

The Peace Palace
The Hague
The Netherlands

Thursday, 6th July 2005
DAY ONE

GUYANA

Claimant

and

SURINAME

Respondent

- - - - -

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

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

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

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

22 SIR SHRIDATH RAMPHAL: Mr President, Members of the Tribunal,
23 let me start by extending Congratulations to you. I am
24 saying this on behalf of both parties and I know that I do
25 so on behalf of all of us on your recent re-election to
26 the ITLOS Bench. It is a most handsome tribute to you
27 personally, as it is to the tribunal as a whole, whose
28 credentials you have so substantially helped to establish
29 since its initial creation. Let me also welcome to the

1 tribunal in place of Mr Allan Philip, whose loss we all so
2 sadly mourn, Professor Ivan Shearer, who we have welcomed,
3 I know, on paper, but with whom we are interacting on the
4 tribunal for the first time. We trust, Professor Shearer,
5 that you will find your membership of the tribunal
6 professionally stimulating and personally satisfying. We
7 pledge to you, as we have done earlier to your colleagues
8 on the tribunal, Guyana's commitment to assisting the
9 tribunal in all appropriate ways and discharging the task
10 that the parties have together entrusted to you, the task,
11 as we see it, of settling once and for all the maritime
12 boundary between Guyana and Suriname.

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

23 We are of course very pleased to be before the
24 tribunal and to be once again in the company of our
25 colleagues from Suriname and, of course, for all this at
26 this most pleasant time of the year in the Hague. But I
27 would be less than candid with the tribunal if I did not
28 convey at the same time Guyana's disappointment and indeed
29 Guyana's concern that we are here at all at this time for

1 the purposes that bring us here. When 12 months ago we
2 settled our rules of procedure and agreed the schedule for
3 written pleadings leading to a decision of the tribunal we
4 were really quite confident of the smooth unfolding of
5 that sequence. It was important to Guyana that it should
6 unfold without obstruction or interruption. So great is
7 the mischief from which Guyana seeks relief, as I hope to
8 illustrate more fully tomorrow when we deal with the
9 matter of Suriname's application to suspend the agreed
10 proceedings on the merits.

11 In July 2004 we settled the tribunal's rules of
12 procedure on a basis which we were confident would
13 eliminate structural road blocks and, of course, we
14 ensured that the tribunal itself was enabled to determine
15 all matters before it consonant with that road map. Yet
16 here we are today discussing with the tribunal
17 obstructions to progress actually encountered and the
18 formal application for the suspension of proceedings. We
19 of course indicated in those days to the tribunal and to
20 Suriname that Guyana would not seek interim measures as a
21 preliminary matter but go forward on the agreed schedule.

22 We have sought to do so. We have sought to do so despite
23 impediments, filing our memorial on time, save for a brief
24 extension occasioned by Guyana's floods. However, instead
25 of reciprocity we have found a pattern of studied
26 impediments to progress from the other side and we have
27 found delays in the tribunal's disposal of them. Of
28 course, we do not complain about the resort to tactical
29 approaches, but tactics must be seen for what they are

1 and, of course, they must always be legitimate.

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

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

29 Guyana first raised this matter in November 2004. We

1 were preparing our memorial. As a result of Suriname's
2 lack of cooperation Guyana was obliged to file its
3 memorial on the 22nd February without having the benefit
4 of that equality of arms, to which the Tribunal itself
5 alluded.

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

9 That was on the 9th March. Two months later, on the
10 13th May, Suriname announced to the Tribunal its intention
11 to file proceedings in relation to the preliminary
12 objection and to request that proceedings on the merits be
13 suspended.

14 Members of the Tribunal, this sequence of events
15 tends to link the two issues which will engage the
16 Tribunal today and tomorrow, and to link them in ways
17 which are worrisome in the context of that spirit of good
18 faith which, as the Tribunal reminded the parties, is
19 incorporated in Article 5 and 6 of Annex 7 and in Article
20 7 of the Tribunal's rules of procedure. Today, Mr
21 President, and members of the Tribunal, my colleague Paul
22 Reichler will present our more detailed arguments for an
23 end to Suriname's obstruction of Guyana's and indeed of
24 the tribunal's access to documents that may be relevant to
25 the administration of justice in the case. Professor
26 Schrijver will be available to supplement his
27 presentation. Tomorrow Professor Philippe Sands will
28 present our principal arguments against Suriname's attempt
29 to postpone agreed proceedings on the merits through a

1 preliminary challenge on jurisdiction which Guyana
2 considers wholly inseparable from the merits of the case
3 and which Guyana also considers to be calculated to induce
4 delay and so to impede the administration of justice in
5 the matter. Dr Akhavan and I will be available then to
6 supplement Professor Sand's presentation.

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

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

29 Thank you.

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

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

10 As you indicated, Mr President, the reason we are
11 here today is to address Guyana's request for an order
12 that would require Suriname to withdraw its objection to
13 Guyana's access to documents in the archives of the Dutch
14 Foreign Ministry. The origin of these proceedings today
15 can be found in the tribunal's letter to the parties dated
16 2 May 2005 in which the tribunal indicated to the parties
17 its decision to hold the hearing in The Hague during this
18 week and, in particular, requested that the parties
19 address "the power of the tribunal to make the requested
20 order". Accordingly, I will begin my presentation this
21 morning with the issue raised by the tribunal in its
22 letter of 2 May, that is whether it has the power to issue
23 the order that has been requested by Guyana. It is my
24 intention to demonstrate that it is really beyond question
25 that the tribunal does have such power.

26 I will then proceed to a second question, whether in
27 the circumstances of this case the tribunal should
28 exercise the power that it unquestionably holds and issue
29 an order that would result in Guyana obtaining access to

1 the documents to which its access has thus far been
2 blocked by Suriname. It will be my purpose to show that
3 fundamental fairness, equality of arms in international
4 legal proceedings, the rights of the parties to make a
5 full presentation of their case and, in fact, the duty of
6 the tribunal to establish the relevant facts, all require
7 that the tribunal exercise its power and issue the
8 necessary order to facilitate and permit access to these
9 relevant documents.

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

21 Turning to the first matter to be addressed, the
22 power of the tribunal, it is worth noting that both
23 parties agree that the tribunal's power emanates from
24 UNCLOS Annex 7 and specifically articles 5 and 6 of Annex
25 7, and from the rules of procedure adopted by the tribunal
26 and the parties a year ago, specifically article 7,
27 sections 1 and 2, and article 11, section 2. I will begin
28 my discussion of the tribunal's power by focusing on those
29 provisions. I promise not to tarry long here since both

1 annex 7 and the rules of procedure are very well known to
2 the members of the tribunal, but I do think that it is
3 worth underscoring a few key fundamental points. First,
4 it is worth recalling that article 5 of annex 7 states
5 that unless the parties to the dispute agree otherwise the
6 tribunal shall determine its own procedure, assuring to
7 each party a full opportunity to be heard and to present
8 its case - "assuring to each party a full opportunity to
9 be heard and present its case". It also bears emphasis
10 that article 6 of annex 7 provides that the parties to the
11 dispute shall facilitate the work of the arbitral
12 tribunal. "They shall facilitate the work of the arbitral
13 tribunal and, in particular, in accordance with their law
14 and using all means at their disposal - "using all means
15 at their disposal" - they shall provide it with all
16 relevant documents, facilities and information - "using
17 all means at their disposal the parties shall provide the
18 tribunal with all relevant documents, facilities and
19 information". Thus, under these articles taken together
20 (articles 5 and 6 of annex 7) it is the tribunal's duty to
21 assure that each party has a full opportunity to be heard
22 and to present its case and it is the obligation of each
23 party to facilitate the work of the tribunal, including by
24 using all means at its disposal to provide the tribunal
25 with all relevant documents, facilities and information.

26 Gentlemen, while there is much more to be said, these
27 article alone provide all the power the tribunal needs to
28 assure Guyana a full opportunity to present its case by
29 holding Suriname to its obligation to use all means at its

1 disposal to provide relevant documents and information.
2 In this case the relevant documents located in the Dutch
3 archives, whose access Suriname has wilfully blocked to
4 know valid purpose other than the tactical objective of
5 keeping them hidden from Guyana and of course the
6 Tribunal.

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

23 In its written pleading of 13 June to which this is
24 our first opportunity to reply Suriname actually agrees
25 that the Tribunal draws its power from Annex 7 Articles 5
26 and 6 as well as from the rules of procedure, Articles 7.1
27 and 7.2. Again the Tribunal is already familiar with the
28 rules of procedure so I will not dwell on that, but it is
29 worth emphasising nonetheless that under Article 7.1 the

1 Tribunal may conduct the arbitration in such manner as it
2 considers appropriate, provided that the parties are
3 treated with equality, at any stage of the proceedings,
4 and each party is given a full opportunity to be heard and
5 present its case. Significantly the rule gives the
6 Tribunal broad power to conduct the arbitration in the
7 matter it considers appropriate. The only limitations are
8 it must assure equal treatment of the parties, which the
9 order proposed by Guyana is intended to accomplish, and it
10 must assure that each party is given a full opportunity to
11 present its case. Again that is the purpose of Guyana
12 seeking this proposed order.

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

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

24 Suriname too in its written pleading cites and quotes
25 Article 7.2 as a source of the Tribunal's power. This is
26 at paragraph 4.1 page 7 of Suriname pleading of 13 June.
27 Suriname goes on immediately following its quotation of
28 Article 7.2 of the rules, at the beginning of the next
29 paragraph which is paragraph 4.2 of the pleading, in the

1 following manner "The question now before the Tribunal is
2 what is the precise scope of the obligation of the
3 parties", quoting expressly from Article 7.2 "to
4 facilitate the work of the Tribunal". Suriname posits the
5 question what is the scope of the obligation of the
6 parties to facilitate the work of the Tribunal. This
7 question which as I have said is drawn from the language
8 of Article 7.2 is a proper one, but it is not a difficult
9 one to answer. The answer is provided in Article 7.2
10 itself. As I read a few moments ago Article 7.2 requires
11 the parties "to facilitate the work of the Tribunal in
12 accordance with Article 6 of Annex 7 to the Convention."

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

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

25 Suriname does not take a contrary position, at least
26 not in its written pleading of 13 June. Rather it says
27 only in paragraphs 4.3 and 4.4 page 8 of that pleading
28 that the obligation of the parties "to facilitate the work
29 of the Tribunal is an obligation owed to the arbitral

1 Tribunal, it is not an obligation owed by one party to
2 another". Guyana agrees. The parties obligation to use
3 all means at its disposal to provide the Tribunal with all
4 relevant documents and information is an obligation owed
5 to the Tribunal. A fortiori the Tribunal has the power to
6 invoke the obligation that is owed to it, and to demand
7 that a party fulfil its obligation by using all means at
8 its disposal to provide such relevant documents and
9 information as the Tribunal might require. Specifically
10 so that the Tribunal might carry out its responsibilities,
11 responsibilities which expressly include as I stated
12 previously assuring equality of treatment and a full
13 opportunity for each party to present its case.

14 Suriname appears to agree with this conclusion. Its
15 logic would seem to be inescapable in any event. At
16 paragraph 4.5, page 8 of its written pleading, Suriname
17 states "it is Suriname's position that under the rules
18 governing this arbitration the tribunal in principle has
19 the power to request that one of the parties makes
20 available to it a particular document or documents in its
21 possession that the tribunal considers to be relevant to
22 the dispute over which it has jurisdiction". Let me
23 repeat that. This is Suriname stating that the tribunal
24 has the power to request that one of the parties make
25 available to it a particular document or documents in its
26 possession that the tribunal considers to be relevant.
27 Guyana welcomes this statement. It puts the parties in
28 agreement that under the rules of procedure that govern
29 this arbitration the tribunal indeed has the power to

1 require the parties to make relevant documents available
2 to it. In the circumstances of this case, as I have
3 already indicated, all the tribunal need to do to
4 accomplish this result is to require Suriname to notify
5 The Netherlands that it has withdrawn its objection
6 blocking Guyana's access to the Foreign Ministry's
7 archives. This is a less intrusive order than one
8 requiring Suriname to produce relevant documents itself,
9 an order which in any event Suriname has conceded is
10 within the tribunal's power to issue.

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

19 While it is to be anticipated that the tribunal would
20 be as specific as the circumstances allow in identifying
21 the documents to be produced and it is also to be
22 anticipated that where the relevance of required documents
23 is not readily apparent it would explain its basis for
24 requiring them especially if requested to do so by one of
25 the parties. There is nothing in the rules of procedure
26 or in annex 7 or elsewhere in the Convention that would
27 require the tribunal to exercise in this manner its
28 acknowledged power to require the production of documents
29 by the parties. And Suriname has cited no authority

1 whatsoever for such a limitation on the tribunal's power.

2 Having accepted that annex 7 in the rules of procedure
3 fully establish the tribunal's authority to order the
4 parties to produce relevant documents, Suriname cannot now
5 invent limitations on that power that are not themselves
6 sourced in annex 7 or the rules that govern this
7 arbitration.

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

26 In any event, it would certainly appear that the
27 appropriate measures to establish the facts provided for
28 in article 11.2 would include the power of the tribunal to
29 order the parties to produce such documents and other

1 information as the tribunal may deem necessary to
2 establish those facts. Suriname's written pleadings is
3 noticeably silent on the subject of article 11.2, by the
4 way.

5 While the power of the tribunal to issue the order
6 requested by Guyana is clearly established by annex 7 of
7 the rules of procedure, it is worth spending a few minutes
8 reviewing the powers of other international courts and
9 arbitral bodies to gain a better understanding of what
10 powers are considered customary and necessary for the
11 proper functioning of the tribunal. It will be seen
12 through such a review that the prevailing practice, indeed
13 the near universal practice, is that international courts
14 and arbitral tribunals are fully empowered to order
15 parties to produce such documents or other evidence or
16 information as the tribunals deem relevant to a proper
17 determination of the facts or necessary to assure the
18 fairness of the proceedings and the equality of arms.
19 Here are some prominent examples. I need not remind
20 President Nelson of the rules of ITLOS itself, Article 77,
21 located at tab 13 of the folder of documents which Guyana
22 has provided today, but just for clarity's sake, article
23 77 of the ITLOS rules of procedure, paragraph 1, "The
24 tribunal may at any time call upon the parties to produce
25 such evidence or to give such explanations as the tribunal
26 may consider to be necessary for the elucidation of any
27 aspect of the matters in issue or may itself seek other
28 information for this purpose".

29 Article 49 of the statute of the International Court

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

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

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

26 The WIPO rules, particularly article 48 (tab 19) are
27 to the same effect. The London Court of International
28 Arbitration rules, article 22.1(e) (tab 20). Again, the
29 arbitral tribunal may order the parties to produce

1 documents. Again, the rules of the American Arbitration
2 Association, article 19(3) (tab 21). Am I going too fast
3 here or is this the proper pace to be going through the
4 rules of the other tribunals? I will assume that it is
5 proper because I am told either to hurry up or to slow
6 down.

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

21 Another relevant example is from the rules of the
22 Bank for International Settlement, particularly article 9
23 of the BIS rules (tab 22). This is worth a little
24 specific attention because article 9 of the BIS rules is
25 strikingly similar to article 7.1 of the rules of
26 procedure in this case. Article 9 provides that "the
27 tribunal may conduct the arbitration in such manner as it
28 considers appropriate, provided that the parties are
29 treated with equality and that at any stage of the

1 proceedings each party is given the full opportunity of
2 presenting its case". As I have indicated, this is
3 virtually identical to Article 7.1 of the rules of
4 procedure that govern the present arbitration and under
5 its terms the Bank has been ordered regularly to produce
6 documents requested by an opposing party and ordered by
7 the tribunal. Three typical orders to this effect are
8 located at tab 25 of the Guyana folder.

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

23 The power of the tribunal is thus well established.
24 Accordingly, I would now like to turn to my second topic
25 which is whether the tribunal should exercise that power
26 in the circumstances of this case. In connection with
27 this topic, whether the tribunal should exercise its
28 acknowledged power, there are three fundamental points
29 that I would like to make. Each of these points is

1 undisputed or fully established by the presentations the
2 parties have made to the tribunal prior to today.

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

12 The first of these facts is that the files to which
13 Guyana sought access contain documents that are relevant
14 and important to this case. This is obvious from the
15 titles of the files which are listed in Guyana's letter to
16 the tribunal of 14 February 2005 and this letter, which I
17 am sure you are familiar with, is for convenience sake
18 located at tab 2 of your arbitrator's folder. Just
19 looking at page 3 of that letter, and I will not consume
20 your valuable time by reading at length from this
21 document, but if we can just take a look at the first
22 items here listed on page 3 - and, by the way, the indices
23 to these files are publicly accessible, which is how we
24 were able to learn the titles of the files. Of course,
25 the reason that these indices are publicly available is to
26 facilitate public access to the files. Under the first
27 heading, items, Code 3 legal affairs, etc, British
28 Guyana/Suriname boundary arrangement, part 1. Netherlands
29 oversees parts of the kingdom, territorial waters in

1 Continental Shelf, part 1. The next file Territorial
2 waters in Continental Shelf, part 2. The next file,
3 "Territorial waters in Continental Shelf Great Britain.
4 They sound pretty relevant to me.

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

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

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

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

28 The second fundamental and undisputed point is that
29 Suriname has had full access to all of the files and all

1 of the documents sought by Guyana. This, too, is
2 expressly admitted by Suriname. Paragraph 3.2 of
3 Suriname's 13 June pleading at page 6 states that "the
4 Netherlands Ministry of Foreign Affairs has provided
5 Suriname full access to the restricted archives". Not
6 only that but Suriname has taken full advantage of its
7 full access to the archives to which it has blocked
8 Guyana's access. And it has taken full advantage of its
9 full access by using documents from these very archives
10 that it has prevent Guyana from seeing in the preparation
11 of its written submission on preliminary objections.
12 Suriname has incorporated some of these documents from
13 these files that Guyana is not allowed to see into the
14 very text of its preliminary objections pleading and it
15 has annexed others to the pleading. BY Suriname's own
16 admission at least three documents incorporated into its
17 formal preliminary objections application were found by
18 Suriname in the archives to which Suriname has denied
19 Guyana access. Not only that but these documents are
20 among those most heavily relied on by Suriname in the
21 framing of its objection to the tribunal's jurisdiction,
22 including one map or a portion of a map found in one of
23 the files sought by Guyana that is identified as figure
24 one in Suriname's written pleading. Indeed, it is on the
25 basis of this map and accompanying explanatory document,
26 also found in the Netherlands archives, that Suriname
27 bases its very contention that the land boundary terminus
28 is disputed. How can it be fair or consistent with the
29 principle of equality of Suriname to utilise documents

1 from the files of a third party to which it has wilfully
2 denied Guyana access? Suriname's use of such documents
3 highlights the fact, as I have mentioned earlier, that the
4 files to which Guyana seek access contain relevant
5 documents and important documents. Suriname itself has
6 identified these documents from these files as important.

7 How can Suriname contend that the documents are not
8 relevant or important when Suriname has not only used them
9 itself but relied heavily upon them?

10 The third well-established point that I want to
11 emphasise is that but for Suriname's objection the
12 Netherlands would have granted Guyana's request for access
13 to the archives. This point cannot be seriously disputed.

14 In fact, the Dutch Foreign Minister, Dr Bot, made it
15 clear to the Dutch Parliament that the reason Suriname
16 refused Guyana's request was solely because of Suriname's
17 objection. I am sorry, I misspoke. Dr Bot made it clear
18 to the Dutch Parliament that the reason he, as Foreign
19 Minister of Suriname ... I think that I am a little tongue
20 tied on this point, but I am going to get it out, I
21 promise you. That the reason Dr Bot refused Guyana's
22 request for access to the documents, Dr Bot acting in his
23 capacity as Foreign Minister of the Netherlands, refused
24 Guyana's request for access to the Netherlands' documents
25 was solely because of Suriname's objection. That was the
26 only reason he gave. His remarks to the Parliament are
27 included at tab 9 of Guyana's folder. Both in the
28 original Dutch and an English translation. In relevant
29 part this is what he said. "On 7 December 2004 in

1 response to my request for its opinion, the Government of
2 Suriname declared that it objected to Guyana being given
3 the opportunity to inspect files. Also in view of the
4 historical and special bilateral relationship between the
5 Netherlands and Suriname - "in view of the historical and
6 special bilateral relationship between the Netherlands and
7 Suriname" - and in view of the lack of obligation under
8 international law, I decided not to allow Guyana to
9 inspect files". The position of the Dutch Government to
10 deny Guyana access to the relevant archives because
11 Suriname objected to such access was reiterated in the
12 Foreign Ministry's letter to Professor Schrijver of 22
13 December 2004. This letter is found both in original
14 Dutch and English translation at tab 4 of your folder. In
15 that letter, the Ministry of Foreign Affairs cited
16 Suriname's objection and explained "considering the public
17 interest of making the relevant files available to the
18 public, on the one hand, and the interest of good
19 relations with Suriname, on the other, I regard the latter
20 as more important. I therefore refuse y our request".

21 Suriname does not deny that it insisted that the
22 Dutch government deny Guyana's request for access to the
23 Foreign Ministry's archives; nor does it deny that the
24 Dutch government complied with this request. However, at
25 the same time Suriname claims that the files are
26 "restricted", implying perhaps that they might not have
27 been made available to Guyana even if Suriname had not
28 intervened to thwart Guyana's access to them. This is a
29 proposition that simply cannot be sustained. In the first

1 place, as indicated, the Dutch government informed the
2 Parliament and informed Professor Schrijver that the sole
3 reason for its refusal of Guyana's request was Suriname's
4 objection.

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

27 Suriname has suggested that for purposes of this
28 arbitration the archives should be treated as belonging to
29 Suriname itself, but Suriname has given no plausible

1 reason why the Tribunal should do this. In word as well
2 as deed Suriname has made it plain that the archives
3 belong to the Netherlands and not to Suriname. For
4 example at paragraph 3.5 page 6 of Suriname's written
5 pleading of 143 June Suriname writes "It should be noted
6 that should Suriname not object to the Netherlands giving
7 Guyana access to some or all of the files, the ultimate
8 decision whether or not to do so would still rest with the
9 Netherlands government." I am quoting from Suriname here,
10 "the ultimate decision whether or not to do so would still
11 rest with the Netherlands government". How then can
12 Suriname argue that the Tribunal should consider the files
13 as belonging to Suriname. The Dutch harbour no such
14 allusions. Dr Bout, the Foreign Minister, told the
15 Parliament that (and this is from a different portion of
16 the same statement to Parliament which is in the
17 arbitrators' folders) "The Netherlands did not want to
18 take a decision on access to the archive files without
19 first consulting Suriname, even though the final decision
20 on making available Netherlands' archives from the pre-
21 independence period rests with the Netherlands." - "Even
22 though the final decision on making available Netherlands'
23 archives from the pre-independence period rests with the
24 Netherlands".

25 Suriname appears to base its argument on ownership of
26 relevant files in the Dutch archives. In a letter
27 received in 1979 from the Dutch Prime Minister on the eve
28 of Suriname's independence promising that newly
29 independent Suriname would be given access to the archives

1 held by the Netherlands in the Hague. But promising to
2 another access to one's documents is an attribute of
3 ownership, not a surrender of them. Certainly the Dutch
4 government never took or accepted the position that its
5 archives belonged to Suriname. The Foreign Minister's
6 recent statement to Parliament confirms this.

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

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

23 It is therefore undeniable that as a result of
24 Suriname's actions Guyana has been prejudiced in the
25 presentation of its case before this Tribunal. It has
26 been forced to file its memorial without access to the
27 relevant documents, even though it first brought this
28 matter to the attention of the Tribunal in November 2004
29 and first requested and ordered in December 2004. And it

1 has been forced to respond at these hearings to Suriname's
2 petition for a suspension of the proceeding on the merits
3 without access to the documents, even as Suriname's
4 petition is heavily relied on. This plainly amounts to a
5 negation of equality of arms, a denial of equality of
6 treatment and a rejection of Guyana's right to make a full
7 presentation of its case. Put simply Suriname has
8 deliberately denied Guyana access to relevant documents
9 that might be helpful to it in the presentation of its
10 case or in the refutation of Suriname's case. For
11 tactical advantage Suriname has created a situation in
12 which it has been free to choose selectively from the
13 Dutch historical records and present only those documents
14 which out of context might appear to support its case.

15 Of course Suriname cannot be expected voluntarily to
16 introduce to the Tribunal relevant documents that it came
17 across in the Dutch archives that harm its case or
18 strengthen Guyana's. Unless Guyana is permitted to access
19 these files these documents will never see the light of
20 day, and will certainly not be brought to the attention of
21 the Tribunal. Such a result would not only be
22 unacceptably prejudicial to Guyana, but it would also
23 impair the Tribunal's function of finding the facts. As a
24 matter of equity and fundamental fairness and the proper
25 administration of justice Suriname's deliberate prevention
26 of Guyana's and the Tribunal's access to relevant
27 documents should not be allowed to stand. Accordingly
28 given the power of the Tribunal under Annex 7 and the
29 rules of procedure, which I have already discussed, it is

1 imperative that the Commission exercise its power and
2 prevent a manifest injustice from being perpetrated. In
3 fact it is already too late for that, an injustice has
4 already been perpetrated by Suriname with prejudicial
5 effects on Guyana even at this stage of the proceedings.

6 The Tribunal must not allow this state of affairs to
7 continue. It should order Suriname to withdraw its
8 objection to Guyana's access to the archives of the
9 Netherlands Foreign Ministry.

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

17 What remains to be discussed is the content of the
18 order that should be issued. As far as the content of the
19 order is concerned Guyana is guided by the views already
20 expressed by the Tribunal in its letter to the parties
21 dated 17 January 2005. In that letter with which you are
22 undoubtedly quite familiar but which for your convenience
23 is included at tab 1 of Guyana's folder, the Tribunal had
24 this to say: "The Tribunal would like to emphasise to
25 both parties the importance of good faith cooperation and
26 equality of arms in international legal proceedings. Not
27 only do these concepts underlie fundamental principles of
28 international law, they are laid down specifically in the
29 instruments governing the present arbitration". The

1 letter then cites Articles 5 and 6 of Annex 7, and
2 Articles 7.1 and 7.2 of the rules of procedure as I did
3 previously, and the letter refers specifically to the
4 obligation of the parties to "facilitate the work of the
5 arbitral Tribunal and provide it with all relevant
6 documents, facilities and information".

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

16 Mr President and members of the Tribunal, as Sir
17 Shridath Ramphal reported Guyana made every effort to
18 reach a solution along these lines with Suriname. But it
19 became clear that Suriname's position on access to the
20 documents was immutable. Suriname would not countenance
21 any access by Guyana to any of the files in the Dutch
22 archives. This position was made plain in writing to the
23 Tribunal and to us on several occasions by Suriname's
24 representatives. Only an order from the Tribunal would
25 cause Suriname to change its position. Accordingly it
26 remains for the Tribunal to establish by order the
27 solution that it encouraged the parties to adopt
28 voluntarily in its letter of 17 January 2005.
29 Specifically the order should in Guyana's view require

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

16 As part of the order a document review process could
17 be established, and should be, based on the precedent
18 established by the arbitral Tribunal in the OSPAR
19 arbitration between the Republic of Ireland and the United
20 Kingdom. In this procedure documents claimed by Suriname
21 to be either unrelated to the present dispute or otherwise
22 deserving of confidentiality would be reviewed in the
23 Hague at the offices of the PCA Secretariat by the
24 Tribunal or its designee and by independent counsel for
25 each of the parties who would be required to sign
26 confidentiality agreements. Counsel would attempt to
27 reach agreement on accessibility of each of the documents
28 subject to this procedure, failing which the Tribunal or
29 its designee, after hearing the positions of counsel,

1 would make the determination as to whether it should be
2 accessible or not. In this manner the legitimate
3 interests of both parties and the objective set by the
4 Tribunal in its letter of 17 January 2005 could be fairly
5 and expeditiously achieved.

6 Such a procedure would accommodate Suriname's
7 principal concerns about Guyana's access to the documents.

8 First, that many of the documents are not related to the
9 present dispute but to a separate land boundary dispute
10 between the two states; and second that there may be
11 reasons other than lack of relevance for treating some
12 documents as confidential. The procedure we are proposing
13 would assure that non-relevant documents and others
14 deserving of confidentiality as determined by the Tribunal
15 or as agreed by the parties would remain outside Guyana's
16 purview.

17 The procedure that Guyana is proposing would also
18 accommodate Suriname's concern that the files to be
19 accessed be identified with appropriate specificity.
20 Fortunately the index to the files is, as I have said,
21 publicly accessible at the Dutch Foreign Ministry, and
22 Guyana has been able to identify the specific files to
23 which it requires access. These are set forth as
24 indicated in Guyana's letter to the tribunal on 14th
25 February 2005? In addition, as Suriname itself has
26 acknowledged in its recent pleading of 13 June, Guyana
27 should not enjoy access to any files from which Suriname
28 has drawn documents and introduced them as evidence in
29 this case, in so far as access to such files may be

1 necessary for Guyana to respond effectively to the
2 evidence introduced by Suriname or to put it in proper
3 context.

4 We do not understand Suriname to continue to insist,
5 as it did in the past, in correspondence with the
6 tribunal, that Guyana be required to identify every
7 specific individual document to which it seeks access.
8 For Suriname to maintain such a position would be most
9 cynical. It would create what we in the US would call a
10 classic Catch 22 situation. That is when someone sets up
11 a situation, when someone sets up pre-conditions that are
12 intended to be and are, in fact, impossible for another to
13 fulfil, this is considered bad faith. How can Guyana
14 possibly be expected to identify specific individual
15 documents when it has been denied access to the files and
16 has therefore never been able to see the documents itself?

17 How can Suriname insist that such a requirement be
18 imposed on Guyana when it is Suriname itself through its
19 objection to the Dutch Government that has made it
20 impossible for Guyana to specifically identify particular
21 documents and has made it impossible for Guyana to satisfy
22 the requirement which Suriname would have the tribunal
23 impose? Thus we are pleased that it no longer appears
24 that Suriname is insisting on this cynical requirement.
25 IN any event, if Suriname's objective is to avoid a
26 fishing expedition, that objective would be a reasonable
27 one, but there are other legitimate ways to accomplish it
28 and these are already incorporated into the order Guyana
29 is proposing. First, the order would apply to and permit

1 access only to files that Guyana has already specifically
2 identified in this 14 February letter to the tribunal as
3 well as files from which Suriname extracts documents that
4 it introduces into evidence. From the titles of these
5 files and, of course, from the fact that Suriname would
6 have extracted documents and used them as evidence in the
7 case, it is plain that Guyana has not embarked on a
8 fishing expedition but that Guyana has limited its request
9 to those documents that are very likely to contain
10 relevant documents. It has limited its request to those
11 files that it is very likely to contain relevant
12 documents.

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

20 Suriname's final objection is to any order that would
21 allow Guyana access to documents relating to the merits of
22 the present dispute, at least at this time. According to
23 Suriname - I am quoting again from its pleading of 13 June
24 - "at this stage the tribunal is only competent to request
25 that the parties make available to it specific additional
26 documents that it considers relevant to and necessary for
27 it to decide preliminary objections, ie whether there is
28 an unsettled dispute concerning the location of the land
29 boundary terminus and documents that may be relevant to

1 and necessary for decision with respect to the question of
2 admissibility of submissions 2 and 3 of Guyana".

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

9 In the first place, the mere filing of preliminary
10 objections by Suriname does not under the rules of
11 procedure governing this arbitration automatically suspend
12 the proceedings on the merits or deprive the tribunal of
13 its acknowledged power to order the production of
14 documents relevant to all aspects of the dispute, merits
15 as well as jurisdiction. Under the rules that govern
16 these proceedings, Suriname is required to request that
17 the tribunal suspend the proceedings on the merits while
18 it deliberate on the preliminary objections and it is for
19 the tribunal to decide whether to grant Suriname's request
20 or not. Until such a request is granted, the tribunal's
21 authority to order production of documents relating to the
22 merits is undisturbed and indisputable. Moreover, as my
23 distinguished colleague, Professor Sands, will demonstrate
24 tomorrow, there is absolutely no justification whatsoever
25 for suspending the proceedings on the merits pending a
26 determination of the preliminary objections. This is
27 because among other reasons Suriname's jurisdictional
28 argument is not exclusively of a preliminary character,
29 but is instead inextricably linked to the merits of the

1 dispute and cannot possibly be resolved without a
2 consideration of the merits. Thus it would be a manifest
3 injustice and waste of resources to suspend proceedings on
4 the merits and to spend six months to a year on
5 preliminary objections only to come to the inevitable
6 conclusion that they must be joined to the merits in any
7 event. I will leave this argument with Professor Sands,
8 but, as far as my own presentation is concerned, there is
9 no reason for the tribunal's order on access to the
10 documents to be restricted to documents pertaining only to
11 the issues of jurisdictional and/or inadmissibility as
12 Suriname suggests, rather the order should cover access
13 not only to these documents but also to documents relevant
14 to the merits of the dispute.

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

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

22 JUDGE SHEARER: I thank you, Mr President. I understand your
23 argument, Mr Reichler, that you take the position that the
24 archives to which you want access belong to the
25 Netherlands and not to Suriname, but subject to resolving
26 that, does your argument depend on the archive material
27 belonging to a third party? I ask you a hypothetical
28 question. Would your argument be the same were Suriname
29 never to have been a colony or part of another country?

1 If it had been at all relevant times an independent
2 sovereign state, would your argument about access to
3 materials be the same? Sort of part two of that question
4 is that it follows on from that that in paragraph 14 of
5 your written observations of 13th June this year, you give
6 an example of the kind of documents to which you want
7 access and it seems to me that the missing piece, if you
8 like, is evidence by a document to which you do access but
9 it raises the question whether there must be more to be
10 found if only one had access to that full file. You give
11 that as one example, but you do not give any other
12 examples. I am just wondering whether you do have other
13 examples of that kind and whether this is the sort of
14 thing to which Professor Petrochilas's book to which you
15 referred at paragraph 32 is giving. In other words, I am
16 trying to find out whether there is some way in which we
17 can more specifically identify particular documents to
18 which you want access rather than to files that simply
19 have a general title. Thank you, that is my questions.

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

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

27 JUDGE SHEARER: That is right.

28 MR REICHLER: Put it this way, we are not suggesting that in the
29 ordinary circumstances that one party may take compulsory

1 discovery from another party in a proceeding of this type.
2 That is not what we are contending nor is it anything
3 that the tribunal is being asked to order or even remotely
4 to consider. The fact is that we are talking about the
5 property of the Netherlands; that is very clearly
6 established, the Netherlands considers these documents,
7 these archives to be its own property. Under general
8 international law, I would submit, as reflected, for
9 example, in the Restatement of Foreign Relations Law,
10 third edition, section 209 (tab 11) it makes it very plain
11 that in the case of the separation of part of the state
12 from another state, as in the case of decolonisation,
13 however we view Suriname's independence, whatever its
14 constitutional status prior to independence, Suriname
15 argues that it was not a colony but it was an integral
16 part of the kingdom of the Netherlands. Even so, when a
17 state is formed from the integrity of another state and
18 assumes independence the property that is located with the
19 metropolitan power does not succeed to the successor state
20 or entity or portion of the former state, whether that new
21 state was created from the kingdom of the Netherlands,
22 from a part of the kingdom of the Netherlands or whether
23 it was hypothetically a colony that was given its
24 independence. What would succeed to the new state, in
25 this case Suriname, would only be that property including
26 files, records, archives that were located in Paramaribo,
27 for example. Under general international law as well as
28 under the Dutch interpretation of who owns this property,
29 these archives, they most definitely belong to the

1 Netherlands. For that reason, of course, we are not
2 asking for any order directed at the Netherlands, which is
3 not a party to these proceedings, but what Suriname has
4 done is it has violated its commitment to facilitate the
5 work of the tribunal to work in good faith co-operation,
6 it has deliberately, undeniably, blocked Guyana's access
7 to these documents by insisting that the Netherlands not
8 allow Guyana to have access. That being the case, what is
9 required and all that is required is an order to Suriname
10 that it fulfil its obligations by withdrawing its
11 objections. in any event, the alternative is that
12 Suriname has acknowledged in their pleadings that they
13 have had full access to all of the files and all of the
14 documents and they have copied them. They have used some
15 of them in their pleadings. Suriname could just as well
16 be ordered by the tribunal to produce relevant documents
17 that it has copied or obtained from the files of the
18 Netherlands. Beyond this, even in the case of documents
19 which originated in Suriname in Paramaribo, or for that
20 matter in George Town, Guyana, if the tribunal were to
21 believe that there were documents in the possession of
22 Suriname, even those that originated in its own files or
23 in the possession of Guyana that originated in its own
24 files, while neither party would have the right to compel
25 discovery from the other, the tribunal would certainly
26 have the authority to require either party or both parties
27 to produce relevant documents from their own files, if it
28 deemed such documents important to its mission of finding
29 the facts or for equality of the parties or to give both

1 parties a full opportunity to present their case.

2 I suppose I have come full circle here and I hope
3 that I have at least addressed your question properly, but
4 in the end it really makes no difference whether the
5 documents were, as is very clear, and remain the property
6 of the Netherlands or whether we are talking about
7 documents that belong to Suriname, either because they
8 copied them or otherwise. The tribunal would certainly
9 have the power to issue the order. The appropriateness of
10 issuing the order, however, is certainly affected. This
11 is the second question I address. The appropriateness and
12 the necessity for the order and the manifest justification
13 for the issuance of the order is based on the fact that
14 certainly in large part that these are Dutch documents to
15 which Guyana would very easily have had access if Suriname
16 had not interfered with that process, interposed an
17 objection and blocked Guyana from obtaining evidence which
18 Suriname is now using against Guyana. That circumstance
19 plainly is within the jurisdiction of the tribunal to
20 remedy and I suggest that the facts which are undeniable
21 call out for the remedy.

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

24 JUDGE SHEARER: The second part of the question was how specific
25 need one be? You give a good example, I think, of a
26 specific document to which you desire access in paragraph
27 14 of your written observations, but I wonder whether it
28 is enough. The list of files that are held by the
29 Netherlands Foreign Ministry which have just general

1 titles about maritime delimitation, would that be
2 sufficiently specific, whether you have precedents that
3 allow access to those general sort of categories. That is
4 why I mentioned Professor Petrochilas's book. He does
5 seem to be saying that you really need to have very good
6 reasons and be quite specific about the documents to which
7 you require access, and not to open up a kind of general
8 voyage through all the documents that might be there.

9 MR REICHLER: Thank you for repeating the question for me.
10 In the first place the reason that we are able to identify
11 this document by way of example with some degree of
12 specificity is because Suriname extracted it from the
13 files and used it and relies upon it very heavily in their
14 submission on preliminary objections. So we know that
15 document exists because that is one of two or three to
16 which Suriname has revealed to us through the process of
17 presenting its arguments on preliminary objections.
18 Certainly it would be desirable, if it were possible, that
19 a party seeking access to documents, be as specific as
20 possible. Specific as possible in identifying the
21 documents to which it seeks access. There is no question
22 but that that should be the case, that Guyana should be as
23 specific as possible in identifying the documents. But in
24 these circumstances I think it is plain that Guyana is
25 being as specific as possible. These are documents that
26 it would have had access to and it would be able to defend
27 the admissibility or use of relevance of all of these
28 documents but for the fact that Suriname has blocked
29 Guyana's access.

1 By virtue of the fact that these documents are
2 normally as we have shown available to the public - and as
3 further evidenced by the fact that the file titles are
4 publicly available, Suriname could not keep the file
5 titles from us - we were able to get file titles and I
6 would submit that those file titles show that we are not
7 on a fishing expedition. That we have limited our request
8 to files that have titles that indicate high likelihood of
9 relevant documents, and that Suriname admits in their
10 pleadings that there are relevant documents included among
11 these files.

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

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

26 My final words to answer your question, and I am
27 aware of the passage of time but I do want to do justice
28 to Professor Shearer's question if I may have another one
29 minute, is what is the purpose of such a rule; what is

1 the purpose of the principle which is quoted in the text
2 of Professor Petrochilas. It is to prevent a fishing
3 expedition. It is to prevent imposing hardship or burdens
4 on another party or on the Tribunal by having a scatter
5 shotgun type approach to a request in the hopes that
6 somewhere out there - what we American lawyers routinely
7 do in pre-trial discovery; I am sure you have been vexed
8 by us many time in the past in the way we frame our pre-
9 trial discovery request, to try to encompass anything
10 conceivable that might be relevant. That is the practice
11 in the United States, it is not a good one and I do not
12 recommend it and I certainly do not recommend it here.
13 Nor is it what we are suggesting the Tribunal adopt. The
14 purpose of Professor Petrochilas is talking about is
15 preventing a fishing expedition. We have prevented a
16 fishing expedition here, it is possible to do that in
17 designing the rule in a way that permits this screening
18 procedure so that anything that is not relevant or for
19 other reasons should not be accessible to Guyana will be
20 screened out and we will not see it. That provides
21 protection to Suriname and at the same time without
22 imposing unrealistic and I would say unfair obligations on
23 Guyana to be more specific when it is Suriname itself that
24 has prevented Guyana from being able to satisfy such a
25 requirement.

26 Thank you, Mr President, and Honourable members of
27 the Tribunal, for your indulgence and I am grateful to you
28 for allowing me to complete my answer to Professor
29 Shearer.

1 THE PRESIDENT: Thank you very much, Mr Reichler, especially
2 for your prompt oral response.

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

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

1 Tribunal at this stage again.

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

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

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

7 THE PRESIDENT: OK.

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

11 THE PRESIDENT: Please do so.

12 MR REICHLER: As to the first question, what if the Dutch
13 Foreign Minister denies the request, I do not think that
14 is something that we should presume. It is appropriate
15 for all the reasons that I have stated, certainly the
16 Tribunal has the power to issue the order and for the
17 reasons I have suggested I believe it is manifestly clear
18 that the interests of justice require that such an order
19 be issued. I do not think we should presume that the
20 Dutch Foreign Minister will then turn around and say "I am
21 going to find other reasons". There is no reason to
22 presume one way or the other what the Dutch Foreign
23 Minister will do. In fact it is very plain that the Dutch
24 were prepared to make these documents available until
25 Suriname said do not do it. If Suriname is now under an
26 instruction from the Tribunal to withdraw its objection
27 the Dutch Foreign Minister might very well just as easily,
28 and I would submit even more easily, decide now I can give
29 the documents to Guyana because Suriname is under

1 instruction. This is what this distinguished arbitral
2 body which is meeting in the Hague and has its Secretariat
3 here, has ordered in the interests of justice, and it is
4 the policy of the Dutch government which it generally is
5 to facilitate and support the peaceful resolution of
6 disputes, and to support international arbitration which
7 is one of the reasons that this country has become the
8 capital of international arbitration. But even so, there
9 is no reason for us to speculate. There is just as good
10 an argument one way or the other and I submit that the
11 Tribunal should perform its function and leave it up to
12 the Dutch Foreign Minister to do his job.

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

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

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

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

25 MR REICHLER: There is an alternative. I understand the
26 question better. I would submit that it is a less onerous
27 task to impose on Suriname to merely ask them to withdraw
28 their objection. However, it is certainly within the
29 power of the tribunal, and I believe that I did mention

1 this in the course of my presentation, to order Suriname
2 to produce, subject to the same procedure with the same
3 protections that we are seeking - and I will come to that
4 question in a moment - to produce all the documents that
5 it acknowledges that it copied from the Dutch Foreign
6 Ministry. So, if there is a fear or a concern on the part
7 of the tribunal that it may issue an order, Suriname
8 complies with the order but then the fulfilment of the
9 objective is frustrated by the Dutch Government, there is
10 an alternative and the order can be issued in the
11 alternative. The order can be issued to Suriname to
12 withdraw its objection, but in the event the Dutch
13 Government for reasons of its own still refuses access,
14 that Suriname should make available to the tribunal all
15 such documents as it copied from the archives of the
16 Foreign Ministry. That would certainly be a way to avoid
17 any frustration or waste of time.

18 As far as the other issue, you have asked who is
19 going to make the decision and you said, "Are you going to
20 make the decision?" And that is an easy one. The answer
21 is, no, I am not going to make a decision nor have I
22 proposed that. What I have proposed on behalf of Guyana
23 is that the same procedure be followed that was followed
24 in the OSPAR arbitration and was followed, I believe, to
25 the satisfaction of the parties. Truly, in that case
26 there was certainly a smaller number of documents
27 involved. It does impose on the time of the tribunal or
28 its designee and the parties if there are a larger number
29 of documents, but the fact that there may be a larger

1 number of documents is a question of resource. It is not
2 a question of justice. To deny Guyana access to documents
3 to which it should have access, not all the documents, but
4 the documents to which it should have access, because
5 there is a plurality or some significant number of them,
6 only multiplies the injustice of the denial. It is not
7 Guyana's fault that there may be some number, some dozens
8 of relevant documents that are important to these
9 proceedings and that should be made accessible. Whatever
10 number there is, if they are relevant and if they are
11 important to the proceedings, both parties should have
12 equal access to them. Some cases are larger than others.

13 Some cases have more documents than others. This may or
14 may not be one of them. That should not govern the
15 deliberations of the tribunal, because whatever the number
16 of documents there is an effective procedure for making
17 the decision.

18 I have said that the decision would be made by the
19 tribunal or its designee. The specific procedure that we
20 are proposing is that the documents be reviewed or such
21 documents as Suriname objects to, which may not be all of
22 the documents, hopefully it would not be all of the
23 documents, but such documents as Suriname objects to on
24 the grounds of relevance or for some other reason Suriname
25 considers that they should be kept confidential, although,
26 parenthetically, documents that are at least 30 to 50
27 years old it would be hard to convince me - I am not the
28 judge of fact about how sensitive or confidential they
29 should be kept, but they certainly have the right to make

1 that argument. In any event, those documents would not be
2 accessible to Guyana in the first instance. They would be
3 screened through this procedure. The tribunal could
4 designate one of its members. The tribunal could appoint
5 an independent expert or special master. The tribunal
6 could do it as an entire tribunal or as a chamber of the
7 tribunal. It could sit with representatives of the
8 parties. We are proposing that they be independent
9 counsel, that is outside counsel, such as, for example, Mr
10 Saunders and myself or Mr Saunders and Professor Sands or
11 Professor Schrijver or Professor Soons and Professor
12 Schrijver, both speak Dutch, but outside counsel who would
13 sign confidentiality agreements, and many of us have done
14 this in the past in discovery proceedings in the United
15 States, and I would certainly trust Mr Saunders to abide
16 by that, as I am sure he would have confidence in me. In
17 any event, you would have independent outside counsel
18 together with the designee of the tribunal. In the first
19 instance, the parties would try to reach an agreement, but
20 in the end it would be the tribunal or its designee who
21 would make the decision as to the accessibility of these
22 documents.

23 PROFESSOR SMIT: Thank you.

24 THE PRESIDENT: Thank you very much, Mr Reichler. We are
25 running late and I think that lunch was supposed to be
26 from 12.30 to 2 pm. If I am not mistaken, we can meet at
27 2.30 again. Thank you very much.

28 MR SAUNDERS: Mr President, just one comment. I guess this
29 comes under the heading of equality of arms. I do not

1 think that I will need extra time, but should I - I really
2 do not think I will my presentation is not as long as Mr
3 Reichler's, but should I perhaps the tribunal would
4 indulge me and give me the same additional time that Mr
5 Reichler took.

6 SIR SHRIDATH RAMPHAL: We have no objection.

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

10 (Adjourned for a Short Time)

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

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

15 MR LIM A PO: Mr President, this is indeed going to be very
16 brief. I will not try to pre-empt the presentations which
17 Suriname will render shortly, nor will I comment on
18 Guyana's conduct in the proceedings so far, but what I
19 wish to stress is that Suriname and Guyana are good
20 neighbours. That is why the Government of Suriname regret
21 that the Government of Guyana came to the conclusion last
22 year that the two countries were not really fit or able to
23 resolve their differences on the limitation of the
24 maritime boundary by themselves and, therefore,
25 unilaterally the Government of Guyana referred these
26 differences to arbitration. At the same time the Suriname
27 Government expressed its commitment which I wish to
28 reaffirm and reiterate to you on this occasion, to
29 participate in these proceedings in a spirit of co-

1 operation and fair play, convinced that the outcome of
2 these proceedings will reflect a well-considered weighing
3 of the legal merits of the respective positions of the
4 parties and their legitimate interests. The outcome
5 should strengthen the bond between the two countries which
6 must be their ultimate strategic objective.

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

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

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

28 AS the tribunal heard this morning, the Republic of
29 Suriname has refused to withdraw its objection to Guyana's

1 request that it be permitted to review and receive copies
2 of certain archives in the Netherlands Foreign Ministry.
3 It is, we believe, a legitimate question for this tribunal
4 to ask why? There are three reasons. First, the nature
5 of the proceedings themselves; second, the nature of the
6 documents themselves and, third, the nature of Guyana's
7 request.

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

23 Fundamental to an adversarial proceeding, especially
24 between two states, is that each party must prove its own
25 claims or defences. That is why each party is expected to
26 co-operate with the tribunal in making available to the
27 tribunal the documents that it believes will best
28 establish its claims or defences. It is not the
29 obligation of either party to co-operate with its

1 adversary in helping its adversary prove its claims or
2 defences. For that reason, therefore, I am quite certain
3 that in its memorial Guyana did not submit or at least
4 tried not to submit documents from its own files or
5 elsewhere that might help Suriname establish its defences.

6 That is hardly surprising since that is the nature of an
7 adversarial proceeding. Yet the request of the Republic
8 of Guyana is a request that Suriname do just that.

9 Although the request is phrased in its written pleadings
10 in lofty phraseology, such as verifying assertions or
11 enabling the tribunal to be fully appraised of relevant
12 historical background or giving the tribunal the ability
13 to carry out its function, what is really happening here
14 is a request by Guyana for documentary material that it
15 hopes will make it possible for it to prove its case or
16 rebut Suriname's. There should be no mistake about that.

17 This is not a neutral exercise in which an academic is
18 trying to write a history of the region. This is an
19 adversarial proceeding in which each party is trying to
20 win and will use all lawful means at its disposal to do
21 so.

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

28 If Guyana did not believe that it had sufficient
29 evidence to support its claim, it should not have brought

1 it. For that reason, any notion of prejudice or
2 substantial disadvantage to Guyana by Suriname's action
3 must be rejected out of hand.

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

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

25 The archives at issue were among the files that, in a
26 practical and real sense, were Suriname's when it was a
27 constituent part of the Kingdom of the Netherlands. They
28 are part of its patrimony, part of its history and
29 essential to its foreign relations. That is why in 1975

1 when Suriname came fully independence the Netherlands took
2 the deliberate step of guaranteeing in writing Suriname's
3 continuing access to the archives after it achieved
4 independence. Access to those archives was thought
5 necessary because Suriname was involved in ongoing border
6 disputes with its neighbours. The archives were deemed
7 essential or at least important to Suriname's defence.
8 The Netherlands did not guarantee similar access to
9 Suriname's neighbours, nor I think it is fair to say would
10 it have even considered such a request as long as Suriname
11 objected.

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

21 In this connection it is useful to recall the words
22 used by the Netherlands foreign minister Dr Bot on January
23 20 2005, words from the letter to which Mr Reichler
24 alluded in his presentation but which he did not call to
25 your attention. This is a letter where Dr Bot told the
26 Netherlands Parliament: "The files on this matter are in
27 the possession of the Netherlands purely as a result of
28 the fact that at the time when the dispute arose until its
29 independence Suriname formed part of the Kingdom of the

1 Netherlands". That is why the archives are there and that
2 is what they are.

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

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

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

1 believe that when private parties were given access to
2 these archives by the Netherlands government there were
3 conditions of confidentiality and prior review that were
4 imposed.

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

19 One further observation with respect to the nature of
20 the archives. In an effort to equate access to the
21 archives to the British archives which the United Kingdom
22 for its purposes decided to make public, Guyana contends
23 that the archives in question are colonial archives,
24 because the British archives clearly were. That is simply
25 not true. Suriname was an autonomous constituent member
26 country of the Kingdom of Netherlands from at least as
27 early as 1954. It was not a colony of the Netherlands
28 after that date and with the greatest respect it is
29 insulting to suggest otherwise. For that reason alone,

1 the archives cannot be equated with the British archives
2 that have been made public. Nor, I respectfully submit,
3 can any legitimate argument be made out of the fact that
4 the United Kingdom for its own reasons decided to make
5 public its archives relating to the period during which
6 Guyana was one of its colonies. One supposes that the
7 reason such an argument is made is to suggest that the
8 Netherlands should have adopted the same policy. However,
9 we have discovered and I have also shared with counsel for
10 Guyana and with the registry a document that is a
11 publicly-available document from the United Kingdom
12 describing its own public record disclosure policy in
13 which the United Kingdom itself recognises in section 4.31
14 of that document that there may well be an exception to
15 its so-called third year open access rule for certain
16 documents relating to border disputes, including those of
17 its former colonies. I hope that the members of the
18 tribunal have been given a copy of that document. It is
19 section 4.3(1) of that policy document.

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

26 The third reason why Suriname has objected and
27 refuses to withdraw its objection to Guyana's request for
28 access to the archives concerns the nature of the request
29 itself. The request is a request for copies "of all

1 documents that consist of, discuss or relate to the
2 maritime boundary dispute". That is easily recognised as
3 a classic American style discovery request. It is a
4 fishing expedition with a big net. I must say that, as an
5 American litigator, I have engaged in American style
6 discovery for almost all of my professional career and I
7 would concede in this tribunal - not for it to be repeated
8 outside -that I have engaged in a few fishing expeditions
9 myself and I know one when I see one. That is exactly
10 what this is. This is not the type of request that one
11 sometimes sees in public international proceedings where a
12 court or a tribunal might ask one of the parties to
13 produce to it a specific document or where one party
14 signals that it would like to see a specific document as
15 Guyana did in its memorial with respect to chart 222,
16 which we then provided. This is not a case like the Corfu
17 Channel case where the court asked the United Kingdom to
18 produce a specific document which was a copy of the order
19 that sent the British ships into the Corfu Channel. You
20 all know that the British refused to produce that
21 document, the court took note of the British refusal, but
22 then went on to say that in the light of the British
23 refusal it had to decide the case based on the evidence
24 before it. And that is what it did.

25 Guyana has candidly conceded that it can not specify
26 the documents it seeks. Let me just say that in response
27 to a comment that Mr Reichler made this morning when he
28 said that he assumed that we had withdrawn our submission
29 that there had to be a specific request for specific

1 documents before this tribunal would be in a position to
2 order either party to produce documents. We have not
3 withdrawn that position. That we believe is a proper
4 statement of the guiding principles of international law
5 and the principles that apply to the work of this
6 tribunal. I give you again the example of chart 222.
7 There was a specific request in the Guyana memorial or a
8 reference to the fact that they did not have a copy of
9 that and they found a copy and we submitted that as a part
10 of our preliminary objections, the full document.

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

22 We respectfully submit that nothing in the Convention
23 or the rules applicable to this tribunal authorises,
24 permits or justifies the request made by the Republic of
25 Guyana. All of the authorities cited by Guyana are either
26 private commercial disputes or irrelevant authorities.
27 The two state proceedings that it cites were mixed
28 arbitrations. I think both of them involved Mexico. And
29 in those the tribunal rejected the request that Mexico

1 make documents available except for specific documents
2 relating to the testimony of one of Mexico's designated
3 expert witnesses. Except for that, as far as I can tell
4 from reading those cases, the other requests that Mexico
5 produce documents were rejected.

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

14 You do not have to take my word for this. Mr
15 Reichler referred you this morning to tab 2 in the book
16 that he gave you, which is a copy of his letter to Judge
17 Nelson, dated 14 February 2005, and he referred to the
18 list of files and he said that these are obviously
19 relevant just look at the titles. There is a file there
20 that says "British Guyana /Suriname boundary arrangement".

21 He says that that is obviously relevant. Territorial
22 waters and Continental Shelf, part 2, obviously relevant
23 and so on. Border arrangement, Guyana/Suriname, part 5
24 and so forth.

25 What he did not refer you to was the next page. Here
26 is the title of one file, "Relationship between the United
27 Kingdom and British Guyana". He wants a file from the
28 Netherlands relating to the relationship between the
29 United Kingdom and British Guyana. Next: "Relationship

1 United Kingdom/British Guyana". Next, "Independence
2 British Guyana". He wants an archive from the Netherlands
3 relating to t British Guyana's independence. Next,
4 "National Manifestations Guyana folder". I have no idea
5 what that is. Maybe that is pictures of the Guyana flag.

6 I do not know what that is, but that is what he wants.
7 He wants to have a look at that file. That is nothing
8 more than a fishing expedition. That is not a specific
9 request for a specific document which international
10 tribunals clearly have the power to ask for and have asked
11 for from time to time. That is not what is going on here.

12 Let me pick up on a question that Professor Shearer
13 asked this morning. He asked about the book written by
14 Professor Petochilos. The portion to which Guyana cited
15 in its written objections is the part of that book where
16 the professor - the good professor, I will leave it at
17 that - was attempting to articulate what he thought were
18 good standards, standards for good international arbitral
19 practice. He was talking about commercial arbitration, by
20 the way. He set forth a series of standards. And the
21 standard to which Guyana referred in its written
22 submission is found on page 220, subparagraph (d). Let me
23 just read that. "As a principle each party has to
24 identify the evidence on which it wishes to rely", as I
25 said earlier. "The tribunal may upon request of a party
26 require further disclosure provided that the request
27 identifies the evidence requested in sufficient detail and
28 provides sufficient reason for their disclosure, the
29 tribunal may also make such an order on its own motion".

1 I respectfully submit that the request made by the
2 Republic of Guyana does not meet either one of those
3 requests. It is not a request made in sufficient detail.

4 It is just give me everything. And there is not a
5 sufficient reason that has been set forth for the
6 disclosure. It is not a sufficient reason to say because
7 the documents are relevant or might be relevant. That is
8 not enough. As I said before, I am certain that there are
9 documents in the files of the Republic of Guyana that are
10 relevant. We will never see those. That is not what the
11 god professor was talking about and that is not what good
12 international practice requires.

13 I would like to say a word about the concept of
14 equality of arms. That is a concept that has been
15 embraced by Guyana as an additional reason for justifying
16 its request for sweeping access. Guyana's argument, as we
17 understand it, is that since Suriname has had access to
18 certain files so too should Guyana. Even leaving aside
19 the fact that Suriname has been given access to those
20 files by the Netherlands and that Guyana has not been
21 given such access by the Netherlands, the concept of
22 equality of arms simply cannot be made to support Guyana's
23 request. That concept which seems to have had its origin
24 in European jurisprudence relates to the notion that each
25 party should have equal opportunity to present its case
26 under conditions that do not place it at a substantial
27 disadvantage vis-a-vis its opponent. The concept is
28 sometimes also used in criminal justice systems as an
29 argument supporting free legal aid to defendants. The

1 concept is procedural and it has never been used to the
2 best of my knowledge to justify or require open or equal
3 access to documents, certainly not under the conditions
4 presented here. For all of these reasons the Republic of
5 Suriname respectfully submits that the request of Guyana
6 for an order of the type described this morning should be
7 denied. Thank you very much.

8 THE PRESIDENT: Thank you very much.

9 MR HOSSAIN: Thank you very much, Mr Saunders, I just wanted to
10 get one or two things clarified. I was very impressed by
11 the opening statement of the co-agent, the Honourable Mr
12 Lim A Po when he talked about two neighbours coming to us
13 to resolve a dispute which has gone on between you. I was
14 particularly impressed by this because I am coming from
15 another Act 7 arbitration between two neighbours in
16 another continent where precisely this kind of a statement
17 had had the right resonance so that both counsel could not
18 use the word "adversarial" as many times as Mr Saunders
19 felt it necessary to use it. In fact, I would say that
20 arbitration between two neighbours is an attempt not to
21 have adversarial relations between neighbours. It is much
22 more true interstate and between neighbours not to look
23 upon each other adversaries but between neighbours who
24 need to resolve something amicably and in good faith.
25 That is why I have not fully understood you when you were
26 saying that, if there is something that helps me, why
27 should I make it available? On the other hand, you say
28 that there are things that Guyana has which may be helpful
29 to you and which you would like to see. I would like to

1 put to Guyana later on what I consider is a very
2 legitimate curiosity, you might have to look at documents
3 which might be helpful to you, why should they not
4 disclose those? In a boundary dispute as I see it, when
5 you are looking back, you know very well how you look at
6 these historical materials to see how you, in fact, drew
7 the line that ultimately both sides believed. It is not
8 even people in this generation, but predecessors and
9 predecessors who had done things, said things and so on,
10 which are relevant for you to say this is what
11 legitimately in an international arbitration we can rely
12 on to say this should be the boundary. So relevance is
13 determined in that way, not necessarily that you blame
14 your predecessors for taking positions as they did. But
15 they took positions at that time which have a bearing and
16 have some relevance. It may be discounted or not
17 discounted. There could be very useful constructive
18 arguments on both sides as to what weight you give to
19 different pieces of evidence. But it seems to me that
20 wanting to shut out evidence in this sense of a kind of
21 extreme form of adversarial confrontation would not be
22 helpful to either side and would be counter productive
23 because you have come to us wanting to resolve something,
24 go back and be good neighbours, freed from a dispute, a
25 dispute satisfactory result through a just and fair
26 process. You would not regard that process as just and
27 fair if relevant materials were shut out, either Guyana
28 shut out those materials and did not give it to you, just
29 as they are wanting to say that you may have things which

1 would help us.

2 This is my point, that ultimately we are asking both
3 of you to help us to make a just determination. So please
4 if you have anything let us have it, if there is anything
5 there let us have it. You say we are not specific enough.

6 I think you have been very helpful in your statement to
7 us, paragraphs 2, 3 and 4. Guyana's present list numbers
8 22 files, each file containing several documents. Almost
9 all those documents constitute internal correspondence
10 among the Netherlands officials, Netherlands and Suriname
11 government and among Suriname government all in Dutch
12 language. All the documents constituting correspondence
13 with the United Kingdom are in English. The files to
14 which Guyana now request cover a wide range of issues
15 concerning the external relations with the Kingdom of
16 Netherlands, specifically relating to Suriname. In
17 particular they concern the inter-connected boundary
18 issues of Suriname with Guyana.

19 MR SAUNDERS: That is what they say, yes.

20 DR. HOSSAIN: This is in your statement.

21 MR SAUNDERS: That is what Guyana is asking for.

22 DR. HOSSAIN: I think you have been very fair in saying that
23 these things do have material relating to boundary issues,
24 but you say it is maritime and possibly something to do
25 with land. Now you may want to say that there is
26 something on land which should be kept away from the
27 Tribunal. There may be ways to achieve that, but if there
28 are things on maritime boundaries why do you not want us
29 to have the benefit of it? We would ask you to cooperate

1 with the Tribunal, both if you. If you want things from
2 Guyana which you say would help the Tribunal, and
3 ultimately the things is not help each other but help us
4 to come to a just determination, why would you not want to
5 cooperate. One final point, and I ask this question. In
6 this case and the other cases between neighbours we
7 actually made the two counsel and the two sides work much
8 more together. Why do you not sit down and say what are
9 the things that would be helpful. You know it and they
10 know it, the realities on the ground, and you could say
11 these are the materials that will be helpful to the
12 Tribunal. Why do you not jointly help us instead of being
13 adversarial. Maybe we could avoid the words adversarial
14 and think of it as a problem solving approach. It is a
15 problem you do not want to live with and go back with from
16 the Tribunal.

17 MR SAUNDERS: I have several responses to that very helpful
18 comment, and I think it has been very helpful. I have
19 several responses. First, before this arbitration was
20 commenced by Guyana the two countries were in discussion,
21 they had been in discussion for a long time. We had had a
22 series of joint border commission meetings. There was
23 even an attempt to enlist the aid of the Prime Minister of
24 Jamaica to assist the parties in resolving the dispute.
25 Those discussions foundered on Guyana's refusal to make
26 available to Suriname the full copy of its CGX concession.
27 You will recall from having read the memorial that Guyana
28 had granted a concession to CGX, a Canadian oil company,
29 to parts of the territory in dispute and they wanted as a

1 condition for some kind of a resolution Suriname to agree
2 to respect the existing concessions. Suriname then asked
3 I think quite legitimately to see a copy of the CGX
4 concession agreement.

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

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

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

27 With respect to making documents available, in a
28 perfect world I guess it would be great if everybody in
29 the world had perfect information, if before I buy stock

1 in the New York Stock Exchange I would like to know
2 everything that the President of General Motors knows. I
3 will never know that, I am never going to have perfect
4 information. In this proceeding there are rules of
5 procedure, there is a reason why states parties are not
6 expected to make discovery from their own files. There
7 are exceptions for specific documents, but even Mr
8 Reichler himself concedes that there are good reasons why
9 there is no discovery from state files. It would be nice
10 if we could go over to George Town and have a look through
11 the files of the Guyana Foreign Ministry but that is not
12 going to happen and it should not happen. It has never
13 happened.

14 In terms of equality of access we are at a
15 disadvantage, as we pointed out in one of our earlier
16 submissions, because in 1995 or 1996 the Suriname Foreign
17 Ministry burned to the ground. We do not have any files.

18 Everything that existed or almost everything that existed
19 prior to 1995 or 1996 has gone. But we had the
20 Netherlands archives. As I said before they belonged to
21 us when we were part of the Kingdom of the Netherlands. I
22 do not want to get into this whole debate about legal
23 ownership, that is not productive, but they were our
24 files, they were Suriname's files when we were part of the
25 Kingdom of the Netherlands, and when we became independent
26 we were guaranteed continued access. So in effect we
27 equate those to the Guyana files. They have the same
28 relative standing in our minds.

29 We will respond and we have responded to specific

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

22 That is simply not appropriate in our view.

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

1 respect to this dispute.

2 DR. HOSSAIN: Again thank you very much for explaining the
3 background in which you are looking at this. You have said
4 that you objected to the fishing thing and I think it was
5 said at the outset again that they did not want to engage
6 in a fishing exercise either, so common ground. My own
7 approach in these things is to try and find common ground.

8 The common ground that I find here is you are also saying
9 that within certain defined limits it is reasonable for us
10 to want to get at the relevant material, and the relevant
11 material for our benefit - because the five of us have to
12 struggle and come out with something which both of you
13 will say is just and fair and something we can live with
14 and go back to our respective countries and say this is a
15 just resolution. But for that we need your help, both of
16 you, and we need to get to the documents which are
17 available to both of you. Would it not be possible to
18 engage in a kind of constructive dialogue overnight and
19 see what are the kind of things that each of you can
20 identify with more specificity. I think you are coming
21 close when you say that it is down to not too many files.

22 You are down to 22 and out of those 22 you are further
23 narrowing down to the titles which are on these disputes
24 and you say you consider these are really not relevant,
25 you are fishing. But the non-fishing elements I am sure
26 you can by now pretty well identify.

27 MR SAUNDERS: With the greatest of respect, Dr Hossain, the
28 issue is not trying to identify which documents are
29 relevant to the dispute. I have no doubt that the

1 documents in the Netherlands archives are relevant to this
2 dispute. I have no doubt that most of them are. There
3 are some that may not be, but I have no doubt that some of
4 them are. But the nature of the request that has been made
5 by Guyana is to say let us have a look at documents that
6 are relevant. That is not appropriate under these
7 circumstances. If there is a specific document they can
8 identify we will of course try to find it and if we can,
9 if it is justified, we will absolutely make that document
10 available. But the issue is not whether we can find
11 documents that relate to this border dispute. This border
12 dispute has been going on for 200 years. The issue is not
13 whether the documents are relevant, but the issue is the
14 right to access. Our submission is that the Republic of
15 Guyana does not have the right to seek access to these
16 files just as we do not have the right to seek wholesale
17 access to their files in their Foreign Ministry. That
18 would be a wholly inappropriate thing for us to ask for.
19 Wholly inappropriate. I am not smart enough to understand
20 whether this Tribunal has the power even to order such a
21 thing because I know you would not. No international
22 Tribunal would ever do that. But that is our starting
23 position. The issue is not are there things in these
24 archives that are relevant, there may well be, in fact we
25 know there are. In fact chart 222 was in the archives.
26 They asked for it and we gave it to them. Are there
27 things in their files that are relevant? I am sure there
28 are. We could sit down tonight if they would give me an
29 index to the files in the Guyana Foreign Ministry and I am

1 certain that I could find many many documents in their
2 files that I would like to see and that I could persuade
3 you are relevant and that you ought to be able to see.
4 But they will not do that. You would not be expected to
5 ask them to do that. We would not ask that.

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

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

28 DR. HOSSAIN: Thank you very much.

29 PROFESSOR SHEARER: Mr Saunders, you have made rather a

1 lot depend on the question of whose archives they were for
2 someone who began by saying that that not a very important
3 issue. Maybe you could clarify the constitutional
4 position. Before Suriname's independence how many
5 treaties did Suriname enter into to in its own capacity?

6 MR SAUNDERS: I cannot answer that question, sir. I would be
7 happy to submit an answer in writing but I do not want to
8 answer that question off the cuff because I simply do not
9 know. I do know that Suriname participated in many
10 international conventions prior to the time of it
11 obtaining independence.

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

14 MR SAUNDERS: Yes.

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

20 MR SAUNDERS: Once again I do not know but I think I may have
21 not been clear enough in my presentation. The issue is
22 not who has the legal ownership of these files in a legal
23 sense. That is not open to debate, I would submit. But
24 the point is that these files prior to Suriname's full
25 independence in 1975 are not colonial archives, we were
26 not a colony of the Netherlands during the period from at
27 least as early as 1958 until 1975. We were an autonomous
28 constituent member of the Kingdom of the Netherlands.
29 That is the point that I was making.

1 PROFESSOR SHEARER: With no foreign relations powers.

2 There were reserve powers and the reserve powers included
3 defence and foreign affairs; is not that right?

4 MR SAUNDERS: I apologise but I do not know.

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

21 MR SAUNDERS; I do not want to get into the question of
22 title. We have two rights with respect to the archives.

23 We have the right to access and we have the right to
24 object to access by others.

25 PROFESSOR SHEARER: That is very helpful. If you have
26 the right to object to access then presumably this court
27 would have the right to ask you to revise the decision
28 that you object to access. We are only talking about
29 rights here, we are not talking about whether it is a good

1 idea or not. In other words if we felt as a Tribunal
2 that it would be really helpful to this process in the
3 sense of my colleague has just described, to look at the
4 archives for the period before Suriname became
5 independent, if we felt that was really helpful and it is
6 always helpful -- this building is full of boundary
7 disputes and it is always helpful to look at the colonial
8 archives or the pre-independence archives as part of the
9 historical record. If we thought that was useful you do
10 believe that you are the key actor here, that if a request
11 is to be made it should be made to you because you have
12 the power, not because they are your archives but because
13 you have the power to advise the Netherlands that access
14 should be given.

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

24 I do not know what the Netherlands government would
25 do. We have objected. We have articulated a legitimate
26 objection to access to the files. I do not know what would
27 happen if this Tribunal ordered us to withdraw our
28 objection. We have made it and I do not know what the
29 Netherlands government would do. But let me go a little

1 bit further and point out that since you say it would be
2 useful to see these files, you are aware that Guyana
3 became independent in 1966. Suriname became independent
4 in 1977. So there is a nine year period during which
5 Guyana was independent and we were not. The archives that
6 they want to see cover that nine year period. With the
7 greatest of respect you will never see the Guyana files
8 for the period from 1966 to 1977. They are not in the
9 British archives, they are in Guyana's files in George
10 Town. Mr Reichler has said, rightly so, that there should
11 be no discovery of those files. You will never see those.

12 So even if you were to order us to withdraw our objection
13 and even if the Netherlands were to say all right, we will
14 make these documents available, and once again I do not
15 know if they would, there is an imbalance, because they
16 are not equal. The reason why I refer to the date of
17 Suriname's independence and the date on which it became an
18 autonomous constituent member of the Kingdom of the
19 Netherlands was solely to respond to the assertion that
20 the files in question are colonial archives. The British
21 files are colonial archives, and Guyana has tried to
22 equate access to the British archives on the one hand to
23 access to the Netherlands archives on the other hand, and
24 they are not equal. We were not a colony of the
25 Netherlands for most of the period in question. We simply
26 were not. That was the point. I was not arguing that we
27 had an independent Foreign Ministry, I was not arguing
28 that we had ambassadors, but I was firmly taking the
29 position that we were not a colony of the Netherlands.

1 PROFESSOR SMIT: I would like to understand the position
2 of the Dutch Government. It seemed to me that the
3 position of the Dutch Government is that we will not
4 disclose these archives unless Suriname approves, or is
5 the position we will not disclose them if Suriname
6 objects?

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

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

14 MR SAUNDERS: under duress.

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

20 MR SAUNDERS: Right

21 PROFESSOR SMIT: The second question is this.

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

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

26 The second one is arbitral Tribunals have a natural and
27 legitimate desire to get access to all information that
28 may be relevant to the resolution of the dispute. And
29 whether it is in archives or in documents or anywhere else

1 that is the objection. The question is how do you achieve
2 it. Once you adopt the proposition that the Tribunal
3 should have access to all relevant information the next
4 question is how does the Tribunal achieve that. That is a
5 procedural question; is there a procedure that can be
6 devised to do that. That would weigh equally on both
7 parties.

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

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

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

1 I can think of that you would not be entitled to see. For
2 example, you would not be entitled to see notes that I
3 prepared for myself last night as I was preparing this
4 presentation. Clearly relevant, very relevant.
5 Privileged. There is one example of relevant documents
6 which with the greatest respect this tribunal would not be
7 entitled to see. The recognised exception in
8 international proceedings is that you may request a
9 specific document for a specific reason. If that document
10 is not made available, you may take note of that fact.
11 The best example of that that I know of is the Corfu
12 Channel case. The tribunal asked to see a copy of the
13 Admiralty Order that sent the British ships into the Corfu
14 Channel because they wanted to find out what their
15 instructions were. It was relevant to know whether they
16 were just passing through or whether they were going
17 through for the purpose of drawing fire from the
18 Albanians. The British refused to produce that document on
19 the grounds of national secrecy. The tribunal said, well,
20 we have to decide the case on the basis of the evidence
21 before us. There are categories of documents that simply
22 are not made available in these kinds of proceedings. The
23 other example is internal archives of a state party. The
24 files in the Republic of Guyana's Foreign Ministry, which
25 I am sure fill a room, relating to this dispute are
26 clearly relevant. I would like to see them. You would
27 like to see them. But the nature of the proceeding and
28 the nature of the sovereign issues that are in play here
29 say that that is not an appropriate request. It is such

1 an evasion of the sovereignty of one of the participant
2 states that the request has to be very specific, not
3 broad, not "just give me everything that is relevant".
4 That is why I think that the exception requires
5 specificity so that you do not unnecessarily invade the
6 sovereign interests of the parties to the arbitration.
7 That is our position.

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

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

28 THE PRESIDENT: We have had a discussion ...

29 MR SAUNDERS: Before you make your comments, I did not want to

1 leave the podium without saying three things. First, we
2 heard just as we came into the room that there had been
3 several bombings in London and I know that you and others
4 in the room have friends and relatives in London. I want
5 to express to you and to the others in this room the
6 serious concern on the part of the Republic of Suriname
7 for the safety of your friends and relatives, Mr Ramphal's
8 friends and relatives, Mr Sand's friends and relatives and
9 the relatives and friends of anybody else in the room who
10 have people who might have been caught up in this terrible
11 tragedy. That is the first thing I would like to say.

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

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

25 Thank you very much.

26 THE PRESIDENT: Thank you very much for the points that you
27 raise, especially the question of the disaster which has
28 struck, which has made itself manifest in London and for
29 your congratulations on my being re-elected to the

1 tribunal and the welcome to Professor Shearer. I was
2 going to say that we had a tremendous discussion today on
3 this very important issue.

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

12 (Short Adjournment)

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

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

1 second round, as it has not been in the first round, it
2 would be of no moment because the authority of the
3 tribunal is absolutely clear.

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

14 The third point of agreement, at least so far, is
15 that we have heard nothing from Suriname to suggest that
16 the procedure that Guyana has proposed for screening out
17 documents which are privileged, otherwise confidential or
18 non-relevant is unworkable. Indeed, this is a procedure
19 that is commonly used in courts and arbitral tribunals and
20 we agree that documents that are not relevant, that are
21 privileged or otherwise subject to confidentiality should
22 not be produced. We have produced a procedure, obviously
23 as any proposition that emanates from the human mind it
24 can be improved upon and we welcome any improvement to it
25 that Mr Saunders might have to offer, we are certainly
26 open to that and look forward to being able to reach an
27 agreement on a procedure for a review of documents, a
28 screening of documents, that would be acceptable to both
29 Suriname and Guyana.

1 Let me turn to what I think are some points of
2 disagreement and I think these are some significant
3 disagreements, just as we had significant agreements, that
4 are worthy of the tribunal's attention. I submit that
5 there is at least one fundamental flaw in Suriname
6 attempting to equate the archives of the kingdom of the
7 Netherlands with the archives of the Republic of Guyana.
8 This is apples and oranges. Suriname's position is that,
9 since it cannot access or presumably since it cannot
10 access Guyana's archives in George Town, Guyana, then
11 Suriname should be able to prevent Guyana from accessing
12 the archives of the Netherlands here in the Hague. We
13 submit, on behalf of Guyana, that there really is no
14 equivalence here. Indeed, under questioning, Mr Saunders
15 agreed that legal ownership of the archives in the
16 Netherlands is in the Netherlands; that is the Netherlands
17 owns the archives in the Netherlands, not Suriname. He
18 said, and my shorthand is not the best but I am trying to
19 quote him accurately, "legal ownership of the files is not
20 open to debate". He concedes the issue. Legal ownership:
21 it belongs to the Netherlands. Indeed, that is clearly
22 the Netherlands' position as I have stated before. Dr Bot
23 said that it is our decision to make: "We choose to honour
24 Suriname's objection, but it is our decision to make.
25 Suriname, indeed, in their pleadings said "Even if we were
26 to withdraw our objection the final decision would rest in
27 the Netherlands." Indeed, as we have pointed out, under
28 general international law as reflected, for example, in
29 the restatement of Third Foreign Relations Law of the

1 United States, just by way of example, it is very clear
2 that when a sovereign state divides in any manner, such as
3 the kingdom of the Netherlands, a sovereign state severed
4 off a piece of that sovereign state, which became the
5 independent state of Suriname, that all property,
6 including archives, of the predecessor state that are
7 located outside the successor state remain the property of
8 the predecessor state as long as the predecessor state
9 continues to exist. Well, obviously, the kingdom of the
10 Netherlands has continued to exist. I do not understand
11 all the fuss, frankly, about the distinction between
12 whether Suriname was a colony or an integral part of the
13 constituent. I thought that I made it clear, certainly in
14 my answer to Professor Shearer's question this morning,
15 that we understand the constitutional arrangement and that
16 Suriname was an integral part of the unified kingdom of
17 the Netherlands, certainly in the years preceding its
18 independence in 1975. I do not understand why anybody
19 would claim that Guyana spoke in a matter that was
20 "insulting", I think was Mr Saunders' word. We certainly
21 did not intend any insult. We recognise that Suriname
22 during their immediate pre-independence period was an
23 integral part of the kingdom of the Netherlands. But for
24 our purposes here and with all due respect this is a
25 distinction without a difference, because, as I said,
26 under general international law, whether Suriname was a
27 colony, which we understand it was not, or an integral
28 part of a unified kingdom of the Netherlands, as a
29 successor state it only acquires property rights,

1 ownership, of such property as is located in the territory
2 of the successor state or such other property as the
3 predecessor state chooses to convey to it. It is very
4 clear that as of this date the legal position of the Dutch
5 Government is that the archives belong to the kingdom of
6 the Netherlands and, indeed, the legal position of
7 Suriname is that the archives belong to the kingdom of the
8 Netherlands. This is, as I said, consistent with general
9 international law. There is really no way to equate
10 archives that are the property of the kingdom of the
11 Netherlands with archives such as may exist that are the
12 property of Guyana. Clearly, there is an equation, an
13 equivalence, between archives of Guyana and archives of
14 Suriname - in Suriname and Guyana - but not archives
15 belonging to the third state, which has chosen to give
16 Suriname the opportunity to object to the access to these
17 Dutch documents by third states and has chosen, as owner
18 of these documents and files, to honour that request.

19 We say there is a constant refrain, "these are our
20 files, these are our files". When you acknowledge that
21 legally they do not belong to you, they are not your
22 files. These are the documents belonging to the kingdom
23 of the Netherlands and there is no equivalence between
24 whatever access there is in George Town, Guyana and access
25 here in The Hague. It is an interesting question whether
26 there should be access to archives in George Town, Guyana
27 and in Suriname as a matter of equivalence. That is an
28 interesting question. I think that Mr Saunders, I am
29 quite sure unintentionally, mischaracterised our position

1 on this. Our position is that there is no obligation for
2 parties in proceedings such as these to make demands for
3 production of documents on each other; that is to say
4 Suriname does not have the right or entitlement to demand
5 access to Guyana's archive in George Town. Guyana does
6 not have the right to demand access to Suriname's
7 archives. But that does not mean that the tribunal in the
8 exercise of its own discretion is powerless to order
9 either Guyana or Suriname or both to produce documents
10 that the tribunal considers relevant and necessary to its
11 understanding of the issues. Clearly, that power remains
12 in the tribunal and, indeed, I do not mean to be
13 repetitive, but it refers back to article 6 of annex 7 as
14 reflected in article 7.2 of the rules of procedure. The
15 obligation to facilitate the work of the tribunal
16 including the obligation to produce such documents - all
17 documents not such documents - all documents that the
18 tribunal may consider relevant. But here we are not
19 talking about documents located in or the property of each
20 of these two sovereign states. We are talking about
21 documents that are the sovereign property of another
22 sovereign, access to which has clearly been denied Guyana
23 because of Suriname's intervention.

24 Let me say that another issue that I consider to be
25 really - I will not even call it a fundamental flaw - I
26 will call it a red herring in the position of Suriname is
27 that there is some requirement that Guyana specify each
28 and every single document to which it wants access and,
29 unless it can do that, it means that it is on some sort of

1 fishing expedition. I think that there is a very simple
2 answer to this and I would say a compelling one. This is
3 not a case about a request to produce documents. This is
4 not a case where there exists a request to produce
5 documents which might be subject to some of the
6 qualifications that Suriname proposes. Guyana has not
7 requested documents from Suriname. It has not requested
8 that Suriname produce documents. It has not requested
9 that the tribunal order anyone to produce documents. This
10 is a case about Guyana's request, administrative request,
11 addressed to the Netherlands for access to the
12 Netherlands' archives. This is a very big difference
13 because, when Suriname went to the UK, went to London, to
14 obtain the documents in the archives of the United
15 Kingdom, which it did, they did not ask for specific
16 documents. How could they possibly know what documents
17 were in the archives? The way that this is done when a
18 researcher or in this case a state or its counsel seeks
19 access to archives of a state is that one goes to the
20 records hall, signs whatever appears one has to, one has
21 access to the public index and one asks for particular
22 files. Then that request is either granted or not. In
23 the case of the United Kingdom, as my colleague Professor
24 Sands will describe, the request was granted because the
25 United Kingdom has followed a policy of equality of arms,
26 equal treatment of the different parties to an
27 international arbitration. It was not going to give
28 access to Guyana without giving it to Suriname. Had it
29 denied access to Guyana, it probably would have denied

1 access to Suriname too, because of the principle of
2 equality of arms and of equal treatment. It is important
3 to recognise the difference between a request for access
4 to archives and a request for production of documents.
5 When Suriname obtained the documents that it claims that
6 it did obtain and that it has acknowledged most of which
7 is relevant from the Netherlands, after this proceeding
8 commenced, did Suriname specify every single document in
9 the archives that it wanted? Of course not. Suriname did
10 the same thing Guyana did. It either asked "Give us all
11 the files relating to these subjects" or it went through
12 the public indices, it identified which files it
13 considered important to it and that is how these requests
14 are made.

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

24 We have heard a lot of times that there is no other
25 case where such a request for documents so broad, seeking
26 wholesale access, where such an order has either been
27 requested or issued. Well, I submit that this case is
28 different from other cases, because what we are talking
29 about is a request for access to archives and the

1 intervention of one of the parties to the proceedings with
2 the third state to block the other party to the
3 proceedings from having equal access to those documents.
4 If Suriname can produce a case involving this situation
5 where the tribunal said "Sorry, we cannot issue such an
6 order, we cannot require the party that is interfering
7 with the other's access to desist from such interference"
8 or where Suriname can come forward with a case where the
9 tribunal demanded of the party who was seeking access to
10 archives that it identified every document in those
11 archives that it wanted, OK, we have to bear the burden of
12 such precedent. But that does not exist. This is a
13 different kind of case. We are not seeking production of
14 documents from Suriname. We are not seeking an order from
15 the tribunal that Suriname produce documents or that the
16 Netherlands produce documents. All we are seeking is an
17 order which this tribunal plainly has the authority to
18 issue that Suriname advise the Netherlands that it is
19 withdrawing its objection so that the process of Guyana's
20 obtaining access to the Netherlands archives can take its
21 normal course. That is all that we are asking and to
22 claim that Guyana has to identify every specific document
23 that might exist in these files, otherwise it is a fishing
24 expedition, frankly is a smoke screen. It is certainly a
25 red herring as I have said. It is uncalled for.

26 There has been an issue raised about how the
27 Netherlands might react in the event Suriname in obedience
28 or in compliance with the Tribunal's order withdraws its
29 objection. The note verbal that was submitted for the

1 first time this afternoon, and we have just received for
2 the first time from Suriname, it was described as an
3 internal Dutch document, and reading from the English
4 translation provided by Suriname say "in principle third
5 parties will not be granted access to files which concern
6 ongoing boundary disputes unless those directly concerned
7 have no objections". "Unless those directly concerned
8 have no objections". If Suriname were to advise the
9 Kingdom of the Netherlands that it has no objections this
10 condition would be satisfied. Does this mean that the
11 Dutch government will most definitely grant Guyana access?

12 Again we do not want to enter into the realm of
13 speculation and that is not the business of the Tribunal
14 either. It is up to the Tribunal to do its job, to issue
15 the appropriate order, and then it is up to the Kingdom of
16 the Netherlands to do its job and carry out its
17 responsibilities. I submit there is no reason to presume
18 that the Kingdom of the Netherlands given a statement of
19 non-objection by Suriname, will act in a manner that
20 frustrates the enforcement of implementation of an order
21 issued and duly issued by an international arbitral
22 Tribunal functioning for this purpose in the Hague.

23 We have Dr Bot's statement, the Minister of Foreign
24 Affairs. I have been accused of mischaracterising it. I
25 did read from it verbatim so that the Tribunal could form
26 its own conclusions, both the statements to Parliament
27 which were in December 2004 and not January 2005 - there
28 may have been a subsequent statement. I read and quoted
29 and talked about the one from December, his initial

1 statement to Parliament, stating the reasons for the
2 rejection of Guyana's request in which he stated very
3 clearly it is in response to Suriname's objections, and
4 since we are under no international legal obligation we
5 will honour Suriname's request. That is not a bunch of
6 reasons, that is one reason. That is the only reason. I
7 still say - and these are my words not Dr Bot's - that the
8 application or the request of Guyana was rejected solely
9 because of Suriname's objection. Indeed that is the only
10 logical conclusion that can be withdrawn when it is the
11 only reason that has been given by the Dutch government,
12 both in Dr Bot's statement to Parliament and in the letter
13 that the Foreign Ministry under Dr Bot's supervision sent
14 to Professor Schrijver. "Suriname has objected. Given
15 the choice between the public interest and public
16 disclosure and detriment to our relations with Suriname,
17 the latter is more important. I therefore refuse your
18 request". It is not a bunch of reasons, it is one. So
19 there is every reason to believe, and again we need not
20 speculate as to what the Dutch government will do - this
21 Tribunal has its duty and the Dutch government has its,
22 but I suggest there is clearly no reason to presume that
23 the Dutch government will deliberately take a decision
24 that frustrates the purposes of this Tribunal. If it
25 happens then there are other recourse for this Tribunal to
26 follow, which we have already suggested.

27 Suriname in such case could then be ordered by the
28 Tribunal to produce copies of the documents that it has
29 copied from the archives. That would be specific. it

1 would define precisely which documents should be produced.

2 But we need not get there because we need not speculate,
3 and particularly speculate negatively, about what the
4 Dutch government is likely to do.

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

9 We tried to resolve this dispute amicably. The
10 request that the files listed in our February 14th letter,
11 Again it is not a request for production of documents, it
12 is a request for access to archives, but the files
13 identified is a pared down list from the original request
14 to the Dutch Foreign Ministry that was submitted by
15 Professor Schijver in August 2004. That represented our
16 good faith effort to pare down the list in an effort to
17 reach an agreement. The answer we received was, "not
18 interested". You heard Mr Saunders speak of narrowing the
19 list, although I must admit that there is no reason for
20 Guyana to narrow the list. It is not a request for
21 production of documents, it is a request for access to
22 archives. But even so in an effort to resolve this
23 dispute and avoid imposing on the tribunal and maintain an
24 atmosphere of statesmanship and amicability between two
25 neighbouring states, we were willing to compromise, but we
26 were told it does not matter, you cannot have access to
27 these archives of the Netherlands. Suriname is going to
28 insist on refusing to permit Guyana to have access to
29 these files. But at this point, while of course it is

1 never too late for parties to meet and to discuss - never
2 say never about the possibility of reaching agreement - I
3 have learned that in my career as a mediator/negotiator as
4 well as Counsel - there comes a point when a decision just
5 has to be made and I think that it has become clear today,
6 particularly after hearing Mr Saunders, that the time for
7 a decision has arrived. I will add this, though. That a
8 decision is made does not preclude the parties thereafter
9 from working together to ameliorate the effects, to find
10 working conditions, to find a way of implementing the
11 order that would be to their mutual acceptance. Indeed, I
12 proposed that this morning. I hope that I was not too
13 subtle in making that suggestion to Mr Saunders, but in
14 case I was let me reiterate. I think for this reason the
15 issuance of the order that Guyana requests is not only
16 justified because you have the power and all of the
17 equitable conditions that I have mentioned, fundamental
18 fairness, equality of access, full presentation of each
19 party's case, not only justified there, but the issuance
20 of the order which would require Suriname simply to
21 withdraw its intervention with the Dutch Government and
22 permit Guyana's request for access to the archives to take
23 its normal course, issuance of that order, I believe,
24 could very well facilitate an agreement. We would still
25 be willing to discuss with Suriname after the issuance of
26 such an order, tailoring it in such a way that everybody
27 could live with it, but more important than that we do
28 regard as legitimate, and I said that this morning, and we
29 said it in our paper, Suriname's concern about the

1 confidentiality of non-relevant documents, privileged
2 documents or other documents as to which Suriname could
3 properly assert a claim of confidentiality. They would
4 have that right. Guyana does not want access to documents
5 that are not relevant. I do not want to sound
6 hypocritical. Mr Saunders has already said that most of
7 the documents are relevant. I cannot help that.
8 Certainly the ones that are not, we have no interest in.
9 Similarly, we have no interest in access to documents that
10 are properly covered by a claim of confidentiality. We
11 have proposed a procedure that would ensure that those
12 rights and interests of Suriname were protected. If there
13 is a better way to do it, we are certainly amenable to
14 that. But the issuance of the order, I think, at this
15 point is not only timely but perhaps overdue. In any
16 event, I think that it will facilitate an agreement as to
17 the implementation of such an order.

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

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

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

24 THE PRESIDENT: Thank you.

25 PROFESSOR SANDS: Thank you very much, Mr President and members
26 of the tribunal for your indulgence of three minutes. I
27 just wanted to come back to one issue which was raised by
28 a document that Mr Saunders distributed and which we got
29 just over the lunch break. It is a document which you

1 should have a copy of in front of you. It is entitled
2 "Access to public records". It is published by the United
3 Kingdom Public Records office. I wanted to just spend one
4 moment taking you to a particular section of it and in
5 particular page 27 of that document. The reason that I am
6 taking you to this document is that, contrary to the
7 position that appears to have been adopted by Suriname and
8 Mr Saunders, he accepts the analogous relevance of the
9 approach taken by the United Kingdom. That presumably is
10 the reason that he put this document before you. You will
11 see there at page 27 a section which relates to archival
12 material relating to border or sovereignty disputes and it
13 is worth reading through it briefly. "Border or
14 sovereignty disputes can be sensitive even if they do not
15 directly involve the UK. This may occur, for example,
16 between two previously colonial territories now
17 independent. It may harm current diplomatic relations to
18 release records which assist one party in the dispute
19 while disadvantaging the other". The reason that I have
20 drawn that to your attention is that it highlights the
21 recognition on the part of the United Kingdom of the
22 possibility of disadvantage. It is a passage which makes
23 very clear that releasing records to one party could
24 disadvantage the other party. That is the main thrust of
25 the point we are making. That is why the United Kingdom's
26 approach and I believe also underneath the arguments put
27 by the Netherlands the Dutch approach is a preference for
28 equality. As many of you on the tribunal will know, if
29 you go down to the United Kingdom Public Records office,

1 you ask, as Mr Reichler said, not for individual documents
2 but for files which have exactly the same types of titles
3 as the ones he read out. "British Guyana/Netherlands
4 relations" would be one example. You are then given a
5 folder. It may contain one document or it may contain 50
6 documents and you then plough through those documents,
7 picking out the ones that are apparently pertinent and
8 useful. But the key point is that both sides have had
9 that opportunity. Guyana went, Suriname has gone. In its
10 pleadings, in relation to the matter we are discussing
11 tomorrow, you will find at annexes 24 and 25 documents
12 legitimately obtained from the Public Records Office. The
13 crucial point is that the approach adopted by the United
14 Kingdom is premised on the recognition of ensuring
15 equality of arms between the parties. I think that by
16 putting this document in Mr Saunders has effectively
17 confirmed that significant principle.

18 The second point that I wish to make is that in one
19 of his interventions earlier, Mr Saunders made clear an
20 argument that somehow Suriname would be disadvantaged by
21 the imbalance that would be created by having a situation
22 in which Guyana would have access to the Netherlands
23 archives for the period 1966 to 1975, but, of course, he
24 is accepting by making that statement that imbalance is to
25 be avoided. The present situation is that Suriname has
26 had access to everything that Guyana has had access to in
27 relation to the United Kingdom archives. The present
28 situation of imbalance is that unlike Suriname Guyana has
29 not had access to the materials that are made relevant.

1 Essentially, the thrust of the argument that is being made
2 is to restore a degree of balance.

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

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

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

25 MR SAUNDERS: Thank you very much, Mr President and members of
26 the tribunal. I will try not to take the full time
27 allotted to me. Let me begin where Mr Reichler began with
28 what he said was the points of agreement and the points of
29 disagreement. I need to take issue with Mr Reichler's

1 characterisation. Mr Reichler said that we did not
2 challenge the authority of this tribunal to issue the
3 order requested. That is not correct. Our position was
4 that the order requested is so broad that it amounts to a
5 discovery order and it is beyond the power of this
6 tribunal to issue. What we have said is that this
7 tribunal, consistent with the practice in other public
8 international courts and tribunals, has the power to ask
9 the parties to make available to it, upon its request,
10 specific documents where there is a specific reason for
11 doing so. We have not conceded that this tribunal has the
12 broad power that Guyana urges, the power to issue an order
13 requiring us to withdraw our objection so that Guyana can
14 have access to all or any part of the archives in
15 question.

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

1 to any boundary dispute relate to the entirety of the
2 boundary dispute issues between Suriname and Guyana, not
3 just the maritime boundary dispute.

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

15 When Mr Reichler then turns to what he says are the
16 points of disagreement, he said it is apples and oranges
17 to compare the files of Guyana in George Town to the
18 Netherlands archives, I guess that is a concession that
19 the Tribunal could not order wholesale access to the
20 Guyana archives and I think that would probably be right.

21 I think the Tribunal could not do that. You could ask
22 both parties to produce specific documents that you think
23 you might like to see having seen the submissions of both
24 parties on any particular issue. You might say there is a
25 particular document here that you would like to see.

26 He then moves from that proposition to say that it is
27 really not the same because the Netherlands owns the
28 files, period, end of story. That is not what we have
29 said.

1 The question of legal ownership is not a relevant
2 criteria as far as we are concerned. I could debate
3 whether in light of the 1975 letter from the Netherlands
4 Prime Minister to the Prime Minister of Suriname, I could
5 debate whether or not in the light of the undertaking to
6 guarantee access to the archives, the Netherlands could
7 destroy their files, could just say we are going to
8 destroy the files, we have legal ownership of these files
9 and we are going to destroy them, so much for your right
10 to access. You could debate that in light of that
11 undertaking. You could say is that an undertaking to keep
12 the files intact for your review. I do not know and I
13 have not addressed that issue, but what I have said is
14 that whatever the right answer is with respect to legal
15 title we have two rights with respect to those archives.
16 We have the right to access, to continuing access, and we
17 have been given the right to object to access by others.
18 It is not correct to imply that the Netherlands is like
19 any other third party. They are not. We were a
20 constituent part of the Kingdom of the Netherlands. That
21 is what these files are. They are the files that related
22 to our border disputes when Suriname was a constituent
23 part of the Netherlands. This is not like documents in
24 the possession of any other third party. It is simply not
25 a correct analogy, I submit.

26 The question then is is it correct that we, Suriname,
27 caused the Netherlands to decline to give access to Guyana
28 by objecting. Once again I do not want to split hairs on
29 that question, all we need to do is look at the two

1 documents that we have that relate to the reasons why the
2 Netherlands did what it did.

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

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

1 international law, I decided not to allow Guyana to
2 inspect the files".

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

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

27 My summary point is as follows. The issue that we
28 are concerned about here is whether or not this tribunal
29 has the power to or ought to order Suriname to withdraw

1 its objection, legitimately exercised and legitimately
2 granted by the Netherlands, which is not a third party but
3 of which the Suriname was a constituent country member, to
4 allow Guyana to have access to documents in the restricted
5 file held in the Foreign Ministry of the Netherlands. We
6 respectfully submit that the answers to those questions
7 are, no, that this tribunal does not have the authority to
8 grant such a broad discovery order in this case and that,
9 under the circumstances in this case, the request by
10 Guyana for an order requiring Suriname, a sovereign
11 nation, to withdraw its objection to disclosing files that
12 were its files when it was a constituent part of the
13 kingdom of the Netherlands, should be denied.

14 Thank you very much.

15 THE PRESIDENT: Thank you very much, Mr Saunders. The tribunal
16 has been meeting in the interstices of this hearing and we
17 thought that we should continue for at least an hour
18 tomorrow from ten to eleven, meeting on the second floor.

19 I will have distributed a paper which will indicate the
20 way that the tribunal is at present thinking. That paper
21 will be on the table but I would like any other proposals
22 that can help the way forward be also discussed. I think
23 that this issue deserves as much consideration as we can
24 give it. The thinking of the tribunal is, of course, for
25 your perusal, for you personally to discuss it, but I
26 insist that we are not limited or confined to this
27 particular proposal, but, perhaps, in the hour that we
28 give ourselves we may make some progress. I declare the
29 meeting adjourned.

1 | (Adjourned until tomorrow morning at 11 o'clock)
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