewed or such
documents as Suriname objects to, which may not be all of
the documents, hopefully it would not be all of the
documents, but such documents as Suriname objects to on
the grounds of relevance or for some other reason Suriname
considers that they should be kept confidential, although,
parenthetically, documents that are at least 30 to 50
years old it would be hard to convince me – I am not the
judge of fact about how sensitive or confidential they
should be kept, but they certainly have the right to make
that argument. In any event, those documents would not be accessible to Guyana in the first instance. They would be screened through this procedure. The tribunal could designate one of its members. The tribunal could appoint an independent expert or special master. The tribunal could do it as an entire tribunal or as a chamber of the tribunal. It could sit with representatives of the parties. We are proposing that they be independent counsel, that is outside counsel, such as, for example, Mr Saunders and myself or Mr Saunders and Professor Sands or Professor Schrijver or Professor Soons and Professor Schrijver, both speak Dutch, but outside counsel who would sign confidentiality agreements, and many of us have done this in the past in discovery proceedings in the United States, and I would certainly trust Mr Saunders to abide by that, as I am sure he would have confidence in me. In any event, you would have independent outside counsel together with the designee of the tribunal. In the first instance, the parties would try to reach an agreement, but in the end it would be the tribunal or its designee who would make the decision as to the accessibility of these documents.

PROFESSOR SMIT: Thank you.

THE PRESIDENT: Thank you very much, Mr Reichler. We are running late and I think that lunch was supposed to be from 12.30 to 2 pm. If I am not mistaken, we can meet at 2.30 again. Thank you very much.

MR SAUNDERS: Mr President, just one comment. I guess this comes under the heading of equality of arms. I do not
think that I will need extra time, but should I - I really
do not think I will my presentation is not as long as Mr
Reichler's, but should I perhaps the tribunal would
indulge me and give me the same additional time that Mr
Reichler took.

SIR SHRIDATH RAMPHAL: We have no objection.

THE PRESIDENT: There are no objections either from the
tribunal. Thank you very much. This afternoon we will
hear Suriname's case.

(Adjourned for a Short Time)

THE PRESIDENT: This afternoon we will start with Surinam and I
will give the floor to Mr Saunders.

MR SAUNDERS: I will yield the floor very briefly to my
colleague, Mr Lim A PO.

MR LIM A PO: Mr President, this is indeed going to be very
brief. I will not try to pre-empt the presentations which
Suriname will render shortly, nor will I comment on
Guyana's conduct in the proceedings so far, but what I
wish to stress is that Suriname and Guyana are good
neighbours. That is why the Government of Suriname regret
that the Government of Guyana came to the conclusion last
year that the two countries were not really fit or able to
resolve their differences on the limitation of the
maritime boundary by themselves and, therefore,
unilaterally the Government of Guyana referred these
differences to arbitration. At the same time the Suriname
Government expressed its commitment which I wish to
reaffirm and reiterate to you on this occasion, to
participate in these proceedings in a spirit of co-
operation and fair play, convinced that the outcome of
these proceedings will reflect a well-considered weighing
of the legal merits of the respective positions of the
parties and their legitimate interests. The outcome
should strengthen the bond between the two countries which
must be their ultimate strategic objective.

THE PRESIDENT: Thank you very much. I will give the floor to
Mr Saunders.

MR SAUNDERS: Thank you very much, Mr President and Members of
the tribunal. I am delighted to have the opportunity to
address you this afternoon and to respond to the
presentation that we heard this morning from the Republic
of Guyana.

Counsel for the Republic of Guyana this morning made
an impassioned presentation, arguing that the Republic of
Guyana should be permitted to review and to have copies of
restricted archives in the possession of the Foreign
Ministry of the Netherlands relating to the maritime
boundary dispute at issue in this arbitration. His
argument was based on what he perceives to be concepts of
fairness, procedural due process, need and equality of
arms. I will respond to each one of those arguments
during the course of my presentation, but I thought that
it would be most helpful to the tribunal for me to answer
directly what I assume is the paramount question in the
minds of Each of you. That is why has Suriname refused
access to the archives?

AS the tribunal heard this morning, the Republic of
Suriname has refused to withdraw its objection to Guyana's
request that it be permitted to review and receive copies
of certain archives in the Netherlands Foreign Ministry.
It is, we believe, a legitimate question for this tribunal
to ask why? There are three reasons. First, the nature
of the proceedings themselves; second, the nature of the
documents themselves and, third, the nature of Guyana’s
request.

I will deal with each of those three in turn. First,
the nature of the proceedings, as the tribunal knows, this
is an adversarial compulsory arbitration between two
sovereign states. It is not a commercial arbitration
where only material interests are involved. Important
issues of sovereignty are infused throughout this
proceeding. In fact, the nature of the dispute itself, a
request to delimit a maritime boundary, is essentially an
effort to determine which state is entitled to exercise
sovereignty or sovereign rights over a part or all of the
area in dispute. Where two states are involved, it is
essential for the parties not to interfere or impugn the
sovereignty of the other. And one of the roles that this
tribunal serves, I respectfully submit, is to ensure that
that will not happen.

Fundamental to an adversarial proceeding, especially
between two states, is that each party must prove its own
claims or defences. That is why each party is expected to
co-operate with the tribunal in making available to the
tribunal the documents that it believes will best
establish its claims or defences. It is not the
obligation of either party to co-operate with its
adversary in helping its adversary prove its claims or defences. For that reason, therefore, I am quite certain that in its memorial Guyana did not submit or at least tried not to submit documents from its own files or elsewhere that might help Suriname establish its defences. That is hardly surprising since that is the nature of an adversarial proceeding. Yet the request of the Republic of Guyana is a request that Suriname do just that. Although the request is phrased in its written pleadings in lofty phraseology, such as verifying assertions or enabling the tribunal to be fully appraised of relevant historical background or giving the tribunal the ability to carry out its function, what is really happening here is a request by Guyana for documentary material that it hopes will make it possible for it to prove its case or rebut Suriname's. There should be no mistake about that. This is not a neutral exercise in which an academic is trying to write a history of the region. This is an adversarial proceeding in which each party is trying to win and will use all lawful means at its disposal to do so.

There is another fundamental notion in arbitration between two states. It is that before a state files a claim it should know its case. It is not open to a state to file a claim first and then look for evidence to support that afterwards. As we would say in America, that would be an example of ready, fire, aim.

If Guyana did not believe that it had sufficient evidence to support its claim, it should not have brought
it. For that reason, any notion of prejudice or substantial disadvantage to Guyana by Suriname's action must be rejected out of hand.

To sum up this point, Suriname refuses to withdraw its objection because the nature of the proceeding itself simply does not permit or recognise the type of request made by Guyana. We do not know of a single instance in which a proceeding between two states resulted in the granting of an order of the sweeping nature requested by Guyana in this case. We have not found any and Guyana cites none.

The second reason why Suriname objects and refuses to withdraw its objection has to do with the nature of the documents themselves. The Foreign Ministry of the Netherlands as you know holds the archives at issue. They are restrictive. They consist largely of internal communications between and among various officials in the Netherlands and Suriname and internal notes including notes of conversations as well as drafts. By their nature they were never meant to be shared with other countries, especially not countries with whom the Netherlands or Suriname had border disputes. They also include correspondence with the British and other foreign governments.

The archives at issue were among the files that, in a practical and real sense, were Suriname's when it was a constituent part of the Kingdom of the Netherlands. They are part of its patrimony, part of its history and essential to its foreign relations. That is why in 1975
when Suriname came fully independence the Netherlands took
the deliberate step of guaranteeing in writing Suriname's
continuing access to the archives after it achieved
independence. Access to those archives was thought
necessary because Suriname was involved in ongoing border
disputes with its neighbours. The archives were deemed
essential or at least important to Suriname's defence.
The Netherlands did not guarantee similar access to
Suriname's neighbours, nor I think it is fair to say would
it have even considered such a request as long as Suriname
objected.

Much has been made in this proceeding of the question
of ownership; does Suriname actually own the archives? I
respectfully submit that that question is irrelevant. As
I have said before Suriname has been granted two rights by
the Netherlands. First the right to have access to the
archives and second the right to place an objection to
access by others. It was a proper exercise of the
Netherlands government to grant Suriname those rights, and
it was proper for Suriname to exercise them.

In this connection it is useful to recall the words
used by the Netherlands foreign minister Dr Bot on January
20 2005, words from the letter to which Mr Reichler
alluded in his presentation but which he did not call to
your attention. This is a letter where Dr Bot told the
Netherlands Parliament: "The files on this matter are in
the possession of the Netherlands purely as a result of
the fact that at the time when the dispute arose until its
independence Suriname formed part of the Kingdom of the
Netherlands”. That is why the archives are there and that is what they are.

Guyana argues and Mr Reichler repeated again this morning that the archives are really in the public domain and that they would have been made available to Guyana absent Suriname's objection. There are several responses to that argument.

First, the documents are obviously not in the public domain. They are restricted and they were restricted long before Suriname objected to Guyana's access. If it were otherwise Professor Schrijver would not have found it necessary to make a request for access.

Second, it matters not what the Netherlands would have done if Suriname had not objected, because Suriname did object, and its objection was legitimate. Suriname's objections followed naturally from the position of the Netherlands' government relating to access to files by third parties to which I will refer again in just a moment. I should say parenthetically that in support of Mr Reichler's contention that the archives are in fact covered he refers to the fact that several academics noted in their books that they had been granted permission to review certain archives in the course of their work. He has given you copies of the source list in those books in which the authors referred to the fact that they had access to certain archives. However, what he did not say is that there is nothing in those books that suggests in any way that any of the documents from the archives were actually used or quoted in the book, and that is because I
believe that when private parties were given access to
these archives by the Netherlands government there were
conditions of confidentiality and prior review that were
imposed.

In a corollary argument Guyana contends that there is
no Netherlands policy relating to access to these archives
by third parties. That is in fact I submit not true. I
shared with Mr Reichler and with the Tribunal through the
Registry earlier today a copy of a note verbal from the
Netherlands Embassy in Paramaribo to the Ministry of
Foreign Affairs in Suriname dated October 13 2004, and
that letter sets forth just such a policy. I will read
from the English translation that was attached to the
Dutch version that I gave you, and I will read just one
sentence. "In principle third parties will not be granted
access to files which concern ongoing boundary disputes
unless those directly concerned have no objection." That
is the Netherlands policy.

One further observation with respect to the nature of
the archives. In an effort to equate access to the
archives to the British archives which the United Kingdom
for its purposes decided to make public, Guyana contends
that the archives in question are colonial archives,
because the British archives clearly were. That is simply
not true. Suriname was an autonomous constituent member
country of the Kingdom of Netherlands from at least as
early as 1954. It was not a colony of the Netherlands
after that date and with the greatest respect it is
insulting to suggest otherwise. For that reason alone,
the archives cannot be equated with the British archives that have been made public. Nor, I respectfully submit, can any legitimate argument be made out of the fact that the United Kingdom for its own reasons decided to make public its archives relating to the period during which Guyana was one of its colonies. One supposes that the reason such an argument is made is to suggest that the Netherlands should have adopted the same policy. However, we have discovered and I have also shared with counsel for Guyana and with the registry a document that is a publicly-available document from the United Kingdom describing its own public record disclosure policy in which the United Kingdom itself recognises in section 4.31 of that document that there may well be an exception to its so-called third year open access rule for certain documents relating to border disputes, including those of its former colonies. I hope that the members of the tribunal have been given a copy of that document. It is section 4.3(1) of that policy document.

Why the British decided to make certain of its archives relating to the Suriname/Guyana border dispute public is a question that must be put to the British, but whatever the answer is it can have no effect on the Netherlands decision to restrict access to its own archives.

The third reason why Suriname has objected and refuses to withdraw its objection to Guyana's request for access to the archives concerns the nature of the request itself. The request is a request for copies "of all
documents that consist of, discuss or relate to the maritime boundary dispute”. That is easily recognised as a classic American style discovery request. It is a fishing expedition with a big net. I must say that, as an American litigator, I have engaged in American style discovery for almost all of my professional career and I would concede in this tribunal - not for it to be repeated outside -that I have engaged in a few fishing expeditions myself and I know one when I see one. That is exactly what this is. This is not the type of request that one sometimes sees in public international proceedings where a court or a tribunal might ask one of the parties to produce to it a specific document or where one party signals that it would like to see a specific document as Guyana did in its memorial with respect to chart 222, which we then provided. This is not a case like the Corfu Channel case where the court asked the United Kingdom to produce a specific document which was a copy of the order that sent the British ships into the Corfu Channel. You all know that the British refused to produce that document, the court took note of the British refusal, but then went on to say that in the light of the British refusal it had to decide the case based on the evidence before it. And that is what it did.

Guyana has candidly conceded that it can not specify the documents it seeks. Let me just say that in response to a comment that Mr Reichler made this morning when he said that he assumed that we had withdrawn our submission that there had to be a specific request for specific
documents before this tribunal would be in a position to order either party to produce documents. We have not withdrawn that position. That we believe is a proper statement of the guiding principles of international law and the principles that apply to the work of this tribunal. I give you again the example of chart 222.

There was a specific request in the Guyana memorial or a reference to the fact that they did not have a copy of that and they found a copy and we submitted that as a part of our preliminary objections, the full document.

It is certainly to be expected that Guyana cannot identify the documents it seeks. Why? Because they have no idea what is in these files or whether anything in these files will help it prove its case or defeat ours. They would just like to have a look. I might say that we would like to have a look, too, at their files. I am sure that there are relevant documents, relevant documents, in the files of the Republic of Guyana, I am certain of that, that we have not seen and that you have not seen. But those are not going to be made available. That is how it should be in litigation between two sovereign states.

We respectfully submit that nothing in the Convention or the rules applicable to this tribunal authorises, permits or justifies the request made by the Republic of Guyana. All of the authorities cited by Guyana are either private commercial disputes or irrelevant authorities. The two state proceedings that it cites were mixed arbitrations. I think both of them involved Mexico. And in those the tribunal rejected the request that Mexico
make documents available except for specific documents relating to the testimony of one of Mexico's designated expert witnesses. Except for that, as far as I can tell from reading those cases, the other requests that Mexico produce documents were rejected.

Even the screening process proposed by Guyana in which one of its legal representatives would be able to see all the archives relevant or not, privileged or not, confidential or not, belies its purported justification that what it is doing is simply an effort to help this tribunal get evidence. That is not at all what it is trying to do. It is trying to win the case and its request is nothing more than a broad fishing expedition.

You do not have to take my word for this. Mr Reichler referred you this morning to tab 2 in the book that he gave you, which is a copy of his letter to Judge Nelson, dated 14 February 2005, and he referred to the list of files and he said that these are obviously relevant just look at the titles. There is a file there that says "British Guyana /Suriname boundary arrangement". He says that that is obviously relevant. Territorial waters and Continental Shelf, part 2, obviously relevant and so on. Border arrangement, Guyana/Suriname, part 5 and so forth.

What he did not refer you to was the next page. Here is the title of one file, "Relationship between the United Kingdom and British Guyana". He wants a file from the Netherlands relating to the relationship between the United Kingdom and British Guyana. Next: "Relationship
United Kingdom/British Guyana. Next, "Independence British Guyana". He wants an archive from the Netherlands relating to British Guyana's independence. Next, "National Manifestations Guyana folder". I have no idea what that is. Maybe that is pictures of the Guyana flag. I do not know what that is, but that is what he wants. He wants to have a look at that file. That is nothing more than a fishing expedition. That is not a specific request for a specific document which international tribunals clearly have the power to ask for and have asked for from time to time. That is not what is going on here.

Let me pick up on a question that Professor Shearer asked this morning. He asked about the book written by Professor Petochilos. The portion to which Guyana cited in its written objections is the part of that book where the professor - the good professor, I will leave it at that - was attempting to articulate what he thought were good standards, standards for good international arbitral practice. He was talking about commercial arbitration, by the way. He set forth a series of standards. And the standard to which Guyana referred in its written submission is found on page 220, subparagraph (d). Let me just read that. "As a principle each party has to identify the evidence on which it wishes to rely", as I said earlier. "The tribunal may upon request of a party require further disclosure provided that the request identifies the evidence requested in sufficient detail and provides sufficient reason for their disclosure, the tribunal may also make such an order on its own motion".
I respectfully submit that the request made by the Republic of Guyana does not meet either one of those requests. It is not a request made in sufficient detail. It is just give me everything. And there is not a sufficient reason that has been set forth for the disclosure. It is not a sufficient reason to say because the documents are relevant or might be relevant. That is not enough. As I said before, I am certain that there are documents in the files of the Republic of Guyana that are relevant. We will never see those. That is not what the god professor was talking about and that is not what good international practice requires.

I would like to say a word about the concept of equality of arms. That is a concept that has been embraced by Guyana as an additional reason for justifying its request for sweeping access. Guyana's argument, as we understand it, is that since Suriname has had access to certain files so too should Guyana. Even leaving aside the fact that Suriname has been given access to those files by the Netherlands and that Guyana has not been given such access by the Netherlands, the concept of equality of arms simply cannot be made to support Guyana's request. That concept which seems to have had its origin in European jurisprudence relates to the notion that each party should have equal opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-a-vis its opponent. The concept is sometimes also used in criminal justice systems as an argument supporting free legal aid to defendants. The
concept is procedural and it has never been used to the
best of my knowledge to justify or require open or equal
access to documents, certainly not under the conditions
presented here. For all of these reasons the Republic of
Suriname respectfully submits that the request of Guyana
for an order of the type described this morning should be
denied. Thank you very much.

THE PRESIDENT: Thank you very much.

MR HOSSAIN: Thank you very much, Mr Saunders, I just wanted to
get one or two things clarified. I was very impressed by
the opening statement of the co-agent, the Honourable Mr
Lim A Po when he talked about two neighbours coming to us
to resolve a dispute which has gone on between you. I was
particularly impressed by this because I am coming from
another Act 7 arbitration between two neighbours in
another continent where precisely this kind of a statement
had had the right resonance so that both counsel could not
use the word "adversarial" as many times as Mr Saunders
felt it necessary to use it. In fact, I would say that
arbitration between two neighbours is an attempt not to
have adversarial relations between neighbours. It is much
more true interstate and between neighbours not to look
upon each other adversaries but between neighbours who
need to resolve something amicably and in good faith.
That is why I have not fully understood you when you were
saying that, if there is something that helps me, why
should I make it available? On the other hand, you say
that there are things that Guyana has which may be helpful
to you and which you would like to see. I would like to
put to Guyana later on what I consider is a very legitimate curiosity, you might have to look at documents which might be helpful to you, why should they not disclose those? In a boundary dispute as I see it, when you are looking back, you know very well how you look at these historical materials to see how you, in fact, drew the line that ultimately both sides believed. It is not even people in this generation, but predecessors and predecessors who had done things, said things and so on, which are relevant for you to say this is what legitimately in an international arbitration we can rely on to say this should be the boundary. So relevance is determined in that way, not necessarily that you blame your predecessors for taking positions as they did. But they took positions at that time which have a bearing and have some relevance. It may be discounted or not discounted. There could be very useful constructive arguments on both sides as to what weight you give to different pieces of evidence. But it seems to me that wanting to shut out evidence in this sense of a kind of extreme form of adversarial confrontation would not be helpful to either side and would be counterproductive because you have come to us wanting to resolve something, go back and be good neighbours, freed from a dispute, a dispute satisfactory result through a just and fair process. You would not regard that process as just and fair if relevant materials were shut out, either Guyana shut out those materials and did not give it to you, just as they are wanting to say that you may have things which
would help us.

This is my point, that ultimately we are asking both of you to help us to make a just determination. So please if you have anything let us have it, if there is anything there let us have it. You say we are not specific enough. I think you have been very helpful in your statement to us, paragraphs 2, 3 and 4. Guyana's present list numbers 22 files, each file containing several documents. Almost all those documents constitute internal correspondence among the Netherlands officials, Netherlands and Suriname government and among Suriname government all in Dutch language. All the documents constituting correspondence with the United Kingdom are in English. The files to which Guyana now request cover a wide range of issues concerning the external relations with the Kingdom of Netherlands, specifically relating to Suriname. In particular they concern the inter-connected boundary issues of Suriname with Guyana.

MR SAUNDERS: That is what they say, yes.

DR. HOSSAIN: This is in your statement.

MR SAUNDERS: That is what Guyana is asking for.

DR. HOSSAIN: I think you have been very fair in saying that these things do have material relating to boundary issues, but you say it is maritime and possibly something to do with land. Now you may want to say that there is something on land which should be kept away from the Tribunal. There may be ways to achieve that, but if there are things on maritime boundaries why do you not want us to have the benefit of it? We would ask you to cooperate
with the Tribunal, both if you. If you want things from
Guyana which you say would help the Tribunal, and
ultimately the things is not help each other but help us
to come to a just determination, why would you not want to
cooperate. One final point, and I ask this question. In
this case and the other cases between neighbours we
actually made the two counsel and the two sides work much
more together. Why do you not sit down and say what are
the things that would be helpful. You know it and they
know it, the realities on the ground, and you could say
these are the materials that will be helpful to the
Tribunal. Why do you not jointly help us instead of being
adversarial. Maybe we could avoid the words adversarial
and think of it as a problem solving approach. It is a
problem you do not want to live with and go back with from
the Tribunal.

MR SAUNDERS: I have several responses to that very helpful
comment, and I think it has been very helpful. I have
several responses. First, before this arbitration was
commenced by Guyana the two countries were in discussion,
they had been in discussion for a long time. We had had a
series of joint border commission meetings. There was
even an attempt to enlist the aid of the Prime Minister of
Jamaica to assist the parties in resolving the dispute.
Those discussions foundered on Guyana's refusal to make
available to Suriname the full copy of its CGX concession.
You will recall from having read the memorial that Guyana
had granted a concession to CGX, a Canadian oil company,
to parts of the territory in dispute and they wanted as a
condition for some kind of a resolution Suriname to agree
to respect the existing concessions. Suriname then asked
I think quite legitimately to see a copy of the CGX
concession agreement.

There is in the memorial submitted by Guyana a
portion of the CGX concession agreement but not the entire
document. We have never seen the entire CGX concession
agreement. Guyana refused to make that available to us.
We have never seen it even in this proceeding, and that
was one of the principal reasons why the attempts by the
parties to resolve this dispute short of arbitration
failed, because we were not willing to agree to respect
existing concession agreements that had been granted by
Guyana without at least knowing what they were and what
the entailed.

You are right, it obviously would have been better if
the parties had been able to resolve this matter amicably
but themselves, and we were quite surprised when Guyana
filed this arbitral claim; we had no advance notice of
that, we thought we were still in discussions with Guyana.

In fact if you look at the response that we made to the
statement of claim, one of the things that we reserved was
an objection because we were still in negotiations and
they had not been fully completed, at least as far as we
were concerned. So you are right, we were trying to do
that. We obviously so far failed.

With respect to making documents available, in a
perfect world I guess it would be great if everybody in
the world had perfect information, if before I buy stock
in the New York Stock Exchange I would like to know everything that the President of General Motors knows. I will never know that, I am never going to have perfect information. In this proceeding there are rules of procedure, there is a reason why states parties are not expected to make discovery from their own files. There are exceptions for specific documents, but even Mr Reichler himself concedes that there are good reasons why there is no discovery from state files. It would be nice if we could go over to George Town and have a look through the files of the Guyana Foreign Ministry but that is not going to happen and it should not happen. It has never happened.

In terms of equality of access we are at a disadvantage, as we pointed out in one of our earlier submissions, because in 1995 or 1996 the Suriname Foreign Ministry burned to the ground. We do not have any files. Everything that existed or almost everything that existed prior to 1995 or 1996 has gone. But we had the Netherlands archives. As I said before they belonged to us when we were part of the Kingdom of the Netherlands. I do not want to get into this whole debate about legal ownership, that is not productive, but they were our files, they were Suriname's files when we were part of the Kingdom of the Netherlands, and when we became independent we were guaranteed continued access. So in effect we equate those to the Guyana files. They have the same relative standing in our minds.

We will respond and we have responded to specific
requests for specific documents. In the Guyana memorial, Guyana made a point of saying that it only had a portion of chart 222, which was a very important map. I have been chastised for using the map when I should say chart and chart when I should use map, but whichever it is it is very important. They said in their memorial they only had a portion of it. We found the full map in the Netherlands archives and that was a specific document that we could look for. They had a specific reason why they wanted to see it, because they wanted to see what kind of a line that was drawn on it and we provided it. That is an example I submit of the kind of cooperation that this Tribunal should expect from the parties. But you should not expect I would respectfully submit wholesale access; give me everything you have got and I will decide what is relevant and what is not. Not appropriate, I respectfully submit. But we will respond and we have said from the beginning we would and we will respond to specific requests for specific documents where there is a good reason for it. What we are not prepared to make available are the archives in the Netherlands on a wholesale basis.

That is simply not appropriate in our view.

You are absolutely right, there should be cooperation between the parties. I think the delegations have attempted to cooperate with each other in a spirit of professional respect for each other. We have not cast any aspersions on our friends from Guyana and we will not, but we will insist on what we believe is rightfully ours, and that is why we are taking the position that we have with
respect to this dispute.

DR. HOSSAIN: Again thank you very much for explaining the background in which you are looking at this. You have said that you objected to the fishing thing and I think it was said at the outset again that they did not want to engage in a fishing exercise either, so common ground. My own approach in these things is to try and find common ground. The common ground that I find here is you are also saying that within certain defined limits it is reasonable for us to want to get at the relevant material, and the relevant material for our benefit - because the five of us have to struggle and come out with something which both of you will say is just and fair and something we can live with and go back to our respective countries and say this is a just resolution. But for that we need your help, both of you, and we need to get to the documents which are available to both of you. Would it not be possible to engage in a kind of constructive dialogue overnight and see what are the kind of things that each of you can identify with more specificity. I think you are coming close when you say that it is down to not too many files. You are down to 22 and out of those 22 you are further narrowing down to the titles which are on these disputes and you say you consider these are really not relevant, you are fishing. But the non-fishing elements I am sure you can by now pretty well identify.

MR. SAUNDERS: With the greatest of respect, Dr. Hossain, the issue is not trying to identify which documents are relevant to the dispute. I have no doubt that the
documents in the Netherlands archives are relevant to this dispute. I have no doubt that most of them are. There are some that may not be, but I have no doubt that some of them are. But the nature of the request that has been made by Guyana is to say let us have a look at documents that are relevant. That is not appropriate under these circumstances. If there is a specific document they can identify we will of course try to find it and if we can, if it is justified, we will absolutely make that document available. But the issue is not whether we can find documents that relate to this border dispute. This border dispute has been going on for 200 years. The issue is not whether the documents are relevant, but the issue is the right to access. Our submission is that the Republic of Guyana does not have the right to seek access to these files just as we do not have the right to seek wholesale access to their files in their Foreign Ministry. That would be a wholly inappropriate thing for us to ask for. Wholly inappropriate. I am not smart enough to understand whether this Tribunal has the power even to order such a thing because I know you would not. No international Tribunal would ever do that. But that is our starting position. The issue is not are there things in these archives that are relevant, there may well be, in fact we know there are. In fact chart 222 was in the archives. They asked for it and we gave it to them. Are there things in their files that are relevant? I am sure there are. We could sit down tonight if they would give me an index to the files in the Guyana Foreign Ministry and I am
certain that I could find many many documents in their
files that I would like to see and that I could persuade
you are relevant and that you ought to be able to see.
But they will not do that. You would not be expected to
ask them to do that. We would not ask that.

Mr Reichler I think concedes when you are talking
about one state and another state there is no such thing
as discovery in public international proceedings.

So the issue is not whether we can identify relevant
documents but whether there is a right to access to these
archives at all. We will submit documents that we think
are relevant and helpful to the Tribunal and quite frankly
helpful to our case when the comes, if it should come for
us to proceed further in this case, and so will they.
They have and they will continue to do that I assume. But
I respectfully submit that by asking whether we would be
willing to sit down with them and go through a list and
figure out which documents are relevant, I respectfully
submit that you are asking too much of us, because we are
a sovereign nation and these are in effect our files.
They were our files when we were part of the Kingdom of
the Netherlands, and we have continued rights with respect
to those files. So at the risk of prolonging my answer I
do not think the issue is whether we could reach agreement
on what documents were relevant; we are talking about a
much larger question here. Going directly to the nature
of sovereignty.

DR. HOSSAIN: Thank you very much.

PROFESSOR SHEARER: Mr Saunders, you have made rather a

lot depend on the question of whose archives they were for
someone who began by saying that that not a very important
issue. Maybe you could clarify the constitutional
position. Before Suriname's independence how many
treaties did Suriname enter into to in its own capacity?
MR SAUNDERS: I cannot answer that question, sir. I would be
happy to submit an answer in writing but I do not want to
answer that question off the cuff because I simply do not
know. I do know that Suriname participated in many
international conventions prior to the time of it
obtaining independence.

PROFESSOR SHEARER: You mean in the negotiations of the
conventions?

MR SAUNDERS: Yes.

PROFESSOR SHEARER: But so does the Province of Quebec and
the Province of British Columbia and the State of Texas.
I would suggest that the answer may be zero, and I might
well ask you how many ambassadors did Suriname have abroad
before independence.

MR SAUNDERS: Once again I do not know but I think I may have
not been clear enough in my presentation. The issue is
not who has the legal ownership of these files in a legal
sense. That is not open to debate, I would submit. But
the point is that these files prior to Suriname's full
independence in 1975 are not colonial archives, we were
not a colony of the Netherlands during the period from at
least as early as 1958 until 1975. We were an autonomous
constituent member of the Kingdom of the Netherlands.
That is the point that I was making.
PROFESSOR SHEARER: With no foreign relations powers. There were reserve powers and the reserve powers included defence and foreign affairs; is not that right?

MR SAUNDERS: I apologise but I do not know.

PROFESSOR SHEARER: What you are describing is so key to your argument that it seems to me that we need to hear somewhat more about that constitutional issue. I would rather have not made it so key myself because it seems tome that you were on the right track when you said it was really a question of Suriname advising the Netherlands which asked for the advice of Suriname and that the governing proposition was the right of Suriname to advise the Netherlands as to whether they would open the archives or not open them. if that is the position then the question of whose archives they were becomes irrelevant. Then the question is who can open the archives, and you are suggesting that in a bilateral relationship with the Netherlands you have the right to open the archives. That does not involve the question of title. I am just asking you to choose one of the other theories.

MR SAUNDERS: I do not want to get into the question of title. We have two rights with respect to the archives. We have the right to access and we have the right to object to access by others.

PROFESSOR SHEARER: That is very helpful. If you have the right to object to access then presumably this court would have the right to ask you to revise the decision that you object to access. We are only talking about rights here, we are not talking about whether it is a good
idea or not. In other words if we felt as a Tribunal that it would be really helpful to this process in the sense of my colleague has just described, to look at the archives for the period before Suriname became independent, if we felt that was really helpful and it is always helpful -- this building is full of boundary disputes and it is always helpful to look at the colonial archives or the pre-independence archives as part of the historical record. If we thought that was useful you do believe that you are the key actor here, that if a request is to be made it should be made to you because you have the power, not because they are your archives but because you have the power to advise the Netherlands that access should be given.

MR SAUNDERS: I cannot speak for the Netherlands. The letter that we have seen from the Netherlands Foreign Minister Dr Bot articulates several reasons why the Netherlands has refused to grant access. He never uses the word which Mr Reichler used, solely, that it was solely because Suriname objected. He goes on to say it is also because there is no obligation under international for them to grant access. He never says that the Netherlands decision was taken solely because of what Suriname said.

I do not know what the Netherlands government would do. We have objected. We have articulated a legitimate objection to access to the files. I do not know what would happen if this Tribunal ordered us to withdraw our objection. We have made it and I do not know what the Netherlands government would do. But let me go a little
bit further and point out that since you say it would be useful to see these files, you are aware that Guyana became independent in 1966. Suriname became independent in 1977. So there is a nine year period during which Guyana was independent and we were not. The archives that they want to see cover that nine year period. With the greatest of respect you will never see the Guyana files for the period from 1966 to 1977. They are not in the British archives, they are in Guyana's files in George Town. Mr Reichler has said, rightly so, that there should be no discovery of those files. You will never see those. So even if you were to order us to withdraw our objection and even if the Netherlands were to say all right, we will make these documents available, and once again I do not know if they would, there is an imbalance, because they are not equal. The reason why I refer to the date of Suriname's independence and the date on which it became an autonomous constituent member of the Kingdom of the Netherlands was solely to respond to the assertion that the files in question are colonial archives. The British files are colonial archives, and Guyana has tried to equate access to the British archives on the one hand to access to the Netherlands archives on the other hand, and they are not equal. We were not a colony of the Netherlands for most of the period in question. We simply were not. That was the point. I was not arguing that we had an independent Foreign Ministry, I was not arguing that we had ambassadors, but I was firmly taking the position that we were not a colony of the Netherlands.
PROFESSOR SMIT: I would like to understand the position of the Dutch Government. It seemed to me that the position of the Dutch Government is that we will not disclose these archives unless Suriname approves, or is the position we will not disclose them if Suriname objects?

MR SAUNDERS: I can do no better than to read again from the note verbal.

PROFESSOR SMIT: Yes, and I have read that note, and I concluded from the note that it means that they would not disclose them unless you approved, and if you did not approve and for instance if you withdraw your objection but say we do not approve.

MR SAUNDERS: under duress.

PROFESSOR SMIT: We do not approve, the Dutch government has now to decide that under its own policy, they might on the basis of this note say we do not disclose it because we do not have the approval. And then this Tribunal would have to direct you to give your approval. Right?

MR SAUNDERS: Right.

PROFESSOR SMIT: The second question is this.

MR SAUNDERS: In response to the first I think that your reading of the note verbal is a fair reading.

PROFESSOR SMIT: OK, but subject at least to that interpretation I just wanted to have your reaction to it.

The second one is arbitral Tribunals have a natural and legitimate desire to get access to all information that may be relevant to the resolution of the dispute. And whether it is in archives or in documents or anywhere else
that is the objection. The question is how do you achieve it. Once you adopt the proposition that the Tribunal should have access to all relevant information the next question is how does the Tribunal achieve that. That is a procedural question; is there a procedure that can be devised to do that. That would weigh equally on both parties.

Your position seems to be at odds with that general notion. Your position is each party is entitled to the information that it has, and the other party does not have a right to the information that it has and the other party does not have a right to the information that it has, except to the extent that that party determines that it wishes to submit it. For instance, in the case of a concession agreement, you cannot submit one part of the concession agreement without the other, but, if there had been no disclosed concession agreement, they would not be required to produce it.

Do I correctly understand your position to be that no party is entitled to relevant information from any other party and that we have to proceed on the basis that each party will produce what it considers to be relevant and then decide the case on that basis?

MR SAUNDERS: You are generally correct in the understanding of our position with one exception. Our position, with the greatest respect to this tribunal, is not that with proper application of proper rules of procedure that this tribunal is entitled to see all relevant information.

There are categories of clearly relevant information that
I can think of that you would not be entitled to see. For example, you would not be entitled to see notes that I prepared for myself last night as I was preparing this presentation. Clearly relevant, very relevant. Privileged. There is one example of relevant documents which with the greatest respect this tribunal would not be entitled to see. The recognised exception in international proceedings is that you may request a specific document for a specific reason. If that document is not made available, you may take note of that fact. The best example of that that I know of is the Corfu Channel case. The tribunal asked to see a copy of the Admiralty Order that sent the British ships into the Corfu Channel because they wanted to find out what their instructions were. It was relevant to know whether they were just passing through or whether they were going through for the purpose of drawing fire from the Albanians. The British refused to produce that document on the grounds of national secrecy. The tribunal said, well, we have to decide the case on the basis of the evidence before us. There are categories of documents that simply are not made available in these kinds of proceedings. The other example is internal archives of a state party. The files in the Republic of Guyana's Foreign Ministry, which I am sure fill a room, relating to this dispute are clearly relevant. I would like to see them. You would like to see them. But the nature of the proceeding and the nature of the sovereign issues that are in play here say that that is not an appropriate request. It is such
an evasion of the sovereignty of one of the participant states that the request has to be very specific, not broad, not "just give me everything that is relevant". That is why I think that the exception requires specificity so that you do not unnecessarily invade the sovereign interests of the parties to the arbitration. That is our position.

MR SMIT: But assuming for a moment that appropriate criteria could be formulated for the exclusion of documents that are privileged or work product or otherwise to be recognised as confidential, your position, as I understand it, is not that, if that could be done, both parties should submit to the tribunal all relevant information.

MR SAUNDERS: That is not our position. Our position is not that because of the nature of the interests involved. In some settings that might be appropriate. Our position in this case is that that would not be appropriate. We are not trying to figure out which documents and their files are privileged or state secrets. We do not have the right of access to there archives, to their files. We do not. They are a sovereign state. They do not have a right of access to ours. We both have an obligation to co-operate with the tribunal and to make information available to the tribunal, but we respectfully submit that that ought to be in the interests of fairness and proper procedure in response to a specific request for documents where we can evaluate the request and respond to it appropriately.

THE PRESIDENT: We have had a discussion ...

MR SAUNDERS: Before you make your comments, I did not want to
leave the podium without saying three things. First, we heard just as we came into the room that there had been several bombings in London and I know that you and others in the room have friends and relatives in London. I want to express to you and to the others in this room the serious concern on the part of the Republic of Suriname for the safety of your friends and relatives, Mr Ramphal's friends and relatives, Mr Sand's friends and relatives and the relatives and friends of anybody else in the room who have people who might have been caught up in this terrible tragedy. That is the first thing I would like to say.

The second thing I would like to say is that we too join in with the Republic of Guyana in congratulating you on your re-election as a member of ITLOS. It is richly deserved and we are delighted that that honour has come to you.

Third, we also would like to welcome to this tribunal Professor Shearer. The passing of Dr Philip was a great tragedy which we mourn. We are certain that members of the tribunal do, too. We are delighted to have Professor Shearer with us. He is a jurist and an academic of great renown and great accomplishment and we are sure that he will add a good deal of experience, wisdom and judgment to this tribunal. We are delighted to have him with us. Thank you very much.

THE PRESIDENT: Thank you very much for the points that you raise, especially the question of the disaster which has struck, which has made itself manifest in London and for your congratulations on my being re-elected to the
tribunal and the welcome to Professor Shearer. I was going to say that we had a tremendous discussion today on this very important issue.

Dr Kamal Hossain did attempt to try to get the parties to co-operate, to get together, to see if they themselves can produce a solution to this problem. I do not think that it should come to an end, this attempt to see what can be done, but I think that before continuing on this tack I would adjourn the meeting for a coffee break for half an hour and then we shall hear the rebuttal from Guyana and then Suriname. Thank you very much.

(Short Adjournment)

THE PRESIDENT: Let us begin. Guyana has the floor now for its rebuttal.

MR REICHLER: Thank you, Mr President and members of the tribunal and good afternoon. I would like to start this rebuttal by emphasising where the parties agree and this is very significant. We have heard the opening presentation of both parties now and unless Suriname was holding something back it appears very clear from Mr Saunders' opening presentation that there is no challenge to the authority or power of this tribunal to issue the order that has been requested. It is very clear under UNCLOS Annex 7, articles 5 and 6, and the rules of procedure, 7.1 and 7.2, that the parties are obligated to facilitate the work of the tribunal and that includes their obligation to use all means at their disposal to produce relevant documents, facilities and information.

Indeed, even if that proposition were challenged in the
second round, as it has not been in the first round, it would be of no moment because the authority of the tribunal is absolutely clear.

The second point of agreement is as to the relevance of the documents. I think that it is most significant what Mr Saunders had to say and, if you will bear with me for a moment, I want to make sure that I quote him correctly, which was that most of the documents in the archives are relevant, I have no doubt of this. So we are talking about documents that are plainly relevant to this dispute. Without a doubt. Indeed he said, "the issue is not whether the documents are relevant, they are. It is whether there is a right of access to these documents".

The third point of agreement, at least so far, is that we have heard nothing from Suriname to suggest that the procedure that Guyana has proposed for screening out documents which are privileged, otherwise confidential or non-relevant is unworkable. Indeed, this is a procedure that is commonly used in courts and arbitral tribunals and we agree that documents that are not relevant, that are privileged or otherwise subject to confidentiality should not be produced. We have produced a procedure, obviously as any proposition that emanates from the human mind it can be improved upon and we welcome any improvement to it that Mr Saunders might have to offer, we are certainly open to that and look forward to being able to reach an agreement on a procedure for a review of documents, a screening of documents, that would be acceptable to both Suriname and Guyana.
Let me turn to what I think are some points of disagreement and I think these are some significant disagreements, just as we had significant agreements, that are worthy of the tribunal's attention. I submit that there is at least one fundamental flaw in Suriname attempting to equate the archives of the kingdom of the Netherlands with the archives of the Republic of Guyana. This is apples and oranges. Suriname's position is that, since it cannot access or presumably since it cannot access Guyana's archives in George Town, Guyana, then Suriname should be able to prevent Guyana from accessing the archives of the Netherlands here in the Hague. We submit, on behalf of Guyana, that there really is no equivalence here. Indeed, under questioning, Mr Saunders agreed that legal ownership of the archives in the Netherlands is in the Netherlands; that is the Netherlands owns the archives in the Netherlands, not Suriname. He said, and my shorthand is not the best but I am trying to quote him accurately, "legal ownership of the files is not open to debate". He concedes the issue. Legal ownership: it belongs to the Netherlands. Indeed, that is clearly the Netherlands' position as I have stated before. Dr Bot said that it is our decision to make: "We choose to honour Suriname's objection, but it is our decision to make. Suriname, indeed, in their pleadings said "Even if we were to withdraw our objection the final decision would rest in the Netherlands." Indeed, as we have pointed out, under general international law as reflected, for example, in the restatement of Third Foreign Relations Law of the
United States, just by way of example, it is very clear that when a sovereign state divides in any manner, such as the kingdom of the Netherlands, a sovereign state severed off a piece of that sovereign state, which became the independent state of Suriname, that all property, including archives, of the predecessor state that are located outside the successor state remain the property of the predecessor state as long as the predecessor state continues to exist. Well, obviously, the kingdom of the Netherlands has continued to exist. I do not understand all the fuss, frankly, about the distinction between whether Suriname was a colony or an integral part of the constituent. I thought that I made it clear, certainly in my answer to Professor Shearer's question this morning, that we understand the constitutional arrangement and that Suriname was an integral part of the unified kingdom of the Netherlands, certainly in the years preceding its independence in 1975. I do not understand why anybody would claim that Guyana spoke in a matter that was "insulting", I think was Mr Saunders' word. We certainly did not intend any insult. We recognise that Suriname during their immediate pre-independence period was an integral part of the kingdom of the Netherlands. But for our purposes here and with all due respect this is a distinction without a difference, because, as I said, under general international law, whether Suriname was a colony, which we understand it was not, or an integral part of a unified kingdom of the Netherlands, as a successor state it only acquires property rights,
ownership, of such property as is located in the territory of the successor state or such other property as the predecessor state chooses to convey to it. It is very clear that as of this date the legal position of the Dutch Government is that the archives belong to the kingdom of the Netherlands and, indeed, the legal position of Suriname is that the archives belong to the kingdom of the Netherlands. This is, as I said, consistent with general international law. There is really no way to equate archives that are the property of the kingdom of the Netherlands with archives such as may exist that are the property of Guyana. Clearly, there is an equation, an equivalence, between archives of Guyana and archives of Suriname – in Suriname and Guyana – but not archives belonging to the third state, which has chosen to give Suriname the opportunity to object to the access to these Dutch documents by third states and has chosen, as owner of these documents and files, to honour that request.

We say there is a constant refrain, "these are our files, these are our files". When you acknowledge that legally they do not belong to you, they are not your files. These are the documents belonging to the kingdom of the Netherlands and there is no equivalence between whatever access there is in George Town, Guyana and access here in The Hague. It is an interesting question whether there should be access to archives in George Town, Guyana and in Suriname as a matter of equivalence. That is an interesting question. I think that Mr Saunders, I am quite sure unintentionally, mischaracterised our position
on this. Our position is that there is no obligation for
parties in proceedings such as these to make demands for
production of documents on each other; that is to say
Suriname does not have the right or entitlement to demand
access to Guyana's archive in George Town. Guyana does
not have the right to demand access to Suriname's
archives. But that does not mean that the tribunal in the
exercise of its own discretion is powerless to order
either Guyana or Suriname or both to produce documents
that the tribunal considers relevant and necessary to its
understanding of the issues. Clearly, that power remains
in the tribunal and, indeed, I do not mean to be
repetitive, but it refers back to article 6 of annex 7 as
reflected in article 7.2 of the rules of procedure. The
obligation to facilitate the work of the tribunal
including the obligation to produce such documents - all
documents not such documents - all documents that the
tribunal may consider relevant. But here we are not
talking about documents located in or the property of each
of these two sovereign states. We are talking about
documents that are the sovereign property of another
sovereign, access to which has clearly been denied Guyana
because of Suriname's intervention.

Let me say that another issue that I consider to be
really - I will not even call it a fundamental flaw - I
will call it a red herring in the position of Suriname is
that there is some requirement that Guyana specify each
and every single document to which it wants access and,
unless it can do that, it means that it is on some sort of
fishing expedition. I think that there is a very simple
answer to this and I would say a compelling one. This is
not a case about a request to produce documents. This is
not a case where there exists a request to produce
documents which might be subject to some of the
qualifications that Suriname proposes. Guyana has not
requested documents from Suriname. It has not requested
that Suriname produce documents. It has not requested
that the tribunal order anyone to produce documents. This
is a case about Guyana's request, administrative request,
addressed to the Netherlands for access to the
Netherlands' archives. This is a very big difference
because, when Suriname went to the UK, went to London, to
obtain the documents in the archives of the United
Kingdom, which it did, they did not ask for specific
documents. How could they possibly know what documents
were in the archives? The way that this is done when a
researcher or in this case a state or its counsel seeks
access to archives of a state is that one goes to the
records hall, signs whatever appears one has to, one has
access to the public index and one asks for particular
files. Then that request is either granted or not. In
the case of the United Kingdom, as my colleague Professor
Sands will describe, the request was granted because the
United Kingdom has followed a policy of equality of arms,
equal treatment of the different parties to an
international arbitration. It was not going to give
access to Guyana without giving it to Suriname. Had it
denied access to Guyana, it probably would have denied
access to Suriname too, because of the principle of equality of arms and of equal treatment. It is important to recognise the difference between a request for access to archives and a request for production of documents. When Suriname obtained the documents that it claims that it did obtain and that it has acknowledged most of which is relevant from the Netherlands, after this proceeding commenced, did Suriname specify every single document in the archives that it wanted? Of course not. Suriname did the same thing Guyana did. It either asked "Give us all the files relating to these subjects" or it went through the public indices, it identified which files it considered important to it and that is how these requests are made.

Requests for access to archives are never specific because one does not know what is in them until one reviews them. So by their very nature they cannot specify or identify individual documents. So the issue is, is the request reasonable? Is it overly broad, is it vexatious, does it cause any prejudice to the parties to the proceeding? If not, then it is entirely appropriate and there is no reason to demand a specificity that is impossible to provide.

We have heard a lot of times that there is no other case where such a request for documents so broad, seeking wholesale access, where such an order has either been requested or issued. Well, I submit that this case is different from other cases, because what we are talking about is a request for access to archives and the
intervention of one of the parties to the proceedings with
the third state to block the other party to the
proceedings from having equal access to those documents.
If Suriname can produce a case involving this situation
where the tribunal said "Sorry, we cannot issue such an
order, we cannot require the party that is interfering
with the other's access to desist from such interference"
or where Suriname can come forward with a case where the
tribunal demanded of the party who was seeking access to
archives that it identified every document in those
archives that it wanted, OK, we have to bear the burden of
such precedent. But that does not exist. This is a
different kind of case. We are not seeking production of
documents from Suriname. We are not seeking an order from
the tribunal that Suriname produce documents or that the
Netherlands produce documents. All we are seeking is an
order which this tribunal plainly has the authority to
issue that Suriname advise the Netherlands that it is
withdrawing its objection so that the process of Guyana's
obtaining access to the Netherlands archives can take its
normal course. That is all that we are asking and to
claim that Guyana has to identify every specific document
that might exist in these files, otherwise it is a fishing
expedition, frankly is a smoke screen. It is certainly a
red herring as I have said. It is uncalled for.

There has been an issue raised about how the
Netherlands might react in the event Suriname in obedience
or in compliance with the Tribunal's order withdraws its
objection. The note verbal that was submitted for the
first time this afternoon, and we have just received for
the first time from Suriname, it was described as an
internal Dutch document, and reading from the English
translation provided by Suriname say "in principle third
parties will not be granted access to files which concern
ongoing boundary disputes unless those directly concerned
have no objections". "Unless those directly concerned
have no objections". If Suriname were to advise the
Kingdom of the Netherlands that it has no objections this
condition would be satisfied. Does this mean that the
Dutch government will most definitely grant Guyana access?
Again we do not want to enter into the realm of
speculation and that is not the business of the Tribunal
either. It is up to the Tribunal to do its job, to issue
the appropriate order, and then it is up to the Kingdom of
the Netherlands to do its job and carry out its
responsibilities. I submit there is no reason to presume
that the Kingdom of the Netherlands given a statement of
non-objection by Suriname, will act in a manner that
frustrates the enforcement of implementation of an order
issued an duly issued by an international arbitral
Tribunal functioning for this purpose in the Hague.

We have Dr Bot's statement, the Minister of Foreign
Affairs. I have been accused of mischaracterising it. I
did read from it verbatim so that the Tribunal could form
its own conclusions, both the statements to Parliament
which were in December 2004 and not January 2005 – there
may have been a subsequent statement. I read and quoted
and talked about the one from December, his initial
statement to Parliament, stating the reasons for the rejection of Guyana's request in which he stated very clearly it is in response to Suriname's objections, and since we are under no international legal obligation we will honour Suriname's request. That is not a bunch of reasons, that is one reason. That is the only reason. I still say - and these are my words not Dr Bot's - that the application or the request of Guyana was rejected solely because of Suriname's objection. Indeed that is the only logical conclusion that can be withdrawn when it is the only reason that has been given by the Dutch government, both in Dr Bot's statement to Parliament and in the letter that the Foreign Ministry under Dr Bot's supervision sent to Professor Schrijver. "Suriname has objected. Given the choice between the public interest and public disclosure and detriment to our relations with Suriname, the latter is more important. I therefore refuse your request". It is not a bunch of reasons, it is one. So there is every reason to believe, and again we need not speculate as to what the Dutch government will do - this Tribunal has its duty and the Dutch government has its, but I suggest there is clearly no reason to presume that the Dutch government will deliberately take a decision that frustrates the purposes of this Tribunal. If it happens then there are other recourse for this Tribunal to follow, which we have already suggested.

Suriname in such case could then be ordered by the Tribunal to produce copies of the documents that it has copied from the archives. That would be specific. it
would define precisely which documents should be produced. But we need not get there because we need not speculate, and particularly speculate negatively, about what the Dutch government is likely to do.

Before calling upon my colleague Professor Sands I would like to address one final point. That is regarding the very statesmanlike and erudite question and, behind that, proposition that Dr Hossain has advanced.

We tried to resolve this dispute amicably. The request that the files listed in our February 14th letter, Again it is not a request for production of documents, it is a request for access to archives, but the files identified is a pared down list from the original request to the Dutch Foreign Ministry that was submitted by Professor Schijver in August 2004. That represented our good faith effort to pare down the list in an effort to reach an agreement. The answer we received was, "not interested". You heard Mr Saunders speak of narrowing the list, although I must admit that there is no reason for Guyana to narrow the list. It is not a request for production of documents, it is a request for access to archives. But even so in an effort to resolve this dispute and avoid imposing on the tribunal and maintain an atmosphere of statesmanship and amicability between two neighbouring states, we were willing to compromise, but we were told it does not matter, you cannot have access to these archives of the Netherlands. Suriname is going to insist on refusing to permit Guyana to have access to these files. But at this point, while of course it is
never too late for parties to meet and to discuss — never say never about the possibility of reaching agreement — I have learned that in my career as a mediator/negotiator as well as Counsel — there comes a point when a decision just has to be made and I think that it has become clear today, particularly after hearing Mr Saunders, that the time for a decision has arrived. I will add this, though. That a decision is made does not preclude the parties thereafter from working together to ameliorate the effects, to find working conditions, to find a way of implementing the order that would be to their mutual acceptance. Indeed, I proposed that this morning. I hope that I was not too subtle in making that suggestion to Mr Saunders, but in case I was let me reiterate. I think for this reason the issuance of the order that Guyana requests is not only justified because you have the power and all of the equitable conditions that I have mentioned, fundamental fairness, equality of access, full presentation of each party's case, not only justified there, but the issuance of the order which would require Suriname simply to withdraw its intervention with the Dutch Government and permit Guyana's request for access to the archives to take its normal course, issuance of that order, I believe, could very well facilitate an agreement. We would still be willing to discuss with Suriname after the issuance of such an order, tailoring it in such a way that everybody could live with it, but more important than that we do regard as legitimate, and I said that this morning, and we said it in our paper, Suriname's concern about the
confidentiality of non-relevant documents, privileged
documents or other documents as to which Suriname could
properly assert a claim of confidentiality. They would
have that right. Guyana does not want access to documents
that are not relevant. I do not want to sound
hypocritical. Mr Saunders has already said that most of
the documents are relevant. I cannot help that.
Certainly the ones that are not, we have no interest in.
Similarly, we have no interest in access to documents that
are properly covered by a claim of confidentiality. We
have proposed a procedure that would ensure that those
rights and interests of Suriname were protected. If there
is a better way to do it, we are certainly amenable to
that. But the issuance of the order, I think, at this
point is not only timely but perhaps overdue. In any
event, I think that it will facilitate an agreement as to
the implementation of such an order.

Do we have two or three minutes for Professor Sands
or have we exhausted all of our time?

THE PRESIDENT: How much time do you need? If it is three
minutes, I will give you that.

MR REICHLER: I thank the tribunal for your time and attention
and your kind courtesy.

THE PRESIDENT: Thank you.

PROFESSOR SANDS: Thank you very much, Mr President and members
of the tribunal for your indulgence of three minutes. I
just wanted to come back to one issue which was raised by
a document that Mr Saunders distributed and which we got
just over the lunch break. It is a document which you
should have a copy of in front of you. It is entitled "Access to public records". It is published by the United Kingdom Public Records office. I wanted to just spend one moment taking you to a particular section of it and in particular page 27 of that document. The reason that I am taking you to this document is that, contrary to the position that appears to have been adopted by Suriname and Mr Saunders, he accepts the analogous relevance of the approach taken by the United Kingdom. That presumably is the reason that he put this document before you. You will see there at page 27 a section which relates to archival material relating to border or sovereignty disputes and it is worth reading through it briefly. "Border or sovereignty disputes can be sensitive even if they do not directly involve the UK. This may occur, for example, between two previously colonial territories now independent. It may harm current diplomatic relations to release records which assist one party in the dispute while disadvantaging the other". The reason that I have drawn that to your attention is that it highlights the recognition on the part of the United Kingdom of the possibility of disadvantage. It is a passage which makes very clear that releasing records to one party could disadvantage the other party. That is the main thrust of the point we are making. That is why the United Kingdom's approach and I believe also underneath the arguments put by the Netherlands the Dutch approach is a preference for equality. As many of you on the tribunal will know, if you go down to the United Kingdom Public Records office,
you ask, as Mr Reichler said, not for individual documents but for files which have exactly the same types of titles as the ones he read out. "British Guyana/Netherlands relations" would be one example. You are then given a folder. It may contain one document or it may contain 50 documents and you then plough through those documents, picking out the ones that are apparently pertinent and useful. But the key point is that both sides have had that opportunity. Guyana went, Suriname has gone. In its pleadings, in relation to the matter we are discussing tomorrow, you will find at annexes 24 and 25 documents legitimately obtained from the Public Records Office. The crucial point is that the approach adopted by the United Kingdom is premised on the recognition of ensuring equality of arms between the parties. I think that by putting this document in Mr Saunders has effectively confirmed that significant principle.

The second point that I wish to make is that in one of his interventions earlier, Mr Saunders made clear an argument that somehow Suriname would be disadvantaged by the imbalance that would be created by having a situation in which Guyana would have access to the Netherlands archives for the period 1966 to 1975, but, of course, he is accepting by making that statement that imbalance is to be avoided. The present situation is that Suriname has had access to everything that Guyana has had access to in relation to the United Kingdom archives. The present situation of imbalance is that unlike Suriname Guyana has not had access to the materials that are made relevant.
Essentially, the thrust of the argument that is being made is to restore a degree of balance.

With regards to the point that Mr Saunders made, that the documents that Guyana is asking for relates to the period 1966 to 1975, with great respect that really is not accurate. The bulk of the materials, it is plain, relate to the periods around the 1930s, 1936 onwards, up until the 1960s when Guyana achieved independence. That is where the bulk of the material comes from.

Finally, to conclude, I would say that one way to approach this might be to ask oneself what would the situation be with a reversal of the context. What if the United Kingdom had chosen to make its own archive available to Guyana but not to make it available to Suriname? I will have to say with great respect to Mr Saunders that I could not stand up with a straight face and say that equality of arms had been maintained if one party had had access but the other party had not had access. Either neither party should have access or both parties should have access. Any other approach leads to great difficulty. Thank you very much, Mr President.

THE PRESIDENT: Thank you very much, Professor Sands. I now give the floor to Suriname. I will give the right of rebuttal to Suriname.

MR SAUNDERS: Thank you very much, Mr President and members of the tribunal. I will try not to take the full time allotted to me. Let me begin where Mr Reichler began with what he said was the points of agreement and the points of disagreement. I need to take issue with Mr Reichler's
characterisation. Mr Reichler said that we did not challenge the authority of this tribunal to issue the order requested. That is not correct. Our position was that the order requested is so broad that it amounts to a discovery order and it is beyond the power of this tribunal to issue. What we have said is that this tribunal, consistent with the practice in other public international courts and tribunals, has the power to ask the parties to make available to it, upon its request, specific documents where there is a specific reason for doing so. We have not conceded that this tribunal has the broad power that Guyana urges, the power to issue an order requiring us to withdraw our objection so that Guyana can have access to all or any part of the archives in question.

Secondly, with respect to relevance, I said that there was no doubt that the documents were relevant. Let me be more specific. I do not read Dutch, I have not seen the archives that are in Dutch, but I am informed that there are very few documents in these archives that relate solely to the maritime boundary dispute. The vast majority of the documents at issue that relate to boundary disputes relate to the entire boundary dispute between Suriname and Guyana and as this tribunal knows there is a large unresolved territorial boundary dispute between Suriname and Guyana. That is not before this Tribunal, but who knows whether in the future some other issue might be made with respect to that dispute. But I am informed that the vast majority of the documents that are relevant
to any boundary dispute relate to the entirety of the boundary dispute issues between Suriname and Guyana, not just the maritime boundary dispute.

Third, we have not conceded that the screening programme proposal made by Guyana is workable. What we have said is that it is not necessary for us to comment on that proposal at all because we do not think that it is appropriate, we do not think that Guyana has the right to have access to any of these archives. So how they get screened for privilege or confidentiality or relevance is not a subject that we have addressed because our position is that they do not have the right to have access to these archives, and that position derives in part from the issues relating to sovereignty.

When Mr Reichler then turns to what he says are the points of disagreement, he said it is apples and oranges to compare the files of Guyana in George Town to the Netherlands archives, I guess that is a concession that the Tribunal could not order wholesale access to the Guyana archives and I think that would probably be right. I think the Tribunal could not do that. You could ask both parties to produce specific documents that you think you might like to see having seen the submissions of both parties on any particular issue. You might say there is a particular document here that you would like to see.

He then moves from that proposition to say that it is really not the same because the Netherlands owns the files, period, end of story. That is not what we have said.
The question of legal ownership is not a relevant criteria as far as we are concerned. I could debate whether in light of the 1975 letter from the Netherlands Prime Minister to the Prime Minister of Suriname, I could debate whether or not in the light of the undertaking to guarantee access to the archives, the Netherlands could destroy their files, could just say we are going to destroy the files, we have legal ownership of these files and we are going to destroy them, so much for your right to access. You could debate that in light of that undertaking. You could say is that an undertaking to keep the files intact for your review. I do not know and I have not addressed that issue, but what I have said is that whatever the right answer is with respect to legal title we have two rights with respect to those archives. We have the right to access, to continuing access, and we have been given the right to object to access by others. It is not correct to imply that the Netherlands is like any other third party. They are not. We were a constituent part of the Kingdom of the Netherlands. That is what these files are. They are the files that related to our border disputes when Suriname was a constituent part of the Netherlands. This is not like documents in the possession of any other third party. It is simply not a correct analogy, I submit.

The question then is is it correct that we, Suriname, caused the Netherlands to decline to give access to Guyana by objecting. Once again I do not want to split hairs on that question, all we need to do is look at the two
documents that we have that relate to the reasons why the Netherlands did what it did.

First we have the note verbal which I have referred to earlier and I would call your attention once again to the relevant sentence in the note verbal, setting forth the position of the Netherlands. It is in the third full paragraph, second sentence: "In principle third parties will not be granted access to files which concern ongoing boundary disputes unless those directly concerned have no objection". So the principle is that unless there is an affirmative representation from those involved that they have no objection the position at least as stated in the note verbal of the government of the Netherlands is that there is no access by third parties. It has not said we are going to grant access unless you object, what they have said is there is no access unless you affirmatively say you do not object.

In the response to Parliament by Dr Bot which has been referred to several times (behind tab 9 in the book submitted to you by Guyana) the second paragraph on the second page of that note says "On 7 December 2004 in response to my request for its opinion" - this is the Netherlands now asking Suriname for its opinion - we did not go there, they asked us for our opinion - "the government Suriname declared that it objected to Guyana being given the opportunity to inspect files. Also in view of the historical and special bilateral relationship between the Netherlands and Suriname" - a different reason - "and in view of the lack of any obligation under
international law, I decided not to allow Guyana to inspect the files".

So Dr Bot sets forth three reasons in his letter, not just the one.

Mr Reichler now says that we do not need to call this request a fishing expedition, we do not need to examine the broad nature of the document request, we do not need to require specificity, because this is not a request for documents, it is a request for access to archives. To which my response is you could have fooled me. What he is asking for and what he wants to see are all documents relating to the maritime boundary dispute. You do not have to take my word for it. On February 5th 2005, Guyana, Sir Ramphal and Mr Reichler, wrote to this tribunal in a letter addressed to the President. This is not in your book. "Guyana also agrees its request for documents was framed broadly upon the basis of the indexes to the files". "Its request for documents was framed broadly upon the basis of the indexes to the files, but it wishes to assure that it is interested in nothing more but also nothing less than the documents which relate to the maritime boundary." That is a request for documents and it is, with respect, about as broad as it could be. That is not a specific request for a specific document. That is not a request for access. That is a request for documents. And that is exactly what is being made here.

My summary point is as follows. The issue that we are concerned about here is whether or not this tribunal has the power to or ought to order Suriname to withdraw
its objection, legitimately exercised and legitimately granted by the Netherlands, which is not a third party but of which the Suriname was a constituent country member, to allow Guyana to have access to documents in the restricted file held in the Foreign Ministry of the Netherlands. We respectfully submit that the answers to those questions are, no, that this tribunal does not have the authority to grant such a broad discovery order in this case and that, under the circumstances in this case, the request by Guyana for an order requiring Suriname, a sovereign nation, to withdraw its objection to disclosing files that were its files when it was a constituent part of the kingdom of the Netherlands, should be denied.

Thank you very much.

THE PRESIDENT: Thank you very much, Mr Saunders. The tribunal has been meeting in the interstices of this hearing and we thought that we should continue for at least an hour tomorrow from ten to eleven, meeting on the second floor. I will have distributed a paper which will indicate the way that the tribunal is at present thinking. That paper will be on the table but I would like any other proposals that can help the way forward be also discussed. I think that this issue deserves as much consideration as we can give it. The thinking of the tribunal is, of course, for your perusal, for you personally to discuss it, but I insist that we are not limited or confined to this particular proposal, but, perhaps, in the hour that we give ourselves we may make some progress. I declare the meeting adjourned.
(Adjourned until tomorrow morning at 11 o'clock)