

PERMANENT COURT OF ARBITRATION
ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

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 In the Matter of Arbitration :
 Between: :
 :
 REPUBLIC OF GUYANA, :
 : Case No. 2004-4
 Claimant, :
 : PCA Reference GU-SU
 and :
 :
 REPUBLIC OF SURINAME, :
 :
 Respondent. :
 :
 - - - - - x Volume 7

Friday, December 15, 2006

Organization of American States
17th Street and Constitution Avenue, N.W.
Guerrero Conference Room, Second Floor
Washington, D.C.

The hearing in the above-entitled matter convened at
9:30 a.m. before:

- H.E. JUDGE L. qDOLLIVER M. NELSON, President
- PROF. THOMAS M. FRANCK, Arbitrator
- DR. KAMAL HOSSAIN, Arbitrator
- PROF. IVAN SHEARER, Arbitrator
- PROF. HANS SMIT, Arbitrator

Permanent Court of Arbitration:

MR. BROOKS W. DALY, Registrar
MR. DANE RATLIFF

Tribunal Hydrographer:

MR. DAVID GRAY

Court Reporter:

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1 P R O C E E D I N G S

2 PRESIDENT NELSON: Good morning. And I see Mr. David
3 Colson before us. I give the floor to Mr. Colson.

4 CONTINUED OPENING STATEMENT BY COUNSEL FOR RESPONDENT

5 MR. COLSON: Thank you very much, Mr. President and
6 Members of the Tribunal. It is a great honor for me to be here
7 today and to appear before this Tribunal on behalf of the
8 Republic of Suriname.

9 Just two housekeeping matters before I begin. As it
10 is clear, I'm not Professor McRae, and I just wanted to be
11 clear. He will resume his presentation tomorrow morning that
12 was interrupted yesterday afternoon, and he will be our first
13 speaker tomorrow morning.

14 And then also, as is normally the case, there is a
15 book in front of you. It has copies of all of the slides that
16 you will see today, plus the documents that are related to
17 those slides. I don't really intend to call your attention to
18 the various tabs. They're there for your reference. There are
19 two or three documents, though, that will not be shown in
20 slides, and I will be making a specific call to those tabs
21 throughout the presentation, in case you would care to turn to
22 those tabs.

23 My task today is to address the subject of the conduct
24 of the parties, the conduct of the parties insofar as it
25 relates to the boundary beyond the territorial sea. We have

09:33:08 1 heard about the conduct of the parties in respect of the
2 territorial sea yesterday, and today my task is to talk about
3 the conduct of the parties relating to the delimitation of the
4 continental shelf and the exclusive economic zone beyond the
5 territorial sea.

6 Now, the Tribunal will appreciate that over the course
7 of the pleadings in this case, we have been treated to a
8 collection of propositions by Guyana insofar as conduct is
9 concerned. Guyana, in its Memorial, took the view that there
10 was an agreement between the parties on the 34-degree line;
11 and, in fact, it also used the term *modus vivendi* in several
12 places in the Memorial to describe the relationship between the
13 parties in respect of the 34-degree line.

14 In its Reply, it softened its position and began to
15 explain that it was really talking more about an *indicia*; that
16 if the Tribunal looked, it would find that in the conduct of
17 the parties there was an indicator of what the parties might
18 have deemed to be equitable and to have acted upon as such, the
19 words that the Court used in the Tunisia-Libya case.

20 Now, in the oral proceedings last week, we heard a
21 slightly different twist on this. The *indicia* argument was
22 maintained, but we also heard that perhaps special
23 circumstances existed in this case, special circumstances that
24 would call for the Tribunal to adjust a provisional
25 equidistance line by virtue of the conduct of the parties to

09:35:11 1 the 34-degree line; and then we also heard what I think is a
2 new argument, in maritime boundary cases at least, that there
3 was an admission against interest in respect of Suriname and in
4 Suriname's conduct in this matter.

5 Now, each one of these formulations, each one of these
6 propositions, is different in legal terms, and Guyana has made
7 no effort to describe those differences, nor to connect those
8 legal relationships to specific facts that have existed in the
9 relationship between the parties over the last 40 or 50 years.

10 Now, I don't intend to quibble or spend any time on
11 that because at the end of the day, it seems that what Guyana
12 really wants the Tribunal to do, however the Tribunal might do
13 it, is to find that Suriname, by its conduct, for approximately
14 50 years--and here is a quote from the transcript--"that for 50
15 years, Suriname has been respectful of Commander Kennedy's
16 historical equidistance line." You can find that on page 99 of
17 the transcript of the 9th of December. And on that basis, if
18 that is true, of course, Guyana wants the Tribunal to find that
19 the 34-degree line is the right and proper boundary in this
20 case.

21 In other words, Guyana wishes the Tribunal to find
22 that Suriname, its government and its people, have all along
23 thought and acted as if Guyana's position was the right
24 position.

25 Now, my task this morning is simply to demonstrate

09:37:16 1 that that's not true. I don't bear the burden of trying to
2 prove to you that Guyana has accepted Suriname's position.
3 Suriname makes no such claim. We simply assert and believe it
4 to be true that there has been a dispute between the parties
5 for more than 40 years about this maritime boundary problem and
6 that the conduct of the parties simply reflects that dispute.

7 Now, Suriname addressed the conduct of the parties in
8 its Counter-Memorial and in its Rejoinder, in its
9 Counter-Memorial at paragraphs 4.37 to 4.41, and 5.1 to 5.89;
10 in the Rejoinder at paragraphs 3.81 to 3.157. And Professor
11 Oxman yesterday reiterated and elaborated on that presentation
12 making clear how this matter has been treated in the cases and
13 how it should be treated in a case that is conducted under the
14 Law of the Sea Convention.

15 Based on the applicable law, Suriname's view is that
16 the facts of conduct in this case do not--do not--demonstrate
17 the location of an agreed boundary. They do not reflect a
18 modus vivendi. They do not indicate line or lines that the
19 parties have deemed to be equitable and have acted upon as
20 such. They do not constitute a special circumstance, and that
21 there is no basis for saying that Suriname's conduct--anywhere
22 that we find in the record before us that Suriname's conduct
23 constitutes an admission against Suriname's interest. If there
24 is an admission against interest in this case or perhaps more
25 accurately an admission against the arguments of counsel, it is

09:39:43 1 that Guyana's conduct acknowledges that the maritime boundary
2 has been a matter of dispute for 40 years.

3 Now, in considering how to approach this subject, it
4 seems useful to begin by addressing the case law in some
5 detail. The cases have received short shrift in Guyana's
6 pleadings. To be sure, there have been many citations and
7 there have been many quotations, but virtually no investigation
8 into the nature of the conduct that was before the Court that
9 led to various passages in various judgments. Last week
10 Professor Schrijver made reference in his presentation by
11 citing to paragraphs in the judgments of Tunisia-Libya,
12 Libya-Malta, Jan Mayen, and even Cameroon and Nigeria. He even
13 brought up the Temple case, but in no case, no situation was
14 there any effort to look at the conduct in those cases against
15 what the Court might have said in those cases.

16 And it seems appropriate to investigate those
17 judgments, including those paragraphs that were cited more
18 thoroughly beyond just a passing reference, and to at least
19 look at one more case, the now infamous Gulf of Maine case, in
20 which conduct, of course, played a substantial role in the
21 arguments of the parties in that case.

22 Now, after I do that, which will probably take about
23 an hour, I would propose to set out clearly and simply the
24 facts that are in the record before the Tribunal. I would try
25 to do this chronologically. I'm not going to say the

09:41:52 1 diplomatic facts are in one basket, the fisheries facts are in
2 a different basket, and the oil facts are in another basket.
3 It seems to us that if you go through the facts that are in the
4 record chronologically, you will get--the Tribunal will get--a
5 good picture of what was going on in the diplomatic
6 relationships between the parties throughout the course of this
7 dispute. And before I close, I hope to say just a word or two
8 about conduct as it may pertain to third states.

9 Now, before turning to the treatment of conduct in the
10 cases, it might be useful just to remind us for a moment about
11 the two core elements of Guyana's factual conduct argument.
12 The first is based in the 1958 proposal that the Netherlands
13 made to the United Kingdom that the continental shelf boundary
14 should be based on Article 6(2) of the Continental Shelf
15 Convention. Now, there is no doubt that that proposal was
16 made, but in Suriname's view, Guyana takes its argument too far
17 in suggesting that it was understood that this meant that
18 Suriname was prepared to accept a strict equidistance line in
19 1958. And Guyana tries to take this even further by trying to
20 keep this proposal alive and well, at least for eight years up
21 to the time of the Marlborough House Talks, disregarding
22 substantial conduct and substantial diplomacy and substantial
23 proposals that are in the record between the time of the '58
24 proposal and the time of the Marlborough House Talks.

25 The second element of Guyana's factual argument

09:44:05 1 concerning the conduct of the parties relates to the oil
2 practice in the disputed area. Now, Guyana tries to make much
3 of the fact that numerically, Guyana has issued more
4 concessions that have some limits that overlap into the
5 disputed area than Suriname has issued. Guyana also tries to
6 make much out of the fact that there was one well drilled 30
7 years ago, an exploratory well, in the disputed area. And it
8 also takes note of the fact that there was more seismic
9 research done under Guyana's licenses that pertain to the
10 disputed area than others under Suriname's concessions, and we
11 don't contest that fact, and we don't contest the fact that
12 there was one well drilled under Guyana's license.

13 Now, we will come back to this as we go through it,
14 the summary of conduct, but those are the two baskets. You
15 have a 1958 proposal that was made by the Netherlands, and you
16 have some oil conduct that pertains to the disputed area, and
17 that is the sole--that's the sum of the argument that you have
18 before you from Guyana: That out of this the Tribunal should
19 find that the 34-degree line is the equitable boundary in this
20 case.

21 Now, I take it ultimately that the position of Guyana
22 is that out of this conduct there is an "indicia," the word
23 that was used by the Court in Tunisia-Libya, and we might begin
24 by asking ourselves, what does that really mean? Now, it's a
25 common view, I believe, that *modus vivendi* is a provisional

09:46:19 1 arrangement upon which the parties have relied, and at a
2 minimum it would seem that a modus vivendi requires a structure
3 and requires some long-standing practice.

4 Now, presumably, an indicia or an indicator is
5 something less. It is perhaps only a signpost, a signpost that
6 points in a particular direction, and it may perhaps point
7 toward a modus vivendi or something else. As we know, in and
8 of themselves, signposts aren't the answer. Signposts only
9 help us if they point in the right way. Signposts, if they are
10 misplaced or misunderstood, do not give us the answer to the
11 question of the direction in which we are to follow.

12 Now, this is the way the Court used the term in
13 Tunisia-Libya. The Court used the term with reference to the
14 fact that there were abutting limits of oil concessions in
15 Libya-Tunisia, in the near shore part of the disputed area in
16 that case, which had been in place for eight years, that
17 abutting practice of the two powers pointed toward a modus
18 vivendi that had been in place between the colonial powers
19 since 1913, and that modus vivendi used a perpendicular to the
20 general direction of the coast as a way of dividing fisheries
21 enforcement activities by the two colonial powers.

22 Now, in the Counter-Memorial of Suriname, this case,
23 the Tunisia-Libya case, was reviewed in some detail. The facts
24 were reviewed in some detail, and the Court's analysis was
25 reviewed in some detail, and Guyana has not taken issue with

09:48:41 1 that presentation. But, given Guyana's continuing reliance on
2 that case and the indicia formula, if you will, it seems to us
3 that it would be useful to revisit the Tunisia-Libya facts once
4 again that gave rise to this word or this formula "indicia."

5 Now, the case was brought to the Court by a special
6 agreement in 1977, and in the preceding months, specifically
7 from early 1976 onward, there were several serious incidents
8 between Libya and Tunisia involving the naval units of both
9 countries trying to either disrupt or to support drilling
10 operations or seismic operations, and tensions had mounted to a
11 crisis level.

12 Now, the most famous of those incidents were the
13 SCARABEO IV and the J.W. BATES incidents which occurred in the
14 middle of 1976. The SCARABEO IV was a drill ship that was
15 operating under Libyan authorization, and it was owned by an
16 Italian company, and the Tunisian Navy ran off the SCARABEO IV,
17 and the Italian Navy--or it tried to run off the SCARABEO IV,
18 and the Italian Navy showed up to protect the Italian lives on
19 that drill ship.

20 The SCARABEO IV withdrew, but then the Libyan
21 authorities enlisted another drill ship. Please note the name.
22 It was the J.W. BATES. And it was to resume drilling
23 operations. And then both Navies, both the Libyan and Tunisian
24 Navies, showed up.

25 Now, we had a focus from Guyana's counsel on the

09:50:59 1 affidavits of persons that were aboard the CGX drill ship, and
2 it was pointed out to us that those persons had never before
3 for 40 years heard of anything like what might have happened in
4 the CGX operation to try to ask a drill ship to leave a
5 disputed area.

6 Now, that person on that drill ship who gave that
7 affidavit clearly had not read the Tunisia-Libya case, nor had
8 they read the history of that company's own operations because,
9 as that affidavit shows, that oil rig supervisor was an
10 employee of Reading and Bates, a U.S. company that does this
11 kind of thing all over the world.

12 Now, fortunately within months of these standoffs, the
13 two countries agreed to take the boundary dispute to the Court.
14 Now, Libya pled that the boundary ought to follow the meridian,
15 the due north line from the land boundary terminus, and Tunisia
16 pled that the boundary ought to run at a 45-degree angle, it
17 would get out to the 50-meter isobath on that 45-degree angle
18 and thereafter would follow something called the sheaf of
19 lines.

20 Now, we are putting on the screen map two from the
21 Court's judgment. Now, we have added for your information two
22 dots. One of those dots locates where the SCARABEO IV and the
23 J.W. BATES incidents occurred, and the red dot on the screen
24 identifies a point at 33 degrees north, or 33, 55' north, 12
25 degrees east, that played a substantial role in the way that

09:53:16 1 the Court went about constructing its decision.

2 Now, concerning the oil--and let me just point out
3 here, you can see the Libyan position which is the due north
4 position coming off of the land boundary terminus turning to
5 give effect to the Kerkennah Islands, and then the Tunisian
6 position which is running off to the northeast.

7 Now, we will put on the screen a second map, and this
8 is a map that has been extracted from the Libyan Memorial, and
9 I would just like to call your attention to the red dot. The
10 red dot is in the same place as it was in the previous pleading
11 or previous slide, and it simply identifies that that was the
12 northernmost extent of where the two concessions abutted. Now,
13 the map depicts these two concessions, and there is at least
14 one error on the map that is in the Libyan pleading because it
15 identifies the Tunisian concession as beginning in 1967.
16 Actually, that concession was issued in October of '66, and it
17 is shown in a purple color here, and Libya came in two years
18 later and issued its concession, and that was the one on the
19 right of the screen in green hash marks, and there aligned, as
20 we can see, only so far as that red dot.

21 Now, one of the key things in understanding the
22 judgment is that that line did not correspond to the position
23 of either state before the Court, and it should be noted--and
24 you can find this in Tab 3 of your folder--that the Libyan
25 agent during the oral hearings told the Court that it had been

09:55:27 1 Libya's intent to align its concessions with those of Tunisia
2 in order to avoid a dispute. Now, why did Libya do that?
3 Indeed, why did Tunisia do that? Because the concession limits
4 here don't correspond to the formal position of either state.

5 Now, I can't answer that. It would be speculative.
6 Nobody really knows why those governments, some, now 30 years
7 ago, did this, but each one of them granted concessions that
8 didn't correspond to their formal positions, and the only
9 speculative answer one can give is that it was the same oil
10 company that was operating on both sides, and oil was being
11 discovered on both sides, and therefore the parties were intent
12 upon ensuring that they would receive the benefits from that
13 oil and gas operation. That's speculative.

14 Now, it might be useful in looking at this map for
15 just a further moment that we can see that the oil concession
16 conduct stops at that red mark, red dot, but if you read the
17 judgment further, read the judgment, you will find that at
18 paragraph 124 of the judgment when the Court starts talking
19 about the first segment of its line being the line that is
20 perpendicular to the general direction of the coast and a line
21 that is rooted in the colonial modus vivendi, it extends that
22 line north of that red dot. It extended it about 15 miles
23 further north. It extended it to the latitude of 34 degrees
24 10'30" north, which was the westernmost point of the Gulf of
25 Gabes, which you aren't able to see on this map, but you can

09:57:38 1 see that that line would extend well north of the line of
2 latitude that is marked there on that map.

3 So, it's hard to escape the conclusion that the first
4 segment of that boundary in Tunisia-Libya, the one that the
5 word "indicia" is always used in connection with, it's hard to
6 escape the conclusion that the first segment of the boundary is
7 the line based in the geographical circumstances, it was
8 perpendicular to the general direction of the coast, and both
9 inshore, where it was perpendicular, and offshore, where it
10 reflected an adjustment, an angle bisector adjustment, if you
11 will, for the presence of the Kerkennah Islands, and it
12 reflected a modus vivendi that had been in place since 1913
13 between France and Italy as the colonial powers.

14 Now, in analyzing the case and in considering just
15 what the Court was talking about when it was using this term
16 "indicia," which is used only once in the judgment at paragraph
17 118, it's useful to take account of the structure of the
18 judgment, the way the Court's judgment is structured as how it
19 builds up to that word. And in your book at Tab 4 we have
20 included paragraphs 86 to 120 of the Court's judgment. And it
21 is here that the Court is addressing the interrelationship of
22 the perpendicular line, the modus vivendi line, and this
23 abutting oil concession practice. And obviously I'm not going
24 to read all of this, but we thought that it would be useful for
25 you to see the totality of this discussion and to have it

09:59:38 1 available to you.

2 Now, at paragraph 86, the Court--this is at Tab 4, if
3 you wish to follow this. At paragraph 86 the Court begins its
4 discussion by saying that there are three basic lines in this
5 case, and it then says that there is the Tunisian 45-degree
6 line, and then it says there is the Libyan northward line, and
7 then it refers to the third line, and it says the Court
8 referred to the third line by saying Ras Ajdir, which is the
9 land boundary terminus, "is also the point of departure of the
10 line perpendicular to the coast proposed by Italy in 1914, and
11 of the line of 26 degrees northeast which had been followed by
12 the two parties in the granting of concessions for the
13 exploration and exploitation of mineral resources during the
14 period 1964 to 1972."

15 From paragraphs 87 to 92, the Court proceeds to assess
16 these three lines. It finds that the Tunisian line and the
17 Libyan line are without merit because the Court refers to them
18 as unilateral acts, and it finds as well that such arguments as
19 had been made in that case to the effect that one party or the
20 other had agreed with the other party's positions, that those
21 arguments were also unsupportable. That's the discussion that
22 you find at paragraphs 87 to 92.

23 Then we come to paragraph 93, and it begins with the
24 words on the screen: "In the view of the Court, a line which
25 does have a bearing on the questions with which it is concerned

10:01:59 1 is the third line mentioned in paragraph 86 above, the line
2 designed to be normal or perpendicular to that section of the
3 coast where the land frontier begins."

4 The Court proceeds in the remainder of that paragraph
5 and on through paragraphs 94 and 95 to address the point that,
6 in fact, there appeared to the Court to be a tacit *modus*
7 *vivendi* between France and Italy starting in 1913 to recognize
8 the perpendicular to the general direction of the coast as a
9 line to be used for the enforcement of fisheries regulations.

10 We then come to paragraph 96. And this paragraph,
11 which begins, "Lastly, in this connection," and we have the
12 words of the whole paragraph on the screen, but I want to note
13 the words that are highlighted. It says, "This line of
14 adjoining concessions which was tacitly respected for a number
15 of years, and which approximately corresponds furthermore to
16 the line perpendicular to the coast at the frontier point which
17 had in the past been observed as a *de facto* maritime limit,
18 does appear to the Court to constitute a circumstance of great
19 relevance for the delimitation."

20 The Court is saying it would appear that a line that
21 shares all of these characteristics is a line that constitutes
22 a circumstance of great relevance for the choice of
23 delimitation method.

24 At paragraph 113 in its discussion, for now we are
25 discussing delimitation method, the Court says that "the

10:04:22 1 methods proposed by the parties give insufficient weight to one
2 circumstance," and then it says, "The Court will therefore
3 indicate what this circumstance is, and how it serves, with the
4 support of other circumstances which the parties themselves
5 have taken into account to produce an equitable delimitation."

6 Then we come to 117. We are getting close to the
7 indicia paragraph at 118. At paragraph 117, the Court says,
8 "The circumstance alluded to in paragraph 113 which the Court
9 finds to be highly relevant to the determination of the method
10 of delimitation is a circumstance related to the conduct of the
11 parties." The Court then goes on to note the oil concession
12 conduct; and it is then in the following paragraph, 118, that
13 the Court says, "It is evident that the Court must take into
14 account whatever indicia are available of the line or lines
15 which the parties themselves may have considered equitable or
16 acted upon as such."

17 The Court then goes on to say that the oil conduct
18 line was consistent with the colonial *modus vivendi*. That is
19 the discussion in 119. And then at 120, the Court comes back
20 again to the point that the line is perpendicular to the
21 general direction of the coast. Thus, the Court found that the
22 positions of both parties were without merit, and it adopted
23 the third line that the Court had found to be present in the
24 case. That third line, in the main, was a compromise line
25 between the claims of the two parties, and that line reflected

10:06:50 1 basic facts. One was the geographical circumstances of the
2 case; a second was the historical practice of the colonial
3 powers dating back to 1913 of a modus vivendi, something that
4 had lived for 40 years and had been acted upon by both France
5 and Italy, where they had tacitly but jointly applied a
6 perpendicular to the general direction of the coast for
7 fisheries enforcement purposes. Their conduct was unequivocal,
8 and both colonial powers had relied upon it.

9 And then there was the third fact, and that was in the
10 near shore part of the delimitation area. There had been a
11 deliberate effort by both countries to avoid overlapping
12 concessions which had gone on for eight years until shortly
13 before the dispute had emerged and which amounted to the
14 compromise line between their respective positions.

15 Now, states that attempt to make conduct-based
16 arguments, such as Guyana tries to make in this case, focus in
17 on that eight-year alignment of oil concessions and maintain
18 that that was the driving force in the Court's decision.
19 However, we believe that a thorough assessment of the judgment
20 makes abundantly clear the reverse. An equitable boundary was
21 demonstrated by the geographical circumstances by the
22 perpendicular to the general direction of the coast, and that
23 same perpendicular had served the colonial powers well for more
24 than 40 years as a modus vivendi for fisheries enforcement
25 purposes.

10:09:05 1 And the oil concession alignment, to be sure,
2 pointed--it was an indicator--to that line that had been used
3 by the colonial powers, and it gave some refinement to that
4 line. It gave some precision to that line, but it was in all
5 events a perpendicular to the coast.

6 Now, you do not need to take my word for this. The
7 Tribunal will recall that after the 1982 judgment, Tunisia
8 requested revision and interpretation of the judgment under
9 Articles 60 and 61 of the Court's Statute. Tunisia's revision
10 argument was based on certain technical facts associated with
11 the limits of these aligned oil concessions, and under Article
12 61 of the Court Statute, these new facts to be admissible had
13 to amount to a decisive factor in the Court's judgment.
14 Tunisia argued that the entire decision of the Court was based
15 upon the concession alignment.

16 Now, the Court gave its answer, and we are showing
17 that now on the screen, and this full paragraph is, I believe,
18 at Tab 7 of your book, but I simply want to note here the first
19 line of what the Court said: "This, however, seems to the
20 Court to be an oversimplification of its reasoning."

21 Now, what happens next? What happens next is the Gulf
22 of Maine case, and it had something to say about the conduct of
23 the parties. It will be recalled that in that case one aspect
24 of Canada's argument was that the United States, by its
25 conduct, had consented to the equidistance method. The

10:11:40 1 Chamber's judgment at paragraph 128 recounts Canada's argument,
2 and Canada tried to make this argument in three ways. It tried
3 to put forward a complete acquiescence argument. It tried to
4 put forward the argument that there was a modus vivendi. And
5 then, thirdly, since by this time Canada had the benefit of the
6 Court's 1982 judgment, it put forward the indicia argument. As
7 you will find the words in paragraph 128 of the Chamber's
8 judgment, Canada had argued that the conduct of the United
9 States reflected, and here is the quote, "indicia of the type
10 of delimitation that the parties themselves considered
11 equitable."

12 The facts there were that Canada had began in 1964 to
13 issue oil and gas permits on Georges bank, and Canada had
14 carried out significant seismic activities in that regard, and
15 there had been communications that had passed between the oil
16 and gas authorities in the United States and Canada, and Canada
17 argued that these communications between mid-level government
18 officials provided notice and demonstrated U.S. acceptance of
19 Canada's position.

20 And furthermore, there was diplomatic contact and
21 correspondence in 1968 by the United States with Canada that
22 had not gone so far as to reserve the United States' position
23 as to what was going on in the northern part of Georges Bank.
24 It was only in 1969 that the United States protested and sought
25 to bring Canada's activities to a halt. It may be recalled in

10:13:48 1 this regard that both United States and Canada at the time were
2 parties to the 1958 Continental Shelf Convention.

3 Now, the Chamber reviewed these facts, and it noted at
4 paragraph 138 that the conduct of the United States, as it
5 said, and here is a short quote, "revealed uncertainties and a
6 fair degree of inconsistency." And, indeed, at paragraph 140,
7 it also said "that the United States showed a certain
8 imprudence."

9 Nonetheless, having chastised the United States, the
10 Court, based on these facts, did not find the elements of
11 acquiescence or estoppel to be present, and then it
12 approached--then it addressed Canada's arguments that relied
13 upon the Tunisia-Libya case discussion. Now, we are putting on
14 the screen paragraph 150, and here the Court said, "Without
15 going into these differences of detail, the Chamber notes that,
16 even supposing that there was a de facto demarcation between
17 the areas for which each of the parties issued permits (Canada
18 from 1964 and the United States from 1965 onwards), this cannot
19 be recognized as a situation comparable to that on which the
20 Court based its conclusions in the Tunisia-Libya case. It is
21 true that the Court relied upon the fact of the division
22 between the petroleum concessions issued by the two States
23 concerned. But it took special account of the conduct of the
24 powers formerly responsible for the external affairs of
25 Tunisia-France and of Tripolitania-Italy, which it found

10:16:03 1 amounted to a modus vivendi, and which the two States continued
2 to respect when, after becoming independent, they began to
3 grant petroleum concessions."

4 Now, Canada had gone on to argue that even if the
5 elements of acquiesce, estoppel, or modus vivendi were not
6 present, the pattern of oil practice was, nevertheless, an
7 indicia, an indicator that the parties regarded equidistance,
8 the equidistance line, as the appropriate method for the
9 delimitation process. And in this regard, Canada had noted
10 that when the United States began its full oil and gas leasing
11 program on Georges bank in 1975, while it had asserted its
12 formal claim, it had nonetheless, according to Canada, showed
13 its true colors when it removed the blocks in areas that Canada
14 claimed from the U.S. oil and gas lease sale so as not to
15 exacerbate the dispute with Canada.

16 Now, the Chamber's response is at paragraph 152 of the
17 judgment: "Canada invokes the conduct of the Parties finally
18 in support of its arguments that both in fact regarded the use
19 of an equidistance line as an equitable culmination of the
20 delimitation process. This argument is based, in the final
21 analysis, on the facts already advanced in support of the
22 acquiescence, estoppel, and modus vivendi claims: In the view
23 of the Chamber, these facts cannot support this idea any more
24 than the others. Each Party has adopted a clear position on
25 what it would consider a just or equitable balance between

10:18:12 1 their respective interests, and the Chamber cannot but take
2 note of this. By way of conclusion it can merely reconfirm its
3 previous comment on the reliance placed on the conduct of the
4 parties for the purposes examined above."

5 Now, the question, the same question comes up in
6 Libya-Malta, and it comes up in two different ways. At Tab 10
7 of your book, we have included two or three key paragraphs from
8 that judgment. It should be paragraphs 24 and 25, and
9 Professor Schrijver called your attention to paragraph 25 last
10 week. Before I come to paragraph 25, I would like to recall
11 what paragraph 24 says.

12 Now, paragraph 24 recounts Malta's argument that it
13 had indicated its belief in the equidistance line as early as
14 1965, and Libya had not reacted until 1973. And also that
15 Libya, which had set its northern limits of its concessions
16 well north of the median line, had nonetheless exempted the
17 work requirements from those concessions in the areas north of
18 the median line, doing sort of the same thing that the United
19 States had done by removing its oil and gas leases that were in
20 Canadian claimed area from the final U.S. oil and gas lease
21 sale. Libya had done something similar by telling its
22 concessionaires, yes, you have that concession, but we are not
23 asking you to do any work in that area pending the resolution
24 of the dispute. This is the same argument, as I said, that
25 Canada made, and frankly, it is the same argument that Guyana

10:20:45 1 makes here in connection with the Burlington and Repsol and
2 Maersk concessions or licenses that solely granted that were
3 intended not to go into the area in dispute with Guyana.

4 Now, the Court didn't find Libya's conduct to be
5 legally meaningful, and in reaching this conclusion the Court
6 said at paragraph 25 of its judgment, that the question is
7 whether--and this is the same language, I think, Professor
8 Schrijver drew attention to. I would take it exactly opposite
9 of the way he proposed its meaning. And the language is: The
10 question is whether there is "any pattern of conduct on either
11 side sufficiently unequivocal to constitute either acquiescence
12 or any helpful indication of any view of either party as to
13 what would be equitable differing in any way from the view
14 advanced by that party before the Court."

15 Now, the Court didn't find that Libya's conduct,
16 either in its silence for eight years about Malta's
17 equidistance ambitions or the fact that it removed the work
18 requirements from its permits in areas claimed by Malta, the
19 Court didn't find that to fit the standard that it asserted
20 there in paragraph 25. The Court was not convinced that
21 Libya's restraint in suspending work requirements north of the
22 median line was such a helpful indication as to what Libya
23 thought might be equitable. Nor was Libya's silence between
24 1965 and 1973 in the face of Malta's promotion of the
25 equidistance line either such a helpful indication to the

10:23:27 1 Court. These were facts, indeed, but the Court found they were
2 not a helpful indication of Libya's view as to what would be
3 equitable differing from its position before the Court.

4 Now, the next case that we come to in which conduct
5 played a substantial role in the arguments of the parties--and
6 we don't think of this as a conduct case very often, but it was
7 Jan Mayen. Review of the judgment indicates that there were at
8 least eight conduct-related arguments made by Norway, and there
9 were two conduct-related arguments made by Denmark. Now, we
10 are going to put up on the screen just for reference here the
11 Sketch Map 1 from the Court's judgment just to help us orient
12 ourselves.

13 It will be recalled that in this case, Norway's
14 position was that the boundary between Jan Mayen and Greenland
15 should be the equidistance line, the median line as it appears
16 on this map. And Denmark's argument on behalf of Greenland was
17 that Greenland should get its full 200-mile zone, and Jan Mayen
18 should be limited. Thus, Norway's conduct--Norway's argument
19 was that Denmark's conduct reflected a profound commitment to
20 equidistance. And Denmark's argument was that Norway's conduct
21 reflected a commitment to providing for full 200-mile zones in
22 the North Atlantic region, and the Court found these arguments
23 to be without merit, all of them, all 10 of them.

24 Now, I will quickly go through these arguments. The
25 first Norwegian argument was that the 1965 Norway-Denmark

10:26:20 1 agreement, which established an equidistance line in the
2 Skagerrak and in the North Sea, that that Treaty between the
3 parties was actually a treaty of general application, and the
4 delimitation which it effected was really a demarcation
5 agreement, and the Court disposed of that argument at paragraph
6 30 of its judgment after reviewing the text of that 1965
7 Treaty.

8 The second Norwegian argument pertained to Article
9 6(1) of the Continental Shelf Convention which both parties
10 were--both countries were party to, and this was regarded as
11 binding in the circumstances. And in this regard, Norway
12 argued that the meaning of Article 6(1) was that equidistance
13 was already established in law between the parties, and the
14 Court disposes of that argument at paragraph 31 of the judgment
15 by reminding that before that conclusion can be reached an
16 examination of whether special circumstances exist is required,
17 and that is for the Court to do.

18 The third Norwegian argument related to a 1963 Danish
19 Royal Decree, which pertained to sovereignty over the
20 continental shelf. Now, that Decree, the sort of broad decree
21 that states make, that Decree referred to Article 6 of the
22 Continental Shelf Convention. It even referred to the median
23 line, and it did not refer to special circumstances. And as
24 one might imagine, Norway argued that the absence of reference
25 to special circumstances in such a decree indicated that

10:28:34 1 Denmark had committed itself fully to a strict equidistance
2 line. The Court was not persuaded by that argument, and said
3 that this was simply a general statement of the Danish position
4 and that it was compelled not to advance other positions in its
5 boundary relations.

6 The fourth Norwegian argument pertained to a 1976
7 Danish law that empowered the Prime Minister to proclaim
8 200-mile fishing zones in Danish waters, and it further
9 provided that in the absence of agreement, the limit of the
10 zone would be the median line. Now, in 1976, Denmark decided
11 not to extend its fishing zone in respect of Greenland north of
12 67 degrees north latitude. In other words, Denmark did not
13 extend its fishing zone into the vicinity of the Jan Mayen
14 Greenland boundary problem. It was clear to the Court from the
15 record that in 1976, Denmark believed it was inexpedient to
16 raise the question of delimitation with Jan Mayen, about Jan
17 Mayen with Norway, and therefore its conduct in this regard was
18 deemed not to be prejudicial to Denmark.

19 The fifth Norwegian argument focused on the fact that
20 in 1980, when Denmark did finally act to establish a fishing
21 zone in these waters pursuant to that 1976 law, that law still
22 required that the limits of Danish jurisdiction not extend
23 beyond the median line, that for over a year there was a Danish
24 200-mile zone extending from Greenland that was limited by the
25 median line between Greenland and Jan Mayen. Thus, for over a

10:31:11 1 year, there was a line on the map that looked like a de facto
2 limit along the median line that was legally required by Danish
3 and Norwegian law. The Court did not find that to be relevant,
4 and here I would like to call up the next slide, and this is
5 what the Court said about that situation: "Denmark, however,
6 explains that the reason for showing restraint in the
7 enforcement of its fishing regulations in this area was to
8 avoid difficulties with Norway. From earlier diplomatic
9 exchanges, it was clear that Norway contemplated an
10 equidistance line delimiting the waters between Jan Mayen and
11 Greenland, and Denmark had indicated that this would not be
12 acceptable." Everyone knew that the median line was not
13 Denmark's real position, in other words.

14 And the Court says then: "The Court cannot regard the
15 terms of the 1980 Executive Order which was amended," and so
16 on, "either in isolation or in conjunction with other Danish
17 acts, as committing Denmark to an acceptance of a median line
18 boundary in this area." In other words, the fact that for a
19 while there was a median line limit to Denmark's conduct in
20 this area had to be assessed against the totality of Denmark's
21 and Norway's practice in this area.

22 The sixth Norwegian argument pertained to a 1979
23 agreement between Norway and Denmark, on the Faroe
24 Islands--that established the equidistance line as the
25 boundary. Now, among other things at paragraph 37 of the

10:33:26 1 judgment, and this is a paragraph that Professor Schrijver
2 referred to, the Court says this "does not commit Denmark to a
3 median line boundary in quite a different area." I have
4 struggled to find what it is in this paragraph that Professor
5 Schrijver might think supports his position.

6 Now, the seventh Norwegian argument pertained to
7 certain Danish correspondence in memorandum that could be
8 understood to be supportive of the equidistance method or at
9 least not to renounce it in this matter. The Court in
10 paragraph 38 said nonetheless, that these communications did
11 not prejudice Denmark's position, and again this is a paragraph
12 that was referred to by counsel for Guyana, and it's hard to
13 say how there was anything in this paragraph that would support
14 Guyana's position.

15 The eighth Norwegian argument--and this is one that we
16 could all probably smile about--the eighth Norwegian argument
17 pertained to the fact that Denmark, like Norway and like
18 Guyana, were members of the equidistance group at the Third
19 U.N. Conference on the Law of the Sea. And again Norway tried
20 to make something out of this, but the Court at paragraph 39
21 said it was not inclined to put much legal weight on membership
22 in negotiating groups at the Conference.

23 Now, altogether here, though, this is a substantial
24 record indicating that Denmark had an affinity for the
25 equidistance method. In other locales it had entered into

10:35:24 1 agreements with Norway based on equidistance, and there was a
2 line on a map for over a year suggesting that the limits of the
3 respective fishing zones coincided along a median line in what
4 was an active fishing area. Nevertheless, the Court put all of
5 these arguments aside.

6 Let's just turn quickly to Denmark's arguments. For
7 future reference, these arguments and discussion are found at
8 paragraphs 82 to 86 of that judgment, and apparently Denmark
9 tried to frame its arguments to fit within the Tunisia-Libya
10 approach. This is referred to by the Court at paragraph 82 of
11 the judgment, and the two facts that Denmark now called upon
12 were Norway's dealings with Iceland and Norway's own internal
13 dealings with itself with regard to Bear Island in the Svalbard
14 archipelago. Norway had not contested Iceland's full 200-mile
15 zone in spite of the fact that there would be normally a
16 delimitation, and it had entered into agreements with Iceland
17 in that regard. And what Denmark sought was equal treatment
18 with Iceland. And in respect of the Svalbard archipelago,
19 Norway had granted itself a full 200-mile limit from its
20 mainland, but it had limited the zone, and it had given
21 basically Bear Island no zone whatsoever.

22 Now, Denmark, then, is arguing that it is entitled to
23 the same treatment that Norway gave Iceland and that it gave
24 itself in respect of Bear Island. And just quickly, we will
25 take a look at the two paragraphs that relate to this. As for

10:37:52 1 Bear Island, at paragraph 85, and you can see the words
2 highlighted, "The Court would observe that there can be no
3 legal obligation for a party to a dispute to transpose, for the
4 settlement of that dispute, a particular solution previously
5 adopted by it in a different context."

6 And moving to the next one with respect to Iceland,
7 which may be more apropos since it really does relate to the
8 general area of the Greenland Jan Mayen delimitation, "In the
9 particular case of maritime delimitation, international law
10 does not prescribe, with a view to reaching an equitable
11 solution, the adoption of a single method for the delimitation
12 of the maritime spaces on all sides of an island, or for the
13 whole of the coastal front of a particular state, rather than,
14 if desired, varying systems of delimitation for the various
15 parts of the coast. The conduct of the parties will in many
16 cases therefore have no influence on such a delimitation."

17 Now, there were, of course, many other cases. We've
18 got Guinea-Guinea Bissau, St. Pierre-Miquelon, Eritrea-Yemen,
19 Qatar-Bahrain, Cameroon-Nigeria, Barbados-Trinidad and Tobago,
20 and in each one of those cases there has been one party or the
21 other arguing its position to be based in conduct, and in all
22 of these the arguments failed, based on the facts that were
23 presented. But it was the foregoing cases where parties made
24 an argument that is comparable to the one that we have heard
25 from Guyana about that there is an indicia in this case that

10:40:11 1 should lead the Tribunal toward finding that the 34-degree line
2 or, indeed, the equidistance method has become ingrained in the
3 practice of the parties, the conduct of the parties, and that
4 that is either the line or the method that you should adopt.

5 I just to want mention for a moment the new argument
6 which we heard from last week that the Temple case also lends
7 some weight to Guyana's position. That's a hard one again to
8 understand how Guyana can try to suggest that that case, the
9 facts of that case, get anywhere near the facts of this case.
10 In that case we had an old Treaty dating from 1904. We had a
11 watershed boundary that was described in that Treaty. There
12 was a Mixed Commission that was established by that Treaty, and
13 it had authority to delimit without further subsequent review.

14 Now, the work of the Mixed Commission was poorly
15 documented. However, there were maps; and those maps, as we
16 know, indicated that the temple was on Cambodia's side. And
17 Thailand, for a substantial time, 50 years, had acted
18 consistent with that position. And the Court found that
19 although the map did not follow directly from the Treaty,
20 because the Mixed Commission had ceased to function, the map
21 nonetheless was authoritative in the circumstance, and had not
22 been contested by Thailand over those many years. And since
23 the Court found that Thailand had enjoyed the benefits of 50
24 years of stability, in the settlement of the question it was
25 essentially estopped from seeking to overturn it.

10:42:31 1 Now, there is nothing like that in these facts.

2 Finally, I just mention, so we cannot say we have
3 conceded this, that the argument was made that there is an
4 admission against interest of some sort in Suriname's facts, in
5 Suriname's conduct, and the two cases that were cited were the
6 Nicaragua-U.S. case and the more recent Congo-Uganda case, and
7 I won't go into those in any detail, but it does seem that this
8 is a remarkable stretch to try to suggest that Suriname, in
9 participating in these pleadings, is analogous to the United
10 States that wasn't participating in those pleadings in that
11 case, and that therefore Nicaragua and the Court had to rely on
12 certain statements by government officials, that because the
13 United States was not trying to defend itself in those
14 proceedings. And likewise, in the Congo-Uganda case, there we
15 have a situation where there was better evidence that had been
16 given under oath in the case of a judicial commission of
17 inquiry, and the Court determined to look at that and give it
18 whatever weight that it thought that inquiry testimony was
19 entitled to.

20 Now, when we get done with this review of conduct in
21 the cases, we need now to take a look at that conduct against
22 the facts in this case. Suriname pointed out in the Rejoinder,
23 and Guyana did not contest this, that the facts--that is, what
24 has happened--are, for the most part, uncontested. The
25 difference is in the positions of the parties as to whether

10:44:47 1 there should be any conclusions that would be drawn from those
2 facts. And as I mentioned earlier, Suriname is confident that
3 the facts show no agreement, they show no modus vivendi, and
4 there is no line mutually used in the conduct of the parties
5 that provides an indicia of a line that both parties regarded
6 as equitable and have treated as such.

7 Now, apart from the relationship between the 1936
8 Point and the 10-degree line which was discussed yesterday, one
9 may review again the facts of conduct that pertained to the
10 continental shelf delimitation, and those facts, we are
11 reminded, start after World War II, when the United Kingdom
12 made a proposal to revive the 1939 draft Treaty. And the
13 Netherlands apparently did not respond to that, and Professor
14 Soons indicated why that was true. The bottom line was that by
15 1952, it was clear that the deal that the Netherlands had been
16 prepared to make in 1939, where it would sacrifice Suriname's
17 interests in the disputed triangle, that that deal was no
18 longer possible. We know that there was a new charter for the
19 Kingdom in 1954, and again Professor Soons has described the
20 legal implications that after that time it is Suriname that is
21 deciding its boundary policy, whatever the officials might have
22 thought about that in the Foreign Ministry in The Hague.

23 Now, by the later half of the 1950s, interest in oil
24 and gas and the offshore oil and gas was developing both in
25 this part of the world and in most other parts of the world.

10:47:03 1 And in Suriname this interest led to a concession granted to
2 the Colmar Company in 1957 by Suriname's Law Number 15. You
3 can find that concession agreement in Annex 11 of Suriname's
4 Preliminary Objections. And in Guyana this interest led
5 ultimately to a concession granted to the California Oil
6 Company, about 15 months later, on 15 April, 1958, and you can
7 find that concession agreement in Annex 105 of Guyana's
8 Memorial.

9 We also know that at the same time this is happening,
10 we have the International Law Commission completing its work
11 and the first U.N. Conference on the Law of the Sea going
12 through its negotiation and completing its work on four
13 Conventions which were produced at 29 April, 1958.

14 Now, before going further into this discussion, and
15 perhaps I will finish with a few remarks before we break for
16 coffee about these concessions and the concession picture in
17 general, we are going to go through some concession limit
18 information after the coffee break. Sometimes it gets a little
19 tedious, but I will do my best to spice it up. But I think it
20 would be useful for the Tribunal to appreciate the exact
21 picture of the offshore petroleum situation in both countries
22 as it exists at the present time.

23 First, it should be clear that there has not been any
24 commercial discovery made offshore Guyana or offshore Suriname
25 to date. That is for about 50 years. There has been no

10:49:14 1 commercial discovery made on the continental shelf of either
2 country. I'm not saying that's never going to happen. I hope
3 it does happen. But today there are no commercial discoveries
4 in that area.

5 Second, exploratory wells had been drilled offshore of
6 both countries in uncontested areas routinely over the last 50
7 years, and there have been no commercial discoveries. There
8 are not a lot, but there are quite a few. There has only been
9 one exploratory well drilled in the disputed area. That's the
10 Arbary I well that was drilled in 1974, and we will come back
11 to that further after the coffee break. And Suriname
12 acknowledges there has been more seismic work done under
13 licenses granted by Guyana than done by Suriname.

14 Now, anyone that follows maritime boundary cases knows
15 that oil concession limit information is routinely offered up
16 by states in these cases to demonstrate their claims. Now,
17 presumably the reason that states do this is because the grant
18 of authority by a government to a company to engage in
19 activities in a particular area is a manifestation of that
20 state's claim to the area concerned. We have heard from
21 Professor Oxman about what the Court had to say about oil
22 practice in the recent judgment of Cameroon-Nigeria at
23 paragraph 304, and the Barbados-Trinidad and Tobago Tribunal
24 said virtually the same thing.

25 Over the years--over the years--there have, indeed,

10:51:41 1 been more concessions granted by Guyana that extend into some
2 part of the disputed area than Suriname has granted. If this
3 is a game of numbers, Guyana wins. However, while Suriname may
4 have granted fewer concessions, they have been longer standing
5 in terms of years, and its presence, if this is again a game of
6 do you have a concession in the disputed area, the presence of
7 Suriname's concession holders in the disputed area has been for
8 more years than Guyana has had a concession holder in the
9 disputed area. Just for instance in these first concessions,
10 the Colmar concession lasted up to 1982. It's a concession
11 that lasted for 25 years. Guyana's first concession to the
12 California Oil Company disappeared in two years.

13 Now, this pattern of conduct is now going to be shown
14 in a graphic that we presented in the--I guess it was the
15 Counter-Memorial, and this is simply to show that over a period
16 of time, Guyana's concession holders have not been present in
17 the disputed area for almost 14 years during a period. There
18 was one period where, for two years, Suriname had no coverage.
19 You can also look at that, and you can see that there have been
20 a number of concession holders from Guyana. And in Suriname
21 there has really been just two: Colmar and Staatsolie.

22 Now, we have seen throughout the pleadings that Guyana
23 simply does not give much weight to either of those
24 concessions. It likes to speak of Staatsolie's concession as
25 being one that Suriname gave to itself because Staatsolie is a

10:54:08 1 national oil company, but it seems to us that it misses the
2 point. It is a grant by the Government of Suriname by
3 legislative decree to the national oil company to operate in
4 that area, and it is not any different from some of or any of
5 Guyana's concessions where it has given a grant of authority to
6 a private oil company. So, the public-private business doesn't
7 seem to be very material in assessing this sort of thing.

8 But probably more to the point, the real issue is that
9 there is no rule of law that says that when you grant a
10 concession it's got to go right up to your boundary claim.
11 There is nothing like that in any book that you can find.
12 There is nothing like that in the cases.

13 So, while concession limits may reveal that a state
14 believes or a state has a claim to an area, it doesn't
15 necessarily say that is all that the state claims, and we will
16 show later on after the break that some of Guyana's concessions
17 don't go anywhere close in their eastern limits to Guyana's
18 boundary claim in this case.

19 Mr. President, perhaps this would be a good time to
20 take the break, or I can continue on, if you wish.

21 PRESIDENT NELSON: Thank you, Mr. Colson.

22 I think this is a good time to take a break, and we'll
23 resume this hearing at 11:15. Thank you.

24 (Brief recess.)

25 PRESIDENT NELSON: I give the floor to Mr. Reichler,

11:21:05 1 speaking for Guyana.

2 MR. REICHLER: Thank you, Mr. President, and good
3 morning, gentlemen. It's the first chance I have had to greet
4 you formally today, since it's not our turn to have the floor.
5 And I regret to have to raise this matter with the Tribunal. I
6 had hoped to avoid it. I had raised it with Mr. Greenwood,
7 hoping that we could come to an agreement upon it, but it
8 appears that we cannot, and I'm sure that Mr. Greenwood will
9 explain when I cede the microphone his position on the matter,
10 in his usual eloquent manner.

11 The issue is this: It concerns the expert witness,
12 Dr. Smith. We have, of course, complied with the--with our
13 undertakings not to discuss substantive matters with the
14 witness, who is formally sequestered. We have not provided
15 transcripts, of course. We have certainly honored our
16 commitment. In fact, we have even refused to allow him to see
17 the transcript of his own testimony, which, arguably, any
18 witness would have the right to see, but we are certainly not
19 going to do that without the Tribunal's approval.

20 The issue is this, however: Over the past couple of
21 days, we have heard very, how can I say, extensive attack on
22 the witness both in terms of the substance of his report and,
23 indeed, I'm afraid, in terms of his objectivity, his alleged
24 bias, his competence, even his integrity. We believe that if
25 we exercise our right to call the witness in rebuttal, that it

11:23:10 1 is appropriate that he be allowed to see the portions of the
2 transcript and only those portions of the transcript that
3 relate to him personally. That is to say, where my friend
4 Mr. Greenwood and my friend--I'm sorry, Professor Greenwood and
5 my friend Professor McRae invoked him and invoked his report
6 and leveled their criticism at it.

7 This is, of course, appropriate rebuttal testimony,
8 should we decide to exercise our right, and it seems to me
9 fairly obvious--I guess it isn't my good friend Professor
10 Greenwood, but it seems to me fairly obvious that the gentleman
11 ought to be allowed to see what criticisms have been made of
12 him, both in terms of his report and personally, before he
13 gives his rebuttal testimony.

14 The alternative, it seems to me, would be to say, have
15 him called and say, here is what Professor McRae had to say
16 about your report. Here is what Professor Greenwood had to say
17 about your report. What do you think about it? Well, he has
18 to answer on the spot without thinking about it, and in some
19 cases they presented elaborate charts and diagrams which they
20 developed, which, of course, is their right, as a way of
21 attacking Dr. Smith's report.

22 He should have a chance to think about the criticisms
23 that they have--that they have leveled at him. He, after all,
24 is an expert witness. He has given opinions. He's been called
25 as an expert. He's been recognized as such. This is not a lay

11:24:56 1 witness who is being asked, now, precisely what time was it
2 when the light turned red? Those are the kind of witness, the
3 lay witnesses, that are normally sequestered because we don't
4 want lay witnesses, fact witnesses, hearing each other's
5 testimony and then adjusting what they are going to say so that
6 we have perfect coordination and coherence and honesty.

7 In the case of expert witnesses, it's been our
8 experience, at least consulting with all of the members of my
9 team, some of whom who have more experience in these
10 proceedings than I do, that it's really not normally the case
11 that expert witnesses get sequestered.

12 Now, we haven't opposed that. We have gone along with
13 that, certainly in this--since his testimony. The issue came
14 up, do we oppose his sequestration after his testimony, and we
15 said no. We didn't to want make an issue of it.

16 But really this is an expert witness in the first
17 place. There's really is some doubt about whether
18 sequestration is appropriate at all. But in this case we are
19 not asking for the sequestration to be ended. We are not
20 asking that he be allowed to see the entire transcript, or all
21 of the arguments that our learned colleagues from Suriname have
22 made. We only are asking for what we think is inherently fair,
23 appropriate to the sound administration of justice, necessary
24 for the equality of arms between the parties, and, indeed,
25 fundamental fairness to the witness, that he be allowed to see

11:26:38 1 these rather vociferous and extensive attacks against him. We
2 take some comfort in the fact that Suriname believes his report
3 and his testimony is so important that they have devoted so
4 much of their presentation in an effort to attack him. Well,
5 that's their right to do that, if they will, but the witness
6 certainly should have the right to respond to the criticisms
7 they made of him personally and his report, and it's really
8 just not fair to say, Dr. Smith, here it is. Do you agree?
9 Not? Why is this criticism right or wrong? He ought to have a
10 day to think about it, and that's all we are asking. And we
11 frankly cannot understand or see any valid basis for an
12 objection to that.

13 PRESIDENT NELSON: Thank you, Mr. Reichler.

14 I give the floor to Professor Greenwood.

15 PROFESSOR GREENWOOD: Thank you very much.

16 Mr. President.

17 Sir, this issue has its origins in the order which the
18 Tribunal announced on the very first day of the proceedings,
19 and if I could remind you what you said at page eight of the
20 transcript, in a decision expressly described as unanimous, the
21 Tribunal unanimously decides that he, that is Dr. Smith, may be
22 recalled only for rebuttal and with regard to matters that he
23 could not have addressed in his first round of testimony.

24 Now, Mr. President, the grounds of criticism of
25 Dr. Smith stem from matters that he did address in his first

11:28:03 1 round of testimony. If we take, first of all, the question of
2 the figures which he used and which he admitted were wrong,
3 those were his corrections. He put the figures in at page 477
4 of the transcript. That makes it clear.

5 And secondly, the criticisms we made of those figures
6 that they weren't, in fact, accurate transcriptions, accurate
7 conversions from nautical miles into kilometers, those precise
8 points were put to him in cross-examination by my learned
9 friend Mr. Saunders. Page 491 if the transcript is the place
10 where that begins.

11 Now, he put these corrected figures in. He got them
12 wrong. The matter has been addressed, and there is no need for
13 it to be readdressed. And, indeed, it's very noticeable that
14 there was no application to re-examine him at the time.
15 Mr. Reichler had ample opportunity to re-examine the witness if
16 he thought the witness was being unfairly treated or had not
17 done himself justice. He asked no questions at all in
18 re-examination.

19 As for the other criticisms made of the report by
20 Professor McRae and myself, well, first of all, I take
21 exception at the suggestion that there has been an attack on
22 Dr. Smith's integrity. There has been nothing of the kind. An
23 attack on his competence, yes, but that again stems from the
24 way in which he answered questions when they were put to him.

25 And all of the issues on which he is being criticized,

11:29:29 1 the handling of South American boundaries in the Aréchaga
2 report, the Berbice Headland, the fact he doesn't know what
3 low-water springs means, all of those points were put in
4 cross-examination.

5 Now, we therefore don't believe that the conditions
6 which the Tribunal itself laid down for recalling Dr. Smith
7 have been satisfied in this case; but even if there is occasion
8 for recalling Dr. Smith, the whole point of sequestering him
9 would be lost if he were now to be shown the transcript,
10 however selectively, so that he can go away and massage his
11 answers by looking up how many meters there are in a nautical
12 mile or what the term low-water springs means.

13 PRESIDENT NELSON: Thank you.

14 MR. REICHLER: If I may, very briefly, it's worth
15 noting that Suriname chose not to criticize Dr. Smith or his
16 report in their Rejoinder. I point out that in Dr. Smith's
17 report, which was dated in March, was filed as Annex 1 to
18 Guyana's Reply, which was submitted April 1 of this year; the
19 Rejoinder was submitted, I believe, 1 September. There are
20 only passing references to Dr. Smith. There's a quote from one
21 of his articles, but there is no criticism. There is no attack
22 on his competence, his integrity. There is no mention in the
23 Rejoinder of the so-called Berbice Headland and what Professor
24 McRae described as Dr. Smith's puzzling--yesterday his puzzling
25 silence on the so-called Berbice Headland. None of that is in

11:31:20 1 the Rejoinder. So, the idea that Dr. Smith could anticipate
2 what the criticisms were and should have addressed or that we
3 could have and addressed them in his direct examination really
4 misses the mark.

5 Now, if, as a tactical matter--and we understand, we
6 are all advocates here, and tactics are part of trial or
7 litigation strategy. If as a tactical matter the Suriname side
8 decided they were going to hold on to all of their criticism,
9 they were going to--even that they had a Rejoinder, they had a
10 chance to respond to everything they objected to in Dr. Smith's
11 report and they decided as a technical matter, and I don't
12 blame them for this the--maybe I would have done the same if I
13 were on the other side, so this is not clearly a criticism of
14 Suriname or its lawyer, but they made a tactical decision to
15 let it go. Essentially why do you do that? You do that so you
16 can surprise the witness when he comes to testify.

17 You raise things on cross-examination that you did not
18 signal in the Rejoinder. As I said, there is mention of
19 Dr. Smith in his report in the Rejoinder, but it's very, very
20 mild, very meager. Certainly nothing like the kind of
21 onslaught we heard from Professor Greenwood and his colleague
22 Professor McRae, so they decided to surprise him. Fine. A
23 fair tactic. But now they want to deprive him of an
24 opportunity to set the record straight, to explain what he did
25 and why he did, and why would they want to deprive the Tribunal

11:32:54 1 of hearing him? If he has something useful to say, the
2 Tribunal ought to have the benefit of it. We are not talking
3 about a jury of unsophisticated laypersons who might be unduly
4 influenced by the words of an expert. We are talking about a
5 panel of Arbitrators who are every bit as expert, if not more
6 so, than the witness himself. What are they afraid of? Why do
7 they want to surprise him? Why do they want to us foreclose
8 him from bringing him back? They want to attack him, but they
9 don't want him to be able to defend himself or his report?

10 There is really something behind all of this, and it
11 really oughtn't be part of these proceedings, and I don't
12 believe, with respect, that the Tribunal should accept it. The
13 Tribunal should give the man a chance to respond to the
14 criticisms that have been made, and the Tribunal can decide
15 whether that's a credible and effective response or not, and
16 whether Professor McRae's attack on him is valid, if it sticks,
17 and then let the Tribunal sort it out. I don't think the sound
18 administration of justice is served by limiting the access to
19 information by the Tribunal.

20 Thank you.

21 PROFESSOR GREENWOOD: Well, Mr. President, with the
22 greatest of respect, this is the Alice in Wonderland. If one
23 looks at Chapter 3 of the Rejoinder, it's redolent with
24 criticisms of the approach taken by Dr. Smith.

25 As for the question of his competence about how he

11:34:32 1 assessed his figures, it wasn't until his so-called corrected
2 figures were put in that we had any occasion to doubt the
3 figures that he produced in his report. There has been, and
4 will be, no attack on Dr. Smith's integrity, but there was
5 ample opportunity for him, first of all, to get it right in the
6 first place; secondly, to put in a corrected table that was
7 properly explained; and thirdly, for Mr. Reichler to ask him
8 these questions in re-examination. That is, after all, what
9 re-examination of a witness is for.

10 What my learned friend is now trying to do is to bring
11 back a witness in the desperate hope of breathing some
12 credibility back into the corpse of a dead horse, and we don't
13 think that that has to do anything with the sound
14 administration of justice. It's also, I may say, hardly
15 commensurate with the approach that he himself took to the
16 scheduling of this hearing where he was most insistent that the
17 second round hearing should be short and to the point. So, we
18 oppose this application. Obviously, if the Tribunal wishes to
19 hear from Dr. Smith again, that's a matter for the Tribunal to
20 determine, but we see no occasion for it, and we certainly see
21 no occasion for the Tribunal now to be asked to revisit its
22 sequestration decision.

23 PRESIDENT NELSON: Thank you very much, Professor
24 Greenwood.

25 Well, we Members of the Tribunal have heard the

11:35:49 1 representatives of the parties, and it is my intention to
2 discuss the matter with the Tribunal and come to a decision as
3 early as possible.

4 Thank you very much.

5 MR. REICHLER: Thank you very much, Mr. President.

6 PRESIDENT NELSON: And now we will resume the hearing
7 with Mr. David Colson.

8 MR. COLSON: Thank you, Mr. President.

9 Mr. President, we're going to or I'm going to have to
10 move a bit more swiftly through the material now, and from time
11 to time I will simply be skipping over some of the relevant
12 events because each year has a relevant event in it, but your
13 books have the maps of the concession limits as they appear
14 from year to year. Many of those are minor changes and
15 adjustments, and I'm not going to spend any time on those right
16 now because I think there are other things that perhaps are
17 more important in the conduct of the parties to talk about,
18 other than the fact that somebody's concession limit changed
19 from 1978 to 1979.

20 But we do have to start the discussion now with the
21 fact that in 1957 we had these two concessions first granted,
22 and the Colmar concession was on the Suriname side, California
23 concession was on the Guyana side, and on the Suriname side
24 that concession was issued first without any reference to a
25 western limit. On the British side, the concession was issued

11:37:51 1 in the first place after a great deal of discussion within the
2 British Government--and you have all of that relevant material
3 in Guyana's Memorial--you have a concession that was granted
4 with a specific eastern limit, and it was supposed to be--it
5 got a little screwed up in the implementation, but it was
6 supposed to be a 10-degree line attached to a 33-degree line
7 out to the 25-fathom depth contour. This again is--predates
8 the '58 Convention.

9 Now, one of the important things I would like to call
10 attention to at this point is during the course of these
11 pleadings, the Guyana team has routinely said, and there was no
12 protest from the other side. This has been a constant refrain
13 on just about every event. Now, I would simply note for the
14 Tribunal's information that if you go through the record that
15 you have in front of you in the Annexes to these pleadings, if
16 you are going to decide this case based on the number of
17 protest notes that you have in the record, prior to the CGX
18 incident, and I want to emphasize that point, prior to that
19 incident you are going to have very sparse material to work
20 with. There are, in fact, two protest notes in the record
21 leading up to the CGX incident, so there is a tie, if that's
22 the way the game is played, one by Guyana and by Suriname, and
23 there is another one that is mentioned but not produced in an
24 affidavit that one of Guyana's affiants has produced to say
25 that there was a protest, but we don't have that note.

11:39:47 1 So, I think the issue is, where were the protests. If
2 the party doesn't bring a protest forward, a protest note
3 forward, it's not there, and there are plenty of cases where
4 there were opportunities to protest from the Guyana and U.K.
5 side, and there were no protests there. I will simply mention
6 the places where we have protest notes in the record.

7 Now, we have this event where there is the California
8 Oil Company concession limit at 33 degrees. That is informed
9 to the Dutch Government, and it was told to the Dutch
10 Government that it was not supposed to be prejudicial to
11 eventual boundary settlement. That you will find in Tab 16 of
12 your book, and we'll have it on the screen just for a moment,
13 but this was the copy of the internal Dutch memo that they
14 received when we were told, when our side was told, that that
15 limit was not supposed to be prejudicial.

16 Now, we come along to the time where we get to--we
17 have both concessions being out there now, and it's obvious
18 that we are supposed to have a boundary negotiation if we are
19 going to settle the fact that there is no agreed boundary in
20 the continental shelf in early 1958.

21 Now, one of the important parts of the story from the
22 other side is that when the Netherlands, in August of 1958,
23 provided the U.K. with a proposal that this delimitation be
24 based on Article 6(2), that it was known and understood on this
25 side that that meant a strict equidistance line. Now, there is

11:41:51 1 nothing in the record to that effect. There is nothing that
2 you can find in any of the documents that says that. There are
3 certainly inferences within the British Government that maybe
4 that is what the British thought was going on, but there is no
5 exchange, and there is nothing to demonstrate that the Dutch
6 side thought that this was going to be a strict equidistance
7 line.

8 Now, one of the important arguments that was made last
9 week was we heard that there was a new document that had been
10 discovered in the restricted Dutch archives. It was a document
11 dated 11 March, and it was put forward by Professor Schrijver,
12 and it was put forward for the proposition that the Dutch side,
13 in presenting the 1958 proposal to the United Kingdom, was
14 encouraged to do so by Suriname. It hadn't just been done in
15 consultation with Suriname, as the '58 note says in
16 consultation with Suriname, that it was actually--the
17 Netherlands was encouraged to do that by Suriname, and it was
18 encouraged to do that because the Colmar Company wanted to have
19 a concession limit.

20 Now, we are not going to deny any of that. I don't
21 think--that's probably what happened, but in the exchange that
22 Professor Sands and Professor Greenwood had on that day in
23 which that document was introduced, it was agreed that our side
24 could introduce the document that that letter of March 15
25 refers to, and that document is in your tab, in your folders.

11:43:46 1 It is Tab 18 in your folders.

2 Now, this is largely confirmatory of the point that
3 was made. Yes, the Suriname side was encouraging The Hague to
4 get on with boundary negotiations, and it wanted to do so
5 because there was the Colmar concession; and to that point,
6 there had been no limit expressed.

7 I want to just put up on the screen one sentence from
8 that document. And all I want to draw attention to is that
9 these are two Dutch officials in the Netherlands talking to
10 each other, and they are saying that I'm informed--if I am
11 informed correctly, the exploration, meaning the Colmar
12 exploration, will take place in particular in continuation of
13 the mouth of the Corantijn River.

14 Now, I don't want to make too much of this, but it is
15 at least plausible that even at that time the Suriname side was
16 thinking that the boundary on the continental shelf should be a
17 seaward extension of the river.

18 Now, the next sentence in that document goes on, and
19 the Dutch officials say, well, let's talk to those Surinamers
20 about the equidistance method. Now, again, these are old
21 documents, and one can't know too much more about them than
22 what we can see there in the words before it, but it seems to
23 us that at least the document is subject to the interpretation
24 that the--please, Philippe.

25 PROFESSOR SANDS: I wasn't intending to interrupt

11:45:58 1 Mr. Colson, and I can wait. I indicated he could continue, and
2 I would when he'd finished, step in. It was merely a question
3 I was going to ask at an appropriate moment, sir.

4 PRESIDENT NELSON: Thank you.

5 MR. COLSON: The point that we simply wished to make
6 is that this document is subject to at least the interpretation
7 that the Suriname side, based upon the Colmar, the fact that
8 the Colmar concession had been issued, was at least thinking at
9 that time that the continental shelf boundary should be an
10 extension of the line of the river. And it was the Dutch side
11 in Holland, in the Netherlands, that brought up the suggestion
12 of trying to talk to the Surinamers about the equidistance
13 method. It's plausible, it's just as plausible, we submit,
14 that when the '58 proposal was made, that the reference to
15 Article 6(2) was intended by Suriname to mean that the
16 continuation of the land boundary could be advanced as a
17 special circumstance. There is nothing in the record that
18 would support any perspective that Suriname was prepared to
19 accept a strict equidistance line as the continental shelf
20 boundary.

21 PROFESSOR SANDS: I do apologize. It was not my
22 intention to interrupt. It was simply by way of question to
23 the other side via the Tribunal. This issue came up as
24 Mr. Colson explained, because Professor Schrijver had
25 introduced a document. That document we only had in draft

11:47:55 1 form. And the question that we therefore had for the other
2 side was whether, in the interest of filling out the materials
3 to assist the Tribunal and get a full picture of what actually
4 happened, whether the other side has available to it that
5 document referred to by Professor Schrijver in final form; and
6 relatedly on the basis of the material that has been put in
7 front of us--on the basis of the material that they have put in
8 front of us, whether the document referred to in the opening
9 paragraph of this new document, which seems also relevant, is
10 in the possession of the other side and if, in the interest of
11 making all the information available, it could be made
12 available to the Tribunal. That document is referred to as a
13 secret communication of 12 September, 1957. I believe that is
14 not in the record at this point, and following on from the
15 principle quite rightly put by Professor Greenwood of tracing
16 documents back, if that is available to the other side, would
17 they be willing to make it available to the Tribunal.

18 Thank you very much.

19 MR. COLSON: Mr. President, I can't answer that
20 question right now, and I will have to consult with my
21 colleagues about what is available. I assume that we would
22 have no difficulty if this is a matter of tracing documents or
23 if we have a better copy than Guyana that we would make them
24 available, but I just don't have that knowledge in my mind at
25 the moment and would have to consult, and presumably we can

11:49:37 1 answer that question after the lunch break.

2 PRESIDENT NELSON: Thank you, Mr. Colson.

3 MR. COLSON: Now we come to the 1958 proposal, and I
4 want to spend a little bit of time with this because it is
5 perhaps the key ingredient in the argument of Guyana. That--on
6 the screen now is that document. It would be your number 16, I
7 believe.

8 This proposal was a proposal by the Netherlands to
9 delimit the continental shelf by the equidistance method as it
10 is set out in Article 6(2) of the Continental Shelf Convention.
11 And what the Netherlands proposed was to reach agreement on a
12 map that would show that line, and then that map would be
13 attached to an exchange of notes that would then constitute an
14 international agreement between the parties.

15 Now, no one, then or now, could discern the line on
16 the map that Suriname thought would be agreed on this basis.
17 The line was to be subject to negotiation. That is the first
18 requirement of Article 6(2), and in the course of those
19 negotiations that would lead to an agreement, among the issues
20 that would have to be sorted out was the fundamental question
21 of whether special circumstances existed, obviously a matter
22 that's prominent in Article 6(2), and there was the issue of
23 the 10-degree line in the territorial sea and how far it would
24 run, leading to the issue of where the 10-degree territorial
25 sea boundary would stop and the continental shelf boundary

11:51:55 1 begin. And there were then all of the complexities that are
2 associated with drawing an equidistance line itself, which
3 Commander Kennedy had continued to tell his colleagues.

4 Now, I'm just not rationalizing this because I think
5 it's very important to note that the Dutch side had just
6 received notice of the limits of the California oil concession
7 that were purported to be an equidistance line. They had a
8 formal notice from the U.K. at that moment, and they didn't go
9 back and say, okay, let's accept what you have done with the
10 California oil concession limit as an equidistance line. They
11 didn't answer in that regard. They simply went back and said,
12 no, we are going to propose a negotiation based on Article
13 6(2), and that is what they did.

14 Guyana suggests, however, there is more here, and they
15 speak of an unequivocal agreement. They speak that the United
16 Kingdom accepted the Dutch proposal and that there was, in
17 fact, a deal on a strict equidistance line in 1958. That's not
18 going to be found in the record. There are musings of British
19 officials about all of this, but the only evidence that Guyana
20 has to this effect, which I will go through very carefully, are
21 mostly internal memorandum of the British Government that
22 relate to their own perceptions of what the Dutch were
23 proposing. There are four pieces of evidence that are offered.

24 Now, I'm going to go through these, and then we will
25 come back to them in a minute because the documents are really

11:53:55 1 more relevant to a different point, but one of these documents
2 is the 1958, 16 October memo that we've heard about from the
3 other side. It's found in Annex 23 of Guyana's Memorial, and
4 it's prominent in the position expressed by both Professors
5 Schrijver and Sands, and this is the memo where Scarlett says
6 he's had a conversation with the Ambassador of the Netherlands,
7 and that Scarlett indicates that both sides were agreed that
8 there was nothing between us, or something to that effect. I'm
9 going to come back to that, but that's one piece of evidence.
10 There's this discussion that is being reported in a British
11 memo, that there is nothing between us.

12 The second piece of evidence now isn't in '58. It's
13 dated 11 March 1964, and it's an internal briefing memorandum
14 in the Dutch Foreign Ministry about the history of this matter.
15 And in that history, somebody writes that it had already been
16 agreed. This is the 11 March, '64 document. It's found in
17 Annex 33 of Guyana's Reply.

18 Now, the third piece of evidence--it's not even 1964,
19 it's now 1966--this was brought up in the hearings last
20 week--this was a reference to a document dated 21 June, 1966,
21 and you're going to find that at page 73 of the transcript of
22 December 9th.

23 And the last piece of evidence that is offered really
24 is simply the Diplomatic Note that the British sent back to the
25 Dutch actually after almost three months, and when they went

11:55:46 1 back, they didn't say--they said, oh, yes, we like this
2 continental shelf idea, but we are not going to take you up on
3 your proposal right now to draw a line on a map and attach it
4 to a Diplomatic Note. We're going to provide you with a whole
5 draft Treaty on everything. And it took them three years to do
6 that.

7 Now, it seems to me that putting something off for
8 three years is really setting the other parties' proposal
9 aside, and in our view, by the time we got to 1961, by the time
10 we got to the British proposal of 1961, whatever life there was
11 in the 1958 proposal had simply disappeared. When the British
12 came back in 1961, they put everything back on the table, and
13 in doing so, they rejected a Dutch proposal to deal with this
14 continental shelf boundary without reference to the other
15 boundary issues between the parties, and that blew the
16 political lid off the pot in Suriname.

17 Now, you cannot take the documents following that 1961
18 British proposal and look at them and say that Suriname was
19 still committed in any way to Article 6 of the Continental
20 Shelf Convention. By the time we get--or let me put it
21 differently. Let me put it in terms of a strict equidistance
22 line. By the time we get to 1962, we have the Netherlands
23 proposal being offered, and there that proposal was for a
24 10-degree line both in the territorial sea and on the seabed.
25 You did not hear one word last week about the 1962 Dutch Treaty

11:57:51 1 proposal.

2 Now, it's remarkable because here is a document that
3 is a major part of the diplomacy. Certainly, it's not subject
4 to the interpretation that Guyana gives it that, for some
5 reason, the Dutch side simply left the continental shelf
6 boundary out of the picture. I mean, states don't do that sort
7 of thing. If you have a comprehensive treaty proposal from one
8 party, the other side goes back with its comprehensive treaty
9 proposal. And we are told repeatedly by the other side that
10 the Dutch didn't know what they were doing in their treaty
11 drafting, and the ambiguity in that language was something that
12 the British side found to be irregular, and therefore within
13 the confines of the British Colonial Office and the British
14 Foreign Ministry, yes, there are a lot of documents that
15 question just what does this mean because it wasn't put quite
16 the way the British meant. But when we come to the--when we
17 come to the real people, the Governor of British Guiana and the
18 legal Ministry of the Foreign Office, they understood fully.
19 And if I could just have slide 20 at this point, this is the
20 memorandum of conversation from the British Foreign Ministry in
21 which we have P.J. Allott of the Legal Office of the Foreign
22 and Commonwealth Office talking with Sir Ralph Grey of British
23 Guiana, and they're talking about the Dutch 1962 Treaty
24 proposal, and they say the Dutch proposal suggested an
25 alternative method. They're comparing it to their method which

12:00:07 1 was, of course, the equidistance line on the continental shelf,
2 Commander Kennedy's equidistance line on the continental shelf.
3 They suggested an alternative method of dividing the
4 territorial waters in the continental shelf. Well, forgive
5 them for their imprecision in the way the memo is drafted
6 because they said territorial waters in the continental shelf,
7 but they could certainly only mean the waters of the
8 continental shelf.

9 Now, we have Commander Kennedy's proposal from 1961,
10 and I'm going to come back to that in a presentation tomorrow,
11 so I'm not going to dwell on the segments that he suggested,
12 but one can simply recognize--and this was discussed yesterday,
13 and I think Professor Franck even had a question on it, that
14 Commander Kennedy was proposing to follow the 10-degree line
15 for 6 miles, and then he was moving to segmented equidistance,
16 and he developed an equidistance line in three segments that
17 went out to the 200-meter isobath. And I will come back to
18 that again tomorrow, and we will look at that.

19 Now, we have the '62 proposal, and then the next real
20 large event in this history is in 1964 when we have the Colmar
21 concession, which had up to that time not had a defined western
22 limit. In Suriname, a law is passed, and we get a defined
23 western limit along the 10-degree line. Now, a map of that
24 concession is our slide 21, and this is Suriname's law 86, and
25 one can have no doubt that by this time, one can have no doubt

12:02:07 1 by this time--if you don't believe the '62 Dutch proposal, here
2 we have the '65 Colmar oil concession with the 10-degree line.
3 If you don't believe the '62 Dutch proposal included a
4 10-degree line for the continental shelf, and if you don't
5 believe the '61 British proposal knocked any opportunity for
6 the parties to reach agreement on an Article 6(2) line that
7 would be a strict equidistance line, if you don't believe it
8 was knocked out of the box by the 1962 proposal, I would
9 suggest here in '64 there can be absolutely no doubt that in
10 Suriname they were not interested in a strict equidistance
11 line.

12 Now, we come to 1965. This map--this concession is
13 out there, the Colmar concession. And on the British side, a
14 new concession was granted, and that was the concession that
15 was given to Shell, and this is shown that by '65, everybody in
16 the oil and gas business knew that there were overlapping
17 concessions on the continental shelf between the two countries.
18 We showed this using data out of public sources that were
19 vintage 1965, the 1965 American Association of Petroleum
20 Geologists Bulletin. And we simply put two maps together that
21 were in that bulletin, and this would be our number 22 right
22 now, if we could put that one up, simply to show that by 1965,
23 certainly everyone in the oil and gas industry recognized that
24 the Shell concession overlapped with the Colmar concession.

25 Now, we come after this to the events that relate to

12:04:23 1 the Marlborough House meeting, and that's been discussed, and
2 I'm going to pass that over. And also I'm going to pass over
3 the very interesting story that concerns the problems that
4 Foreign Ministries have when they have to support inconsistent
5 positions, one might say. Obviously Professor Riphagen had his
6 own objectives in trying to support a particular position of
7 the Netherlands before the International Court of Justice, and
8 he was not interested in the fact that there were others within
9 the Kingdom of the Netherlands that were doing things that he
10 didn't support. And, of course, Foreign Ministry officials are
11 looking out for what they are going to have to do before the
12 International Court of Justice, and they're going to try to
13 suppress activities or diminish activities that might in any
14 way be picked up in the wind by the other side and used against
15 them in their arguments.

16 And as we pointed out in the Rejoinder, Professor
17 Jaenicke did, in fact, get wind of the fact that there was an
18 inconsistency in the Dutch position, and he did bring that to
19 the attention of the Court. Now, that's very interesting, and
20 one could have a lot of fun with it. We are going to have move
21 on, I'm afraid.

22 We go from the oil picture, though, and I would just
23 like to move for a moment. In response to the information and
24 the argument that Guyana has made to the effect that the
25 Netherlands in Europe didn't really support Suriname, I'd

12:06:17 1 simply like--we brought forward some information in the
2 Rejoinder that is not--was not intended to say that Guyana
3 agreed with any of this. It was simply to point out that
4 authorities in Europe acted consistent with Suriname's boundary
5 position, and this is shown by some continental shelf research.
6 This is slide 26, some continental shelf research that was done
7 in 1966 by Dutch survey vessels, and these are just the plots
8 of various stations that they were sampling starfish on the
9 continental shelf, and presumably they had British authority to
10 do some of this work because they were sampling starfish on
11 Guyana's continental shelf, and they were simply attributing
12 which continental shelf were they on, and they were using the
13 10-degree line to do that.

14 There is another interesting picture that was in the
15 Rejoinder--this would be our slide 27--and these are
16 hydrographic survey. These are reports from--of hydrographic
17 surveys conducted by Dutch vessels and the hydrographic survey
18 lines that they were running. And I think we can tell now, we
19 know enough about the geography of this area. We can see they
20 are not following anything like an equidistance line. They are
21 basically running north-south of the coast of Suriname, and
22 largely that one that is furthest to the west looks pretty
23 close to the 10-degree line.

24 Now, I would like to bring you to the next document,
25 and this, again, was something, frankly, that has been found.

12:08:10 1 It was in Guyana's Memorial, and we didn't pay too much
2 attention to it, but more and more it's come to be an
3 interesting document because Professor Oxman used it the other
4 day, and Professor Greenwood used it the other day, and this is
5 the memorandum that was written in 1966 by the hydrographer of
6 the British Navy to one of his captains, Captain of the ship
7 VIDAL, and that ship was going out to do seismic work. And if
8 we could have that slide, I want to point out different
9 passages of that letter because my job here is simply to
10 convince you that the British understood that there was a
11 dispute.

12 And here we have some references that cannot be
13 interpreted--this would be our slide 28. And the full document
14 is number 31, and you have seen this before, but here we have
15 the hydrographer of the British Navy indicating very clearly
16 that he knows that there is a dispute. He's coordinating with
17 the Dutch side, and the two European governments are doing
18 everything they can not to exacerbate this dispute. And there
19 is survey work, so one of them is going to survey up to their
20 position, and the other is going to survey to the other
21 position. Now, this is sort of standard practice. We both let
22 each other operate consistent with one's position. We won't go
23 out and arrest each other in this survey, and as he says, this
24 was hydrographic survey. At that time, both of those states
25 would have regarded this as something that they were entitled

12:10:09 1 to do without reference to a boundary claim, but here both
2 sides are acting consistent with their position, and the
3 British are acting consistent with their position, and it
4 indicates that the Dutch are going to act consistent with their
5 position.

6 Again, we offer this not to try to suggest that the
7 British side recognized that Suriname's position was the
8 correct position. It is only to demonstrate that everyone knew
9 that there was a dispute.

10 Now, we go into a period of time after the
11 mid-sixties, and we go through a period of oil concessions, and
12 I'm not going to run through them. We are not going to have
13 time now, but I want to just bring you up to 1977, when, of
14 course, the conference is going on at that time, and now we
15 have to--we have Guyana passing a law. And this is our slide
16 32, and this, again, is Guyana's maritime law in which it
17 states very explicitly that its maritime boundary position, as
18 described in that law, is the equidistance line.

19 Now, we have heard repeatedly that Guyana has always
20 understood this to mean the 34-degree line, yet Guyana will
21 tell us that it enforces its fisheries enforcement jurisdiction
22 to a different line, and it's just inconceivable that you can
23 reconcile these two positions.

24 The fact is in 1966 at the Marlborough House Talks,
25 and the fact is in 1977, Guyana had an equidistance position.

12:12:00 1 They may have simplified it in some way. They may have thought
2 about it in some way as a series of bearings approximating 33
3 or 34 degrees out to the 200-meter isobath. But they didn't
4 think of a 34-degree line, I submit, going to the 200-mile
5 limit when they introduced this law, and we think that their
6 Fisheries Jurisdiction practice makes very clear that they know
7 and understand that.

8 Now, I want to bring us, then, to 1980, which is when
9 we have Staatsolie being created. Again, Guyana tries to
10 diminish this by saying this is an act of the state to grant
11 something to itself, but we want to simply note that it seems
12 that if there is any value in looking at oil concession limits,
13 the value comes from the act of the state, and it is the state
14 that is granting this national oil company its specific limits,
15 and it has done so to the 10-degree line. Staatsolie is the
16 only company that may get a concession from the Government of
17 Suriname. It gets its concessions by legislative act, and then
18 it enters into licenses and contracts with international oil
19 companies. It's a different process than Guyana uses, but the
20 legal effect of the government grant of authority, we submit,
21 is not any different.

22 I want to just mention one of Guyana's concessions in
23 this period. Guyana--this would be our slide 34--Guyana has
24 made much out of the fact that it doesn't think much of either
25 the Colmar or the Staatsolie concessions insofar as they

12:14:27 1 demonstrate Suriname's commitment to its boundary claim, and it
2 has argued that the Colmar concession, because it did not do a
3 lot of work in the disputed area, therefore it doesn't have
4 much relevance, and that Staatsolie being a government oil
5 company, it doesn't really have value in these proceedings.

6 Now, I simply want to note this one concession that
7 Guyana entered into with the company called Major Crude. Now,
8 this is a company that you can see here in a memorandum that
9 was prepared for the cabinet by the Minister of Energy and
10 Natural Resources of Guyana what Guyana thought of this
11 company. This is a document out of Guyana's Memorial. It's
12 Annex 120, and it talks of the kind of company that they were
13 working with.

14 Now, I'm not--I don't want to diminish Major Crude,
15 but Guyana knew, and Guyana's held these kind of concessions up
16 as having substantial value in these pleadings, and
17 demonstrating Guyana's boundary claim. When this
18 company--there was substantial question about the concession to
19 begin with, they did enter into the concession and then it
20 disappeared in a few months. Now, it's just not worth much
21 when you start adding up numbers of concessions.

22 So, Major Crude left the scene, and then we come to
23 the period of 1986 to 1990. We heard about the 1989
24 Presidential meetings and the 1991 MOU, and those events were
25 described in great detail in both Suriname's Preliminary

12:16:33 1 Objections and Guyana's Memorial, and we heard about them last
2 week.

3 Now, you cannot look at those events which were
4 initiated by a grant of authority by Guyana to the LASMO/BHP
5 Company. You can't look at those events and come away with any
6 conclusion other than there is a dispute. The Presidents meet
7 and they talk about a dispute. There is a set of meetings of
8 the petroleum officials, and they're talking about a dispute.
9 There is an MOU, whether it entered into force or not,
10 describing the area in dispute as between the 10 and the
11 30-degree line. You can't walk away from that story without
12 acknowledging that at least at this time these officials
13 recognized that there was a dispute.

14 And I wanted to just mention something. We heard last
15 week about how difficult it had been for Suriname to get to
16 reaching an agreement on this MOU, and there was a lot of
17 comment that Suriname had been dragging its wheels, and I just
18 to want note something. If you go in the record, you will see
19 that Guyana started meeting with LASMO/BHP in 1986, and it took
20 them more than or at least 24 months, actually just over 24
21 months just to issue the concession to the oil company.

22 Now, the fact that it took 18 months to get from a
23 Presidential meeting in 1989 to an MOU about how operations
24 would proceed in a disputed area between two governments, the
25 very sensitive matter, I would say that that is not dragging

12:18:41 1 one's feet. There would be a lot of governments that wouldn't
2 be able to figure out how to do joint operations in a disputed
3 area within an 18-month period of time.

4 Now, it's in this period also, I mentioned I would
5 mention where the protests are. It's in this period 1989 where
6 you will find the two protests in the record. There is a
7 protest from Guyana to Suriname about an option, I guess is the
8 best word, that Suriname had with a company called IPEL, and
9 this got out, and Guyana protested it, and Guyana only said
10 that the area in which they're operating, or IPEL proposes to
11 operate, is going to be an area that Guyana claims.

12 Suriname went back, and the other protest note is in
13 the record--and Suriname went back and clearly expresses its
14 position in that note that its position is the 10-degree line.
15 Those are the only two Diplomatic Notes leading up to the CGX
16 incident that are in the record that you have before you, and
17 it is all about this IPEL issue in 1989.

18 Now, I want to move away from petroleum for a minute
19 and I just want to show a couple of fish maps, fish slides,
20 shrimp. This would be our number 42, I think. We have a
21 Regional Fisheries Convention in this area that, under the FAO
22 and FAO Fisheries Convention that is called "WECAF," and, of
23 course, there are always reports in these kinds of
24 institutions, and I just wanted to draw attention to a document
25 that's in our Counter-Memorial showing Suriname's fishing area,

12:21:08 1 and again, this is the statistical areas that Suriname uses for
2 reporting shrimp catches simply to note its shape, and it's
3 obviously the 10-degree line. There was a similar picture from
4 Guyana, and this would be slide 43, and this is Guyana's
5 perspective and, of course, the--you need to think about the
6 right-hand side of that line, and you can see that it's a curvy
7 line, and it's a rough approximation of the equidistance line
8 as the 1977 law calls for.

9 Now, if we go back just for a second to 1986, it's an
10 important point that I wanted to point out. In the record, up
11 to 1986, you do not have any real indication of a position of
12 Guyana that extends the 34-degree line beyond the 200-meter
13 isobath. There is nothing there. You have assertions, but
14 there is no proof.

15 What you had in 1986 was Guyana established a new law
16 designed to promote petroleum activity, and it got working with
17 World Bank consultants. And at that time in 1986, there was,
18 for the first time, a grid map prepared by folks working for
19 the World Bank in which that 34-degree line for the first time
20 goes straight out to the 200-mile limit. That's the first time
21 you will find that in the record before us.

22 Now, we come to 1997, and Guyana at that time again
23 passes another new law, and this is a new tax code again
24 designed to bring foreign investment into the country, and one
25 of the immediate results of that was to bring forward a new

12:23:30 1 concession that covered part of the disputed area, and I just
2 to want show you that picture. It would be on slide 45. And
3 this was the Maxus concession. And can you see there the Maxus
4 concession overlapping with Staatsolie's concession in the
5 disputed area, the darker blue.

6 Now, here is one of Guyana's concessions, and the only
7 point I want to make here is it is the only concession that
8 does not go up to its boundary claim. That's the only point I
9 want to make.

10 Now, after this, we have many other activities in the
11 petroleum world. It begins to accelerate. We come to 1999,
12 and Guyana enters into its two concessions with CGX. It enters
13 into a concession with Esso. For the first time in 1999,
14 Guyana is issuing a concession that in any material way extends
15 seaward of the 200-meter isobath. And that's in the Esso
16 concession. The Esso concession approximately went up to the
17 limits of Guyana's boundary claim. On the Suriname side, at
18 the same time Burlington came to Suriname and asked for a
19 concession to the east of the Esso concession, and that was
20 granted.

21 And so, at the end of 1999, before the CGX incident,
22 we would have the following picture if you looked out at the
23 oil concessions. This would be 46, I think. So, we have the
24 Staatsolie concession going in the southern part of the
25 disputed area going over all the way to the 10-degree line. We

12:25:47 1 have the darker blue representing an area of overlap of the
2 concessions issued by Guyana and by Suriname. And in the
3 seaward area we have an Esso concession basically going up to
4 its boundary claim and a Staatsolie license to Burlington to
5 operate in areas that were not in dispute.

6 Now, to conclude this review of the facts, I need to
7 mention some fisheries information that was put into the
8 pleadings. In the Memorial, Guyana offered up the argument
9 that it had enforced its fisheries law west of the 34-degree
10 line, and it helpfully included some enforcement information.
11 We plotted those coordinates, and we found them to be very
12 demonstrative of exactly what Guyana's fishery enforcement
13 looked like, and that's shown on Number 47.

14 Now, here we have Guyana's fishery enforcement
15 information that it has provided to the Tribunal. You can see
16 there the 10-degree line, the 34-degree line, the equidistance
17 line, and you can see that there is virtually no law
18 enforcement on fisheries in the disputed area that Guyana has
19 offered up in evidence in this case. And most of what it has
20 offered up is fishing enforcement that fall well outside of the
21 disputed area.

22 Now, we showed in the next slide the information that
23 Suriname has brought forward to the Tribunal about Suriname's
24 fishing enforcement in the disputed area to the extent we have
25 records. Guyana hasn't contested any of this, and the

12:28:00 1 information has been put in the Counter-Memorial, and here you
2 see by those red dots the coordinates of fishing inspections or
3 fishing arrests that have been undertaken by Suriname in the
4 area of overlapping claims. When we compared this information,
5 we did not provide you with fishing enforcement information
6 that fell outside of the disputed area because we simply
7 thought it wasn't pertinent to the arguments that were being
8 made.

9 Now, I want to now--Professor Murphy is going to be
10 dealing with CGX incident this afternoon, and so I'm not going
11 to say anything about it, but it does seem to me that it's hard
12 to look at these facts and reach any other conclusion other
13 than there has been a disputes between the parties. You can't
14 create an argument such as Guyana made in its Memorial when it
15 said at paragraph 5.1 that Guyana had no reason to expect that
16 activities under the CGX License should cause any particular
17 difficulties. Well, I suppose it depends on what kind of
18 activities. You know, perhaps some study of the disputed area,
19 but drilling a well is a very different proposition, and you
20 will not find a government in the world that would allow
21 another government in a disputed area to go drill a well in
22 that area. It just won't happen. Therefore, I don't find it
23 unusual there was diplomacy before that. When Suriname found
24 that it was fully the intention to drill the target that was in
25 the disputed area and not other targets that CGX had outside of

12:30:14 1 the disputed area in its concession area, that the boundary
2 problem became ripe, and the rest is now in the Tribunal's
3 hands.

4 I want to just mention one more fish-related issue,
5 and then I want to turn very briefly to some third state
6 conduct issues, and then we will try to finish by the appointed
7 hour, Mr. President.

8 At Annex 84 of its Memorial, Guyana provided a copy of
9 a Diplomatic Note dated 15 September, 2000. This was after
10 CGX. After CGX we started sending lots of protest notes to one
11 another, but--and after in September we get this protest note
12 that Guyana has put in its pleadings, and it complains of
13 fisheries law enforcement by Suriname that was in the disputed
14 area, and it referred to three different vessels, refers to the
15 shallow water, the ebb tide, and the OLIVIA, and all of these
16 are said to be Guyana fishing vessels, and Guyana is asserting
17 those vessels were fishing in Guyana waters in the traditional
18 way that you formulate these things in Diplomatic Notes, but
19 they were fishing in an area obviously that Suriname claimed.

20 Now, two of these vessels are on the fisheries
21 enforcement information, on some of the information you have
22 seen before, because those vessel had been arrested before, and
23 they had been released. But this information which postdates
24 CGX was not on that map. So, if we had used this new
25 information that helpfully Guyana provided, there would have

12:32:15 1 been more dots on the map in the disputed area.

2 The point that I really want to draw out is that in
3 the same Memorial, the same Memorial that Guyana says it has no
4 information about Suriname's fisheries law enforcement
5 practices it put in this Diplomatic Note. Now, I will let the
6 Tribunal draw its own conclusions about that.

7 Now, after this review of the conduct leading up to
8 the CGX incident, I would like to turn just very briefly before
9 we conclude to refer to the arguments that Guyana has made that
10 pertained to a third state.

11 Now, presumably, the way the Court has dealt with this
12 issue, particularly in Jan Mayen, should dispose of this, but I
13 do want to draw the attention of the Tribunal to two aspects of
14 Guyana's argument. Guyana has raised in its pleadings
15 Suriname's relationship with French Guiana, and it has done so
16 in two ways to assist its argument. First, Guyana wants to
17 give the Tribunal an impression of how much maritime space
18 Suriname might someday get, depending on how this Tribunal
19 addresses its jurisdictional responsibilities and how this
20 boundary in this case will someday be decided, and what will
21 someday be decided in connection with the French
22 Guiana-Suriname situation. You have seen lines put forward
23 that have no basis in both Guyana's pleadings and in the last
24 few days. They're using their version of the way a provisional
25 equidistance line would be constructed, and certainly they can

12:34:27 1 find some support in diplomatic records dating back many, many
2 years that perhaps this boundary would run at 30 degrees.

3 But those are against diplomatic documents talking
4 about things long ago, and we pointed out in our Rejoinder that
5 the only discussions that are going on--that there is no
6 agreement in the first instance between France and Suriname.
7 There are technical level discussions that have occurred
8 between the two sides; and what has been determined in those
9 technical level discussions is that if you would have a
10 simplified equidistance line running off the coast seaward of
11 the Marowijne River, it would probably run at a 24- to
12 25-degree bearing.

13 Now, I can disclose those technical discussions, and
14 that's all they are. Neither government, neither France nor
15 Suriname has decided that that's what the boundary is going to
16 be, but the technical people on both sides have agreed that's
17 what a simplified equidistance line would look like.

18 Now, the other thing, other reason that we have the
19 argument being brought forward is, of course, in the diplomacy
20 you find in the record that France and Suriname, France and the
21 Netherlands have, in the past, talked about the equidistance
22 line, the equidistance method being followed to construct that
23 line. Whether that will, in fact, happen is not clear, but
24 even if it does, we have seen from Jan Mayen that there is no
25 reason that Guyana should be entitled to the same treatment

12:36:38 1 that Suriname might be willing to give a third state.

2 The geographic situation is different, and what
3 happens through negotiation, what happens through dispute
4 settlement have different characteristics.

5 Now, finally, I want to close by simply noting--and
6 this has been mentioned by others on our team--that Guyana has
7 invoked Judge Jiménez Aréchaga's writings in the international
8 boundary series in Volume I to support what is, in effect, a
9 regional argument, that all of the boundary lines on the west
10 coast of South America are equidistance lines.

11 Now, we have shown that that's an overstatement, and
12 we have shown that even in Judge Aréchaga's writings in the
13 same volume when he got down to specifics talked about these
14 lines in the main as perpendiculars to the general direction of
15 the coast, in particular with respect to the France-Brazil
16 boundary and the Brazil-Uruguay boundary.

17 Now, I'm going to have the opportunity tomorrow to
18 talk to the Tribunal a bit more about Judge Aréchaga, and I
19 welcome the fact that he has been brought into this case by
20 Guyana, but I can assure the Tribunal that he was in this case
21 before that happened because many of the things that Judge
22 Aréchaga has taught in the law are part of Suriname's basic
23 arguments in this case, and I want to come back to this
24 tomorrow.

25 Judge Aréchaga knew something about coastal fronts and

12:38:33 1 their projection into the sea. He also understood the
2 inequities that equidistant lines create. And he understood
3 the application of delimitation method to geography and the law
4 better than most people.

5 His separate opinion in Tunisia-Libya, and I wish to
6 come back to that tomorrow, but his separate opinion stands out
7 as perhaps the most articulate reasoning of how the Court's
8 words in the North Sea case are to be understood in terms of
9 the projection of coastal geography into the sea.

10 The separate opinion also is a contemporaneous account
11 by a nonparticipant in the work of the Third U.N. Conference on
12 the Law of the Sea, and how equidistance, as expressed in the
13 '58 Convention, was rejected. I'm told that I misspoke, and
14 said that Judge Aréchaga's analysis was part of Guyana's
15 presentation. I certainly meant to say his analysis was part
16 of Suriname's presentation. Thank you for that.

17 I guess that's the reason you get to correct
18 transcripts from time to time.

19 But Judge Aréchaga's separate opinion speaks of the
20 work of the Third Conference and the relationship between the
21 work of the Third Conference, the result of Articles 74 and 83,
22 and what that meant for the rule that had been set out in
23 Article 6 of the Convention. And finally, before I conclude,
24 Mr. President, I could not help but note, and it has not yet
25 been said in this case, but--in this pleading, but I want to be

12:40:34 1 the first to say it that Judge Aréchaga, of course, was the
2 President of the Tribunal in St. Pierre and Miquelon, and you
3 saw what that Tribunal did with coastal front projections
4 yesterday.

5 Thank you, Mr. President. I look forward to coming
6 back before you tomorrow. And if this is a timely time, it's
7 time for the lunch break.

8 PRESIDENT NELSON: Thank you.

9 May I just, I would like to ask you just one very
10 brief question, and I hope it will be a brief response.

11 What is your conclusion with regard to the relevance
12 of fishing activities with respect to drawing the line? The
13 conclusion?

14 MR. COLSON: Our view is that the unilateral acts of
15 conduct, whether they are expressed in terms of fishing or oil
16 conduct, are not relevant considerations in a case of a single
17 maritime boundary. That is the short and sum of it. We have
18 said if there is really a full tacit agreement, whether it's on
19 fishing activities or oil activities, as the Court said, in
20 paragraph 304, that might be a different matter. We have the
21 one time in the jurisprudence since the Gulf of Maine case in
22 Jan Mayen, where there was a very small adjustment made in the
23 southern part of the delimitation area, it was a very small
24 adjustment, but it was made to ensure equitable access to the
25 fishing resources, to the caplin resources that were available

12:42:23 1 so that both parties would have an opportunity to get to those
2 resources on their side of that boundary line. That's the only
3 case.

4 PRESIDENT NELSON: Thank you very much, Mr. Colson.

5 I now give the floor to Mr. Reichler.

6 MR. REICHLER: Thank you, Mr. President.

7 And very briefly, in an effort to be helpful to the
8 Tribunal as it deliberates over the lunch break, Mr. Greenwood
9 suggested that Chapter 3 of the Rejoinder was, I think his word
10 was replete with references to Dr. Smith's report. There are
11 279 paragraphs in Chapter 3 of the Rejoinder, of which seven of
12 them contain a reference to Dr. Smith or his report. The first
13 one at 3.159, just says that they will be addressing it.

14 The next five at paragraphs 3.164, 3.173, 3.174,
15 3.177, and 3.191 all comment favorably on Dr. Smith's report
16 because they have observed correctly that there are areas in
17 which he disagrees with Guyana's position, either contradicts
18 or doesn't support it. So there are five favorable references
19 to Dr. Smith.

20 The only--the last, the seventh reference at paragraph
21 3.219 is the only part of the Rejoinder where they criticize
22 any aspect of Dr. Smith's report, criticizes his opinion on the
23 effects of erosion in this region. That's an issue that they
24 had not raised so far in these oral proceedings, and it is an
25 issue as to which we would not propose to question him on

12:44:07 1 rebuttal.

2 All of the other criticisms that they have made in
3 these oral proceedings are absent from the Rejoinder.

4 PRESIDENT NELSON: Thank you, Mr. Reichler.

5 I give the floor to Professor Greenwood.

6 PROFESSOR GREENWOOD: Thank you, Mr. President.

7 Mr. President, Members of the Tribunal, you will be
8 well aware that this is not a matter of a game of mathematics
9 in which I have got seven references to your four or I've
10 picked up the word Smith by going through the transcript nine
11 times and you've only picked it up three. It is a matter of
12 what Chapter 3 of the Rejoinder deals with substantively, and
13 Chapter 3 is quite a rejection of the basic analysis of Guyana,
14 which in its turn is based almost entirely in large areas on
15 the analysis offered in Dr. Smith's report. There is nothing
16 in the cross-examination of Dr. Smith which can come as a
17 surprise to Guyana.

18 PRESIDENT NELSON: Thank you very much.

19 We will have a lunch break and return at 14:30.

20 (Whereupon, at 12:45 p.m., the hearing was adjourned
21 until 2:30 p.m., the same day.)

22

23

24

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12:45:26 1

AFTERNOON SESSION

2 PRESIDENT NELSON: My apologies for the delay. He
3 reported on the preliminary meeting of the experts as follows:

4 One, the parties' expert met in a preliminary meeting
5 with the Tribunal hydrographer on 9th December, 2006.

6 Two, minutes of that preliminary meeting have been
7 prepared and will be made available to the parties.

8 Three, the parties' experts agreed to provide certain
9 further information to the Tribunal hydrographer as described
10 under further action in the minutes. The parties are asked to
11 facilitate the work of the experts in providing this further
12 information.

13 Finally, the Tribunal hydrographer sees no need for a
14 further meeting for the time being.

15 Thank you.

16 I now will resume the hearing, and I give the floor to
17 Professor Sean Murphy. You have the floor, sir.

18 PROFESSOR MURPHY: Thank you, Mr. President.

19 It's a great honor to appear before this Tribunal, and
20 a great privilege to do so on behalf of the Government of
21 Suriname. I will be addressing Guyana's submissions 3 and 4 as
22 set forth in the Reply brief. These were originally styled as
23 Guyana's submissions 2 and 3, and I will begin by giving a word
24 on the burden of proof here. As the proponent of these
25 submissions Guyana must bear the burden of proving them to the

14:35:22 1 satisfaction of the Tribunal. I think that is plain from
2 Article 11 of the Tribunal's Rules of Procedure.

3 Suriname, as a general matter, asks that these
4 submissions be rejected as either outside the Tribunal's
5 jurisdiction or as inadmissible, and in the alternative,
6 Suriname requests that these submissions be denied on the
7 merits, and that the Tribunal find that it is Guyana who has
8 violated the Law of the Sea Convention by authorizing the
9 drilling of an exploratory well in a disputed maritime area and
10 refusing to make every effort to enter into a provisional
11 arrangement of a practical nature regarding a disputed area.

12 My presentation will take up each of Guyana's
13 submissions in turn.

14 Let me begin, then, with submission number 3. The
15 basic allegation here is that Guyana says Suriname has used
16 armed force on June 3rd, 2000, in violation of the Law of the
17 Sea Convention, the U.N. charter and general international law
18 against the territorial integrity of Guyana and/or against its
19 nationals, agents, and others lawfully present in maritime
20 areas within the sovereign territory of Guyana or other
21 maritime areas over which Guyana exercises lawful jurisdiction.

22 I will note here, Mr. President, that Guyana did not
23 say in the submission anything about a threat to use armed
24 force, and I suggest that under the Tribunal's Rules of
25 Procedure, Article 9(b), such a submission should have been

14:36:59 1 made at the time of the Memorial, and that Guyana is not in a
2 position to unilaterally change that submission at this point.

3 Now, as a consequence of this submission, Guyana is
4 asking for damages in an amount of no less than \$33.8 million.
5 Suriname submits that there are multiple fatal defects in this
6 submission relating to jurisdiction, admissibility, merits, and
7 damages. My presentation will proceed as follows: First, I
8 will speak about the facts of the CGX incident, and the fact
9 that it occurred in the area of overlap of maritime claims
10 after Guyana unilaterally authorized exploratory drilling.

11 Second on the issue of jurisdiction, I will argue that
12 Guyana failed to satisfy in two respects the requirements of
13 Part XV of the Law of the Sea Convention with respect to the
14 CGX incident, and therefore cannot invoke the compulsory
15 jurisdiction procedures.

16 Third, on admissibility, the claim is inadmissible
17 because Guyana comes before the Tribunal with unclean hands,
18 and because such issues of state responsibility have no place
19 in a boundary delimitation case.

20 Fourth, on the merits, Suriname's conduct in June 2000
21 was enforcement of a coastal management measure. It was not a
22 use of force and not a threat to use force within the meaning
23 of international law.

24 And fifth, with respect to damages, even if Guyana
25 prevails on the merits, Guyana is not entitled to damages for

14:38:36 1 submission number 3.

2 Let me turn to the facts first, where I will focus on
3 two things, first on the location of the CGX incident, and
4 second on the incident itself.

5 First, the CGX incident clearly occurred in the area
6 of overlap, an area that was clearly not under the sovereignty
7 or sole jurisdiction of Guyana. As Mr. Colson discussed in
8 depth this morning, the conduct of the parties over the past
9 few decades readily reveals conflicting claims to the area of
10 the seas between the 10-degree line and the 34-degree line.
11 This might be referred to as the area of overlap or the area of
12 dispute. On the screen is a map that Mr. Colson also used.
13 It's a graphic showing the British concession to Shell mapped
14 onto Suriname's Colmar concession. I think we may have spelled
15 Colmar improperly there and I apologize for that, but basically
16 this is a map showing those two concessions mapped onto each
17 other. Since it is a little difficult to see what's happening
18 here, we have developed a simpler map for you just showing the
19 basic lines, and what you see there is the color for the Shell
20 concession, the color for the Colmar concession. Where they
21 overlap is the dark blue area, and that is the area of overlap.

22 While Suriname refrained from engaging in exploratory
23 activities in this area of overlap from the 1960s forward, we
24 maintain that that reflects responsible behavior concerning a
25 disputed area, not a concession of Guyana authority in this

14:40:22 1 area, and indeed, we think it a dangerous proposition that a
2 state's restraint in aggravating a dispute over a disputed
3 maritime area should be held against it in determining who has
4 jurisdiction over that area. We think that is a very bad
5 proposition.

6 In formal diplomatic documents, both states clearly
7 recognize this area as an area of overlap. You are, of course,
8 aware of the Agreed Minutes of 1989. This is reflecting a
9 meeting between the Presidents of the two countries, and in
10 this you clearly are seeing that they are identifying an area
11 of potential oil development along their northeastern and
12 northwestern boundaries that is disputed by the two sides. We
13 submit this hardly establishes a belief that Guyana alone has
14 jurisdiction in this area, let alone sovereignty over it.

15 Similarly, if you look at that Memorandum of
16 Understanding of 1991, you see there confirmation that both
17 countries, both countries, considered that there existed an,
18 "area of overlap" in their offshore claims to oil resources.
19 Moreover, the 1991 MOU clearly defines within it that there is
20 an overlap of an area, and it's bounded by the lines north 10
21 degrees east and north 30 degrees east.

22 Again, this is hardly showing a belief that Guyana
23 alone has either sovereignty or exclusive jurisdiction over
24 this maritime area.

25 In our Rejoinder at paragraph 4.17 we list the various

14:42:11 1 statements in Guyana's evidence where Guyana itself admits that
2 the CGX incident occurred in the area of overlap. Now, why do
3 I belabor these facts? Guyana simply cannot establish that it
4 alone exercised sovereignty, authority, or jurisdiction in this
5 disputed area, and that presents a core factual problem for
6 submission number 3. Guyana launched this submission in its
7 Memorial at a time when it claimed there existed an agreement
8 between the two parties about the so-called 34-degree
9 historical equidistance line. Since the Memorial, Guyana's
10 position has changed. Guyana now argues that one can identify
11 indicia that the parties thought the 34-degree line was
12 equitable.

13 We dispute that any such indicia exist, but even so,
14 Guyana is now adopting a much, much softer position regarding
15 the status of this area of overlap, one that we submit rips
16 away the foundation of submission number 3. For if Guyana is
17 now accepting that this was a disputed maritime area rather
18 than an area exclusively under Guyana's jurisdiction or
19 sovereignty, then it takes quite a bit of wind out of this use
20 of force claim.

21 Let me turn now to the second part of my factual
22 discussion, the CGX incident itself. Without question, the CGX
23 incident occurred in the area of overlap. On the screen, you
24 have the map showing that location. The coordinates were 7
25 degrees, 19 minutes, 37 seconds north, 56 degrees, 33 minutes,

14:44:04 1 36 seconds west. Both parties agree on this position. I point
2 to you Guyana's Memorial, paragraph 5.9, Suriname's Rejoinder,
3 Figure 12.

4 Guyana at some point in the period 1999 to 2000
5 decided to authorize a Canadian oil company, CGX, to drill for
6 oil at this location in the area of overlap. That decision was
7 never--never--communicated to the Government of Suriname.
8 Counsel for Guyana had a lot to say about how Suriname should
9 have invoked compulsory dispute settlement procedures at some
10 point at this period of time, but it failed to note that Guyana
11 never, prior to the incident, informed Suriname about the fact
12 that it planned to drill for oil in the area of overlap, the
13 location of the drilling, or the timing of the drilling.

14 Indeed, Guyana did its best not to inform Suriname of
15 such information. Now, I would direct you in the Judges'
16 folder to your Tab H, and there will be there a series of
17 documents relating to my presentation. At document number one,
18 you will find a table of evidence in the record showing the
19 diplomatic exchanges between the governments in the lead up to
20 the CGX incident. This is Tab H in your folder, item number
21 one. It's a table we prepared to just give you a road map
22 through the evidence. This is showing you all the diplomatic
23 exchanges in the lead up to the CGX incident.

24 What's the first step that happens here?
25 Suriname--Suriname, having gleaned bits and pieces of

14:46:03 1 information from the press about a possible drilling operation,
2 initiates this diplomatic dialogue on May 11th, 2000. This is
3 the Diplomatic Note that is in the Guyana Memorial at Annex 76.
4 In that Diplomatic Note, it's Suriname who expresses grave
5 concern about this possible drilling that may be intended for
6 the disputed area, it doesn't really know, and it asks for
7 clarification.

8 It further says, if there are any activities along
9 these lines, Suriname states they should be terminated
10 immediately. We submit that is a very appropriate, careful,
11 and judicious response to what Suriname regarded as a
12 potentially unlawful act.

13 Guyana responds on May 17 with what you might
14 characterize in layman's terms as a mind your own business
15 response. This is a Diplomatic Note at Guyana's Memorial Annex
16 77. In this Diplomatic Note, Guyana did not state the location
17 where the drilling would occur. Guyana did not indicate when
18 the drilling would occur. Guyana doesn't even say drilling is
19 going to occur in the area of overlap. It simply asserts that
20 any exploration or exploitation will occur in the territory of
21 Guyana, even though Guyana obviously knew this was going to
22 happen in a recognized area of overlapping claims.

23 Guyana also stated that the two countries' Border
24 Commissions should reconvene for the purpose of deliberations
25 on issues relating to developments in the Corantijn area.

14:47:55 1 Guyana clearly had no intention of informing Suriname of its
2 exploration plans. Even though it had been expressly asked for
3 that information, it had no intention of discussing them with
4 Suriname.

5 What's the next step? Suriname responds by a note on
6 May 31st, 2000. This is in Guyana's Memorial at Annex 78.
7 Suriname calls upon Guyana to terminate any activities planned
8 for west of the 10-degree line. At this point it still hasn't
9 heard anything from Guyana about where this drilling is going
10 to happen, and Suriname proposes a meeting between the two
11 governments to clarify any misunderstanding concerning the
12 maritime border.

13 All right. The next step is Guyana responding on June
14 2nd, 2000, and this is in Guyana's Memorial Annex 79. Guyana
15 says the maritime boundary is the line of equidistance, and it
16 invites Suriname to send a delegation to Guyana to discuss the
17 matter. Mr. President, at this point, Guyana had a choice.
18 Suriname had formally protested any proposed drilling.
19 Suriname had formally asked that the drilling not proceed, and
20 Suriname had formally asked for negotiations about this matter.
21 Guyana could have postponed the deployment of the CGX rig to
22 the area of overlap. There was no reason--no reason--why the
23 drilling had to go forward prior to engaging in good faith
24 negotiations between the two governments. Both were obviously
25 prepared to engage in such discussions.

14:49:39 1 There was also no reason why the drilling had to go
2 forward prior to pursuing Law of the Sea Convention dispute
3 settlement, either conciliation or arbitration, if that's what
4 Guyana wished to do. Instead, Guyana proceeded to drill for
5 oil.

6 Now, if, as learned counsel for Guyana asserts, the
7 medium is the message, then the message here was a Guyanan
8 rejection of solving a dispute through adherence to the rule of
9 law, and instead acceptance of unilateral action.

10 From the newspaper accounts, Suriname became aware
11 that a drilling operation was imminent in the area of overlap,
12 so not having heard anything from Guyana about it, Suriname
13 dispatches aircraft to engage in surveillance of the area of
14 overlap. This occurs between May 31st and June 2nd, 2000. On
15 the morning of June 2nd, the CGX rig is discovered in the area
16 of overlap and that it had begun the process of its drilling
17 activities. The legs were going down.

18 All right. Let's say a little bit about the CGX rig.
19 Here you have it up on the screen. This rig was built in 1974.
20 It is flagged to the Marshall Islands, and it is owned by a
21 company based in Texas, a U.S. company based in Texas. I have
22 placed also in your Judges' folder, this time at Tab Number 2,
23 so H2, the specifications of the rig. And what you will find
24 there is that it has a length of about 231 feet, a breadth of
25 about 200 feet. This is not a small object. It sleeps 88

14:51:36 1 persons on this rig. It has a 71-foot diameter deck for
2 landing a helicopter. There are three square legs. You can
3 see them sticking up there, the three pinkish grids going up
4 into the air because the legs have not been deployed downward
5 at this point. Those legs can go down and deploy onto the
6 shelf, and that is shown in the next picture, which is not a
7 terrific picture, but the legs are down there. Once it is set
8 up, this rig can drill to a depth of 25,000 feet.

9 Once the CGX rig was located in the area of overlap,
10 the President of Suriname was informed. The President of
11 Suriname immediately called the President of Guyana on June 2nd
12 and asked that the rig not conduct drilling in the area of
13 overlap. I direct to you Suriname's Rejoinder, Annex 15 at
14 paragraph eight. The President of Suriname then informed the
15 Suriname military that diplomatic efforts had been unsuccessful
16 in getting the rig to depart.

17 At around 7:00 p.m. on June 2nd, Suriname dispatches
18 two patrol boats to the location that had been identified by
19 its surveillance aircraft. On the screen now you have a
20 picture of one of Guyana's patrol boats. I'm sorry, Suriname's
21 patrol boats. This is also in your Judges' folder, this time
22 at Tab 3.

23 Now, Guyana's counsel made much of the fact that these
24 patrol boats are part of Suriname's Navy, and therefore under
25 military control. Military control of coastal patrol vessels,

14:53:32 1 of course, is pretty standard worldwide. Most countries do not
2 have the resources to have a separate navy from their coast
3 guard patrol, and, indeed, both Suriname and Guyana have
4 coastal patrol boats, and both have placed them under the
5 authority of their military.

6 Both also send their personnel from their coastal
7 services to train with the U.S. Coast Guard, and in the
8 declarations we submitted to you of the Suriname individuals
9 involved in this incident, you will see reference to some of
10 the men having been trained in the United States with the U.S.
11 Coast Guard.

12 The bottom line is, Suriname has a small navy of just
13 a few of these patrol boats whose principal mission is
14 patrolling Surinamese waters to stop illegal fishing, illegal
15 smuggling--there is a big drug problem, drug trafficking
16 problem--and immigration violations.

17 What are the features of these vessels? They are
18 small, fiberglass patrol boats. They have a length of about 30
19 meters, a width of about six meters. If you wanted to compare
20 the footprint of this vessel to the CGX rig, you would find
21 this vessel has a footprint of about 180 square meters, and the
22 rig has a footprint 4,270 square meters, meaning that the rig
23 footprint is about 24 times larger than the patrol boat. That
24 explains why when the patrol boats approached the rig in the
25 middle of the night, they thought they were coming across a

14:55:08 1 lighted city because it looked so large to them.

2 What are the weapons these gunboats--sorry, these
3 patrol boats carried? These are not gunboats. Counsel for
4 Guyana many times referred to these as gunboats, but these
5 patrol boats do not have any armaments mounted on them, at
6 least they didn't at that time. They are not equipped for,
7 they were not equipped for and did not display any armaments.
8 Indeed, nothing was mounted on them. The crew had only very
9 standard weapons. They had their sidearms, and they had a
10 group weapon which was stored below deck throughout this
11 incident.

12 Now, counsel for Guyana tried to make something out of
13 that squad automatic firearm or light machine gun, whatever one
14 wants to call it, but that weapon is pretty standard on Coast
15 Guard vessels worldwide, including Coast Guard vessels here in
16 the United States.

17 Who were the Surinamese officers involved in this
18 incident? We have provided you with five declarations from the
19 men involved in the incident, and you will find them in our
20 Rejoinder at Annexes 16 and 17 and 19 through 21.

21 Captain John Paul Jones, an excellent name for a
22 mariner, was named the mission commander. His declaration
23 appears at our Rejoinder Annex 20. One of the patrol boats,
24 you will see it referred to as PO2, was commanded by Captain
25 Bhola. His declaration is at the Rejoinder Annex 16. The

14:56:42 1 other control boat, P03, was commanded by First Lieutenant
2 Galong, who later becomes Captain Galong, and that's at the
3 Rejoinder Annex 17.

4 Captain Jones is the mission commander, and he is
5 located on P03 throughout the course of this incident.

6 Now, counsel for Guyana noted that Jones was selected
7 because of his experience, but then he somewhat distorted the
8 reason for his selection. As you can see in his declaration,
9 or not his declaration, the declaration of the individual who
10 appointed him as mission commander, and this is at our
11 Rejoinder Annex 17, paragraph 12, Jones was selected because,
12 and I quote here, "he was known for his calm and authority with
13 the men, and he had gained some experience while leading
14 operations during the interior war."

15 Now, we submit that the point here is that Suriname
16 was not picking someone to engage in a commando-type operation.
17 They were picking someone who they knew was calm under
18 pressure. That's who they wanted to lead this mission.

19 I would also note that Captain Jones is one of the
20 individuals who's trained with the U.S. Coast Guard. You will
21 see that in his Annex--his declaration which is Annex 20,
22 paragraph one.

23 Now, what were the instructions given to these patrol
24 boat commanders? You have up on the screen the instructions
25 that were given by the Lieutenant-Colonel who was the commander

14:58:17 1 of Suriname's Air Force and Navy, and what you see here is that
2 he is instructing the commanders to proceed to the location
3 identified by the Suriname aircraft to determine if there is a
4 drilling platform engaged in economic activity, and if so, to
5 notify that rig that it was conducting these economic
6 activities in Suriname's waters without permission and should
7 leave within 12 hours. If the rig did not comply, further
8 instructions had to be sought. The patrol boats had no
9 authority to initiate or threaten any kind of force.

10 What were the instructions given to the crews of the
11 patrol boats? Again, here you have Lieutenant-Colonel de Mees,
12 who spoke directly to the crews, and you will see as you read
13 through this that he says to them, do not shoot your guns, do
14 not issue threats, do not stand on deck and wave your guns
15 around. All right? Only use your weapons in self-defense.
16 These are the instructions being given to the crew.

17 Now, counsel for Guyana points to this statement and
18 says look, they're talking about the first shot being the start
19 of a war, yet the statement in this context is clearly a
20 warning. We do not want war, is what Lieutenant-Colonel de
21 Mees says. That is the hallmark of a country, of a military
22 officer, trying to prevent armed conflict, not to instigate it.

23 At 7:00 p.m. on June 2nd, the patrol boats set out to
24 sea. Around 1:30 a.m. on June 3rd, the patrol boats arrive at
25 the site. The patrol boats establish radio communications with

15:00:13 1 the rig. Captain Jones informs the rig that it's in Suriname's
2 waters without consent and he orders it to leave. He says if
3 you don't leave, the consequences will be yours. The rig asks
4 for 24 hours to leave. They needed more time in order to get
5 themselves organized. Jones agreed.

6 Shortly thereafter, Lieutenant Galong requests that
7 they cooperate, and he assures them that it is not our
8 intention to harm them. The rig asks where it should go. It
9 receives directional instructions from Lieutenant Galong. The
10 patrol boats then depart the area, they're only there for about
11 an hour, and within 24 hours the CGX rig departs. That's the
12 CGX incident. The bottom line here is no boarding or seizure
13 of the CGX rig. No physical harm to anyone on the CGX rig.
14 There is no firing of weapons. One thing for counsel for
15 Guyana was certainly right about is there was certainly no
16 smoking gun here, no display of weapons, no threat that weapons
17 will be used. All we have are the words, "or the consequences
18 will be yours," which carry no particular meaning and were
19 coupled with the words, "It's not our intention to harm you,"
20 which I submit does carry some meaning.

21 Counsel for Guyana hypothesized that the patrol boats
22 would have used force if the CGX did not comply. We submit
23 that is sheer conjecture, wholly unsupported by the evidence.
24 The patrol boats had no such instructions. The commander of
25 the mission felt he didn't have the authority to engage in such

15:02:01 1 action. Indeed, I have up on the screen here Captain Jones's
2 statement in paragraph four. He's basically saying in short, I
3 didn't even take weapons with me, or I took weapons with me
4 which were completely ineffective to enforce an involuntarily
5 removal of the platform, and I wasn't even allowed to use these
6 weapons without specific instructions unless I was acting in
7 self-defense.

8 And then in paragraph 9 he says, if the platform had
9 not left our waters voluntarily, I definitely would not have
10 used force. I had no instructions, and anyhow I did not have
11 the right weapons to do it. I even had no instructions to
12 board the drilling platform, and also I did not consider that.

13 Now, counsel for Guyana also hypothesized that the
14 patrol boats would have received further instructions to attack
15 the rig. It would have called home, gotten some more
16 instructions of some kind. That, too, we submit is sheer
17 conjecture. It's wholly unsupported by the evidence. In the
18 statement you now have up on the screen, slide 16, you have the
19 Commander-in-Chief of the Suriname armed forces stating that
20 basically under no scenario was the armed forces command going
21 to use force. He's talking here about the instructions that
22 they gave and things of that sort, and that they were having
23 internal conversations within the command group, and towards
24 the end of this thing, he says we concluded that Suriname would
25 not use force in any case unless it was called for as a basis

15:03:39 1 of self-defense.

2 Now, what would have been the consequences for
3 Suriname had it unleashed armed force? Well, there were
4 probably going to be lots of different consequences, but here
5 is one consequence that it would have had. Up on the screen
6 you have a further statement by Colonel Sedney, the
7 Commander-in-Chief of the Suriname armed forces. He says that
8 in the period just prior to the CGX incident, he gets a visit
9 from the American Ambassador in Paramaribo, who requested to
10 see him. "The Ambassador told me that he had appreciated the
11 manner in which Suriname had defended its interests up to then,
12 and he didn't want to take sides or intervene in the dispute.
13 Neither did he wish to indicate which actions Suriname should
14 or should not take, but he asked me explicitly, in case of
15 action to be taken, to take note that there were also American
16 nationals on the platform. I," meaning Colonel Sedney, "told
17 him not to worry about the safety of people on board, and I got
18 the impression that his mind was set at ease with this
19 assurance."

20 So what should we take from this? We should take from
21 this, I think that the idea of the Suriname military deciding
22 it was a good next step to shoot up a U.S.-owned oil rig with
23 U.S. nationals on it who might be injured or killed was
24 definitely not at the top of their priority list. It strikes
25 us as highly implausible, and if we were going to engage in

15:05:19 1 conjecture here, the conjecture should be that Suriname was not
2 going to pursue that course of action. It was going to pursue
3 other courses of action most likely diplomatic in nature.

4 All in all, the incident has all the hallmarks of a
5 law enforcement operation in a coastal management zone.
6 Captain Galong, one of the commanders of the patrol boats, had
7 the following to say. He said: "In the periods of May 1989 to
8 1990 and then from 1997 up until now, I have performed at least
9 30 patrol missions off the coast of Suriname. These patrol
10 missions also involve the sea area between 10 degrees and 30
11 degrees north, which is disputed between Suriname and Guyana.
12 The patrols had mainly to do with expelling fishermen without a
13 license from Suriname waters. This has always been achieved by
14 issuing a summons."

15 Then he says, "My instructions never imply that I may
16 use force, and I have never used force. All things considered,
17 the course of the removal of the drilling platform, as far as
18 I'm concerned, does not differ essentially from the course
19 taken during other patrols." We submit that Captain Galong had
20 that entirely right. This operation was no different from
21 standard law enforcement operations in a maritime zone.

22 Let me leave the facts behind and move on to talk
23 about jurisdiction. On Wednesday, Professor Greenwood spoke
24 about the importance of paying attention both to the law
25 applicable to a dispute before this Tribunal, and the

15:07:02 1 significance of whether a state has consented to the
2 jurisdiction of a tribunal formed under the Law of the Sea
3 Convention. In that regard, I begin by noting that submission
4 3 alleges that Suriname has violated certain international law
5 norms other than the Law of the Sea Convention, including the
6 U.N. Charter and customary international law. With respect,
7 this Tribunal does not have jurisdiction to adjudicate alleged
8 violations of the U.N. Charter or customary international law.
9 To the extent that Guyana's claims are based on those
10 violations, they must be dismissed.

11 Now, that leaves two alleged violations of the Law of
12 the Sea Convention, the first one is under Article 279, which
13 obligates the parties to settle any dispute between them
14 concerning the interpretation or application of the Convention
15 by peaceful means in accordance with the U.N. Charter, and an
16 alleged violation as well of Article 301. Here it states that
17 in exercising the rights and duties under the Convention,
18 states parties shall refrain from any threat or use of force
19 against territorial integrity or political independence.

20 There are two jurisdictional problems for Guyana with
21 respect to submission 3. Two jurisdictional problems. First,
22 Guyana never satisfied the requirements of Part XV Section 1 of
23 the Law of the Sea Convention before they brought submission
24 number 3.

25 And second, since Guyana's claim relates to a dispute

15:08:43 1 concerning a coastal state's enforcement of sovereign rights
2 with respect to nonliving resources, the claim also falls
3 outside this Tribunal's jurisdiction pursuant to Part XV
4 Section 3. On both grounds Guyana cannot take advantage of the
5 compulsory dispute settlement procedures under Section 2 of the
6 Law of the Sea Convention.

7 Let me briefly discuss each of these jurisdictional
8 defects in turn.

9 Article 283(1), which appears in Section 1 of Part XV,
10 is an Article entitled "Obligation to Exchange Views." It says
11 that when a dispute arises between state parties concerning the
12 interpretation or application of this Convention, the parties
13 to the dispute shall proceed expeditiously to an exchange of
14 views regarding its settlement by negotiation or other peaceful
15 means.

16 Part XV Section 2 then provides in Article 286 that
17 any dispute concerning the interpretation or application of
18 this Convention shall, where no settlement has been reached by
19 recourse to Section 1, be submitted to compulsory dispute
20 settlement.

21 The problem for Guyana is as follows: In the period
22 from the time of the CGX incident, June 3rd, 2000, up until the
23 point where the application was filed before this Tribunal in
24 February 2004, Guyana never informed Suriname that Guyana
25 believed that Suriname had violated Articles 279 or 301, or

15:10:39 1 even that it had violated the Law of the Sea Convention
2 generally by Suriname's conduct in June 2000.

3 Similarly, Guyana never requested that Suriname, in
4 light of those violations, provide to Guyana reparation,
5 whether in the form of satisfaction or compensation. Again, in
6 your Judges' folder, Tab H, item four, I prepared a table to
7 show the evidence recording where Guyana asserted to Suriname
8 that it had violated Articles 279 to 301, and you will find in
9 that table no evidence because there is none. There is plenty
10 of discussion after June 2000 about the need to resolve the
11 boundary dispute. That's in the evidence, but there is zero
12 discussion about a violation of the Law of the Sea Convention
13 because of the CGX incident. The first time Guyana makes any
14 such claim is when it files the Notice of Arbitration on
15 February 24th, 2004, almost four years after the incident.

16 Now, Mr. President, we submit that Guyana had an
17 obligation under Article 283, paragraph one, to inform Suriname
18 of any alleged violation of the Law of the Sea Convention.
19 They were supposed to proceed expeditiously to an exchange of
20 views regarding its settlement by negotiation or other peaceful
21 means. By failing to fulfill that obligation, Guyana did not
22 undertake recourse to the Section 1 procedures, and because of
23 that failure to take recourse to Section 1 procedures, Guyana
24 cannot avail itself of the Section 2 compulsory dispute
25 jurisdiction.

15:12:36 1 Now, this is not just a technical or arid plea.
2 Section 1 is designed to require the parties to discuss the
3 claimed violation prior to the resort to compulsory dispute
4 settlement. It's an integral part of the entire Part XV
5 dispute resolution process. If a state feels aggrieved, it
6 first has to go to the allegedly offending state. Why do that?
7 Well, the matter might be resolved diplomatically. The matter
8 might be pursued through conciliation under Article 284 of the
9 Convention and Annex 5 of the Convention. The parties might
10 decide on some binding dispute settlement process other than
11 that envisaged by the Commission.

12 There are all sorts of possibilities, and none of that
13 was able to play out because of this failure to bring the
14 violation to the attention of Suriname.

15 Now, of course, I'm sure the Tribunal is aware that
16 this issue of whether Article 283 has been satisfied has arisen
17 in other cases arising under the Law of the Sea Convention.
18 The Southern Bluefin Tuna cases, the MOX Plant Case, the Land
19 Reclamation cases all had the issue arise within them.

20 In all of the cases, the Tribunal did see Article 283
21 paragraph one as a significant requirement prior to the
22 triggering of compulsory dispute settlement. In all of those
23 cases the facts demonstrated that the applicant state had
24 raised during the course of prior negotiations the assertion
25 that the Respondent had violated the Law of the Sea Convention.

15:14:26 1 In this case, the facts establish exactly the opposite: No
2 effort at any prior point to engage in any negotiations of any
3 kind regarding these alleged Law of the Sea Convention
4 violations.

5 One can compare what has happened in this proceeding
6 to, for instance, the Southern Bluefin Tuna Cases. In that
7 case, by Diplomatic Notes, Australia and New Zealand notified
8 Japan of the existence of a dispute arising under the Law of
9 the Sea Convention and requested negotiations. The slide up on
10 the screen shows you a portion of the oral proceedings at the
11 provisional measures stage. Here you have Mr. Campbell, I
12 believe, on behalf of Australia, providing information
13 regarding the diplomatic negotiations that preceded the filing
14 of the cases at ITLOS. First what happened is they sent
15 Diplomatic Notes expressly informing Japan of the existence of
16 a dispute concerning the matter at hand. The Diplomatic Notes
17 asserted that Japan had violated the Law of the Sea Convention.
18 Express reference was made to Law of the Sea Convention
19 obligations, such as the obligation to conserve highly
20 migratory species, and further, Australia and New Zealand
21 requested negotiations about Japan's obligations under the Law
22 of the Sea Convention, and thereafter those negotiations took
23 place.

24 Here you also see in the provisional record that these
25 negotiations were held, and at them Australia and New Zealand

15:16:08 1 clearly stated their position citing expressly to Articles 64
2 and 116 to 118 of the Law of the Sea Convention. Now, those
3 negotiations failed, but only then did Australia and New
4 Zealand trigger the compulsory dispute settlement procedures of
5 the Law of the Sea Convention. You will see in the next slide
6 that in the provisional measures order, the International
7 Tribunal for the Law of the Sea found prima facie jurisdiction
8 only after concluding, and I quote, "negotiations and
9 consultations have taken place between the parties, and the
10 record show that these negotiations were considered by
11 Australia and New Zealand as being under the Convention of
12 1993, and also under the Convention on the Law of the Sea."
13 That's at paragraph 57.

14 Likewise, "Australia and New Zealand have invoked the
15 provisions of the Convention in Diplomatic Notes addressed to
16 Japan in respect to those negotiations." That's at paragraph
17 58.

18 It then, of course, proceeded to the Annex VII
19 Tribunal, and in that award, the Annex VII Arbitral Tribunal
20 decided that Article 283 had been satisfied--of course, found
21 for other reasons that there was no jurisdiction--but found
22 that 283 had been satisfied because the negotiations about the
23 matter under the Law of the Sea Convention had been "prolonged,
24 intense, and serious," and during the course of those
25 negotiations the applicants had invoked the Law of the Sea

15:17:44 1 Convention.

2 Now, by contrast, Mr. President, in the proceeding
3 before this Tribunal, it's rather hard to say that there were
4 any prolonged, intense, or serious negotiations about
5 Suriname's alleged violations of Articles 279 and 301 since
6 there were no Diplomatic Notes and no negotiations of any kind
7 regarding these alleged violations. Guyana simply never
8 bothered to undertake such action.

9 We view it as instructive to consider the decision in
10 the Barbados versus Trinidad and Tobago case on this issue.
11 You will find the relevant discussion there at paragraphs 201
12 to 202 of the Barbados judgment. The Tribunal took seriously
13 the question of whether Article 283 paragraph one had been
14 satisfied because it said this is an Article of general
15 application to all provisions of UNCLOS.

16 The Trinidad and Barbados Tribunal found that Article
17 283 had been satisfied because for years the parties had
18 engaged in negotiations over their maritime boundary. However,
19 the Tribunal noted that for other kinds of disputes, meaning
20 other than a boundary dispute under the Law of the Sea
21 Convention, disputes arising under other Articles, Articles
22 other than Articles 74 and 83, an aggrieved state must, and I
23 quote, "as a first step," resort to the Article 283 procedure
24 before invoking compulsory dispute settlement. In this case,
25 we submit, Guyana never took that first step.

15:19:37 1 Let me turn to the second jurisdictional defect which
2 arises with respect to Part XV, Section 3. The Tribunal is
3 aware that Section 2 on compulsory jurisdiction procedures
4 begins with Article 286. That Article, in turn, begins with
5 the words, "subject to Section 3." Section 3, in turn,
6 contains certain limitations and exceptions to Section 2
7 jurisdiction. One of those limitations appears in the first
8 Article in Section 3, which is Article 297. Article 297 says
9 that Section 2, compulsory dispute settlement, is only
10 available for certain kinds of disputes that relate to the
11 exercise by a coastal state of its sovereign rights or
12 jurisdiction. Among the three kinds of disputes listed in
13 Article 297, there is no reference to a dispute concerning a
14 coastal state's enforcement of its sovereign rights with
15 respect to nonliving resources. Since Guyana's submission is a
16 dispute concerning a coastal state's enforcement of its
17 sovereign rights with respect to nonliving resources, the
18 dispute is not encompassed in Section 2 of the Law of the Sea
19 Convention.

20 So, in sum, both jurisdictional defects place Guyana's
21 submission number 3 outside the jurisdiction of this Tribunal.

22 Mr. President, I will now turn to why submission
23 number 3 is inadmissible before this Tribunal. Two key defects
24 exist here. One concerns Guyana's unclean hands, and the
25 second concerns the inappropriateness of trying to transform a

15:21:47 1 case concerning a maritime boundary delimitation into a case
2 concerning state responsibility for acts taken prior to the
3 delimitation of the boundary.

4 With respect, first, to the issue of unclean hands, we
5 have addressed this in considerable detail in the pleadings. I
6 direct you to the Preliminary Objections, Chapter 7, and the
7 Rejoinder, Chapter 2, subsection 2(c), and I won't recount all
8 the information in the pleadings in that regard. But I would
9 like to remind the Tribunal that the basic doctrine is traced
10 back to the River Meuse case normally, and there you do find
11 Judge Manley Hudson stating in his concurring opinion, that it
12 would seem to be an important principle of equity that where
13 two parties have assumed an identical or reciprocal
14 obligations, one party which is engaged in a continuing
15 nonperformance of that obligation should not be permitted to
16 take advantage of a similar nonperformance of that obligation
17 by the other party.

18 So, in essence, the idea is that if one party is
19 engaging in nonperformance, then the party shouldn't be able to
20 claim for a reciprocal obligation if they themselves are
21 engaged in nonperformance.

22 We think this is a well established principle in
23 international law, and we maintain that both Suriname and
24 Guyana had reciprocal obligations under the Law of the Sea
25 Convention with respect to this area of overlap. Guyana, in

15:23:31 1 proceeding to drill in that area, breached its obligation, and
2 under this doctrine of unclean hands, Guyana cannot now press a
3 claim before this Tribunal that Suriname has violated its
4 reciprocal obligation. That's all I'm going to say about the
5 clean hands doctrine, Mr. President, but we do think it
6 squarely is applicable as a matter of inadmissibility in this
7 case. The second issue of inadmissibility concerns the
8 inappropriateness of transforming a boundary case into a state
9 responsibility case. This, too, is thoroughly outlined in our
10 pleadings.

11 Here, the central issue in this case is that the
12 Tribunal is delimiting a maritime boundary. I think that
13 should be clear from the fact that we are spending seven days
14 so far talking about maritime boundary delimitation and a
15 little less than a day talking about these submissions 2 and 3,
16 so the basic premise here is that we have a maritime boundary
17 case, and underlying that is the fact that we don't have a
18 boundary, an agreed boundary at least.

19 We think, therefore, it is inappropriate for Guyana to
20 be advancing a claim that turns inescapably on whether Guyana
21 has sovereignty over a disputed maritime area. Indeed,
22 Guyana's entire submission number 3 is built around the idea
23 that there was a fixed maritime boundary, one that clearly
24 established Guyana's control over a particular area that
25 Suriname moved into. That's not the case here. That's clearly

15:25:10 1 not the case.

2 Now, presumably, Guyana is prepared to accept a
3 decision by this Tribunal that the 10-degree line is the
4 appropriate maritime boundary, and if so, then Guyana cannot
5 maintain that Suriname was wrongful in regarding the 10-degree
6 boundary as the extent of Suriname's maritime jurisdiction.
7 Suriname certainly intends to accept the Tribunal's decision
8 regarding the location of the boundary; and in the event that
9 the Tribunal finds it has jurisdiction to delimit, and if it
10 concludes that Suriname is wrong about the 10-degree line, and
11 if the CGX incident occurred in an area of the seas allocated
12 by this Tribunal to Guyana, we submit Suriname should not be
13 condemned for actions previously taken in a mistaken belief
14 regarding the location of the boundary.

15 States normally do not bring such claims of state
16 responsibility in a maritime boundary delimitation case. I
17 would refer you to the Tunisia-Libya case. Mr. Colson noted
18 this morning that in that case there were some fairly dramatic
19 incidents in the mid-1970s, the SCARABEO IV incident, the
20 J.W.S. BATES incident, where a drill ship was sent into
21 disputed waters, various navies showed up, there was a big
22 to-do about it. Yet, when that case ended up going to the
23 International Court of Justice, there was no effort by any of
24 the parties to argue that its sovereignty had been infringed
25 based on those incidents. That is true of most delimitation

15:26:57 1 cases, including where fisheries disputes have unleashed very
2 significant forms of violent activity. Guyana has cited no
3 case--no case--where a territorial dispute is decided in favor
4 of one state and where the losing state was then held
5 responsible for its effort to exercise control over the
6 formerly disputed area. The fact that states generally are not
7 advancing state responsibility claims and that tribunals are
8 never accepting such claims we think speaks volumes.

9 Now, other tribunals when faced with a rare claim that
10 sovereignty has been infringed have quite prudently refrained
11 from passing upon the state responsibility issue. I would
12 refer you to the Cameroon-Nigeria case, where, of course, there
13 was a boundary delimitation issue there, and Cameroon alleged
14 that Nigeria had used force in violation of U.N. Charter
15 Article 2(4) and customary international law.

16 Now, in delimiting the border between Nigeria and
17 Cameroon, the Court did award to Cameroon certain areas that
18 had been occupied by Nigerian military forces, and in the next
19 slide you see that although it did that, it stated in the
20 delimitation judgment in conjunction with Nigeria's anticipated
21 withdrawal, that that sufficiently addressed any injury
22 allegedly incurred by Cameroon. I quote, "The Court will not
23 seek to ascertain whether and to what extent Nigeria's
24 responsibility to Cameroon has been engaged as a result of that
25 occupation."

15:28:48 1 Counsel for Guyana asserted on Monday that the Court's
2 finding was based on a lack of evidence, but the Court's
3 language says nothing about a lack of evidence. I encourage
4 the Tribunal to look at the relevant portion of the Court's
5 decision. The Court basically accepted that injury was
6 probably suffered by Cameroon due to Nigeria's occupation.
7 Indeed, it would be rather hard to argue that the occupation of
8 the Bakassi Peninsula did not injure Cameroon.

9 Guyana appears to be confusing this part of the
10 judgment with a different part, paragraphs 320 to 324 of the
11 judgment, where the Court finds a lack of proof regarding
12 certain other charges made by Cameroon. Those were charges
13 about an alleged Nigerian violation of the provisional measures
14 order of the Court and an alleged Nigerian responsibility for
15 certain boundary incidents. Those matters the Court did find
16 there was a lack of proof on, but with respect to this issue,
17 paragraph 319, what you have up on the screen, this is not one
18 where the Court found there was a lack of proof. This is one
19 where the Court found that on the basis of its delimitation of
20 the area and the expected withdrawal of Nigerian troops, that
21 should end the matter.

22 We submit that it's no surprise that the International
23 Court of Justice President Rosalyn Higgins has recently noted
24 that the Court has never yet made a finding that a state's
25 responsibility is engaged in a case where the main focus is

15:30:28 1 territorial title. We think there are several prudential
2 reasons why tribunals have dismissed state responsibility
3 claims when raised in a boundary delimitation case. In the
4 short term, tribunals no doubt sense that it is not helpful
5 when trying to encourage states to accept and to abide by a
6 boundary delimitation if that decision, the delimitation
7 decision, includes some sort of condemnation of one side or the
8 other for prior conduct. In his opening comments, Guyana's
9 Minister of Foreign Affairs, Mr. Insanally, spoke rather
10 eloquently about Guyana and Suriname's friendship and respect
11 that they will no doubt share over eternity as neighbors living
12 in peace and harmony and ever increasing cooperation. Very
13 eloquent words. Yet, surely it is not helpful in fostering
14 that relationship for Guyana to be asking this Tribunal in the
15 delimitation award to condemn Suriname for having violated the
16 U.N. Charter.

17 In the long term, tribunals probably sense that states
18 may be discouraged from bringing boundary disputes to
19 arbitration if they are going to face the possibility of claims
20 of wrongdoing based on delimitation conduct.

21 Moreover, we submit that allowing states to pursue
22 state responsibility claims in this context may create perverse
23 incentives in favor of unilateral action in disputed boundary
24 situations. A state that has designs on occupied but contested
25 land or marine areas may think that moving people or rigs into

15:32:24 1 the area will give it a stronger territorial claim. Such
2 thinking, we think, will only be reinforced if the state
3 believes that its opponent is less likely to respond for fear
4 that it will be exposed to a state responsibility claim. In
5 other words, by allowing such claims, we may be encouraging
6 states to take unilateral actions with respect to disputed
7 territory--an undesirable outcome for those interested in
8 maintaining international peace.

9 So, for both of these reasons, clean hands and the
10 inappropriateness of introducing a state responsibility claim
11 into a boundary delimitation case, the Tribunal should dismiss
12 submission number 3 as inadmissible.

13 Mr. President, let me turn to the merits of Guyana's
14 submission number 3. For four reasons we think that Guyana's
15 submission number 3 fails on the merits. First, Suriname's
16 conduct in June 2000 was enforcement of a coastal management
17 measure. It was a law enforcement.

18 Second, Suriname's action was not a use of force nor a
19 threat to use force within the meaning of international law.

20 Third, Suriname's conduct was not directed against
21 Guyana, but against a vessel flagged to a third state.

22 And fourth, Suriname's action was a lawful
23 countermeasure taken in response to Guyana's unlawful action.
24 I will address each of these points in turn.

25 First, Suriname's action was a reasonable exercise of

15:34:13 1 law enforcement measures. As the Tribunal is well aware,
2 countries worldwide use patrol boats to monitor unlawful areas
3 of maritime areas under their jurisdiction. When they do so,
4 they are regarded as exercising a law enforcement function.
5 Even if warning shots are fired or boardings of vessels occur,
6 this is still regarded as a law enforcement operation.

7 Suriname is no different in this regard. Suriname's
8 national law prohibits fishing and mining activities in
9 Suriname's maritime zones without Suriname's permission. For
10 example, as Mr. Colson mentioned this morning, Suriname's
11 mining decree of May 8, 1986, sets forth general rules
12 regarding exploration by and exploitation of minerals in the
13 continental shelf. And if you violate that, you can be
14 punished for imprisonment of up to two years and fined 100,000
15 Suriname guilders.

16 Suriname regularly uses its patrol boats which
17 comprise its Navy to enforce these laws. That's what they do.
18 Now, we presented evidence to you regarding Suriname's law
19 enforcement in the area of overlap. Suriname's patrol boats
20 regularly police vessels operating in the area of overlap,
21 mostly for fishing violations. Mr. Colson provided you with
22 these two maps this morning. They show on the left Suriname's
23 stopping and inspecting of, I believe, 17 fishing vessels in
24 the area of overlap. Those were Suriname vessels. They were
25 Guyana vessels. They were third country vessels. There were

15:36:04 1 at least two arrests made in these incidents. It's not
2 surprising that Suriname would be conducting its enforcement
3 operations in the area of overlap since Guyana was not doing
4 so. When you look at the map on the right, this is Guyana's
5 evidence--the maps are ours, but they put in information about
6 their fisheries enforcement activities. We plotted those
7 activities, and what you have is that map on the right side of
8 the graphic.

9 Guyana in its presentation last week conceded that it
10 was not exercising law enforcement operations up to its claimed
11 34-degree line, and I direct you to page 406 of the transcript.

12 Now, we have mapped this law enforcement activity onto
13 a single map with respect to the area of overlap, and we think
14 it's pretty apparent who was engaging in law enforcement
15 activity with respect to at least fisheries in this area of
16 overlap.

17 Now, we submit that while there were obviously
18 heightened political sensitivities about the idea of an oil rig
19 coming into this area, nevertheless, the CGX incident has all
20 the characteristics of a law enforcement-type operation.
21 Suriname believed its national law was being violated by the
22 drilling that was going to take place in this area of overlap.
23 It consulted with its Attorney General on that matter. When it
24 was decided that action should be taken, the same patrol boats
25 and the same personnel that normally engage in law enforcement

15:37:46 1 activities in Suriname's waters were dispatched to the CGX
2 location. The patrol boats, after reaching the location,
3 instructed the oil rig to leave because they were violating
4 Suriname's law. The oil rig left. That's exactly what happens
5 in countless times, countless times and countless situations
6 every day worldwide when countries are engaging in coastal
7 maritime law enforcement activities.

8 Guyana's behavior at the time of the incident suggests
9 to us, too, that they expected Suriname to engage in this law
10 enforcement action. By letters of November 8, 2005, and
11 March 2nd, 2006, counsel for Suriname requested from Guyana all
12 records of communications between the government of Guyana and
13 the CGX company, including those relating to the aftermath of
14 June 2000 incident, and you will find those letters at our
15 Rejoinder Annex 42.

16 We were told by counsel for Guyana that no such
17 records exist of any communications between the Government of
18 Guyana and CGX Company relating to the CGX incident.

19 Now, if that's true, and we have no reason to think
20 that it's not, but if that's true, the lack of any such
21 communications demonstrates to us that Guyana fully expected
22 that Suriname would request the CGX rig to leave the area of
23 overlap. Otherwise, there should be records of Guyana
24 contacting CGX about what happened, how did it happen, where
25 did it happen, letters going back and forth, logs of some kind

15:39:40 1 or another, what did they say to you? If this was such a big
2 use of force that suddenly came out of the blue, you would
3 expect some sort of documentary record relating to it. Well,
4 there isn't one. There is no such record. Instead, the
5 Government of Guyana appears to have fully anticipated that
6 what would happen did happen, and that may well be because this
7 is an area where Suriname has been regularly exercising its law
8 enforcement function, and it's no surprise it sent out its
9 coastal patrol vessels in the way that it did.

10 So, to sum up this point, we think Suriname's acts
11 fall well within the scope of what would normally be considered
12 law enforcement activity in the sense that its conduct did not
13 rise to the level of some sort of use of force.

14 So, let me turn to the next point, which is that the
15 action was not a use of force or a threat to use force within
16 the meaning of international law.

17 Guyana has framed the submission as a use of force
18 against an area over which Guyana has either sovereignty or
19 lawful jurisdiction. Now, that submission was predicated upon
20 the idea of using force against Guyana territorial
21 integrity--that's what the submission says--or against persons
22 present in maritime areas under the sovereign territory of
23 Guyana or over which Guyana exercises lawful jurisdiction. But
24 as I've noted, you can't think of the area of overlap in those
25 terms. That's simply not what it was.

15:41:21 1 Further, the conduct at issue in this incident is not
2 of the nature that one would normally associate with the use of
3 force as that concept is understood in Article 2(4) of the U.N.
4 Charter and associated instruments. Instructing a vessel to
5 leave an area of disputed waters is a long way--a long
6 way--from the kind of coercion that characterizes an unlawful
7 use of force. No shots were fired, no one was harmed, no
8 weapons were brandished. If one were to regard this conduct in
9 this incident as constituting a violation of U.N. Charter
10 Article 2(4), we would have vastly expanded the scope of that
11 Article to cover minor incidents that occur worldwide every
12 day.

13 Mr. President, I'm about halfway through my
14 presentation. I note that we are close to the coffee break,
15 and if this is an opportune time to take it, I'm happy to do
16 that, or I'm happy to continue.

17 PRESIDENT NELSON: Thank you very much, Mr. Murphy.

18 We shall continue with this hearing at 4:00.

19 PROFESSOR MURPHY: Very good. Thank you, sir.

20 PRESIDENT NELSON: Thank you.

21 (Brief recess.)

22 PRESIDENT NELSON: I have to read what I call here the
23 Second Order regarding the recall of Dr. Smith.

24 The Tribunal has considered the positions of the
25 parties regarding Guyana's request to recall Dr. Robert Smith

16:07:27 1 during his second round of oral pleadings, and decides as
2 follows:

3 First, the Tribunal affirms the terms of its order of
4 7 December 2007, in which it stated that Dr. Smith may be
5 recalled only for rebuttal and with regard to matters he could
6 not have addressed in his first round of testimony.

7 Accordingly, Guyana may recall Dr. Smith within the limits of
8 its 7 December 2007 Order. 2006, it should be, yes. Sorry to
9 be jumping the gun.

10 Second, prior to recalling Dr. Smith, the Tribunal
11 will allow Guyana to share portions of the transcript with
12 Dr. Smith that directly pertain to his report or testimony.
13 Guyana shall notify Suriname of the portions of the transcript
14 that it wishes to share with Dr. Smith by 8:00 p.m. today, and
15 the parties shall seek to stipulate to those portions. Any
16 objection by Suriname that portions of the transcript proposed
17 by Guyana to be shared with Dr. Smith are not within this order
18 and shall be raised with the Tribunal at 9:30 a.m. tomorrow, 16
19 December 2006.

20 MR. REICHLER: May I address you, Mr. President?

21 PRESIDENT NELSON: Of course.

22 MR. REICHLER: Thank you.

23 Of course, we appreciate the deliberation and the
24 Order of the Tribunal. I just wonder if we might have a tiny
25 bit more time. I have not been through the transcript yet. I

16:09:58 1 have only been through my notes that I took during the
2 testimony, and I may need a little bit more time to go through
3 the transcript and identify those portions that we would want
4 to disclose to Dr. Smith, if it would be possible. And we
5 certainly are mindful of the fact that our colleagues need to
6 have an opportunity to review so they can determine whether we
7 have selected appropriate portions consistent with the
8 Tribunal's order, but I wonder if 10:00 might not be too late
9 to disclose. They would have tomorrow morning, or if they're
10 up as late as we are, 10:00 won't be so late, but I don't want
11 to cause any inconvenience to Mr. Greenwood and his team or the
12 other side, but I will have to read through the transcripts
13 tonight and actually pick out portions, so I just wonder if we
14 might have a bit more time.

15 PRESIDENT NELSON: Is this--

16 PROFESSOR GREENWOOD: Mr. President, sir, we are
17 mindful of Guyana's problems in that regards, but there are
18 also difficulties for us. I don't think it's reasonable to
19 expect us to deal with what might be a substantial portion of
20 the transcript and to go through it between 10:00 tonight and
21 half past nine tomorrow, and that would, of course, include
22 going back to Mr. Reichler to negotiate with him, if needs be,
23 what portions should be produced.

24 May I suggest this, that Guyana has until 10:00
25 tonight to notify us of what it wants to produce. We will

16:11:36 1 respond to Guyana--we will try to respond to Guyana by 9:30
2 tomorrow morning, and any applications to be made to you should
3 be made at the end of tomorrow morning's hearings rather than
4 at the beginning.

5 PRESIDENT NELSON: Is that acceptable?

6 MR. REICHLER: It could be, and I'm trying very hard
7 to accommodate so we can relieve the Tribunal of any additional
8 burden. We would hope that we would be able to resolve this
9 among ourselves, and there won't be any disagreement about
10 portions of the transcript to be disclosed. My hope is that,
11 by Sunday morning, we would know what the portions are that
12 need to be disclosed, so there is some time for the witness to
13 at least think about it. So, if the close of the session
14 tomorrow is sufficient time--leaves sufficient time for the
15 Tribunal to resolve any disputes--and we hope there are none by
16 Sunday morning--then that would be perfectly fine with us.

17 PROFESSOR GREENWOOD: Mr. President, I would envisage
18 that we would be able to agree with this. In the event we are
19 not able to agree with everything, then if you could be told at
20 the close of business tomorrow morning, that would give the
21 Tribunal the luncheon recess in which to decide the matter. I
22 hadn't imagined that you were proposing to decide it on the
23 hoof at half past nine anyway.

24 MR. REICHLER: That's very kind and accommodating of
25 you, Mr. Greenwood. I would have expected nothing less,

16:13:17 1 because that's been your attitude throughout, and I appreciate
2 that, and that's perfectly acceptable to us.

3 I would like to make one request, is that you tolerate
4 and understand--and my apologies to Professor Murphy, I have
5 enjoyed listening to his argument thus far today--but given the
6 Tribunal's order, I will entrust Guyana's conduct during the
7 rest of the proceedings today to my colleagues, and if I may be
8 excused so that I can go back to my office and start reviewing
9 the transcript right now. If we can get the portions to
10 Mr. Greenwood before 10:00, we certainly will.

11 PRESIDENT NELSON: Thank you very much.

12 PROFESSOR GREENWOOD: Thank you, Mr. President.

13 If Mr. Reichler is going to leave, may I quickly deal
14 with now what I was going to raise at the end of today's
15 hearing rather than leaving it up until then, and that was just
16 in relation to the documents requested by Mr. Sands. I have
17 spoken to my learned friends about this, and we have gotten an
18 explanation of what the position is.

19 The documents to which Mr. Colson referred this
20 morning was put in by agreement with the Guyanese counsel in
21 response to a letter that was referred to by Mr. Schrijver
22 because it is itself referred to in the letter that Professor
23 Schrijver put before you. The letter that Professor Schrijver
24 put before you, as far as we can tell, is a final copy, a final
25 version, not a draft. It does, however, have the Dutch word

16:14:41 1 for copy on the top of it, so it is a photostat of a 1950s
2 copy.

3 The document Mr. Colson put in refers to a letter of
4 1957. I have provided copies of that to my learned friends for
5 their convenience, but a copy was, in fact, handed over to
6 Professor Schrijver in the Netherlands in February of this
7 year, so it's not a document they're being sandbagged with.

8 PRESIDENT NELSON: Thank you.

9 MR. REICHLER: Professor Greenwood just proved my
10 point about his courtesy and accommodation, and we thank him
11 very much for his accommodation with respect to this document.

12 Thank you.

13 PRESIDENT NELSON: Again, I thank you gentleman very
14 much for your spirit of cooperation. Thank you.

15 You can continue, Mr. Murphy, Professor Murphy.

16 PROFESSOR MURPHY: Thank you, Mr. President.

17 I'm delighted to take you from the sandbagging of
18 procedural issues back to the situation of the CGX incident and
19 specifically to the question of whether if there is
20 jurisdiction for the Tribunal to address this matter and, if
21 the matter is admissible before you, whether or not on the
22 merits one could say that there was, in fact, a use of force
23 with respect to Suriname's conduct in the CGX incident.

24 I was at the part of my presentation where I was
25 maintaining that, because of the location of the CGX incident,

16:16:08 1 one should initially approach this with some caution in
2 thinking about whether it is a use of force against the
3 territorial integrity of Guyana. And further I noted that the
4 nature of the action is not one where you would normally expect
5 it to be regarded as a use of force; that is, no shots being
6 fired, no weapons being brandished--things of that sort.

7 I would also note that there are other incidents that
8 are far more dramatic than this that also have not been
9 regarded as constituting an unlawful use of force. Rather,
10 tribunals tend to view these incidents as falling within the
11 general category of law enforcement activity, and in this
12 regard I think it's worth taking note of the Spain versus
13 Canada Fisheries Jurisdiction Case.

14 The Tribunal, of course, will be well aware that
15 Spain's application in that case described the incident
16 involving the Spanish vessel, the Estai, and it was an incident
17 where you had warning shots fired from a 50-millimeter gun,
18 obviously a weapon of much greater caliber than what's at issue
19 or what's not at issue in this case, and there was a boarding
20 of the Estai by the Canadian coastal vessels. Canada took
21 control of the Estai, forcibly escorted it to a Canadian port,
22 imprisoned the Captain, confiscated items from the Estai.

23 Spain, of course, then came to the International Court
24 of Justice asserting that this conduct constituted a use of
25 force against a Spanish vessel in violation of Article 2(3) and

16:17:48 1 Article 2(4) of the U.N. Charter.

2 Well, what did the International Court of Justice do
3 with this matter? You will see in the next slide that the
4 International Court found that the use of force authorized by
5 Canada falls within the ambit of what is commonly understood as
6 enforcement of conservation and management measures.
7 "Boarding, inspection, arrest, and minimum use of force for
8 these purposes are all contained within the concept of
9 enforcement of conservation and management measures according
10 to a natural and reasonable interpretation of this conduct."

11 Now, admittedly, the issue before the International
12 Court in that case was the scope of Canada's reservation to the
13 Court's jurisdiction, and this was noted by Guyana's counsel
14 last week. That distinction actually is germane, we would
15 submit, to our second jurisdictional argument, which is that
16 the Tribunal has no jurisdiction over this claim since
17 Suriname's conduct was enforcement of a coastal State's rights
18 that fall outside the scope of Part XV of the Convention.

19 However, with respect to the merits of Guyana's claim,
20 we don't think this distinction is germane. Had the
21 International Court regarded Canada's action as something more
22 than standard coastal State enforcement action, then the Court
23 would have found jurisdiction. Yet the Court did not find
24 jurisdiction because Canada's action, which was far more
25 aggressive than anything that Suriname allegedly did in this

16:19:37 1 case, Canada's action, according to the Court, constituted an
2 enforcement action, and we submit that that conclusion is
3 directly relevant to the merits of Guyana's claim.

4 The fact that the incident occurred on the high seas
5 we also don't think is germane. If anything, Suriname has
6 greater rights to exercise such measures within this area of
7 overlap than it does on the high seas, given Suriname's claims
8 to this area, and nothing in the Court's judgment suggests
9 otherwise.

10 Now, you can look at other cases as well. The Saiga
11 case is also something worth paying attention to. There, we
12 had a Coast Guard vessel stopping and ordering another vessel
13 to cease activity, and there the International Tribunal for the
14 Law of the Sea talks about what would be regarded as a use of
15 force in the context of stopping a vessel. And in the slide
16 that you have on the screen, slide 38, we are seeing the
17 International Tribunal for the Law of the Sea saying that there
18 is a normal practice used to stop a ship at sea, and you give
19 them certain visual signals. When that doesn't succeed,
20 certain actions may be taken, including the firing of shots
21 across the bow, and I note here the Tribunal said it is only
22 after the appropriate actions fail that the pursuing vessel
23 may, as a last resort, use force. Even then, it's still
24 permissible, but we are submitting that the Suriname patrol
25 boat didn't even get to this point in the matter at issue

16:21:16 1 before this Tribunal.

2 Now, ultimately, the Tribunal for the Law of the Sea
3 did find that a use of force had occurred in the Saiga case,
4 but under vastly different circumstances. You may recall that
5 the Guinea patrol boat fired at the Saiga with live ammunition
6 without issuing any of the signals or warnings required by
7 international law and practice. It also used excessive force
8 after they boarded the vessel, firing indiscriminately on the
9 deck and using gunfire against the ships' engine, and the
10 Tribunal found that in using force in that way they did not
11 attach sufficient concern to the safety of the ship or the
12 persons on board. But Suriname's conduct comes nowhere close
13 to that sort of conduct. When you look outside what tribunals
14 are saying, to what the views of scholars are on this issue, we
15 submit that it confirms that the type of conduct at issue here
16 was not a use of force as that term is understood in
17 international law.

18 So, for example, in the chapter on enforcement of the
19 law in his classic treatise, Dr. O'Connell explains that
20 international practice in the arrest of foreign ships in
21 jurisdictional zones varies. Some countries do resort to
22 gunfire after signals to receive boarding parties are ignored,
23 but the legal standard is not necessarily complied with merely
24 because of an immediate failure to respond to those orders.
25 This is basically discussing how, in the context of law

16:22:53 1 enforcement activities, it is the case that there will be
2 situations where you may need to use weapons of some kind or
3 another.

4 Now, again our incident didn't even get to that point,
5 but the idea of a patrol vessel being out there with a weapon
6 and possibly in some circumstances using the weapon does not
7 take the matter outside the scope of typical coastal law
8 enforcement action. So, we would submit to you that there
9 clearly was not a use of force in violation of Article 2(4) of
10 the Charter or the Law of the Sea Convention in this context.

11 Now, could Suriname's conduct be regarded as a threat
12 to use force? Understandably, counsel for Guyana made this
13 kind of an argument. Since there wasn't any actual use of
14 force, you're pretty much left with trying to argue that there
15 was a threat to use force, but we submit that Guyana has not
16 even begun to prove that any such threat existed. Guyana
17 referred to the views of Professor Ian Brownlie as good
18 authority, and indeed, Professor Ian Brownlie is a good
19 authority on the use of force.

20 Well, what does he say? He says a threat of force
21 consists in an express or implied promise by a government of a
22 resort to force conditional on nonacceptance of certain demands
23 of that government. That's the first sentence. The second
24 sentence here says: If the promise is to resort to force in
25 conditions in which no justification for the use of force

16:24:30 1 exists, the threat itself is illegal.

2 So, there are two things going on there. There needs
3 to be an express or implied promise that force will be used if
4 you don't accept a certain condition; and then secondly, it's
5 occurring in the context where there was no justification for
6 issuing that threat.

7 Well, was there an express promise to use force in
8 this case? No. There was no express promise to use force of
9 any kind. In fact, you can contrast what happened here with
10 the Corfu Channel Case, one of the first cases decided by the
11 International Court of Justice. You may know that, in that
12 case, Britain issued a Diplomatic Note in August of 1946 which
13 concluded with a threat to use force against Albanian coastal
14 guards if the Albanian Coast Guard attempted to prevent passage
15 of U.K. ships through the Corfu Channel, and if they opened
16 fire on the British warships, then the Diplomatic Note said "we
17 will fire back." Now, that's an express promise to use force,
18 and that's nowhere near what we had going on in this case, so
19 we would submit that there is no question there is no express
20 promise here.

21 Is there an implied promise to use force? Well, in
22 what sense would there be an implied promise to use force? The
23 only thing at issue here appears to be the use of the words
24 "leave or the consequences will be yours." That, I guess,
25 according to Guyana, is an implied threat to use force.

16:26:10 1 Now, counsel for Guyana made some big issue out of the
2 perception by the individuals on the CGX rig, that the
3 declarations that a couple of those gentlemen have submitted
4 indicate that they felt threatened. Well, if that's the issue,
5 the perception of the persons on the rig, then all of the
6 discussion we heard from counsel of Guyana about the high-level
7 meetings back in Suriname, in Paramaribo, is irrelevant because
8 the people on the rig don't know anything about that.

9 And, indeed, the people on the rig don't know anything
10 about the weapons on the patrol boats either, so all the
11 discussion about what was this group weapon is irrelevant, too.
12 The reality is it's the middle of the night. The guys on the
13 rig aren't seeing anything, except maybe a couple of very small
14 blips on their radar screen; right? So, what they are getting
15 is, over the radio, someone who has shown up, identified
16 themselves as the Suriname Navy, and saying "you must leave the
17 waters or the consequences will be yours," and coupling that
18 with, "and by the way, we don't intend to harm you." That's
19 what they're getting.

20 Now, I have no doubt that the gentlemen on the rig
21 were nervous. Any time law enforcement officers show up and
22 tell you "leave the area," one gets nervous; right? You get
23 pulled over for a speeding ticket, it makes you nervous. But
24 the fact that you get nervous does not constitute a threat to
25 use force against you, and we submit that there is nothing in

16:27:42 1 the record that justifies taking this matter to the level of
2 identifying that Suriname has engaged in an unlawful threat to
3 use force. It's unfortunate that these gentlemen's oil company
4 forced them to go out and drill in an area that they knew was a
5 disputed area. I'm sure they felt nervous, it's the middle of
6 the night, patrol boats showing up. That, however, does not
7 satisfy the evidentiary standard required for the Government of
8 Guyana to establish that a very serious violation of
9 international law has been committed.

10 The whole case here comes down to a few cryptic words
11 issued over the radio, and we submit that is far too thin a
12 reed to rest a use-of-force claim upon.

13 The fourth point I wanted to make with respect to the
14 merits of this claim is that Suriname's conduct was not
15 directed against Guyana. Even assuming that the measures taken
16 by the patrol boats constituted some sort of use of force or
17 threat to use force within the meaning of international law,
18 the reality is this was not being used against anything that's
19 the territory of Guyana or under Guyana's exclusive control,
20 and it's common ground that the CGX rig was not property of
21 Guyana. It wasn't flagged to Guyana, it wasn't owned by anyone
22 in Guyana. There may have been some Guyana nationals on the
23 rig, but from what we can tell, it was crewed almost entirely
24 by non-Guyanaian nationals, so any use of force or threat to
25 use force was not directed against Guyana. It was directed

16:29:24 1 against the CGX rig, a rig flagged to the Marshall Islands, a
2 rig owned by a U.S. company, and a rig that appears to have
3 been crewed by many individuals from third countries, not
4 Guyana.

5 Now, that's fatal, we submit, to Guyana's claim. You
6 simply cannot maintain an interstate claim on behalf of the
7 national of another state, and we cited in our proceedings to
8 jurisprudence such as the Barcelona Traction case. Any
9 interests of Guyana in the vessel are not significant for
10 purposes of applying the Law of the Sea Convention, and we
11 cited here again to the Saiga case, where you will see that the
12 Tribunal clearly talked about the ship as being a unit and that
13 the obligations of the flag state relate to that ship, and the
14 right of the flag state to seek reparation for loss or injury
15 caused to the ship, that's the right of the flag state. It's
16 not the right of somebody else who is out there.

17 Now, there is other conduct that Guyana also alleges
18 constitutes the use of force, and they talk about this in terms
19 of measures taken by Suriname in making communications to three
20 oil companies--CGX, Maxus, and Esso--and that somehow these
21 communications scared off those countries from engaging in
22 oil-exploration activities in the area of dispute and,
23 apparently, according to Guyana, elsewhere as well. Again, we
24 submit that that can't possibly fall within the scope of what
25 would be regarded as a use of force or threat to use force in

16:31:08 1 international law. There is nothing in any instrument, whether
2 it's the Charter or the Definition of Aggression or anywhere
3 else, that one would find conduct of that kind constituting a
4 use or threat to use force.

5 My fifth point on the issue of the merits is that
6 Suriname's conduct was a lawful countermeasure. This is an
7 argument we make in the alternative, and I stress very much "in
8 the alternative." We submit that Suriname that has done
9 nothing wrong. But, if the Tribunal for some reason regards
10 Suriname's action as violating some international obligation,
11 we submit that the conduct was nevertheless a lawful
12 countermeasure taken in response to Guyana's prior unlawful
13 act.

14 What's the requirement for a countermeasure? Well,
15 you have to have an act that's taken in response to a
16 previously wrongful act. It has to be preceded by a request
17 that the other State discontinue its wrongful conduct. It must
18 be commensurate with the injuries suffered, and it must be for
19 the purpose of inducing the other State into complying with its
20 international obligations. We run through in our pleadings the
21 jurisprudence on this. We submit that Suriname's conduct fully
22 satisfies these criteria.

23 I will take the last three criteria first. Suriname
24 did clearly ask Guyana through diplomatic channels to refrain
25 from the drilling activity; I discussed that before.

16:32:40 1 Suriname's conduct was narrowly tailored to the minimal action
2 necessary to get the rig to leave the area, and the conduct was
3 solely for the purpose of inducing Guyana into refraining from
4 its wrongful conduct. So, we think the last three criteria
5 that you have on the screen there were fully satisfied.

6 With respect to the first criterion, Suriname's
7 conduct was in response to Guyana's wrongful act, a wrongful
8 act in the form of authorizing unilateral drilling in a
9 disputed area of the continental shelf. We know from the Law
10 of the Sea Convention Article 83(3) that you may not engage in
11 drilling for oil in a disputed area of the continental shelf.
12 It's not expressly stated there, but that's clearly the
13 implication of Article 83(3). You're not supposed to
14 jeopardize or hamper the reaching of a final delimitation
15 agreement. This is a duty. It's a duty not to undertake an
16 activity that radically affects the ability to reach a final
17 delimitation agreement, but drilling is just such a radical
18 activity. It's invasive. It's potentially a permanent
19 exercise of sovereign rights over natural resources. It
20 entails the establishment of a permanent installation on the
21 seabed. It's not transitory in nature. It can cause
22 environmental damage to the seabed and marine environment, and
23 coastal States have an obligation to protect the environment in
24 this area. If it succeeds in finding oil, it can radically
25 alter the dynamics of reaching a final delimitation agreement.

16:34:29 1 It's worth pondering the Aegean Sea Continental Shelf
2 Case in this regard. There, the International Court declined
3 to issue interim measures because Turkey's conduct in the
4 disputed area was not radical in nature. It was seismic and
5 aeromagnetic surveying, there was no risk of physical damage,
6 it was transitory in nature, no establishment of a permanent
7 installation, and therefore the Court did not issue the
8 provisional measures in that case. We submit that the clear
9 implication of this is that conduct in a disputed area of the
10 type attempted by Guyana is--is--of a radically different
11 nature, and we submit that the scholarly commentary supports
12 this proposition. Many scholars have inferred from the Court's
13 opinion that any activity which represents irreparable
14 prejudice to a final delimitation agreement--namely, the
15 establishment of installations on or above the seabed or the
16 actual appropriation or other use of the natural
17 resources--those activities are prohibited by Article 83(3).
18 For instance, Churchill and Lowe have said that 83(3)
19 suggests that neither party should take any action in the area
20 subject to delimitation, such as engaging in exploratory
21 drilling for oil or gas, which might be regarded as prejudicial
22 by the other party. Thus, we submit that 83(3) protects
23 against this kind of conduct taking place, and Guyana violated
24 its duty under Article 83(3) by authorizing the drill rig to
25 operate in the area of overlap.

16:36:21 1 Now, if I understand counsel for Guyana correctly--and
2 this is at the transcript at page 584--he argued that, since
3 Guyana had waited a long time trying to get Suriname's
4 agreement to joint exploration in this area of overlap, that
5 meant Guyana could unilaterally decide on drilling. We think
6 that's a rather astounding and astonishing claim. It isn't
7 supported either in the Law of the Sea Convention or in any
8 Article referred to by Guyana or in any other scholarly
9 commentary.

10 For example, if you look at a recent article written
11 by David Ong about Article 83(3), he indicates that it is an
12 Article that contains general obligation to cooperate. He says
13 the substantive content of this cooperative requirement is
14 uncertain, but he ultimately concludes that the only recourse
15 available, should negotiations prove fruitless, is the resort
16 to dispute-settlement procedures under Part XV, meaning that
17 Guyana should have pursued dispute settlement if they felt
18 negotiations were fruitless, not that they should go out and
19 engage in unilateral drilling. Indeed, I think counsel for
20 Guyana tripped himself up on his own argument; for if Suriname
21 was obligated to seek provisional measures from ITLOS prior to
22 deploying the patrol boats, which is what I think their
23 argument was, then surely Guyana was obligated to pursue
24 dispute settlement prior to unilaterally deciding to deploy
25 this rig into the area of overlap. By failing to do so, Guyana

16:38:08 1 violated its obligations under the Law of the Sea Convention.

2 That was a wrongful act.

3 Now, we maintain that even if you think that
4 Suriname's conduct was somehow wrongful in June of 2000, which
5 we maintain it was not, even then the action does not engage
6 Suriname's state responsibility since it was a lawful
7 countermeasure to Guyana's prior wrongful act. Now, Guyana has
8 asserted that the law on countermeasures does not permit a
9 response that constitutes a use of force. Well, with respect,
10 we don't think that this Tribunal is facing that situation in
11 that there was no use of armed force here.

12 Moreover, if we understand Guyana's argument
13 correctly, they are saying that they can prevail on submission
14 3, even if they don't prove that there was a use of force or a
15 threat to use force. I refer you to the transcript at page
16 575, lines 20 to 25.

17 So, they're saying that they don't even necessarily
18 have to show a use of force. Our reference to countermeasures
19 is speaking generally to the proposition that Suriname engaged
20 in conduct in response to prior wrongful conduct, and so, at
21 best, the Tribunal is faced with a situation where, in response
22 to a wrongful act, Suriname engaged in a mission that sought to
23 affirm a right that was being unjustly denied. Again, the
24 Corfu Channel Case is of interest here.

25 As I noted before, the United Kingdom made an express

16:39:49 1 promise to use force against Albania if its passage through the
2 Corfu Channel was challenged, and then the U.K. did, in fact,
3 send four warships through the Channel. The Court recognized
4 this threat in its judgment. It says here the diplomatic
5 correspondence from the United Kingdom made this threat and
6 ended with this warning that this threat would occur.

7 But the Court then goes on to say that the United
8 Kingdom's express threat to use force--express threat to use
9 force--one that was clearly understood by the Albanian coast
10 guards, was legal--was legal--because it sought to vindicate
11 Britain's right to innocent passage. "The legality of this
12 measure taken by the United Kingdom cannot be disputed,
13 provided it was carried out in a manner consistent with the
14 requirements of international law. The mission was designed to
15 affirm a right which had been unjustly denied. We submit that,
16 if you get to this point, Suriname was affirming a right that
17 was being unjustly denied."

18 Let me turn to my last point with respect to
19 submission number 3, which is that even if Guyana prevails on
20 the merits of submission 3, it is not entitled to damages. We
21 have outlined in our Memorial in some detail why the evidence
22 presented to you with respect to damages in this submission is
23 quite flawed. The information there is quite speculative, it
24 is quite lacking in detail. When you get down to the bottom of
25 it, what they are basically trying to argue is that Guyana is

16:41:40 1 entitled to recover for expenses that were not incurred by
2 these oil companies; that is, by the oil companies not going
3 into the disputed area and not expending some \$30 million, that
4 somehow that means Guyana has been injured \$30 million. It
5 doesn't make any sense, and we encourage you, if you get to
6 this point, to read closely our arguments in that regard
7 because we just don't think that they can establish that any
8 damages to Guyana occurred.

9 Mr. President, that concludes my argument with respect
10 to submission 3. Unless there are any questions, I will move
11 on to submission number 4.

12 PRESIDENT NELSON: I give the floor to Professor Smit.

13 ARBITRATOR SMIT: Professor Murphy, I'm sure that the
14 day you left Columbia Law School you blessed the day because
15 you would no longer be subject to my nasty inquiries.

16 PROFESSOR MURPHY: Many students feared your
17 inquiries.

18 ARBITRATOR SMIT: Absolutely. But now you have chosen
19 to subject yourself again.

20 PROFESSOR MURPHY: I'm afraid so.

21 ARBITRATOR SMIT: I have wondered about one thing. If
22 the Tribunal were to conclude that--let me phrase it that
23 way--is the exercise of jurisdiction by the Tribunal dependent
24 on whether there was a failure of trying to reach agreement
25 before?

16:43:18 1 PROFESSOR MURPHY: Yes.

2 ARBITRATOR SMIT: All the cases you have cited the
3 courts rule they were the necessary attempts to reach agreement
4 and therefore it had jurisdiction. We did not see a case in
5 which the Court said they didn't try to reach agreement and,
6 therefore, we have no jurisdiction. And if we were to decide,
7 we wouldn't reach any of the other points that you had
8 discussed.

9 PROFESSOR MURPHY: If you were to find that there were
10 no negotiations on the submission prior to the point at which
11 it was filed?

12 ARBITRATOR SMIT: Right, and that the Tribunal,
13 therefore, has no jurisdiction.

14 PROFESSOR MURPHY: Yes, that's absolutely correct.

15 ARBITRATOR SMIT: That is your position?

16 PROFESSOR MURPHY: That is our position.

17 ARBITRATOR SMIT: But you have not cited any authority
18 in favor of that proposition.

19 PROFESSOR MURPHY: Yes, I fully accept, Professor
20 Smit, that in the cases that occurred to date--and there is
21 only a handful because the Convention has been in force for
22 only a certain number of years and these disputes are starting
23 to bubble up, but I fully accept that in the cases where this
24 issue has arisen, the evidence established that there were
25 diplomatic communications between the two governments about the

16:44:21 1 Law of the Sea Convention having been violated and
2 identification of the Articles that were allegedly violated,
3 and therefore the tribunals found that the jurisdictional
4 requirement had been met.

5 So, I can't rely on those cases for the proposition
6 that, in our case, there are or are not diplomatic
7 negotiations, but I can point to the evidence in our case and
8 say that there are no such negotiations. And given that those
9 other tribunals saw Article 283 as a relevant issue--it wasn't
10 that they looked at the Article and said, "Well, it does say
11 there need to be expeditious consultations, but that's not
12 really so important." They thought it was important. They
13 looked at it, and they then looked at the evidentiary record
14 before them, and they said, "The record shows there were
15 negotiations."

16 Now, it is interesting that in the boundary
17 delimitation context, the fact of lengthy negotiations about
18 the boundary, perhaps that doesn't require the two sides
19 talking about the Law of the Sea Convention because I think the
20 Barbados decision stands for the proposition that you can
21 assume that, as a course of these long 1980s, 1990s discussions
22 about delimitation, that the parties had negotiated to the
23 extent one could do it, and there didn't need to be some second
24 stage of negotiations occurring where they talk about the Law
25 of the Sea Convention, but with respect to other kinds of

16:45:50 1 Articles, like Article 301 at issue here, I think it is clearly
2 the case that there is expected to be a first step--that's how
3 the Barbados Tribunal put it--a first step in negotiations. We
4 submit there is nothing in the record showing that first step
5 occurred, and therefore no jurisdiction and therefore you don't
6 get to any of the other issues I'm arguing.

7 ARBITRATOR SMIT: Thank you.

8 PRESIDENT NELSON: Please continue.

9 PROFESSOR MURPHY: Thank you, Mr. President.

10 With respect to submission number 4, again we have a
11 basic allegation from Guyana that Suriname violated the Law of
12 the Sea Convention by failing to make every effort to enter
13 into provisional arrangements of a practical nature and by
14 jeopardizing or hampering the conclusion of a final
15 delimitation agreement.

16 Now, this submission also has multiple defects, and I
17 believe that there are about six of them that I have
18 identified. Fortunately, I will be able to go through these, I
19 think, fairly quickly.

20 First, I'm going to talk about what is required and
21 what is not required in Articles 74 and 83. Second, I'm going
22 to talk a little bit how it's only conduct postdating
23 August 1998 that is relevant in this matter. Third, I will
24 demonstrate that Suriname did engage in a good-faith effort to
25 enter into a provisional arrangement and took no action to

16:47:19 1 jeopardize a final agreement. Fourth, by contrast, Guyana did
2 not engage in good-faith efforts to reach a provisional
3 arrangement. Fifth, we submit that by trying to exploit the
4 oil resources, Guyana jeopardized the reaching of a final
5 agreement in violation of the Law of the Sea Convention. And
6 then finally, if, for some reason Guyana prevails on the
7 merits, they have proven no damages in this submission.

8 So, let me turn to the first point of what is required
9 and what is not required by Articles 74(3) and 83(3). Well,
10 this language I'm sure is quite familiar to the Tribunal, and I
11 just want to focus on the fact that there's basically two
12 components here pending a final delimitation agreement. In a
13 spirit of understanding and cooperation, the parties are
14 supposed to make every effort to, and there is two things,
15 enter into provisional arrangements of a practical nature and
16 during the transitional period not to jeopardize the hampering
17 of a final agreement.

18 These are interesting provisions. I would submit that
19 key characteristics are that they do not provide a concrete
20 obligation to actually conclude a provisional arrangement or to
21 actually conclude the final delimitation agreement. That's not
22 what is being stated here. There is no specific course of
23 action being called for, certainly not in the sense of
24 requiring the states to conclude particular types of
25 agreements. States are free to develop their own negotiating

16:48:55 1 positions and to press them in the negotiations. Indeed, the
2 use of the word arrangement itself signals that a binding
3 agreement is not even necessarily what is at issue.

4 So, we have argued in our pleadings, this is best
5 viewed as an agreement to agree. That is, it is an obligation,
6 but it leaves considerable discretion to states in how they
7 pursue and develop these transitional arrangements, and it
8 cannot be viewed as a violation of this type of obligation to
9 reject the preferred outcome of another party.

10 The negotiating history of paragraph three supports
11 this basic proposition, and you will have seen this slide
12 before when Professor Oxman did his presentation. You see
13 there that paragraph three did go through some changes in the
14 course of the negotiations. The first formula you have there
15 from the 1975 draft is basically the pro-equidistance states
16 formally. Note there that there is no requirement of any kind
17 that one conclude an arrangement or even try to conclude an
18 arrangement. That was not in that draft. In the 1976
19 draft--this is the pro-equity states formula--you will see here
20 that there is an explicit requirement that you conclude a
21 provisional arrangement. States "shall" make provisional
22 arrangements.

23 Then you get to what ultimately became paragraph three
24 of the Treaty, and the implication of the ultimate formulation
25 in light of the negotiating history is that the formula that

16:50:38 1 would have required states to enter into a provisional
2 arrangement was not adopted. Instead, you have text that
3 basically encourages states that enter into provisional
4 arrangements and not jeopardize a final delimitation agreement.

5 So, I just raise this to note that the drafters
6 expressly eschewed an approach that compelled the state to
7 enter into a provisional arrangement.

8 Now, other tribunals looking at this, tribunals and
9 scholars looking at this, have made the same type of
10 interpretation that I'm placing before you. So, for instance,
11 with respect to the issue of provisional arrangements,
12 Professor Cameron recently wrote in the "International
13 Comparative Law Quarterly," that Article 83(3) does not impose
14 an obligation to in fact conclude a provisional arrangement.
15 Rather, this is in the nature of an agreement to agree, and if
16 the agreement cannot be reached on a provisional arrangement,
17 that alone would not be a violation.

18 With respect to the final delimitation agreement, you
19 can look at the Cameroon-Nigeria case where similarly the Court
20 said that the failure to reach a final delimitation agreement
21 doesn't mean there has been a violation of the Articles; that,
22 instead, there is basically an obligation to negotiate in good
23 faith.

24 So, the bottom line of all this is that there is an
25 obligation to engage in good faith negotiations. We accept

16:52:12 1 that, but we believe that that is established if one sees a
2 party attempting to enter into discussions with the other party
3 advancing its position. It doesn't require you to accept the
4 other side's position or even meet somewhere in the middle. It
5 just requires the two States to be engaging in some level of
6 discussions that are meaningful and that do address the issues
7 between them.

8 Let me move, then, to my second point, which is that
9 only conduct by Suriname and Guyana on this issue that
10 postdated August 1998, is what's relevant for the Tribunal. We
11 made this argument in the Rejoinder. The Convention only
12 entered into force as between Guyana and Suriname in August of
13 1998, and under standard international law, whether we are
14 talking customary international law or whether we are talking
15 about the Vienna Convention on the Law of Treaties Article 28,
16 which is about to pop up on the screen. You cannot
17 retroactively apply a treaty obligation to facts that arose
18 before the Treaty entered into force, and so our basic argument
19 here is that since the Treaty only entered into force in August
20 of 1998 as between these two States, then the only factual
21 events relevant in determining a violation under the Treaty are
22 those events that are occurring in the post-August 1998 period.

23 We believe that we have demonstrated in our
24 pleadings--and I'm not going to go into this in any detail, but
25 we believe we demonstrated in our pleadings--that prior to

16:53:56 1 August 1998, we fully engaged in negotiations with the
2 Government of Guyana, but I'm going to leave that aside because
3 I think the only relevant issue is what happened after August
4 of '98.

5 So, let me move on to my third point. At all
6 times--at all times--after August of '98, Suriname engaged in a
7 good faith effort to develop a provisional arrangement, and it
8 at no time undertook action that would jeopardize the reaching
9 of a final agreement. There is simply no evidence in the
10 record that Suriname sought to frustrate the conclusion of a
11 provisional arrangement or a final agreement.

12 Now, we in our pleadings have argued this, and I'm
13 just going to put up on the screen at slide 56 the places in
14 our pleadings where we have run through the negotiations that
15 we engaged in, and in those pleadings there are, of course, a
16 number of Annexes cited.

17 I have also tried to assist the Tribunal by placing at
18 Tab 5 of your hearing folder a table of the evidence regarding
19 these negotiations because you will find there, unlike the
20 earlier table I referred to, you will find there a significant
21 number of meetings that have occurred of various kinds.

22 Now, obviously the two parties disagree about what was
23 going on in these post-'98 negotiations. Guyana apparently
24 thinks that Suriname was simply stonewalling. Suriname sees
25 these negotiations as suffering from Guyana's single-minded

16:55:36 1 effort to get Suriname to accept, the oil concessions that
2 Guyana had already issued in the disputed area and suffered
3 from Guyana's unwillingness to share information from Suriname
4 that would have allowed Suriname to understand what these
5 concessions were. That's the Suriname perspective.

6 We also think that rather than stonewalling, the
7 record shows that we were trying, Suriname was trying to
8 understand the extent of the numerous concessions granted by
9 Guyana in the area of overlap, what the implications were of
10 those concessions. We were asking for seismic information. We
11 were asking for copies of concession agreements such as the
12 agreement with CGX.

13 In order for Suriname to engage in a meaningful
14 dialogue about whether we would do joint exploration of some
15 sort, Suriname felt it needed information. It needed
16 information before it agreed to do things, such as accept the
17 concessions that had already been issued by Guyana.

18 We were also trying to find our way forward in the
19 aftermath of the CGX incident, which was a politically
20 sensitive thing, and it was difficult to do that in this
21 context.

22 These were very difficult politically sensitive
23 discussions that were taking place, and looming over all of
24 this, as you will see in the record, was the fact that there
25 were disagreements between the two States about other aspects

16:57:14 1 of the boundary and that that was also posing difficulties for
2 both sides.

3 Now, the Tribunal will obviously wish to review the
4 evidence for itself and reach its own conclusion about whether
5 one side was stonewalling or the other, and I won't try to go
6 through that, but I would like to make four observations as you
7 think through this record. First, when you look through all of
8 the Annexes listed in that table that I have provided to you,
9 you will find all sorts of meetings taking place, meetings at
10 the Presidential level, meetings at the level of Minister,
11 meetings of a Joint Technical Committee, meetings of the
12 Guyana-Suriname Border Commission and its subcommittee,
13 meetings at a CARICOM summit, meetings in the context of
14 facilitation by the Prime Minister of Jamaica acting as a
15 CARICOM facilitator.

16 So, the idea that Suriname was not engaged in
17 negotiations is completely wrong. Suriname and Guyana were
18 engaged in negotiations in many different kinds of ways.

19 My second observation is that Suriname was open to
20 whatever process might help resolve the dispute. In July 2000,
21 the CARICOM negotiator--again, the Prime Minister of
22 Jamaica--proposed a Memorandum of Understanding for resolving
23 the boundary problem. Suriname accepted this Memorandum of
24 Understanding, coming from a neutral facilitator. Guyana did
25 not. This is in Suriname's Counter-Memorial, Volume 2, Annexes

16:58:52 1 6 and 7. The MOU isn't there, but the letters between Suriname
2 and the Prime Minister of Jamaica make this clear. We think
3 this is an important factor, in that the MOU was the proposal
4 of the neutral entity seeking to get the two countries
5 together. Suriname accepted it. Guyana did not.

6 My third observation is that the negotiations that
7 unfolded were not fruitless. They did have meaning to them.
8 For instance, you have been presented before with the fact that
9 there was a declaration, a joint declaration, by the Presidents
10 of Suriname and Guyana, and you see a relevant passage up here
11 on the screen. The two Presidents reconfirm their belief that
12 the border issue should be resolved in a spirit of
13 understanding.

14 And then they noted with satisfaction the progress
15 made at the third meeting of the Joint Border Commissions.

16 So, what do you have here? You have the President of
17 Guyana in January of 2002 saying he's satisfied with the
18 progress of these negotiations. It's rather hard, we think, to
19 assert that this was stonewalling or this was fruitless if you
20 have the President of Guyana saying that these negotiations
21 were proceeding satisfactorily.

22 Now that's, of course, at a very high level. What's
23 happening at a lower level? Well, what you will find in the
24 evidence are things such as this example, Agreed Minutes of the
25 Fourth Joint Meeting of the Border Commission. This is

17:00:35 1 occurring in October of 2002. It's in Guyana's Memorial,
2 Volume II, Annex 87. What you see here is, and these are
3 agreed minutes. These are agreed by both sides. The two sides
4 agreed on the examination of a number of relevant issues for
5 which further detailed information would be required to
6 effectively move the process forward, and then it lists various
7 things, licenses issued, funding operation, environmental
8 protection. You can see it all there.

9 The two sides were obviously discussing serious issues
10 in attempting to find solutions to them.

11 My fourth observation is that an odd aspect of
12 submission number 4 by Guyana is that Guyana cannot, and has
13 not, established that Suriname somehow benefited from its
14 alleged thwarting of a provisional arrangement or a final
15 agreement. As Guyana's Foreign Minister noted in his opening
16 statement, there has been no developmental activity in the
17 disputed area, and, he said, it has not benefited either Guyana
18 or Suriname. So, we are left with Guyana arguing that Suriname
19 was simply stonewalling for no apparent reason. That is not
20 only highly implausible it's insufficient for Guyana carrying
21 its burden of proof.

22 Putting all this together, the myriad ways in which
23 the negotiations were occurring, the willingness of Suriname to
24 accept a third party facilitation, the substance of the
25 discussion that was occurring, and the lack of any established

17:02:18 1 motive for Suriname to thwart the negotiations, putting all
2 that together, we submit that this Tribunal cannot find that
3 Suriname was not engaging in good faith negotiations.

4 My fourth point with respect to submission number 3 is
5 that, by contrast, we believe Guyana did not engage in a good
6 faith effort to enter into a provisional arrangement. It
7 focused exclusively on securing rights for CGX to drill in the
8 area of overlap, and we submit that that violates Articles
9 74(3) and 83(3). If you go through the record, I think you
10 will find that after August '98, Guyana's sole focus was on
11 allowing Guyana's licensee, CGX, to resume its exploratory
12 drilling, that Suriname not disturb the terms and conditions of
13 Guyana's concessions, and that Suriname accept those
14 concessions. That's what was going on in this negotiation.
15 And as such, to the extent that either side is stonewalling or
16 making it impossible to reach some sort of provisional
17 arrangement, we submit that it is Guyana that has failed in
18 that regard.

19 Consequently, we did, as one of our submissions,
20 maintain that the Tribunal should issue a declaration that
21 Guyana violated its obligations to Suriname by failing to make
22 every effort post-August '98 to enter into a provisional
23 arrangement.

24 Now, my fifth point here is that in seeking to exploit
25 the oil resources in the area of overlap, we believe that

17:04:04 1 Guyana also violated Articles 74(3) and 83(3) by jeopardizing
2 the reaching of a final agreement. I won't repeat all the
3 points that I made before about how you can't go into this area
4 of overlap and begin drilling. That's got to be a violation of
5 these Articles. Yet, those same points establish that
6 Suriname's conduct not only was a lawful countermeasure, but
7 that there was this preceding wrongful act, and that preceding
8 wrongful act was a violation of these Articles of the
9 Convention. Again, we have asked in our submissions to you
10 that you find and declare that Guyana breached its legal
11 obligations by thwarting or hampering the conclusion of a final
12 delimitation agreement by attempting to engage in this drilling
13 activity.

14 Sixth and final point on submission number 4, even if
15 Guyana somehow miraculously prevails on the merits with respect
16 to this submission, Guyana has proven no damages of any kind.
17 They submitted no evidence on this at all. They have not even
18 asked the Tribunal for a specific amount of damages, so we
19 submit that such a generalized request for damages, cannot be
20 taken seriously and should be dismissed.

21 Mr. President, that concludes my presentation with
22 respect to submissions 3 and 4. Unless you have any questions,
23 that concludes Suriname's presentation for today.

24 PRESIDENT NELSON: Thank you, Professor Murphy.

25 Any questions?

17:05:48 1 I give the floor to Professor Smit.

2 ARBITRATOR SMIT: Professor Murphy, in your Rejoinder
3 you asked for a declaratory judgment, but no affirmative
4 relief; right? Although it doesn't say specifically that you
5 abstained from asking for affirmative relief. You just asked
6 for a declaratory judgment.

7 PROFESSOR MURPHY: That's correct.

8 ARBITRATOR SMIT: What is the appropriate legal basis
9 for this Tribunal to give you a declaratory judgment in a
10 situation in which, if you wished, you could ask for
11 affirmative relief? I'm referring to maybe domestic court
12 cases in which the courts have said, "We don't give declaratory
13 judgments as an exercise in theoretical considerations and
14 speculation." If you have a claim, make the claim. Don't ask
15 for declaratory relief without making the claim. If you say
16 you want declaratory relief and you don't make a claim for
17 affirmative relief because you think that the appropriate
18 remedy is to give a declaratory relief without affirmative
19 relief, that may be something for the Tribunal to consider, but
20 I was just a little bit struck by the fact that you asked for
21 declaratory relief in a situation in which you could ask for
22 appropriate affirmative relief.

23 PROFESSOR MURPHY: Thank you, Professor Smit.

24 Suriname has approached this proceeding in the hope
25 that it will not aggravate the situation between the two

17:07:37 1 countries as many of the speakers before have said. These are
2 two countries that in many respects are friendly and wish to
3 live in peace for many years to come, and it was our belief
4 that it was appropriate to the extent that the Tribunal was
5 going to be addressing whether or not Articles 74(3) and 83(3)
6 had been violated, to the extent that it was going to be doing
7 that, it would be appropriate for it to make a statement
8 regarding our belief that Guyana had engaged in the violations.
9 It is the case that International Tribunals have issued
10 statements that are basically declaratory in nature without at
11 the same time providing other forms of reparation, damages,
12 compensation, things of that sort. We believe it's perfectly
13 appropriate to do it in this case. There are examples of this
14 that if it's helpful for to us provide it to you, we are happy
15 to do so.

16 And it may be helpful in terms of the development of
17 the Convention in its early years for the Tribunal to speak to
18 that issue, but we are in your hands. If there is a
19 complication because of the way we framed the request for
20 relief, we accept that, but our feeling is that it is perfectly
21 appropriate to ask for this kind of relief as we have done it.

22 ARBITRATOR SMIT: Thank you.

23 PRESIDENT NELSON: I give the floor to Dr. Hossain.

24 ARBITRATOR HOSSAIN: Mr. Murphy, you mentioned that,
25 in respect of this concession, Suriname had not earlier been

17:09:24 1 notified that such drilling was about to take place?

2 PROFESSOR MURPHY: Yes, that's correct. We had no
3 notification.

4 ARBITRATOR HOSSAIN: Okay. My more general question
5 is this morning also there was a question. There were no
6 protests from Suriname's side. Now, these concessions that
7 were being granted, do you have evidence on the record that
8 protests, in fact, were lodged by Suriname whenever they became
9 aware that concessions were being granted in this area which
10 they regarded as the area of overlap?

11 PROFESSOR MURPHY: You know, I think, unfortunately, I
12 should defer that to one of my colleagues. The issue of
13 protest to the concessions once the concessions were being
14 issued was addressed by Mr. Colson this morning. He will be
15 addressing you tomorrow and could revisit that issue. For
16 purposes of submissions 3 and 4, our position is that the fact
17 that there was no notification to us of the effort to engage in
18 this drilling speaks volumes, and I'm talking about diplomatic
19 notification. Obviously, ultimately, Suriname became aware
20 that something was up due to the press, but it was not coming
21 from the Government of Guyana. The issue of protests to the
22 concessions as they were occurring, we didn't think was
23 directly relevant to these particular submissions.

24 ARBITRATOR HOSSAIN: If I could ask one more question.
25 In this case you just said there was no formal notification of

17:10:53 1 the drilling, but presumably you were aware of this activity
2 because the patrol boat had gone, and when it came to your
3 knowledge that this was going, and presumably the drilling rig
4 would have taken some time to start positioning itself and so
5 on, so during that time was there no exchange of correspondence
6 saying this has come to our notice and we think it shouldn't be
7 happening?

8 PROFESSOR MURPHY: I think the record before you shows
9 that in the May-June time frame, there began to be certain
10 reports circulating through the media that were coming to the
11 attention of the Government of Suriname. So, again, it was not
12 the Government of Guyana telling Suriname anything, but it was
13 the Government of Suriname becoming aware that something was
14 up. They didn't know exactly where--I mean, the reports were
15 that it would be in this area of overlap. They didn't know
16 exactly when, but they began to get certain reports and they
17 tried to piece things together. They weren't getting
18 information from the Government of Guyana. They ultimately
19 sent out the surveillance aircraft at the end of May and early
20 June. That aircraft ultimately spotted the rig, and that's the
21 point at which the patrol boats could go out and find the rig.

22 ARBITRATOR HOSSAIN: Thank you.

23 PRESIDENT NELSON: Thank you very much, Professor
24 Murphy.

25 PROFESSOR MURPHY: Thank you, Mr. President.

17:12:17 1 PRESIDENT NELSON: These hearings have come to an end
2 today. We shall resume them tomorrow morning at the usual
3 time. Thank you.

4 (Whereupon, at 5:12 p.m., the hearing was adjourned
5 until 9:30 a.m., the following day.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN