The Peace Palace
The Hague
The Netherlands

Friday, 8th July 2005

GUYANA

Claimant

and

SURINAME

Respondent

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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 - DAY TWO

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THE PRESIDENT: You have the timetable for today. The issue is "Need for a hearing on Suriname's preliminary objections". Suriname will be taking the floor. Who will be taking the floor for Suriname?

MR SAUNDERS: Professor Rosenne will make the presentation on behalf of Suriname and, if it is acceptable to the President, he would prefer to address the tribunal from his chair Instead of from the podium.

THE PRESIDENT: It is completely acceptable to me.

MR SAUNDERS: Thank you very much.

THE PRESIDENT: Professor Rosenne.

PROFESSOR ROSENNE: Thank you, Mr President. May it please the court. Mr President and members of the tribunal, it is a privilege for me to address you on behalf of the Republic of Suriname at this informal hearing, I understand, on the proceeding following the filing of the preliminary objections by Suriname, but before I get into that, Mr President, may I add my personal congratulations to you on your well-deserved re-election to ITLOS, a tribunal with which I have worked and know quite a lot.

I have to stress, and I shall be referring to this fact from time to time, that this is an unusual arbitration, because it is not before this distinguished arbitration tribunal by agreement between the parties. The parties have not signed a compromis to bring this dispute before this tribunal. It is an innovation. It is a compulsory arbitration within the context of part 15 of the Law of the Sea Convention and, as far as I know, this is the first international multilateral treaty broadly adopted by over 100 states which has introduced into international practice this concept of a unilateral application for an arbitral tribunal under annex 7, or for that matter under annex 8, of the Law of the Sea Convention. And this must condition the whole approach both of the parties and with respect of the tribunal to questions. The only other tribunals to which states can have recourse by unilateral application is, of course, the

International Court of Justice, with a very broad jurisdiction, both under article 36, paragraph 2 of the statute and in multilateral treaties under article 36, paragraph 1 of the statute and, of course, your own tribunal, Mr President, ITLOS. We must never lose sight of the fact that this is not an arbitration that has come before this distinguished panel of arbitrators by the joint agreement of the parties. It has been brought unilaterally by one state unexpectedly against another state.

I want to be clear on another thing, but I will not go into any detail, which follows on from the remarks that were made yesterday by Mr Reichler. We have filed preliminary objections. Those preliminary objections are not a petition. They are not a request. They are actual preliminary objections and they attract all the normal circumstances which such a document generates. Suriname has requested that this submission be dealt with as a preliminary matter, following rule 10, paragraph 2(a) of the rules of procedure, and I want to be absolutely clear about this, the unusual quality of the arbitration and the fact that what we have filed are preliminary objections, not a request for anything except that they be dealt with.

I want to establish three propositions. First, the proceedings in this arbitration have been automatically suspended upon the filing of the preliminary objections. Secondly, this tribunal must hold a hearing on these objections. Thirdly, the objections to jurisdiction are so fundamental that they are normally heard and decided before the merits are argued. Guyana contends that in this case a decision on jurisdiction requires first – if I understand correctly what they are saying – a hearing on the merits. We fundamentally disagree, but, even if the tribunal were to make that determination, it could not do so until it has held a full hearing and deliberation on the preliminary objections. It is, I submit, axiomatic that this Tribunal must deal with the issue of

jurisdiction as a preliminary matter.

As was said, this is an arbitration between two states. It is a fundamental principle of international law that no state may be required to give an account of itself without its consent. Applying that principle to this case I would say it is a fundamental principle of international law that a state should not have to give an account of itself on issues over merits before a Tribunal which either lacks jurisdiction in the matter or whose jurisdiction has not been established. While something similar may be true in private international arbitration, here the consent of the parties usually by contract is required for jurisdiction, here consent is even more critical because national sovereignty is involved, and as I have said there is no agreement between the parties to submit this maritime boundary despite to arbitration to this Tribunal.

Suriname has agreed to the jurisdiction of a Tribunal which is empowered only to determine disputes concerning the interpretation and application of the Law of the Sea Convention. Were this Tribunal to fail to hold a hearing on the preliminary objections and proceed by reference to a hearing on the merits, without addressing the substance of the preliminary objections, it would be requiring Suriname to give an account of itself without its consent. That would not only be insufficient, improper and unfair; it would be an infringement of Suriname national sovereignty and would not be in accordance with all accepted rules and principles of international law.

In President Nelson's letter to the parties dated 24 May 2005 the Tribunal asked that the parties address "whether or not the preliminary objection should be dealt with as a preliminary matter and the proceedings suspended until these objections have been ruled upon." The Tribunal further indicated that after having received the parties' written elaboration it would consider whether to reserve time during these hearings to discuss the procedure for dealing with Suriname's preliminary

objection.

We submit, Mr President, that there are two questions for this Tribunal to consider as it decides on the procedure for dealing with Suriname's preliminary objections. First, should there be a hearing on these objections. Secondly, should the decision on the preliminary objections await a final decision of the tribunal on the merits of Guyana's claim? I would ask you to note, distinguished members of the tribunal, that there is not a third question, whether the proceedings on the merits should be suspended because, as I will be explaining in a few moments, the proceedings on the merits have already been suspended and are suspended at this moment.

As I will demonstrate, the answer to the first question is clear. There must be a hearing on Suriname's preliminary objections. Guyana has already submitted its written observations on those objections, so the next order of business is for the tribunal to fix a date for Suriname's reply and then to hold hearings on the preliminary objections. I am not aware of a single case in which an international court or tribunal exercising jurisdiction on a compulsory basis, as is this one, has decided on the disposal of preliminary objections to its jurisdiction without a hearing.

The answer to the second question is also no, because in this case the objection to jurisdiction is exclusively preliminary and, therefore, has to be determined before the merits are argued. The quotations offered by Guyana itself from the cases it cites. Paragraphs 11, 12 and 14 of its written observations, which I will discuss in a moment makes this clear.

We recognise, however, that this tribunal need not, indeed cannot, decide that question today, since a decision whether or not to join a preliminary objection to the merits for the purposes of decision cannot be taken until after there has been a hearing on those objections.

I am going to discuss the question that the

proceedings on the merits are at this moment suspended. Guyana has contended that the tribunal should decide that the proceedings on the merits should not be suspended. Guyana seems to regard Suriname's preliminary objections as an application for the suspension of the proceedings on the merits. I must say that I have never heard of such a thing. Guyana is completely mistaken on this. There is no such application. Because of the established principles of international law, the proceedings on the merits are suspended at this moment. It is true that there have since been proceedings around the issue of access to the archives and, as we heard yesterday and again this morning, this is an issue which is equally applicable to the case as a whole as well as to any particular phase of a case. That is incidentally the reason why Suriname did not object to yesterday's argument on access to the archives.

In paragraph 19 of its written observations, Guyana completely misreads Suriname's letter of 26th May and its reference to the MOX Plant, annex 7 arbitration. Suriname is quite familiar with that case. It does not stand for the proposition that the tribunal should examine the preliminary objections before deciding whether to suspend proceedings on the merits. Suriname made reference to that case in the letter of 26th May merely as an example of the general proposition that there can be no argument on the merits, that the merits are suspended so long as substantial doubts exist as to the tribunal's jurisdiction over the main line issue. It is quite immaterial how or where those doubts originated. It is sufficient that they exist. When the order number 3 in the MOX Plant case annex 7 arbitration, was made, that tribunal (Annex 7 tribunal) was still acting on the basis of prima facie jurisdiction as it had been established previously by ITLOS for the single purpose of the prescription of provisional measures under article 290, paragraph 5 of the Law of the Sea Convention. Its jurisdiction had been challenged by the respondent, the United Kingdom, and the

arbitral tribunal had not yet ruled upon that challenge. The possibility of proceedings in the European Court of Justice then intervened and the tribunal found in that reason why it should suspend all proceedings in the case before it, not only the proceedings on the merits, but the special exception of Ireland's request for provisional measures. That is what the citation in Suriname's letter referred to.

This tribunal need not decide the issue of jurisdiction before deciding that proceedings should be suspended. All that is required for the suspension is that the preliminary objections are filed. At this point the proceedings are automatically suspended. One might argue that it is unfair that the proceedings on the merits should be automatically suspended on the filing of a preliminary objection because even a wholly baseless and unfounded objection might accomplish this end. Here the tribunal need not concern itself with such a theoretical concern because the preliminary objections that Suriname has filed in this case show that there are very serious doubts – very serious doubts – as to the jurisdiction of this tribunal. That is more than could be required. The land terminus for the delimitation of the territorial sea is unsettled and no court or tribunal exercising jurisdiction under the Law of the Sea Convention has jurisdiction over a dispute relating to land boundaries. It is sufficient for me record that between the adjacent states the maritime boundary starts from the land boundary terminus. As long as there is no agreement on the location of the land boundary terminus the maritime boundary cannot be limited. Accordingly the preliminary objections are legitimate and substantial.

Mr President, in paragraph 10 of its written observations Guyana rightly observed that "it is appropriate to keep in mind the approach first identified by the Permanent Court of international Justice in the matter of the Palestine Concessions Case, a case with which personally I happen to be very familiar with as I

live in a place with this that case was concerned. We agree and propose to do precisely that.

I would point out, however, a major feature of that case, namely that at that time the Permanent Court had not adopted any rule of procedure regarding preliminary objections. It was the Permanent Court itself that realised that so long as the preliminary objections were outstanding nothing could be done on the merits; no argument and certainly no decision. In fact it was not until the revision of the rules of that Court in 1926 that the Permanent Court first adopted a rule of procedure for preliminary objections. That was Article 38 of the Rules of 1926, which for convenience you can find in Judge Hudson's book at page 721. That rule is reasonably similar to our rule 10 in that it deals with the filing of preliminary objection. However, it does not contain any statement of the options available to the Court when it comes to make its decision on the objections. That was left to experience, and it was not until the rules of 1936 that the Permanent Court consolidated its experience and practice in Article 62 which qualified the law as first stated in Mavrommatis, that there can be no argument on the merits while the preliminary objection is outstanding. The Permanent Court chose the more definite formulation that "on receipt by the Registrar of the objections the proceedings on the merits shall be suspended". There is no suggestion that preliminary objections can be considered as an application to suspend the proceedings on the merits as Guyana seems to be suggesting. The proceedings on the merits are suspended.

In paragraph 5 of that Article of the rules the Permanent Court went on to provide that after hearing the parties the court shall give the decision on the objection "or shall join the objection to the merits". This makes it clear that if the court does that or if it over rules the objection, the merits are automatically resumed and the court is to fix time limits for the further proceedings. In essence that remains the basic principle

for dealing with preliminary objections in Article 79 of today's ICJ rules as arose in the year 2000, and in Article 97 of the rules of procedure of ITLOS. The suspension of the proceedings on the merit is automatic on the filing of preliminary objections and those proceedings can only be resumed automatically if the Tribunal rejects the preliminary objections or reached no definite decision on them in the preliminary or interlocutory phase. In this context the word preliminary must not be overlooked. It is of cardinal significance and has a major procedural connotation. As ITLOS decided in the Saiga No 2 case there is a distinction between objections that are raised as preliminary objections to be dealt with incidental proceedings, and objections which are not requested to be considered before any further proceedings on the merits. That you will find in the reports of 1999, the report starts at page 10 and I am referring to page 33, paragraph 53.

Suriname's preliminary objections in this case are under the first category. Suriname has raised them as preliminary objections to be dealt with in incidental proceedings in that sense. Our rules of procedure are quite clear in what they mean, when they use the expression "preliminary objection". As a result of filing such an objection the proceedings on the merits are suspended.

I now turn to the question that there must be a hearing on Suriname's preliminary objections.

Here our basic premise is that there is a fundamental difference between hearing the preliminary objections and ruling on them. They need to be heard as early as possible. The Tribunal will decide them when it considers that it is sufficiently informed of the position of the parties on them, and that it can reach a decision on the objections without prejudging the merits.

International litigation practice recognise a clear distinction between an objection which can be raised at any time, sometimes called a plea in bar, and a

preliminary objection. A decision is required on both types of plea before the Court or Tribunal reaches its decision on the merits. The principal difference between the two is whether the decision is to be made as an interlocutory decision without prejudice to any decision that the Court or Tribunal may reach on the merits, or whether the objection on and the merits are to be considered and decided together. Preliminary objections have to be raised at a certain time early in the course of the proceedings, and the proceedings themselves cannot continue until the Court of Tribunal seized of the case has reached its decision on the preliminary objections. Objections that are pleas in bar do not require any special treatment in the rules of procedure. However, Suriname's preliminary objections are not pleas in bar, therefore article 7 of the rules of procedure are governing. Preliminary objections require special treatment in the rules of procedure especially in respect of the time period within which they may be made. That is the case because the proceedings on the merits are suspended and, therefore, any earlier time limits for the regular filing of written pleadings and when the court or tribunal should take a decision on them are no longer applicable. In the case of the ICJ and ITLOS, their rules, article 79 of the ICJ 2000 version and article 97 for ITLOS, not fully identical, go further and indicate the options that are available to the court or tribunal when it comes to making its decision. Our rules do not go so far and leave the tribunal freedom of action in that respect, but, whatever option the tribunal chooses, it must be done only after a hearing on the preliminary objections. Guyana argues that the tribunal has to "carefully examine each objection in order to assess whether it is appropriate or possible to resolve it at the preliminary stage without discussing the merits". That you will find in Guyana's written observation at paragraph 20. We agree, Mr President, with Guyana on this. Indeed article 10 of our rules of procedure specifically provides

for that, but that "assessment" requires a hearing. That is precisely what we are asking the tribunal to do. That examination can either lead to the end of the case or to the end of the suspension of proceedings on the merits. What cannot be done is to muddle the two entirely different processes, of the suspension of the proceedings on the merits and the examination of the preliminary objections at the hearing.

In its oral statement Suriname is addressing only the procedural aspects of the contention of the draft by Guyana, not their substance. Following normal international practice, we consider that there must be a hearing on our preliminary objections no matter how the tribunal ultimately decisions to deal with them. We reserve all our rights and positions on the substance of the objections that we have raised as well as all our rights and positions on the merits of the case. Now is not the time or the occasion to discuss either of those aspects. Now is the time to make the necessary arrangements for the hearing on the preliminary objections. As the Permanent Court observed, and again I refer to Mavrommatis at page 10, "It will suffice to observe that the extremely wide bearing of the objection upon which ... before the case can be argued on the merits" – "before the case can be argued on the merits" – "the court has to take a decision".

Mr President, in its written observations Guyana has produced an extraordinary mishmash potpourri – that is in the Oxford English dictionary, by the way – of cases from the European Court of Human Rights, ICSID and others. Except for the Human Rights cases, which are a category of their own, the other cases cited by Guyana are what the Encyclopaedia of Public International Law distinguishes as "the settlement of civil disputes by what is known as arbitration". The Encyclopaedia mentions in particular – this is volume 1, page 217, I think we informed you, Mr Reichler, that we were going to cite this.

MR REICHLER: Yes.

PROFESSOR ROSENNE: It mentions in particular the International Chamber of Commerce or ICSID, the International Bar Association and other miscellaneous bodies which handle that type of case. As those cases are not incidents of litigation between two states, as they are not cases of compulsory recourse to arbitration against the will of the respondent, they are of no moment and have no persuasive value to the present case and I will not take up the tribunal's time to deal with them. It is sufficient for me to point out that this applies to the cases mentioned in paragraphs 16, 17 and 18 of Guyana's written observations. I will, however, be saying something about one case of interstate litigation on which Guyana seems to set great store because it relates directly to the first question, should there be a hearing on the preliminary objections? In paragraph 15 of its obligations, Guyana refers to the United Kingdom and France Continental Shelf arbitration. I start off by observing that that arbitration was brought on the basis of a special agreement. It was not unilateral recourse to some sort of compulsory arbitration. That alone is the first distinction. In addition to that, I am sorry to have to say so, but the reference that they give is incorrect. They give it as 54 International Law Reports, page 6, when it should be 54 International Law Reports, page 139. The separate and later case on interpretation of the original award, I do not see in a report of that case any preliminary objections by France. Article 10, paragraph 2 of the special agreement in that case made provision for proceedings of interpretation and set the conditions for that. By that provision either party could within three months of the rendering of this decision refer to the arbitral tribunal any dispute between the parties on the meaning and scope of the decision. Article 16 of our rules of procedure is a similar provision. On receipt of the United Kingdom's application for interpretation, the registrar immediately communicated it to France and the President of the Court of Arbitration, the late Professor

Castenne, fixed a date for the filing by France of written observations on that application. Those observations were duly filed and it was decided to hold hearings in order that the parties might present their oral observations. In its final conclusion of those hearings France submitted three objections, the details of which are not in evidence here. They were all designed to show that the request for interpretation did not meet the prescribed conditions of the special agreement, so the arbitration court did not have jurisdiction over that proceeding in interpretation or whether that request for interpretation was inadmissible. These are not preliminary objections. They were all the normal type of defensive objections when the derivative or incidental procedure for interpretation like that for the revision of a judgment requires that defined conditions should be met before the application for interpretation is admitted. The proceedings on interpretation only commence when the application is admitted. Through the second decision, that is a decision on interpretation, the arbitral tribunal has used the word "objections" in the English version and "exception" in the French version of that award, which you will find in volume 18 of the United Nations Reports on International Arbitral Awards. "Objection" and "exception" without the adjective "preliminary" and its French equivalent is not the same thing as a preliminary objection as that term is currently used in interstate litigation.

In paragraphs 11, 12 and 14 of its written observations Guyana respectively cites the Right to Passage case, the new application in the Barcelona Traction case and the Nicaragua case in the International Court concerning the disposal of preliminary objections. That is not the issue here which is limited only to the procedure to be followed for dealing with the preliminary objections. In fact, each of the cases cited by Guyana in those paragraphs confirm that the court will only give a decision on the disposal of the objections after a full hearing. Furthermore, as the International Court said in

the Nicaragua case, "above all it is clear that a question of jurisdiction is one which requires decision at the preliminary stage of proceedings". You will find that at page 30 of the ICJ reports for the year 1986. It is in the merits decision.

I now want to come to the question of jurisdiction here. Suriname's preliminary objection to the tribunal's jurisdiction is so fundamental that following the normal rule it should be heard and decided before the merits are heard. Guyana disagrees. But even a determination for which Guyana argues, is arguing and continues to argue, that the objections should be joined to the merits, even that requires a full hearing before the decision can be taken. Jurisdiction is always a preliminary issue and is normally dealt with before the merits. It is such a fundamental proposition that it probably requires no further citation. I simply quote once again one of the cases that Guyana itself has cited and quoted in its written observations, the famous Nicaragua case of the 1980s. "While the variety of issues raised by preliminary objections cannot be foreseen, practice has shown that there are certain kinds of preliminary objections which can be disposed of by a court at an early stage without examination of the merits. Above all, it is clear that the question of jurisdiction is one which requires decision at the preliminary stage of the proceedings".

The essence of Guyana's submission is that the tribunal should join the objection to the merits without any further proceedings on the objection. We strongly oppose that unprecedented contention which in our submission has no basis in international law and practice. Certainly the tribunal should not make this major innovation in international litigation practice only on the basis of the procedural written statement and this limited discussion of today. Even if the question of jurisdiction were not so fundamental, it should be taken up and decided first. Guyana's submission that the tribunal should decide today to join the preliminary

objections to the merits phase of the proceedings puts the cart before the horse. The question cannot be decided now. Suriname is fully aware that joinder of the objections to the merits is a theoretical possible option for the tribunal even though the International Court of Justice abandoned that option in 1972 and replaced it by a more sophisticated formula, as ITLOS has done in its article 97. That formula now refers to an objection which "does not possess in the circumstances of the case an exclusively preliminary character". But whatever formulation is used, the central point is that this tribunal, like the International Court and like ITLOS, can only reach that or any other decision after it has heard full argument on the objections and has been able to deliberate on them in the usual manner. A determination of preliminary objections that "does not posses an exclusively preliminary character" is an alternative to a decision upholding or dismissing the preliminary objection. It is not a simple procedural matter that can be disposed of by an order, adopted merely after discussions such that we are now having. At the same time, Suriname feels that the issues that Guyana has raised touch upon very fundamental aspects of part 15 of the Law of the Sea Convention and this tribunal would not wish to rush in with major procedural innovations without having proper argument on them.

Before concluding, Mr President, may I recall to the tribunal and to all others present in this hall that there is nothing unusual in a respondent raising preliminary objections when it is faced with a unilateral application. As the Permanent Court has said, once again I refer to Mr Mavrommatis, "if a state has recourse to the court under a clause establishing the latter's compulsory jurisdiction, it must be prepared for the contingency that the other party may cite agreements entered into between the opposing parties which may prevent the exercise of the court's jurisdiction". That you will find at page 29 of the Mavrommatis report.

Thank you, Mr President, for the attention that you have given to me.

THE PRESIDENT: Thank you very much, Professor Rosenne. It is now 12.20. I take it we can break now and have lunch. We will resume the hearing at two o'clock. The meeting is adjourned.

(Adjourned for a Short Time)

THE PRESIDENT: We ought to hear Guyana on this issue of need for a hearing on Suriname's preliminary objections, but, before I give the floor to the representative of Guyana, I would like to mention that I have been informed that Suriname intends to present a proposal concerning access to documents for the perusal of the tribunal, especially the parties, and I think that it may be more convenient to look at this document after Guyana has submitted its rebuttal. I, therefore, give the floor to the representative of Guyana.

PROFESSOR SANDS: Thank you, Mr President, members of the tribunal. We say, having listened carefully to what was said this morning, that the simple issue that faces the tribunal is the question of whether it should suspend the proceedings and hold hearings on Suriname's objections in circumstances in which such a hearing would be futile in the sense that the result would inevitably to lead to a joinder of issues of jurisdiction to the merits.

Let me begin with a number of preliminary points before getting to the meat of what I have to say and, in particular, responding to the points made this morning by the distinguished representative of Suriname. Can I just make some general points in relation to the memorandum and style of pleading? Firstly, can I say that I think that it is unbecoming in the context of litigation between two states to make allegations of bad faith. The memorandum to which we have had to respond makes a number of such allegations and I do hope for the future conduct of the proceedings we can put those on one side and assume good faith on both sides.

Secondly, could I say with great regret, the

memorandum submitted by Suriname contains various points on which a degree of caution needs to be exercised in relation to the treatment of the material. In the informal meeting that was held this morning I referred you, in particular, to page 15 of that memorandum. I do not propose that you go to it now, but it included an extract of materials taken from the archives of the United Kingdom which Suriname is, of course, perfectly entitled to have access to. It included a quotation from Sir Arthur Watts. The quotation was not taken in full and it was, if you like, truncated and important information was removed from the quotation that made its way into this memorandum. The consequence of that is that we are on our side will obviously have gone through the task of checking each and every document and, with regret, we invite you to do the same in relation to the treatment of this material.

The third point that I would make by way of preliminary issue is one that has already been raised. It is striking, indeed, that Suriname has chosen to rely in this phase of this hearing on materials that were from a restricted archive. We have no way of knowing the context and the background on which that material was taken. Where materials are taken from the United Kingdom archive, of course, we are free to go and search around. We are not in a position to do that, so we invite you to treat again with a degree of caution, if you are permitted to take any account at all of that material, and our view would be that you are not, such material which has been indicated as coming from that restricted source.

The fourth point I would make is that, of course, Suriname is absolutely entitled to make objections to jurisdiction and raise issues of admissibility. That is not in question and nor do we criticise Suriname in any way for having done that. What our concern is with is the manner in which it is done, that this request, for that is what it is, is a request that is premised on a defence to the merits, it is not an argument about jurisdiction.

The fifth point that we would make, just in response

to what very good friend and mentor, Professor Rosenne, said this morning in response to his suggestion that this was an innovative situation in which you found yourself. With great respect, it is not. This is the fifth annex 7 arbitration under the 1982 Convention on the Law of the Sea. I have been involved in four of them. It is the fifth annex 7 arbitration in which a state has unilaterally invoked proceedings and there has been a variety of different ways of dealing with jurisdictional objections in those proceedings. So we are not in any way in new territory or in a new domain.

Again, before I get to the meat of the arguments, let me turn to some introductory points. What is Suriname's strategy here? It is abundantly clear to us in relation to this issue and the wholly distinct issue of archives that Suriname for whatever reasons wishes to delay the conduct of these proceedings. What it would like to have is for you to adopt a decision suspending the proceedings, to engage in further written exchanges, one assumes, to be followed by a hearing with the result that, perhaps, 18 months down the line we might get a decision on jurisdiction, a decision which we say would be bound to conclude that you cannot separate these issues out from the merits. And for the consequence of that one has to ask oneself, in the case of two rather impecunious countries, what is the benefit of spending 18 months doing that. Our benefit is that I will add up my hours and bill the government of Guyana, and my friends on this side will do the same thing. But is it really in the interests of the administration of justice to put these two countries to that additional expense if it is already clear at this point that the conclusion will inevitably lead to a joinder of issues of jurisdiction and merits.

It is a very high risk strategy that Suriname had adopted this morning, and it is if I may say a surprising one. It did not as you will have noted address much of the arguments we raised in our written observations.

It is premised on three points. Firstly the rather

surprising suggestion that these proceedings have already been suspended. I must say I find that surprising because I was not aware that the Tribunal had taken such a decision, nor was I aware that there was anything in the rules of the procedure which provided for automatic suspension. That in our submission is plainly wrong.

Secondly it was said on behalf of Suriname that the Tribunal is under some sort of legal obligation to hold a separate meaning on objections. In our view that too is plainly wrong. What you will have heard during the course of this morning, or not heard, is that there was no reference to the rules of procedure that govern these proceedings. it was quite remarkable to sit through a presentation in which you were not taken to the language which the parties have agreed for the conduct of these proceedings. We say that Article 10 makes it plain as night follows day that it is for you to decide whether to suspend the proceedings and whether to hold a hearing.

The third point that was made is that the objections here are so fundamental that they must be heard and decided before the merits stage are argued.

To be clear, it was suggested that we were putting on the Guyana side the card before the horse, that we were somehow saying that you had to deal with the merits before you get to the jurisdictional issues. But that is not our view. We say Suriname is perfectly entitled to raise jurisdictional issues, but as we all know from the cases we have been involved in there are situations in which the jurisdictional issues are so intertwined with the merits that it makes no sense to separate them out. All of the arguments that have been raised by Suriname can properly be raised in a single set of proceedings.

The third point that is made by Suriname that you can properly decide the jurisdictional issues before you get on to the merits is the flaw in the argument. They cannot be decided. For reasons that I will explain in more detail, you would inevitably have to take decisions on what was and what was not agreed in the period between

1936 and 2000. That is not something that you are allowed to do at the jurisdictional phase. The entire logic and thrust of the argument is misconceived.

I will move on to my next introductory point. I have passed on it already. Contrary to the argument made by Professor Rosenne this morning, it was said in passing, but I want to nip in the bud the issue, this is not, as Suriname argued, an informal hearing. We checked the language very carefully and I do want to read into the record what your letter, Mr President, of 24th May 2005 actually said. "In light of the above, the tribunal would like to give each party the opportunity to further elaborate in writing no later than 10th June 2005 its views on whether or not the preliminary objections should be dealt with as a preliminary matter and the proceedings suspended until these objections have been ruled on". Just to pause there, that letter in our view makes it abundantly clear that it is our understanding that the tribunal does not believe that it is faced with a suspended proceeding. The letter then goes on "The tribunal will then consider whether to reserve time at the hearing currently scheduled for 7th and 8th July 2005 in The Hague to discuss the procedure for dealing with Suriname's preliminary objections". Not the "informal hearing", not the "pre-hearing". We had an informal meeting upstairs, no transcript, no record, this is very different. It looks and feels like a pretty formal hearing to me. We have agreed on a timetable, two rounds, we are in a rather formal setting. So we proceed on the basis that this is a formal hearing and that it is the opportunity for the tribunal to ascertain the views of the parties on the issues that you have invited our views on.

The sixth introductory point that I would make is that Professor Rosenne on behalf of Suriname was totally silent this morning about what we say is the key issue, the relationship between the jurisdictional objection and the merits. I found that, I have to say, rather surprising given the nature of the memorandum that was

written and it took us somewhat by surprise. None of those arguments had been made, of course, previously. They came to us just before lunch. As I have said already, we say that it is self-evident that all the issues raised by Suriname are linked to the issues of the merits. Can I just draw your attention in that regard to a passage from my friend and mentor, Professor Rosenne, which has been distributed from page 915 of his seminal work on the law and practice of the international court, which is pertinent not because we are before the International Court of Justice but because it goes to the question of the relationship between an argument on jurisdiction and an argument on the merits. At page 915 it says, "As a rough rule of thumb, it is probable that when the facts and arguments in support of the objection are substantially the same as the facts and arguments on which the merits of the case depend or when to decide the objection would require decision on what in a concrete case are substantive aspects of the merits, the plea is not an objection but a defence on the merits". We say that that is exactly the situation we are now in and that that is self-evident from the arguments that were made this morning in another place and which are set out in the memorandum.

Suriname's choice to characterise this as a preliminary objection is one that it is fully entitled to do, but it cannot be dispositive. What it happens to call a process or a document is a matter for it, but the rules of procedure, as I will show, create no right of any party to unilaterally suspend the proceedings.

The final point that I would make by way of introduction is that, if I heard correctly, the totality of this morning's argument was directed entirely to what one might call preliminary objection number one, the objection on jurisdiction. There was no argument given on the two issues of admissibility raised by Suriname and I think that that spoke very loudly about the merit of those arguments.

Let me turn then to the issues that I want to address of substance and Guyana's position, to summarise it. We make four points. Firstly, the parties have negotiated, agreed and adopted rules of procedure which do not provide for automatic suspension of the proceedings on the merits when preliminary objections have been filed. Secondly, the rules of procedure make it absolutely clear that it is for the tribunal to decide whether to suspend the proceedings on the merits or to join the preliminary objections to the merits. Thirdly, in making that decision, the tribunal should take into account the requirements of the good administration of justice and general principles of international law. In our submission, both of these indicate that objections are not to be addressed in preliminary proceedings where they are not of an exclusively preliminary nature or where their determination would necessarily involve consideration of the merits of the claim. In addition, a further factor to be taken into account is the need to avoid undue additional cost and delay, a point which Sir Shridath Ramphal will take up briefly once I have concluded, with your permission. Our fourth point is that, applying these principles to the objections raised by Suriname, it is in our submission self-evident that they cannot be addressed as part of a preliminary procedure, because each of the three objections is plainly not of an exclusively preliminary character and, secondly, the determination of each objection must necessarily and inherently involve consideration of the merits of the claim. Thirdly, a preliminary procedure would impose significant additional cost and delay without any benefit for the sound administration of justice.

Let me turn to the first of those points, the rules of procedure, the matter on which Suriname was so silent this morning. The relevant rule of procedure is article 10. I do not propose to read it all out in full. You are, I am sure, very aware of it, but let me take your attention to paragraph of that Article. "A submission

that the arbitral Tribunal does not have jurisdiction or that the notification or a claim made in a pleadings is inadmissible shall be raised either (a) where Suriname requests that the submissions be dealt with as a preliminary objection not later than three months after the time of the filing of the memorial or (b) in all other circumstances not later than in the counter memorial or with respect to the reply in the rejoinder". Just to pause there, the crucial words in that particular section Article 10.2(a) "where Suriname requests". That is wholly inconsistent with a right to suspend the proceedings by the filing of an objection and the entire thrust of Professor Rosenne's argument this morning on that point is simply negated by the language of Article 10(2)(a).

But if that is not enough to have paragraph 3. "The arbitral Tribunal after ascertaining the views of the parties may rule on objections to jurisdiction or admissibility as a preliminary issue or in its final award". So the obligation on the Tribunal is not as Professor Rosenne said to hold a hearing, it is to ascertain the views of the parties. That can be done in a number of ways. It can be done through written submissions or it can be done through a hearing or it can be done through a combination of the two, and our understanding is that the process we are now engaged in is the Tribunal ascertaining the views of the parties on whether to join the issues of jurisdiction and admissibility to the merits, and so we propose of course to go through all of the arguments that we think you ought to take into account in reaching that decision.

Article 10 is really the governing law for this Tribunal. it is all very well and interesting to hear about the Permanent Court of International Justice, the ICJ, ICSID, but actually they are all of a lesser relevance. This is the dominant text. This is not a text that fell out of the sky, this is a text that was negotiated by the two parties. It was drawn upon a precedent, the rules of procedure adopted by Ireland and

the United Kingdom in the MOX case, held also in this building, and those rules were adopted for a very good reason. The parties, both in the Ireland and the United Kingdom case and in this case, recognised that having a separate hearing in relation to jurisdictional issues does dislodge the timetable, does impose additional cost. There may be circumstances in which it is justified, but it is for the Tribunal to decide on those circumstances.

It could have been that this proceeding might have been before the international Tribunal for the Law of the Sea. That was discussed, and if we had been before the international Tribunal for the Law of the Sea Suriname would not now face the problem that it seems to think it faces. That did not happen. Suriname engaged in a negotiation. Mr Saunders participated in that negotiation and so did I. We went over the text back and forth. This was the language which emerged, full sovereign agreement of the parties, and that sovereign agreement of the parties throw it back to you, the Tribunal, to decide what to do. So to the extent that we have put precedents before you it does not go to the question of what the rule does or does not mean, because the rules of procedure in the ICVA that were mentioned this morning are totally different. They provide for automatic suspension. They provide for automatic suspension in ITLOS. They provide for automatic suspension in ICSID under Article 41, although interestingly, and you will find it at Annex 19, I do not need to take you to it, ICSID has decided to change those rules and to move away from a situation in which there is automatic suspension on the filing of objections to the rule that we have in this Tribunal, and the reason they have done it is people were routinely putting in objections to buy themselves an additional 18 months to draft their memorial or counter memorial. That is what this is really about. That is not something the parties agreed to do in these proceedings and we need to be absolutely clear that that is the issue.

So in those circumstances we say that Article 10(2)

and 10(3) are dispositive of the matter and those are the principles and rules you have to apply.

What do they mean in practice? The rules do not identify with any clarity or specificity what are the general principles, and it was for that purpose we thought it would be useful to put to the Tribunal examples of what other Tribunals have done when faced with a situation in which arguments as to jurisdictional objections or admissibility have a connection with arguments on the merits, and it becomes pretty clear in our view that when you go through all of that material you come to a rather clear conclusion. The practice is remarkable consistent. Professor Rosenne and I were talking just before we came on about this interesting question of whether there is a common law of international courts and Tribunals or whether each Tribunal is an island unto itself, and we may have different views about that, but what is striking if you go through the jurisprudence it points in exactly the same direction, and that suggests to our side that the rules are sensible and they have been acceptable to states and to other international litigants. What the rule which emerges from this review suggests is that an international court or arbitral Tribunal will order a preliminary objection to be joined to a hearing on the merits when the interests of good administration of justice requires, and the good administration of justice requires that to happen either if the objection is not of an exclusively preliminary nature or where a decision on the objection would necessarily require a discussion or consideration of the merits of the claim, and that is the forbidden domain which could not be addressed at a jurisdictional argument.

Just to pause there, you have seen the Memorandum on objections that Suriname has put in. It all goes to the defence on the merits, whether or not there was an agreement on point 61, whether or not Suriname was or was not justified to use force and so on and so forth. The arguments are inevitably and inextricably linked to the merits. What sort of hearing would we have in 12 or 18

months' time if you cannot address those sorts of issues. It would be a very short hearing, because we would not be able to talk about any of those issues in relation to point 61 and so on and so forth.

I do not propose to take you through the totality of all the jurisprudence. We have included the extracts of all the cases that we have cited in the written memorandum and I did think that it would be useful just to dip into one or two of them just to explore a little further what these various international courts and tribunals have to say when they deal with these issues.

The first one to look at is at tab 4 of the bundle of materials that we have just distributed. That is the very well-known Rights of Passage case. You will see on the top right-hand corner, page 2 of 54, and then if you go on a couple you will see page 27 of 54 in the top right-hand corner. There was, to cut to the chase, a difference of view as to whether or not an arguable case existed on a particular matter and we do not need to detain ourselves with the specific arguments that were in issue. If you go to the bottom of that page you will read at the bottom, "The facts on which those submissions of the Government of India are based are not admitted by Portugal". There is a difference of view between the parties. The elucidation of those facts and their legal consequences involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of right of passage, in particular as to the extent to which that practice can be interpreted and was interpreted by the parties as signifying the right of passage is a question which, according to international law, is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely whether the practice was expressive of the common agreement - expressive of the common agreement - of the parties as to the exclusiveness of the rights of domestic jurisdiction or whether it

provided a basis for a resulting legal right in favour of Portugal. There is again the question of the legal effect and of the circumstances surrounding the application of article 17 of the Treaty of 1779 and of the Maharaja decree issued in pursuance thereof. With regard to all these and similar questions, it is not possible to pronounce upon the fifth preliminary objection at this stage without prejudging the merits. The court decides to join the objection to the merits. It is not a delimitation case, but it is a case that goes to the heart of the country's sovereignty. This is a very important issue. But the key point is that it requires an examination of what the states and the colonial powers previously did. And the court said, "we are not going to do that because that goes to the merits". The case is bang on point in relation to the present situation; for objection one, objection two and objection three you have to look at the practice of the parties. And the court is saying, "we are not going to do that because that is merits, so we will join it". They are very sensible.

A similar situation arose in the case that you will find at tab 6, which of course is a delimitation issue. That is the case of Cameroon and Nigeria. In the case of Cameroon and Nigeria, the issue arose in terms of the admissibility of an application concerning the interests of a third state. In that case also the court determined at page 44 in the top right-hand corner - "the court therefore cannot in the present case give a decision on the eighth preliminary objection on a preliminary matter. In order to determine where a prolonged maritime beyond point G would run, where and to what extent it would meet possible claims of other states and how its judgment would affect the rights and interests of these states, the court would of necessity have had to deal with the merits of Cameroon's request". So the court again decides to join the jurisdictional issue which remains alive to the merits. Again, we say that that case is absolutely bang on point, not in relation to the same issue of

admissibility but the inter-relationship between admissibility, the jurisdictional objection and the merits.

The other cases to which we have drawn your attention and we have given you the relevant extracts is the Barcelona Traction case that you will find at tab 5 and which I do not propose to go to now, and also the decision of the International Court of Justice in Nicaragua versus the United States, which is at tab 3. It might be worth just going to that one to have a quick look at it because it summarises the practice. You will find that at tab 3, page 15. The court here is concerned with a change in the rules of procedure and it identifies the emergence of a new rule, article 79. That new rules, says the court, presents one clear advantage that it qualifies certain objections as preliminary - that is not, of course, the case we face with our rules - making it quite clear that when they are exclusively about character they will have to be decided upon immediately, but, if they are not, especially when the character of the objection is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage. We say that that principle applies equally in the circumstances in which we now find ourselves. Simply put, Suriname is not going to be disadvantaged in any way by sticking to the timetable and raising jurisdictional objections as part of the merits. I have had that happen in other people and many other people in the room have had that happen in other cases. One case I have cited before you is the case of Tradex versus Albania at tab 13. I know that Professor Rosenne was rather discouraging or disparaging of its relevance to these proceedings. I included this case because it confirmed the generality of the practice. You will find this at tab 13, page 185. In the third paragraph down the

tribunal notes and then at the bottom, "that the tribunal feels a further examination of this matter in the context of establishing jurisdiction according to article 8.2 would be so closely related to the further examination of the merits in this case that this jurisdictional examination should be joined to the merits". That is a case I know very well. I was counsel for Albania and they joined that jurisdictional objection to the merits and at the main set of the proceedings Albania won on jurisdiction. That has happened in quite a large number of cases which I know people in this room have been involved in. There is no pre-judging by joining jurisdiction to the merits of the outcome. We have all been involved in cases where a respondent has been successful with a jurisdictional objection once there has been joinder of the merits with the jurisdiction. In fact, in the Tradex case it became easier to win on jurisdiction because there was so much more merits material available. The claimant's arguments on expropriation were shown to be wholly inadequate only in the course of a full hearing on the merits and, on the basis of the inadequacy of that pleading, Albania succeeded in making the argument that the tribunal did not have jurisdiction because it could not be said that there was an expropriation. That is the reason we have put in some ICSID pleadings.

You will find a similar approach in relation to the European Court of Human Rights which, of course, does involve interstate applications. As we know, it is not correct to say that it is wholly distinct and subject to special procedure, and they have approached the matter in precisely the same way in relation to the joinder of issues of jurisdiction and merits. I refer you in particular to the judgment in Wasidu versus Turkey, which you will find at tab 8. I do not propose to take you to it now. Again in Caraxis and Greece at tab 9. Lest it be said that this is somehow a European style approach dealing with the issues, we also thought it sensible to

include a decision of the Inter-American Court of Human Rights simply to demonstrate the same approach is taken in Latin America in relation to the issue of joinder of jurisdictional objections and the merits. That is why those cases are in there.

I turn briefly to the issues raised this morning in relation to the MOX Plant case. That of course was an annex 7 arbitration, one that I had a particular familiarity with. Of course, that was a case in which a wholly new event emerged in the circumstances of the pleadings. Namely, an investigation by the European Commission on whether or not Ireland was entitled to bring proceedings to an annex 7 arbitration. The United Kingdom had made jurisdictional objections and objections on issues of admissibility, but had recognised at the point of the proceedings as they then were that those arguments were so wholly integrated with the issues of the merits that it was not sensible to deal with them separately. In that arbitration we had exactly the same rule as Article 10(2)(a) and 10(3) and the United Kingdom for a variety of reasons took the view that it was more sensible to deal with those jurisdictional objections at the merits stage because it would allow the arguments to be addressed in full. I have to say that in the context of circumstances in which we do not yet have full access to all of the materials it is difficult for me to see how it can be sensible or the good administration of justice to try to deal with these issues where the case has not been fully pleaded and matters which go to issues of land boundary terminals are very much in issue as a jurisdictional objection.

We say in summary that the principles of international law are very clear in relation to these issues, and we are not proposing anything novel or new, and that in these circumstances this is the point at which the views of the parties can be ascertained, we have chosen to deal with these issues fully. Suriname as is its right has taken presumably for tactical reasons the

decision to go on another route. They are perfectly entitled to do that. But it cannot be said that Suriname has not an opportunity to raise these issues or to argue them in full. It was allocated time and it chose not to use up all of its time and we do not think that a hearing later on in 2006 or 2007 on these issues is helpful where the applicable principles are so clear.

I come to the third part of my presentation, what is the relationship between those applicable principles and Suriname's three objections. One to jurisdiction and two relating to issues of admissibility.

Let me begin with the first objection, and I think we are all pretty clear that it is the only one that has legs sufficient to get into a merits phase. I would simply say in relation to the second and third objections that Suriname has not been able to identify a single case in which the argument for the state has failed to come with clear hands should not be able to come to an international court or Tribunal, and that is what it basically boils down to. There is some dicta cited from a couple of very old cases but which are not on point on the facts, and the writings of Sir Gerald Fitzmaurice. But there never has been a case in which the claimant has been denied access to an international court at a jurisdictional stage because it is said that it has come to the court without clean hands -- at least a case of which I am aware.

What is the first jurisdictional objection? The first jurisdictional objection to summarise is that there is no agreement on the location of the land boundary terminus at point 61, and the determination of this point at the mouth of the River is necessary to and must precede the determination of the maritime boundary between Guyana and Suriname. But the Tribunal does not have jurisdiction to make such a territorial determination, because it can only look at issues which relate to maritime issues and not territorial issues.

Let me take that argument head on by reference to the pleadings of Suriname. Let us begin with paragraph 4.12

of their memorandum and we get to the heart of what the argument is. What they say at paragraph 4.12 which concerns the scope of the Tribunal's authority to decide its jurisdiction in this case is that this authority is limited to examining whether there is an unsettled dispute concerning sovereignty over land territory, more specifically concerning the location of the land boundary terminus, the resolution of which is required before a maritime boundary can be delimited. If it finds that there is such a dispute it has no jurisdiction to proceed any further. Let us pause there. What they are asking you to do is to decide at the jurisdictional stage that there is a dispute. How can you do that without looking at the merits. How can you do that without looking at what the 1936 Commissioners' report did and what intended to do, and what has happened over the nearly intervening 70 years? You are going to have to look at those issues. Those issues go to the merits. It maybe that having reviewed those issues you find that there is no agreement. We say you will not find that, but Suriname says you will find that. But the simple point is you would inevitably have to prejudge the outcome of the merits to decide whether or not there was a dispute or an agreement in relation to point 61.

Let me turn to a couple of other examples. That was on the facts. You would have to prejudge the facts on the merits. Paragraph 5.5, Suriname adopts a range of arguments on acquiescence, the concept of acquiescence in international law. What they are effectively saying is that they did not acquiesce in the 1936 point, point 61. I would like to hear an explanation from Suriname in their next round as to how you can decide whether or not Suriname has acquiesced in relation to point 61 without going into the merits. It may be that I am missing something and I do not have the intellectual wherewithal to work it out for myself, but I simply do not see how you can make a finding on acquiescence without looking at the factors. The same thing could be said in relation to

paragraph 5.10, estoppel. There is no estoppel which operates in relation to Suriname, and point 61. That may well be right – we say it is not right, they say it is right – but how can you look at the law and the facts to determine where an estoppel situation has arisen without going into the merits of the case and seeing what did or did not happen between 1936 and the 21st century. Again I would love to hear from Suriname how it is possible to do that. If they can show you that it is possible to do that then maybe we would have a sensible hearing on jurisdiction. I for my part do not see how that could be done.

But let me take a related point, and I would just note in relation to paragraph 4.12 that it leads to the rather curious situation that if you the Tribunal agree with their argument on point 61 and the 10 degree parallel, then curiously you have jurisdiction to deal with the rest, because there will be no disagreement between the parties. There will have been a common position. So there is a curious internal illogicality of the argument that is run by Suriname. Basically if you agree with them you have jurisdiction. If you agree with us they are entitled to say we are wrong and you do not have jurisdiction. That cannot be right. It is a very curious situation, it is a very curious argument.

But let us assume on a pure hypothetical that they are right in relation to point 61. This is purely for hypothetical determination. That does not mean that this Tribunal does not have jurisdiction.

There are two other arguments which were available for jurisdiction. We did not elaborate them in our memorial because we did not need to, we were waiting to see what they say in their counter memorial. We now know what they are going to say so we will be able to come back and deal with it.

But let us assume that there is not an agreement on point 61 or consistent practice in relation to point 61. They say in those circumstances you cannot make a

delimitation because there is no agreement. We say that that is not right. Article 9 of the Law of the Sea Convention provides for exactly that situation. In tab 1 you will find Article 9, it is mouths of rivers. "If a river flows directly into the sea the base line shall be a straight line across the mouth of the river between points on the low water line of its banks". What stands in the way of this Tribunal interpreting and applying Article 9 in relation to the Courantyne River? We say nothing. So if there is no agreement you are fully able to use Article 9 to reach that agreement, and that is a matter which falls plainly within the jurisdiction of this Tribunal. But even if we are wrong on that, even if on that issue we are wrong, as Suriname itself recognises it is possible to delimit the Continental Shelf and exclusive economic zone without agreement on the land boundary, point 61, and without invoking Article 9? How could that be?

If I can take you to Figure 5 of Suriname's memorandum, it is just after page 12. At page 12 you have Figure 3 and then you have Figure 4. Figure 4 is rather interesting. If you look on the left hand side you will see the bottom left hand corner says 1936 point. That is point 61. If you go up the coast a few miles you will see something indicated as Point X, and what Suriname now says is that Point X is where the delimitation should begin.

Let us assume they are right on that. What happens with the delimitation into the exclusive economic zone or the continental shelf. If you follow along the delimitation from Point X you will see that at a point 15 nautical miles from the coast is joins with the delimitation from point 61 or the 1936 point. So there is absolutely no reason why you need for the purpose of delimiting from a point 15 miles off the coast into the exclusive economic zone, the Continental Shelf, an agreement or decision on the starting point, because it is the same equidistance line according to this map, and we reserve our position, of course, on the accuracy of this map. What you cannot do in those circumstances, although

we say that you can because there is agreement and, if there is not agreement, article 9 applies, is go from 15 nautical miles up to the coast, but for all the rest there is no question at all. I would like to hear from Suriname this afternoon on why that is not possible and why you do not have jurisdiction to deal with that. It is self-evident that there is jurisdiction to deal with that. They have made the argument themselves for which we are extremely grateful.

On all of these issues, we say that the issue of jurisdiction in any event is absolutely clear, that they do not have a leg to stand on, but they are perfectly entitled to insist that jurisdiction be addressed and that it be addressed in relation to the merits.

Let me explain why we say that they do not have a leg to stand on in relation to point 61. Can I take you first to tab 15? Tab 15 is, of course, the 1936 - I am sorry, it is not an excellent copy, I apologise for that, it is the best we have been able to get in these circumstances and I am sure that, as these proceedings go on, we will be able to get a cleaner copy made up. But this is the point at which the joint commission of the British Commissioner and the Netherlands Commissioner identified the land boundary and then separately proceeded to define the direction of a delimitation within the territorial waters, but only those that then pertained in 1936. If you look at the second page, you will see the latitudes and the longitudes that are agreed by the British and the Dutch. You will see in the second set of figures the accepted means, 5 degrees, 59 minutes and 53.8 seconds north, and then longitude 57 degrees, eight minutes, 51.5 seconds west. That is the marker in 1936.

Now let us turn over the page to tab 16. Tab 16 is a document entitled "Suriname plan atlas". This is an official Government publication which you will see on the second page. It is a document prepared by the National Planning Office of Suriname and Regional Development and Physical Planning Department. It is dated 1988 on the

second page. If you then go on to the third page, in the left-hand column, under the heading "Regional Location and Trade", you will see a section which says "Section 1.2 Boundaries". I apologise that it is tiny print. We will have to improve on the size of the print. If you go into that paragraph 1.2, the seaward boundary and then you see the last paragraph there, "The seaward dividing line in the west, however, raises some problems. As the full width of the Courantyne River is in Suriname territory, irrespective of the water level fluctuation, the equidistance line method cannot be applied. Therefore, in 1938" - that is probably an error - "a Dutch/British Frontier Commission established a point on the west bank of the Courantyne River, the so-called Kaizer Phipps point, five degrees, 59 minutes, 53.8 seconds north, latitude, 57 degrees, eight minutes, 51.5 degrees west, longitude", exactly the same as 1936. No difference. I should go on, "As the most northern point of Suriname's border with Guyana as well as the point of departure for the seaward dividing line between both countries".

That is 1988. If you go over the page to tab 17, you have a letter on the second page from the Ministry of Foreign Affairs of Suriname to the Government of Guyana. On the second page you will see again, half way down, the Government of the Republic of Suriname wishes to reiterate that from the point marked "latitude, 5 degrees, 59 minutes, 53.8 seconds north, longitude 57 degrees, eight minutes, 51.5 degrees west, the direction of the boundary line and the territorial waters is on a true bearing of ten degrees east". This is 31st May 2000. It is consistent practice on the part of Suriname that that is the starting point. Then for the avoidance of doubt, over the page at tab 18, document dated 28th June 2000, a letter from the Government of Suriname to, I believe, it is CARICOM, the Caribbean community, and again you will find exactly the same co-ordinates. So absolutely consistent practice over 62 years.

We are not saying at this point that you have to make

any decision, but what they are saying is that at the hearings you would have to decide that that is wrong at a jurisdictional phase. Again, we would invite them to explain how you can do that without getting into the merits. Purely hypothetically, they may well be right. We do not think they are right, but we do not think that that issue can be addressed without going into the full merits of the case. That is why we say that the good administration of justice requires all the documents to come out - I see Mr Lim A Po is nodding in agreement with me, I am not sure if he is nodding in agreement ...

MR LIM A PO: You know that the Chinese do it the other way around.

PROFESSOR SANDS: I take the point. The Albanians do the same.

That is why we say that the sensible way to proceed is to join these issues to the merits and have a single phase at which all these issues can be addressed.

I turn now to the second and third objections on which nothing was said this morning simply to illustrate again very briefly why we say for exactly the same reasons you cannot possibly decide on these issues without looking to the merits of the case. The second objection is that Guyana's claim regarding Suriname's unlawful use or threat of force in 2000 has no legal or factual basis, because Guyana always knew that Suriname claimed a ten degree line and that Suriname never acquiesced to Guyana's historical equidistance line and that, consequently, that exploratory activity under the relevant Guyanese licences in the disputed maritime area breached a modus vivendi agreement between the parties justifying Suriname's use or threat of armed force. If that is not an issue for the merits, I simply do not know what is. I simply do not see how you can decide that question at a jurisdictional hearing. It may be worth just having a brief look at the relevant paragraphs. If you look, for example, at paragraph 6.10 there is a statement half way down, "Suriname's intentions with regard to the area of overlapping claim are clear and do not qualify as acquiescence". That is the main thrust

of the second objection. Deciding whether acquiescence has or has not been engaged as a principle turns on the facts of any particular case and a consideration, appreciation and application of the law of acquiescence to those facts. Again, we wait for elucidation from Suriname as to how they propose to argue these issues at the hearing on jurisdiction that they seek without getting into the merits. We say that it is simply not possible.

At paragraph 6.44 you have got a similar point in relation to the third objection. The third objection is that Guyana's claims regarding Suriname's failure to agree on practical measures of a provisional nature has no legal or factual basis because Guyana, not Suriname, is responsible for the failure to negotiate in good faith.

At the bottom of page 44, paragraph 6.44, it is said that far from showing that Suriname breached its obligations under the 1982 Law of the Sea Convention in this regard the record shows clearly that the consistent one-sided formulation of Guyana's negotiating position concerning activities in the area of overlapping maritime boundary claims constituted a breach of its duty to negotiate in good faith. You are being asked to decide at the jurisdictional stage that Guyana does not come to you with clean hands because it has breached its duty to negotiate in good faith. Again, that requires an identification of the facts, it requires an identification of the applicable rules of law and it requires the application of the law to the facts, a three-stage process which we are all very familiar with. We simply again, I am beginning to sound like a broken record, look forward to hearing an explanation from Suriname today as to how that can be dealt with at a jurisdictional hearing without getting into the merits. It simply cannot be done, we say. It simply cannot be done.

To conclude, you have essentially been presented with a situation in which you have to engage in a sort of balancing exercise. Both sides have a legitimate interest. Suriname has a legitimate right not to be put

to the cost and the trouble and the expense of a futile hearing on the merits if this tribunal does not have jurisdiction. Guyana for its part is entitled not to be put to a futile hearing on jurisdiction where circumstances inevitably mean that the decision at the end of such a process or hearing would have to leave to a joinder of the jurisdictional issues to the merits. And in balancing those two issues the tribunal, we submit, has got to take a view on which harm is more likely to occur. That view requires, we say, an assessment of the content of the jurisdictional objection that has been put forward by Suriname. That is why the parties agreed to depart from the rules used in other places for an automatic suspension of the proceedings on the merits and to put in place in the context of two impecunious countries, which have better things to spend their money on, a system which would allow this tribunal to form a view as to what is the more sensible approach to the administration of justice. We have explained, I hope fairly clearly, why it is that the balance falls very clearly on one side. We respect entirely Suriname's right to raise issues of jurisdiction and issues of admissibility. But Guyana has the right to stick to an agreed timetable unless there are compelling reasons for departing from that timetable. We have not heard what those compelling reasons are. It may be that in their second round Suriname are able to explain how it is at a jurisdictional hearing you could dispose of this case without getting into the merits. For my part, and on behalf of the Republic of Guyana, we do not see how that can be done and we, therefore, respectfully submit that the proper order for this tribunal, giving effect to the intention of the parties as reflected in article 10 of the rules of procedure is to join the objections to the merits.

With your permission there is one final matter that is to be addressed and that concerns the cost and delay implications of going a different route and, with your permission, I would invite Sir Shridath Ramphal to come up

to the bar and address you on that point.

THE PRESIDENT: Thank you. I give the floor to Sir Shridath Ramphal.

SIR SHRIDATH RAMPHAL: Mr President and members of the tribunal, paragraph 4 of Guyana's written observations to the tribunal summarise really Guyana's position on Suriname's preliminary objections and it did so under three heads. Two of those arguments have just been elaborated to you by Professor Sands. I seek your permission to speak to the third, which was summarised in paragraph 4(d) of those written submissions and was reflected in this way in the final paragraph of those submissions, paragraph 36. Guyana submits that the good administration of justice requires the rejection of Suriname's application to suspend the proceedings on the merits. In the very final paragraph of our written observations we have raised this final matter. It is on this matter, the implications of delay through the suspension of the proceedings on the merits, that I wish to say just a few words.

It may be said, and Professor Sands has alluded to this possibility, that a suspension of the proceedings on the merits may be a way of saving the expense of a full hearing, if that is that Suriname is right on jurisdiction and admissibility. But all things are relevant. Suriname may be wrong, in which case the expense probably of proceedings over a year or more, if experience to date is anything to go by, will simply be added to the bill. The expense of counsel and the expense of hearings is one thing. The expense of development foregone is quite another. And it is this that I would like to address, drawing for these purposes on the memorial that Guyana has already filed. In doing so, I am particularly mindful of the President's reminder at the very outset of these hearings yesterday of the character of the parties in this case as two quite poor developing countries. Right at the very outset of Guyana's memorial, actually in the introductory chapter, paragraph 1.6 on page 2 of that memorial, is to the following effect: "Suriname's hostile

conduct combined with its rejection of both a principal settlement and the provisional joint development zone have threatened international peace and security, have undermined foreign investment in Guyana and in Guyana's energy sector in particular and has effectively prevented Guyana from exploring and exploiting its natural resources in the interests of national development for the interests of its people." That is Guyana's essential position. It is the funds, ergo, of these proceedings.

It really is from this untenable and quite unacceptable position that Guyana, the poorest country on the South American continent, sought respite and refuge under the tent of UNCLOS and this annex 7 tribunal.

This is not a plea ad Misericordiae. It is simply a stark straightforward reality, certainly as Guyana sees it.

In examining Guyana's decision to invoke its rights under UNCLOS and initiate these proceedings, Guyana's memorial elaborated the several negotiating efforts made by Guyana over the period 2002 to 2004 and explained in paragraph 5.19 of it submission how "by late 2003 Guyana understood that further attempts to negotiate a maritime boundary agreement would be futile. The only viable option would be for Guyana to invoke its rights under UNCLOS and initiate arbitration proceedings under part 15 of the 1982 Convention".

Thus, as set out in the memorial at the end of that very paragraph, President Jagdeo, in explaining the resort to UNCLOS to the people of Guyana, and indeed to the people of Suriname as well, said this. What he said was set out in the memorial. "Now having exhausted all other practical means of settling this dispute with Suriname and conscious of the urgency of doing so in the interests of the people of both countries, Guyana has today invoked these procedures." He concluded in words that speak volumes in relation to some of the arguments we heard yesterday with these words, "Everyone can be assured that we will proceed with the arbitral process with Suriname

which we have initiated in the spirit of the United Nations Convention and the highest standards of international amity, proceed not in an adversarial process, but one designed to establish a sound basis for economic development in the maritime regions of both Suriname and Guyana. We hope that the Government of Suriname will co-operate with us in achieving this".

Mr President, members of the tribunal, this is no mere academic argument between Guyana and Suriname being laid to rest. Still less is it forensic jousting between adversaries. This is the business of exploiting resources for development that will change lives. The President of Guyana's language was prescient of Suriname's current request for a suspension of the proceedings on the merits. It was resonant of the reasons why acceding to that request would not be consonant with the good administration of justice. The reference by the President to "the urgency of settling the dispute with Suriname in the interests of the people of both countries" is underlined with reference to Guyana in chapter 10 of the memorial where it is said the scope of the injury done to Guyana and even more significantly the ongoing nature of that injury is spelled out. I invite you to look at that chapter. Guyana considers that it is precisely this kind of mischief to countries from lingering maritime disputes that the procedures of annex 7 were intended to remedy. When the countries concerned are, as I said, among the poorest in the world, a policy of frustrating the removal of the mischief of continuing controversy over the maritime boundary is really rather cynical. But even more to the point it is inimitable to the administration of justice in this area of maritime conflict resolution.

In addition to the arguments advanced already by Professor Sands, Guyana therefore urges the tribunal not to allow its procedures for the settlement of maritime disputes to be made an instrument for protracting them. Suriname's objections on jurisdiction and admissibility should not, we say, be the subject of separate preliminary

proceedings but should be dealt with in the proceedings on the merits on the basis of the schedule already agreed by the tribunal.

Finally, when considering Suriname's request for postponement of proceedings on the merits, we think that it is valid to recognise that Suriname has relatively little to lose in dealing with its objections on jurisdiction in the proceedings on the merits. On the other hand, a postponement of those proceedings and of the settlement of the maritime boundary is greatly inimitable to the economic development of Guyana for whom such a postponement defeats, of course, the very purpose of recourse to Annex 7. The stark reality of the matter is that while Suriname is in oil production, Guyana is not. And the absence of a maritime boundary is likely to prove a major impediment to any change in this situation, given the resort to force by Suriname in 2000. Suriname may be indifferent to this situation, it may even for its own purposes be content to see its perpetuation, but Guyana cannot. Nor we urge should the tribunal acquiesce in the principles and precepts of UNCLOS and its institutional arrangements designed to support those principles and precepts be deployed in support of such purposes.

I thank you, Mr President, members of the Tribunal, for allowing me to add these observations. That therefore concludes Guyana's response to Suriname initial presentation. Thank you.

THE PRESIDENT: That you very much, Sir Shridath. I think at this stage we will have a coffee break of 15 minutes. Would that be all right?

MR SAUNDERS: Perhaps a little bit longer.

THE PRESIDENT: OK. Can we then say 4 o'clock.

(**Short adjournment**)

THE PRESIDENT: The turn for Suriname in the first rebuttal.

PROFESSOR ROSENNE: Thank you, Mr President. I will start the rebuttal of Suriname. I am afraid that my remarks are disjointed as I suppose inevitable at this stage of the proceedings, and to add to the difficulties my handwriting

is such that I cannot read it! So you will understand if there are gaps here and there.

Mr President, objection has been taken to our use of the expression "adversarial process". With respect I would like to explain that in our usage this was a purely technical description of the type of case in which we are involved, as distinguished from what is sometimes called the inquisitorial process. it has no connotation as regards the mutual relations of the two countries and I can say that Suriname and Guyana are not adversaries in any hostile sense.

Secondly, Mr President, I know there have been five Annex 7 arbitrations, three of them between countries which were far from impecunious. I will list them, and their results. The first is Southern Blue Fin Tuna. The parties agreed that jurisdiction questions would be decided first by the arbitration. That tribunal's decision following provisional measures prescribed by ITLOS broke a diplomatic deadlock and enabled the countries to reach what is the most satisfactory solution, an agreed solution of their difference.

The next one is MOX Plant, between Ireland and United Kingdom in which my friend, Philippe Sands, was counsel for Ireland, also not impecunious countries. A jurisdictional difficulty or a jurisdictional problem led to the suspension of all proceedings except Ireland's request for some provisional measures.

The third one is very interesting I think, Malaysia and Singapore. The existence of the annex 7 arbitration, after provisional measures, again from ITLOS, led to a diplomatic solution of the difference without even any proceedings in the arbitration at all. They have been suspended. They have been stopped.

We are left with two, the one between Trinidad and Tobago and Barbados and this one. So the annex 7 arbitrations are by no means a special system. They are used worldwide and have had actually positive results even without a decision on the merits in the sense of bringing

the dispute to an end which, all said and done, is what we really want to see, an end to the dispute whether it is through a preliminary objection or through a decision on the merits or however it comes about.

Now having said those two preliminary observations, I would like to get into the substance of what we heard this afternoon. Mr President, we are not here, as I understand it, or as we understand it, to discuss the substance of the objections. The letter of 24 May 2005 to which reference has been made by myself this morning and by Professor Sands later on this afternoon states that the tribunal "will then consider to reserve time at the hearings currently reserved for 7th/8th July 2005 at The Hague to discuss the procedure for dealing with Suriname's preliminary objections" - "for dealing with the preliminary objections". This appears in the meeting schedule for today's meeting as "need for a hearing on the preliminary objections". That is what we thought was going to be discussed today. In light of the general practice of litigation between two states, we have not been discussing the substance of the objection. We would have required much more time to argue our objection fully than the truncated time available for today's discussion. Guyana has complained that we have not dealt with some aspects of our objections. We submit that the tribunal should now fix time limits for full argument on the objections and we request the tribunal to do so. This is not the time or place to discuss how any point can be argued without entering into the merits. We say that we should argue the matter first and let the tribunal decide the matter. We cannot today prophesise what the tribunal will decide and Guyana cannot ask us to do so. I may add, Mr President, in my country prophesy died out about 2000 years ago and, as far as I know, has not been revived since. What we have now is not the hearing to which we are entitled. Most of the discussion this afternoon concerned the substance of the objections and we were told how Guyana thinks that they should be argued. Suriname

has another view. We do not propose this afternoon to give the response to Guyana's difficulties. We do not think that this is the time and we maintain our contention that proper international practice in this type of arbitration and the proper administration of justice requires the Tribunal not to embark on any procedural innovation and to do what was done in all the state to state cases as cited by Guyana and hold a hearing on the objections before deciding on their disposal. In our view such a hearing could take place at a common convenient date within the next three to four months and we would hope that the Tribunal will give its decision within a reasonable time thereafter.

As I mentioned this morning Guyana should have taken into account the possibility that Suriname would exercise its rights under Article 288 paragraph 4 of the Law of the Sea Convention and raise a matter of jurisdiction to be decided by this Tribunal.

Mr President, Suriname is not arguing that if appropriate the Tribunal could invoke one of the three options and join the objections to the merits, we are not denying that and we accept that. However, all the cases to which reference has been made, the decision to join the objection to the merits, the decision on the disposal of the objection was made after the objection had been argued fully in writing and orally. We say the same should apply here. The objection should be argued in their substance before the decision is taken. Rules of procedure Article 10 requires the Tribunal to rule on the objection after receiving the views of the parties. In our submission there is only one way to ascertain the views of the parties, and that is through the normal procedure of written observations followed by a hearing. This is supported by the cases cited by Guyana and we ask the Tribunal to proceed in this way.

Thank you, Mr President, and I would ask you to give the floor to my colleague Mr Colson.

THE PRESIDENT: Thank you, Professor Rosenne. I now give the

floor to Mr Colson.

MR COLSON: Mr President and members of the Tribunal, it is an honour to stand before you for the first time and to represent the Republic of Suriname. I had not expected to speak today and we had not expected to get into the substance of the preliminary objections which seems to us was a large part of what Professor Sands had to say a few moments ago. But I have been asked in the sort time available to respond to a few of the points that he has made.

The merits of this case do not concern the 1936 point or point 61. That is a territorial point. The merits should we get to them concerns the delimitation of the maritime boundary. That is what this Tribunal has the authority to do if it has jurisdiction to do.

The Tribunal has been requested to decide the maritime boundary. It has not been asked to decide the territorial point, nor could it do so in the absence of an agreement between the parties. Guyana in its memorial simply assumed that agreement, but it nowhere articulated where that agreement came from, it simply made a number of broad assertions throughout it pleading, saying there was an agreement. We have been chastised again this afternoon for saying that Suriname has not agreed, that Suriname is not estopped from looking at another point, and that Suriname has not acquiesced in the 1936 point. The law and the facts that concern whether or not there is agreement in law between Suriname and Guyana on the land boundary terminus relate to the law and facts of territorial sovereignty. They do not relate to the law and facts of maritime delimitation that are contained within the Convention. Guyana recognises that the issue relating to jurisdiction is whether or not there is an agreement between the parties on the land boundary terminus. That is a territorial issue. If there is no such agreement, there is no jurisdiction in our view for this tribunal to proceed to establish the maritime boundary. The case is over. How far the tribunal can go,

a tribunal that is constituted under part 15 of the Convention, how far it can go in determining whether or not there is an agreement on a territorial point is a legal question that needs to be briefed and fully considered and argued by the parties.

The merits must begin with and not determine whether there is or is not a territorial dispute. This morning Professor Sands reminded us of the broader concerns of access to archives in boundary cases. I would like to draw your attention to the international ramifications of the issue that really is now before you. As you know, Suriname submits that the tribunal has no jurisdiction to hear the case and the reason for Suriname's position is that there is a dispute between the parties about a matter of territorial sovereignty that is associated with the maritime boundary, namely the location of the land boundary terminus. In an adjacent state situation, such as that between Suriname and Guyana, the position of the land boundary terminus must be known before the maritime boundary can be established. It is Suriname's position that a tribunal constituted under part 15 of the Convention cannot decide a question of territorial sovereignty. Therefore, an annex 7 tribunal's jurisdiction fails in a case concerning a maritime boundary if that dispute also involves the question of territorial sovereignty, be it a question of disputed sovereignty over an island or as in this case a question of the position at the end of the land boundary at the sea. By its application, Guyana attempted to insinuate into the dispute settlement framework of the 1982 Convention a mixed dispute containing elements of territorial sovereignty and elements of maritime claims. Suriname has challenged that attempt in its preliminary objections. This is the first time that this – and I submit to you it is a major international question concerning mixed territorial sovereignty and maritime claims disputes – has arisen in a proceeding under part 15. Suriname submits that the questions presented are

major and fundamental. They implicate directly in a real and substantial way the obligations of states parties to the Convention, they relate to the expectations of states parties concerning the application of the Convention to their particular circumstances and the tribunal's treatment of these questions will be closely studied and have potential worldwide implications. For these reasons the preliminary objections deserve their own treatment by the tribunal, their own hearing by the tribunal, and a reasoned judgment by the tribunal. As the tribunal appreciates, the issue of whether there would be compulsory and binding dispute settlement for maritime boundary disputes under the 1982 Law of the Sea Convention was one of the most difficult issues at the Third United Nations Conference on the Law of the Sea. It was difficult and sensitive for more than one reason. One of the most important of those reasons was the concern of many states that the compulsory and binding jurisdiction relating to many law of the sea questions established by the new Convention would also tread upon territorial sovereignty questions which those states were not prepared to see absorbed within the dispute settlement framework of part 15 of the Convention. It was only when it was clear that part 15 would not touch upon such questions of territorial sovereignty, including that even the conciliation process established under Article 298 would not touch such questions, was this concern removed as a stumbling block to consensus. There can be no doubt that if this concern had remained associated with the compulsory dispute settlement provisions of the Convention, the Convention would not have the widespread support that it enjoys.

Today there are a number of states that have territorial sovereignty disputes associated with their maritime boundary dispute. For example, two neighbouring countries come to mind. China and Japan. Both parties to the Convention in exactly the same legal circumstances as Suriname and Guyana as neither has exercised its option

under article 298, nor has either expressed a preference for choice of procedure under article 287. What if one of those countries brought a case under part 15 against the other to determine their maritime boundary, saying the dispute over sovereignty over the Suncoquedial Islands was really no dispute at all and that the annex 7 tribunal that would be established in that circumstance could decide the maritime boundary on the assumption that those islands belong to the applicant? The only difference between that situation and this situation is a question of scale. The principle is the same. Thus, the question posed by the preliminary objections necessitated by Guyana's application is fundamental and it is far reaching. Furthermore, aside from the fundamental and far-reaching question presented, the matter cannot be joined to the merits for the plain and simple reason that Suriname cannot be expected to argue for its maritime boundary position starting from a land boundary point that Guyana puts forward that Suriname disputes. On the one hand, it is not reasonable for Guyana to imply that Suriname should proceed to draft its counter-memorial as if Guyana is correct on the land boundary terminus question simply because Guyana says so. On the other hand, if Suriname were to draft its counter-memorial setting forth its maritime boundary positions starting from a land boundary terminus to which it believes that it is entitled, the tribunal would then have competing land boundary questions before it. The tribunal in Suriname's view cannot decide between those competing disputed territorial points because disputes over territorial sovereignty are not governed by the legal relations established by the 1982 Convention.

Professor Sands drew our attention to the Cameroon/Nigeria case, preliminary objections made by Nigeria, and I would draw an entirely different conclusion from the one that Professor Sands drew. In that case Nigeria made a preliminary objection to Cameroon's request that the Court establish a Cameroon/Nigeria maritime

boundary bound point G arguing that Cameroon's request was inadmissible – this was not even a question of jurisdiction in that matter – it was inadmissible because third state interest might be affected.

Now, Nigeria was given a full hearing on this preliminary objection and others and after that full hearing the court, in a reasoned judgment, decided that this particular preliminary objection was not exclusively of a preliminary character. It was only after full briefing and argument that the court reached the conclusion that Nigeria's concerns about the maritime boundary beyond point G should not be dismissed but could be addressed within the merits, if necessary, after the court had heard from the parties on the merits and after it had found out whether a third party might intervene.

In substance Nigeria's eighth preliminary objection in a maritime boundary matter and Suriname's preliminary objection are very different. Suriname's preliminary objection is more fundamental because it concerns the scope and the meaning of the treaty relationship between the parties, it either does or does not give this tribunal the power to proceed in the circumstances as a matter of its jurisdiction. Suriname is confident that after a full hearing on the preliminary objections the tribunal will rule in Suriname's favour and the question about whether the preliminary objections should be folded into the merits will be mute. However, aside from the point of substance of what either Suriname or Guyana's view might be, as a matter of procedure it would be absurd if Nigeria were to have been granted a full hearing on its eighth preliminary objection and Suriname is not.

Let me turn to just a point or two that Professor Sands made that I think simply illustrate the need for a full hearing on the preliminary objections. Professor Sands suggests that even if the tribunal were to find that there was no agreement between the parties on the land boundary terminus, the tribunal could still proceed to determine the maritime boundary using one of two

techniques. These are interesting and innovative concepts and they need to be discussed and argued and fully explored. They do not need to be dealt with in a few minutes here in this room late in the day. One of those ideas was that the tribunal had the authority under article 9 of the Convention to establish a river closing line. Well, for the tribunal to draw a river closing line with an anchor on the left bank of the Courantyne River would be, in effect, to establish the territorial point at which the land boundary ends. That is what Suriname believes the tribunal does not have a right to do, which is to establish a point that is a territorial point on a land boundary.

The second way that he has suggested the tribunal might proceed even if there is no agreement or if the tribunal finds there is no agreement on land boundary terminus is (I would call it) the finesse option. Pick a point some place out in the water that finesses the question of whether or not there is an agreement on the land boundary terminus and start from there. That again is an idea that someone in Professor Sands' position might be expected to suggest. He somewhat misused the diagram in our preliminary objections because that diagram was for the purpose of simply demonstrating that, hypothetically, just a few miles difference in the land boundary terminus in these geographical circumstances, if you applied the equidistance method, which neither party wants to apply in this case, you would end up with an area that those equidistance lines would not meet for about 15 miles. The point simply was that the location here of even a few kilometres on the land makes a difference. I would expect that if we had a full hearing to hear more from Professor Sands about this issue and I would expect the tribunal to have some interest in thinking through the issues that are associated with whether or not it is possible for a tribunal in this circumstance where it is confronted with a mixed dispute to find a point at sea that it can proceed and say is without prejudice, and again remember that you

are dealing with a number of these kinds of dispute around the world. Can a Tribunal do that in a situation between China and Japan and find a point at see that it says is without prejudice to the parties' positions over dispute over sovereignty. I question it myself, but it is an area of argument that one would expect in these circumstances.

I simply submit that those kinds of issues that Professor Sands mentioned are kinds of issues that one would expect to see from Guyana in a full response to Suriname's preliminary objections and an opportunity on our part to give a full response in rebuttal.

Finally let me conclude by simply going back and restating that Suriname's preliminary objections in our view raise fundamental questions about the Tribunal's jurisdiction to proceed in a territorial sovereignty dispute. The questions go to the heart of the legal relationships created between states parties to the 1982 Law of Sea Convention, particularly what matters are properly subject to dispute settlement under the convention. In our view these questions will not be illuminated if we now proceed directly into the merits. If Suriname now engages in a counter memorial and then we go on to a reply and rejoinder about the law and facts pertaining to the delimitation of the maritime boundary.

In our view Guyana's proposed procedure is as inefficient as it is unprecedented. the questions raised by the preliminary objections are exclusively of a preliminary character, they are unrelated to the merits of the maritime boundary debate and they must be decided by this Tribunal in our view as a preliminary matter at a full deliberation and recorded in a decision that will be studied with great interest, because the questions presented have worldwide implications.

In closing I would like to simply note what Professor Rosenne has said, that we certainly have no reason to think that the process that would be required in this would take as long as Guyana claims.

Thank you, Mr President.

THE PRESIDENT: Thank you very much, Mr Colson. I now give the floor to the representative of Guyana.

PROFESSOR SANDS: Thank you very much, Mr President. Two points of introduction. I am not going to try and frighten you into following a particular direction, that is not our role, in a second round of submissions; nor do I have the benefit of a fully scripted and typed out document in front of me from which I am going to make presentations. But I am delighted that at this fairly late stage Suriname has chosen to engage with some but not all of the issues.

I heard a great silence on three issues. Nothing any more about whether or not this Tribunal is suspended. That issue I assume thankfully has been put on one side. Secondly, and remarkably nothing about Article 10 paragraph 3 of the rules of procedure. We have now gone through the entire hearing, a formal hearing, and Suriname has nothing to say at all about what Article 10 paragraph 3 has to say or the difference between that provision and the equivalent provision in the ITLOS rules. If we had been before that institution we would not be having this hearing. At the time of negotiating those rules of procedure Suriname decided it did not want that rule, it did not want automatic suspension, and it is now stuck with the election that it made at that time.

The third great silence was there was nothing about the admissibility issues. It was all, as with the first round, about jurisdiction. So even if you get rid of the jurisdiction objection which we say would not happen and could not happen at any further hearing, you would still be stuck with the admissibility issues. Those do not go away at all.

That raises a fundamental question, what on earth is the point of holding a hearing, I think it was said in three to four months, to address all of these issues if two-thirds of them are inevitably going to remain even on their own argument. Let me just focus on that point. I was very struck, I have to say, by the tension between two

propositions made by Suriname. On the one had it said that these are really fundamental difficult, complex and vital issues, that the whole world is watching. It needs a hearing. On the other hand it is said but it should not take very long, we can have a hearing in three months time. We can get our pleadings down within the three months and have a hearing. I would ask you to enquire what actually can be achieved in three months. I do not think with great respect very much can be achieved in three months because we are simply going to have all the materials that we have already got in front of us, and go back over precisely the same issues which concern essentially the elephant in the room, the subject that dare not speak its name, the matter on which Suriname was completely silent and provided no guidance to Guyana, no guidance to the tribunal. How on earth do you decide these issues without looking at the merits? Total silence. They simply said that, "Oh, that's a territorial issue and we do not have to deal with it because it is not within your jurisdiction", but, of course, it is not as simple as that, because point 61 has two functions. It serves at the limit of the territorial boundary but it also serves, on our argument, the starting point for the maritime point. That may indeed raise a complex jurisdictional question if Suriname is right, but it is not a question that can be answered without looking at the merits. And you have not been provided with a single argument explaining to you how a hearing held in September or October 2005 would get over that problem. In my submission that is the end of the matter. They should have provided you with way out intellectually, legally, juridically and on policy grounds as to how to resolve that issue. They have not done it and in our respectful submission the reason that they have not done it is that they cannot do it. They know that the arguments they raise are essentially a defence on the merits, to use Professor Rosenne's words, and they cannot escape that and they have not been able to provide you with the means of

doing that.

Let me come to some of the point that are specifically made. I am delighted to hear firstly that Suriname does not consider this procedure to be analogous to litigation in the New York courts or the courts in London between commercial litigators. It is not. It is a dispute between two sovereign states and that requires a particular approach and a particular sensitivity to the needs and requirements of two states that are neighbours and that have excellent relations and which both, presumably, wish those excellent relations to continue. That is why a co-operative approach is useful.

The second point. In relation to the five annex 7 arbitrations which I think between us, Professor Rosenne, with the exception of the Trinidad and Tobago/Barbados one, we have just about all covered. I was struck as he went through the list that in each one of the cases the issue of jurisdiction was dealt with completely differently but on not one of the cases was there a dispute as to how jurisdiction should be addressed. This appears to be the first one. That is striking. That takes us, of course, into the situation that we now face. But in each of the cases or in the majority of the cases, the intention was, for the cases that ran forward, for jurisdiction and merits to be dealt with together. There is one other case that Professor Rosenne did not mention, the case in which I was involved, Saiga No. 2, where it went on an agreement between Guinea and St Vincent from annex 7 arbitration to the tribunal for the Law of the Sea. I drafted the agreement which made that transfer and the agreement provided again for the same reasons that we have today for merits and jurisdictional issues to be treated in an integrated manner. The United Kingdom process we have already discussed and we have seen the approach that was taken there. This appears to be the very first case, regrettably, in which there is a difference of view between the parties as to how to proceed, to deal with jurisdictional issues. We have said

that article 10(3) puts the burden on this tribunal to decide how to proceed.

It was said as a third point by Professor Rosenne that Suriname is in some way entitled to a hearing. With great respect that is not right. Article 10 of the rules of procedure entitles Suriname to have nothing more than that its views are ascertained. That is the full extent of Suriname's right under the rules of procedure which were negotiated by the two parties and that is what this process is. There is no vitiation of some fundamental right of international law to which elusion has been made but no example given which suggests that somehow a state has a right to a hearing on jurisdiction.

The fourth point is that it was said that Guyana perhaps somehow should take into account the right of Suriname to raise its jurisdictional objections, that perhaps somehow we missed article 288 of UNCLOS. With great respect we have plainly shown that we are very acutely aware of what article 10 of the rules of procedure provide. If Suriname had wished to preserve its right to suspend proceedings, it should have chosen ITLOS and, as we know, it had an opportunity to do so and declined to do so. It has to live with the consequences of its decision.

I turn now to the points made by my good friend, Mr Colson. The point was made – and really this is the heart of his argument – that you simply cannot have the jurisdiction to decide whether point 61 is or is not the agreed land terminus. That may or may not be right, what you do have jurisdiction to decide is whether point 61 is the starting point of the maritime delimitation. The fact that it has a dual function as a point in fact and in law may indeed raise a question, an interesting question, as to jurisdiction. But for all the reasons we indicated previously it is not one that can be determined without looking to issues of merits, not least because both sides have in their written pleadings already indicated their arguments as to the relationship between point 61 and where the boundary line in the maritime area is to be

drawn. We have shown on our material that both sides for their concessions, both sides in relation to the practice of producing maps and some such things have taken point 61 and on occasion they have departed on which line to take. But you certainly have jurisdiction over the arguments as between those two lines and you certainly in our submission have jurisdiction as to the termination point of that line to the extent that it is the starting point for a maritime boundary.

Mr Colson also referred to the arguments that we made in relation to the article line of UNCLOS point and the point that was made by the rather helpful figure number 4 put forward by Suriname in its memorandum. I must say that I listened to him with great care, as I always do, and rather thought that his argument pointed very strongly to the reason why merits and jurisdiction should be joined. We do not see how you can decide those two arguments in the alternative at a hearing held in September or October 2005 without looking at the totality of the merits, the drawing of charts, the taking of witness statements, the examination that will surely be required of the practice of both states. We have a fundamentally different approach as to the extent of your jurisdiction and we accept that Suriname is entitled to have its approach. We come back to really the crucial key issue, could you decide that at a preliminary hearing on jurisdiction? And we have heard nothing from Suriname to explain how you possibly could decide that. It would be a futile hearing, we would say. It would inevitably lead to a joinder of jurisdiction and the merits.

Mr Colson made points concerning the interests, the views, the intentions of the negotiators of UNCLOS. No doubt these are very important points and there are many people in the room who have far, far more experience than I do on those negotiations and on the intentions of the drafters. Again, it cannot realistically be being argued that at a jurisdictional hearing in September or October you can possibly take those into account to form a view as

to whether you have jurisdiction and, if you do, where you should draw the boundary. It is in our submission not something that can be done and it really amounts to nothing more than a form of fear-mongering to invoke a spectre of hypothetical disputes between other states which may have their views. I have now done enough international litigation to appreciate that you have to take each case on its own merits. I do not know much about the case to which Mr Colson referred but I cannot see that it is going to add a great deal of light for the elucidation of the factual and legal issues that you are faced with. Interesting stuff, certainly, but really not pertinent to this phase of the proceedings.

I make the same point in relation to Cameroon versus Nigeria, which I think does rather support our view that where a plea of admissibility is made that concerns an issue such as the interests of a third state or issues relating to the use of force of acquiescence in the practice in the grant of oil concessions, the International Court of Justice is saying, "Look, those may be pertinent relevant issues, but we cannot deal with them at a preliminary phase". I am not going to get into the game of saying that somehow Suriname's interest is more or less fundamental than Cameroon or Nigeria's interest. I do not think that that serves a useful purpose. States are sovereigns, they have attachments to their interest. Guyana strongly respects Suriname's sovereign interests and we know that Suriname strongly respects Guyana's sovereign interests. There is no other questions.

That I think concludes our presentation in relation to the rebuttal phase of these proceedings. By way of conclusion, I can be very brief, it comes back really in a sense to the balance of equities in the absence of either party's right, which side will be more disadvantaged, if you like, by suspending or by proceeding. In the circumstances in which it is inevitable that a suspension will lead to a hearing which will inevitably decide that the jurisdictional issues should be joined with the

merits, and we have had no argument to explain why that would not happen, in our respectful submission that points decisively to a continuation of the proceeding according to a timetable that was acceptable to Suriname when it entered into the agreement adopting the rules of procedure and which continues to be acceptable to Guyana. If at the end of the day Suriname is saying that all of this can be dealt with in a hearing in three or four months with an award on jurisdiction two or three months later, joining jurisdiction to the merits, one can begin to see, I think, what is really in issue here. It forms part of a broader strategy of litigation. It is not so fundamental an issue and, in particular, it is not right to suggest that Suriname would not get its day in court to deal with important issues it considers to be relevant on jurisdiction and admissibility. It will have its day in court. It may be successful and I identified other cases in which jurisdictional objections have prevailed at the merits stage. So it is not the case – I will leave you with a final thought – that if you were, as we say you must, to join jurisdiction to the merits that Suriname would not have its full opportunity to raise all of these issues in what we say is the most appropriate way.

Thank you very much, Mr President.

THE PRESIDENT: Thank you very much, Professor Sands. You will recall that at the beginning of this afternoon's session I noted that Suriname had promised to submit a proposal on the issue of access to documents. I think, with the agreement of the Tribunal, we can deal with this now. I give the floor to Mr Saunders.

MR SAUNDERS: Mr President, might I yield the floor to Mr Lim A. Po.

MR LIM A. PO: Mr President, members of the Tribunal, would you allow me to spend two minutes in response to Sir Shridath Ramphal? No. OK. I will go to the point.

We have seriously considered once again the comments which were made this morning about cooperation, especially as you will remember yesterday I made a statement to that

effect. The Suriname government is indeed concerned about the need for cooperation with Guyana. In fact there is a huge dimension of cooperation with Guyana. 40,000 Guyanese, which is 10 per cent of the population of Guyana, live in Suriname. So cooperation is not a concept that is strange to Suriname and Guyana.

At the same time we think that the issue which I raised today on the sovereignty on the land issue is a huge and critical issue for Suriname. Dr Ramphal will definitely remember how he and I together 35 years ago had been discussing this particular issue and trying to reach an agreement on it. So it is a huge issue that occupies the mind of Suriname, to the extent that we may even decide not to refer to documentation and rely on documentation that deal with the land boundary issue, even if that documentation would also have a reference to maritime issues. So important is the land boundary issue to us.

We have a proposal which we think addresses Guyana's concern, which is its main concern, about equality of arms. The proposal is in brief this. Suriname will in these proceedings not invoke or otherwise rely on any document which is located in the restricted archives to which Guyana have been denied access, with the following proviso. (1) Suriname reserves its right to rely on the documents from the restricted archives. (2) If it does Suriname will withdraw its objection so as to permit Guyana to have access to the file from which any such document was taken. (3) The right of each party to ask the other party through the Tribunal to disclose specific relevant documents is preserved.

I would strongly feel that this represents a fair balance which takes into account the interest, all legitimate interest, of both parties concerned. We have a huge issue in the fact the sovereignty issue on the land boundary is a major consideration for us in terms of access. On the other hand Guyana has a major concern in respect of equality of arms, and an overriding principle

of course is the stewardship of your Tribunal to make sure that there is a cooperative framework.

This is the proposal I would like to make. It is not a proposal, it is a position which we take, and obviously we reserve all the rights in all these things, but I think in this spirit this is how we think we would like to resolve this issue. Thank you.,

THE PRESIDENT: Thank you very much, Mr Po. This document is not in written form.

MR LIM A. PO: I will distribute copies. Could I add for the sake of clarity to this, Mr President, that the proposal not to rely, the first paragraph, is in fact Guyana's alternative proposal or request.

THE PRESIDENT: Would Guyana want to reply now?

MR REICHLER: Yes, Mr President. I have four words, too little and too late. This is not acceptable. The premise of the proposal that the Tribunal presented to the parties yesterday and which was discussed this morning was that all documents, all relevant documents, should be made available to the Tribunal; all relevant documents. That is consistent as we have repeatedly said with Annex 7 Article 6 and with rule 7 paragraphs 1 and 2 of the rules of procedure. I believe members of the Tribunal in the discussion we have had have indicated that in prior boundary disputes they have found that it is useful for the tribunal to have access to all of the historical materials. You will remember that we are talking about materials that are 30 years old and older. These are historical materials in the archives of the Netherlands. All relevant documents, all relevant information. Would that not be most helpful to the tribunal in sorting through the facts, finding the facts and achieving an equitable solution to this dispute? What we have here now is no documents. This is not an effort to work with Guyana to agree upon a class of documents that can be produced, which is what I believe Dr Hossain was alluding to in his most helpful comments this morning, this is no documents. We get nothing. You get nothing from the

Dutch archives unless they decide that there is a document in those archives that is so helpful to their case, and they have looked at all of the other documents in that particular file from which this document comes, that the value of that particular document to their case compares favourably to whatever value Guyana might get out of reviewing the document only in the file from which that helpful document came. These are the same tactical arguments, these are the same adversarial litigation oriented proposals that we have heard repeatedly from Suriname as indicated when Mr Saunders told us his approach to this arbitration in his first presentation. This is not an effort to get all the facts out. This is not an effort to put all of the documents before the tribunal. This is an effort to keep all the documents from the tribunal, to keep them all from Guyana, unless there is one that is so helpful to them that they are willing to share it with us, generously, because it is so helpful to them. Then they will share the other documents in the file. Of course, they will not use the document in the first place unless they know that there is nothing else significant in the file. So we get nothing, not all, not some, not a compromise, we get nothing.

This clearly is inconsistent with the objectives of this tribunal, it is inconsistent with annex 7, it is inconsistent with the rules of procedure and it frustrates the purpose of the tribunal.

The offer that the right of each party to ask the other party through the tribunal to disclose specific relevant documents is preserved. What is that but a repetition of the proposal that Mr Saunders put forward this morning? We have to identify specific documents without knowing what documents exist in order for us to be able to request them. That right is preserved? That is not a right. That is a forest, as we indicated this morning.

Suriname will not invoke or otherwise rely on any document which is located in restricted Dutch archives to

which Guyana has been denied access. Too late, they have already done it. Now they come forward with this proposal, after they have submitted their lengthy paper application for suspension of the proceedings, based on their preliminary objections, relying principally – figure one is from the so-called restricted file. The entire basis for their claim that there is no agreement on point 61 consists of one document prepared by the Dutch in 1959 which posits a different starting point for the maritime delimitation. I will not get into the merits of that issue, but, Contrary to all of the historical practice, all of the documents Professor Sands read from their public statements, by their President, by their Prime Minister, in 2000, their Official Plan Atlas in 1998 asserting that point 61 is the northern land boundary terminus and its starting point, specifically, for maritime delimitation, they have one document in 70 years which the Dutch drafted in 1959. They pull that out of the restricted files which they will not allow us access to and they use it as the main feature of their preliminary objection paper and they say that they will not invoke or otherwise rely on any document from the restricted files. They have done it. Now they are willing to say, OK, we will not do it again and, if we do it again, we will give you access to files which we have already sanitised or assured ourselves that there is nothing there that is going to help Guyana. This is a sham.

Mr Lim A Po prefaced the introduction of this so-called proposal by stating that their main concern is not to compromise their position on the land boundary, meaning the dispute between Guyana and Suriname over the new river triangle, which is located about 300 kilometres south of the northern land boundary terminus. It bears no relation, we agree, to the maritime boundary dispute. Well, that can be resolved. That can be addressed. We are sensitive to that. We are not looking to prejudice Suriname on the dispute over the new river triangle. We

know that that has no place before this tribunal and we are not seeking to bring it before this tribunal. Nor are we seeking access to documents or information regarding the new river triangle that have absolutely no bearing on the maritime boundary dispute. If, as Mr Saunders himself said, the vast majority of documents in the Netherlands archives are relevant to this dispute and if some subset of those documents deal with the unrelated issue of the new river triangle, then the way to accommodate Suriname's legitimate concern and also Guyana's legitimate concern, as well as the tribunal's interest in having all relevant documents, is to have those documents reviewed by the expert or special master who would then redact those portions of the document which deal exclusively with the new river triangle issue. I do not mean to be overly restrictive and I am talking in general terms here. It may be that there are other parts of the document that can be redacted and we can sit down and discuss that. I am sure once an appropriate order is issued along the lines of the proposal that the tribunal made last night, that would facilitate a resolution between the parties of what should be redacted from these documents, what information should be kept confidential. We are prepared to be reasonable and flexible about that. All that w want are documents and information that are relevant to the maritime boundary dispute.

We come back to the position that this arbitration is about the maritime boundary dispute under UNCLOS annex 7 under the rules of procedure. The tribunal plainly has the power to require the parties to facilitate its work and to assist the tribunal in obtaining all relevant documents and information using all means at their disposal, all relevant documents and information. Again, to the extent that needs to be the guide post, that needs to be the basis of any order that is issued. To the extent that documents are of mixed subjects, that is something that we as litigators have a great deal of experience with. If there is information in there and any

document or documents that is not relevant to the dispute and, particularly, if it relates to the new river triangle, that can be redacted out and the rest of the document or such portions of it as relate to the maritime boundary issue can be produced and all legitimate interests of both parties and the tribunal can be protected in that way. We revert to the tribunal's proposal of this morning but willing to accommodate and take account of Suriname's interest in avoiding disclosure of information relating to the new river triangle or the land boundary dispute that is not relevant to this dispute. There are procedures that can be implemented and agreed to that would accommodate all legitimate interests.

I will turn the floor over to Professor Sands, with our permission, Mr President, who has another point to make on the subject.

THE PRESIDENT: Thank you. Professor Sands.

PROFESSOR SANDS: Thank you, Mr President. I will just come very briefly to the key point of principle, the equality of arms between the parties. The problem with this proposal is the second paragraph. It is wholly inconsistent with the principle of equality of arms between the parties. There is nothing in this which stops Suriname from putting in its second written pleadings on the merits a document. We are now at the end of the pleadings, there is no opportunity, perhaps, for new documents and it does not meet the objective of ensuring that both parties have access to documents in a timely manner in order to prepare their pleadings. You will remember the schedule that has been agreed by the parties, the memorial by Guyana, the counter-memorial by Suriname, reply by Guyana, rejoinder by Suriname. You can see exactly what is coming. And what is coming is that in the final written pleadings a bundle of documents will come in - we have seen it straight away - and they will say "Sure, you can have access now", and then we will come back before you and we will have a big fight about whether or not we can have a third round of written pleadings. That

is plainly it. Look at their faces. That is what is coming. This is inconsistent with the principle of equality of arms and for that reason it cannot possibly work as a basis for a tribunal which is to adopt that as one of its leit motifs in its work. Thank you very much, Mr President.

THE PRESIDENT: Thank you very much, Professor Sands. Are there any further comments? I must thank the delegation of Suriname for producing this document, hoping that it would move us forward. Guyana has found it unacceptable, but, if I listened to Professor Sands carefully, they are sensitive to the idea that matters dealing with the land boundary dispute should be dealt with, the idea of avoiding using documents which deal with the terrestrial boundary and even suggested ways of dealing with that matter. All I can say is that we have had a very full hearing on the access to documents and the need for a hearing on Suriname's preliminary objections. I think that this is the time for the tribunal to meet and to deliberate. Evidently, it is not going to be a simple task but we hope that we would find a solution which would represent, in the words of the Convention, an equitable solution to the problems. I thank you very much for your co-operation and your punctuality. I think all of us have benefited from this exchange. Thank you very much. The meeting is adjourned.
