In the matter of an arbitration between

BARBADOS

and

THE REPUBLIC OF TRINIDAD AND TOBAGO

Before:

JUDGE STEPHEN M SCHWEBEL (The President)

PROFESSOR VAUGHAN LOWE

MR IAN BROWNlie CBE QC

PROFESSOR FRANCISCO ORREGO VICUNA

SIR ARTHUR WATTS, KCMG QC

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PROCEEDINGS - DAY ONE

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ATTENDANCES

Barbados was represented by:

Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General and Minister of Home Affairs, Agent for Barbados
Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham & Watkins
Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
Professor Michael Reisman, Counsel and Advocate
Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus Deringer, Paris
Sir Henry Forde QC, Counsel and Advocate
Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins
Mr Adrian Cummins QC, Counsel
Dr David Berry, Counsel
Ms Megan Addis, Counsel, Latham & Watkins
Ms Teresa Marshall, Permanent Secretary, Foreign Affairs
Mr Edwin Pollard, High Commissioner for Barbados in London
Mr Anthony Wiltshire, Minister/Counsellor at the Barbados High Commission, London
Mr Francois Jackman, Senior Foreign Services Officer
Mr Tyronne Brathwaite, Foreign Services Officer
Mr Christopher Parker, Fisheries Biologist, Fisheries Division
Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations, BARNUFO
Mr Anderson Kinch
Mr Oscar Price, Information Technology Support, Latham & Watkins
Ms Philippa Wilson, Information Technology Support, Latham & Watkins.
Mr Dick Gent, UK Hydrographic Office
Dr Robin Cleverly, UK Hydrographic Office.
Ms Michelle Pratley, Assistant, Latham & Watkins
Ms Claudina Vranken, Assistant, Latham & Watkins
The Republic of Trinidad and Tobago was represented by:

Senator the Hon John Jeremie, Attorney-General, Agent
Mr John Almeida, Co-Agent, Messrs Charles Russell
Mr Laurie Watt, Co-Agent, Messrs Charles Russell
Ms Lynsey Murning, Charles Russell
Professor James Crawford SC
Professor Christopher Greenwood, CMG, QC, Counsel
Mr Samuel Wordsworth, Counsel
Ambassador Phillip Sealy, Trinidad and Tobago Ambassador to the United Nations
Mr Gerald Thompson, Director, Legal Affairs, Ministry of Foreign Affairs
Mr Eden Charles, Foreign Service Officer at the United Nations, Ministry of Foreign Affairs
Mr Martin Pratt, International Boundaries Research Unit
Mr Francis Charles, Expert
Dr Arthur Potts, Ministry of Fisheries and Agriculture
Mr Charles Sagba, Ministry of Foreign Affairs
Mr Andre Laveau, Ministry of Foreign Affairs
Ms Glenda Morean, High Commissioner for Trinidad and Tobago

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell
THE PRESIDENT: Good morning, ladies and gentlemen. It is a privilege to open this first session of the arbitral proceedings between Barbados and Trinidad and Tobago. With me are Sir Arthur Watts, Professor Vaughan Lowe, Professor Orrego Vicuna and Professor Emeritus Ian Brownlie.

I should first like to call on the distinguished agent of Barbados, Deputy Prime Minister and Attorney General Mottley, who will introduce her team.

THE HON MIA A MOTTLEY: Thank you, Mr President. I have the honour of leading the team from Barbados, which includes my co-agent Mr Robert Volterra, Professor Sir Elihu Lauterpacht, Professor Michael Reisman, Mr Jan Paulsson, Sir Henry Forde of Barbados, Mr Stephen Fietta, Mr Adrian Cummins of Barbados, Dr David Berry of the University of the West Indies, Ms Megan Addis, Ms Michelle Pratley of Latham and Watkins, Ms Claudina Vranken, Latham and Watkins, Ms Teresa Marshall, Permanent Secretary, Foreign Affairs, Mr Edwin Pollard, High Commissioner for Barbados in London, Mr Anthony Wiltshire, Minister/Counsellor, Barbados High Commission, Mr Francois Jackman, Senior Foreign Service Officer, Mr Tyronne Brathwaite, Foreign Services Officer, Mr Christopher Parker, Fisheries Biologist in the Fisheries Division, Ms Angela Watson, the President of the Barbados Association of Fisherfolk Organisations, Mr Anderson Kinch, a fisherman of Barbados of long standing, Mr Oscar Price, Ms Phillipa Wilson and Mr Dick Gent of the UK Hydrographic Office and Dr Robin Cleverly, UK Hydrographic Office.

Thank you, sir.

THE PRESIDENT: Thank you. I call now on the distinguished agent for Trinidad and Tobago, the Attorney General, Mr John Jeremie.

MR JEREMIE: Thank you very much, Mr President, members of the Tribunal. Good morning. I am the Attorney General of Trinidad and Tobago and I have the honour to appear before you in these proceedings as agent of Trinidad and Tobago.

Can I join my learned friend and colleague, the Hon
Attorney General of Barbados, Mia A Mottley, in saying that it is an honour - I say a mixed one - for me and my colleagues in the Trinidad and Tobago team to appear before you on behalf of the Republic of Trinidad and Tobago. Today is, of course, Barbados' day as claimant in these proceedings for opening its case. So the task that I have to perform at this stage is to introduce you to the members of the team representing Trinidad and Tobago.

Mr Laurie Watt and Mr John Almeida are of the firm of Charles Russell. They are joint co-agents. Also with me are Ambassador Philip Sealy, Ambassador of Trinidad and Tobago to the United Nations, Professor James Crawford, Senior Counsel, Professor Christopher Greenwood, QC and Mr Samuel Wordsworth. They will be assisted by Mr Gerald Thompson, the legal advisor of the Ministry of Foreign Affairs of Trinidad and Tobago. Mr Francis Charles, Dr Arthur Potts, Mr Charles Sagba, Mr Martin Pratt of the International Boundaries Research Unit of Durham University and Ms Lynsey Murning of Charles Russell.

Mr President, as I have said before, it is a privilege for us all to be here, but, when I spoke of it being a mixed honour for me this morning, what I meant is that we were brought here somewhat peremptorily, in my view, but we are here as we should be to defend the vital interests of the state of Trinidad and Tobago before this distinguished Tribunal. We look forward keenly to presenting Trinidad and Tobago's case to you later this week. Until then I need take no more of your time. Thank you very much.

THE PRESIDENT: Thank you. May I on behalf of the Tribunal welcome you all very warmly. We apologise for the fact that the room is a bit small. I hope that you can all find seats or else we will have a few more seats brought in. Certainly no one will wish to stand for these proceedings, however engrossing they prove to be.

I call now on the agent or co-agent, as the case may be, of Barbados, to begin the presentation of Barbados.

THE HON MIA A MOTTLEY: Thank you very much, Mr President,
members of the Tribunal, the Honourable John Jeremie, my learned friend and distinguished colleague the Attorney General from Trinidad and Tobago and his team. It is honour for me to appear on behalf of the Government and people of Barbados, representing our case in this matter.

I wish at the outset to take this occasion to convey my very best regards to the team of Trinidad and Tobago and, indeed, to the people of Trinidad and Tobago, a country which we have formally come to call the "Twin Island Republic". I want to begin by thanking you, Mr President, and the members of you Tribunal for having agreed to undertake this task and, indeed, for having allowed the conduct of these proceedings to be as swift as it has been over the course of the last 20 months. My country considers this to be of the utmost importance to its present and future development. I know that we have placed this dispute with Trinidad and Tobago - and it is no more than a dispute - into the most capable hands which will fashion, as you have before, an equitable solution which the Law of the Sea requires. Indeed the Caribbean and the entire international community as a whole has taken a keen interest in this process which will have, I believe, a determining effect on the practice of maritime boundary delimitations in other regions of the Caribbean where much still remains to be accomplished.

This is the first time that Barbados finds itself involved in an arbitration of this kind, and we have not come here lightly. Barbados' foreign relations over the course of time as a country has been one that has been marked by an assiduous pursuit of negotiated agreement, one that has been marked by consensus and the pursuit of consensus and one that is rooted in regional unity. Barbados indeed has been a founding member of the three organisations in our region; the now defunct Federation of the West Indies, CARIFTA, and its successor body the Caribbean Community, which is a community of the sovereign nations of the English speaking Caribbean, Haiti and Surinam. Domestically it is generally recognised, and we
take pride in this, that Barbados is a society known for its respect for human rights and the rule of law. We believe that our political and economic progress and our social stability are rooted in these factors. Indeed, I say further that it is our belief that it is only through the rule of law that small countries can gain any sort of progress in an international community where otherwise might would be brutish and unfortunate in respect of the activities that it perpetrates against small countries.

In summary, Mr President, this is a perspective that Trinidad and Tobago I believe is likely to share. Barbados says what it does and does what it says. Indeed, to use the words of another Caribbean neighbour, a colloquial expression, we not only talk the talk but we walk the walk.

Mr President, for the benefit of members of the Tribunal and yourself it may be useful for me just to recite briefly some facts on Barbados. Barbados is a small island developing state. Our land territory is 430 square kilometres, very small, a population of 270,000 people however, making it one of the most densely populated countries in the world. Its principal agricultural product today continues to be sugar, that which was predominant throughout its modern settlement in the early 17th century until now. However, sugar production has been on the decline, and indeed to date faces the additional pressure of a radical downward shift of prices in its principal export market, the European Union. The options for agricultural transformation are few in view of the limited land space which we have, and indeed the relatively poor soil quality.

Tourism over the course of the last two decades has taken over as a principal foreign exchange earner in the island, followed closely by the international financial services sector. But as we all know the cost of air travel and security concerns that face all of us across this globe have made this sector of tourism and its future more unpredictable. We therefore have recognised over the
course of the last decade that we must pursue economic
diversification as a matter of urgency to better secure
our sustainable development and to maintain the quality of
life which our people have come to enjoy. It is all the
more so now that we do so particularly since there is a
recognition in the last decade across the globe of the
inherent vulnerability of small states as they seek to
provide for themselves and their citizens, particularly in
relation to external economic shocks and natural
disasters. Given this, it is trite almost for me to
suggest that Barbados' maritime space assumes a critical
importance with regards to its natural resources, both
living and non-living. I will return in greater detail to
this. Indeed, it is fair to say that those of us in
Barbados believe that unless there is a appropriate
exploitation of all of our resources, land or maritime,
our gains and developments thus far will be in fact
marginalised in this century.

Our bond with Trinidad and Tobago, one of the
countries closest to us geographically, as well as
historically and in social terms, is a very tight one.
Let us be absolutely clear about that. It exists at all
levels, the political level, the economic level as well
as, perhaps, more importantly than anything else, at the
level of individuals and families. The movement between
the two countries is daily. Countless Trinidad and Tobago
companies successfully operate in Barbados and, indeed,
own many of the of major enterprises which function in
Barbados today. Countless Barbadians and Trinidadians
spend holidays in each other's countries and together
there has been a collaborative effort on the part of the
two private sectors as we seek now to move into the very
innovative and exciting Caribbean single market and
economy where we seek to develop and to bring to the
Caribbean one economy and one single market across 15
different countries, hitherto never existing before.

This present dynamism is rooted indeed in that long
history of association to which I referred. The fact that
we are committed to being able to work together as one in as many areas as possible. Barbados' written pleadings will speak to the strong history in more detail than I will at this stage. But suffice it to say that of particular interest in this context is that Barbadians were amongst the first in the 17th century to settle in Tobago. It also should be noted that in the 17th century for over 50 years Tobago was administered as a part of a quasi-confederal system with other islands of the Lesser Antilles by a Government who was based in Barbados. Those who visit Tobago will remark on its striking similarity to that of Barbados.

During this time in the immediate post-emancipation period in the 1830s and indeed well into the early 20th century, Barbadians emigrated in their thousands to Trinidad and Tobago.

Another interesting and relevant aspect of the special relationship which exists between our two countries - and I believe that Trinidad and Tobago does not contest this in their pleadings - is that Tobago's small inshore length fishery was developed from as early as 1962, largely with the help of Barbadian fisherfolk who taught the Tobagonians the very fine art which many do not know of de-boning flying fish and ensuring that it is, therefore, edible and in the process many of the Barbadians worked with the Tobagonians to establish themselves there.

These close relations between the two countries moved beyond the point of fishing and indeed of the Barbadians in Tobago in 1962 helping with the fishing. After the independence of the two countries in 1962 for Trinidad and Tobago and 1966 for Barbados, it was just under 15 years when the two Prime Ministers, then Honourable Dr Eric Williams, commonly known as the Father of Independence in Trinidad and Tobago, and the Right Honourable Tom Adams, got together and signed the Economic Co-operation Agreement in 1979. Another one indeed was signed later in 1987. These agreements underlined the close relations.
that the two countries enjoyed and their political and
economic interdependence. Both agreements referred
explicitly to co-operation in the area of marine affairs
and energy. Indeed, were testament to the goodwill of
both parties to deepen the relationship in these two areas
of critical importance to them both. Barbados and
Trinidad and Tobago have therefore had these issues on a
common agenda for over 25 years. We felt, as we do now,
that after these co-operation agreements there was a
natural journey towards the development of a fisheries and
maritime boundary agreement. Indeed, intense interrelated
negotiations took place between 2000 and 2003 under the
distinguished leadership of our former Prime Minister of
Barbados, the late Sir Harold St John, who we regret is
unable to be here with us today, given his intimate
involvement in this process. Unfortunately, these
negotiations rather than bringing us together were to
undermine the gulf which separated the two countries,
particularly with regard to the position of the fisheries
and the related issue of maritime boundaries. During
these meetings it was evident that the parties were not in
agreement, whether it was as regards the consequences of
the interrelated nature of fisheries and boundaries or,
indeed, as to the methodology which was to be pursued.
While Barbados stated what methodology it applied,
Trinidad and Tobago did not reveal the materiality basis
of its own approach for the delimitation of the boundary.
Nonetheless, some nine meetings were held of formal
negotiations in order to try to bring the parties closer
together. These negotiations were effectively ended in
February 2004. The Prime Minister of Trinidad and Tobago
in a meeting with the Prime Minister of Barbados, in
Barbados, made it clear that the matter of the boundary
was, to use his words, intractable. Indeed, Prime
Minister Manning of Trinidad further invited us to take
Trinidad and Tobago to court. The Tribunal will no doubt
understand Barbados' grave concern when it learnt shortly
before this arbitration commenced that in August 2003,
even during the continuing round of negotiations between our two countries, Trinidad and Tobago had signed a letter of intent and a memorandum of understanding with Venezuela dealing with the issue of co-operation in exploiting hydrocarbons along the entirety of the Trinidad-Venezuela Agreement line, including possibly into Barbados' exclusive economic zone in an area beyond the 200 nautical mile arc of Venezuela and Trinidad and Tobago.

Reports began circulating shortly before this arbitration commenced that an agreement between those two states had been reached and the hydrocarbon activities would commence shortly thereafter. Indeed, in the weeks before the arbitration commenced, Trinidad and Tobago opened a new round of concession tenders in the disputed areas south of the median line. These reports led Barbados on 19th February 2004 to request Trinidad and Tobago to provide details of these agreements. Trinidad and Tobago has admitted in its Counter Memorial that it is currently planning to commence licensing for exploration and development in the disputed area in early 2006. I trust that this will not be in disregard of this arbitration and this Tribunal.

It should also be noted, Mr President, that shortly before the meeting of the Prime Ministers in February 2004, Prime Minister Manning publicly indicated that Trinidad and Tobago was considering referring the matter to CARICOM, that is the Caribbean Community to which I referred earlier. This clearly reflected an understanding on the part of Trinidad and Tobago that there was a dispute and that they were indeed contemplating the use of third-party dispute resolution. These, Mr President, were the circumstances that have led us to this present arbitration.

I now turn, however, to the substantive part of my opening and, with your leave, will first address very quickly the subject of Barbados' traditional fisheries off Tobago.

Mr President, our traditional fisheries have existed
off Tobago for some time. Most coastal states around the
world have fishery sectors. Barbados is no exception.
However, there is something that sets the Barbadian
fisheries sector and consequently the Barbadian fish
consumer apart from all others in the Caribbean and dare I
say even the rest of the world, that is the four-wing
flying fish. The fish is eaten in significant quantities
in Barbados so much so that Barbados is known throughout
the world as the "land of the flying fish". In the 19th
century here in Europe the flying fish were referred to as
the "Barbados Pigeon". Indeed, it is a staple of the diet
of Barbadians not just now but for centuries since modern
settlement. Merely by way of illustration, and my
colleagues will later speak in greater detail to this, you
find the flying fish on our one dollar coin, on our bank
notes. You find that our national dish is a dish called
"Flying Fish and Cou Cou" and for those who do not know
Cou cou, it is a form of polenta. It tastes a little
better than polenta, but nevertheless similar, being made
from cornmeal.

It is also a fish associated with the dolphin, what
is commonly known now in North America and Europe as
"mahi-mahi" and not "Flipper". The dolphin is another
pelagic species that, in fact, follows the flying fish and
preys upon the flying fish and the dolphin is also found
on the coat of arms of the nation of Barbados. I am not
going to go into the detail of the fisheries evidence,
because my learned friends, Professor Michael Reisman,
Stephen Fietta and, of course, Sir Henry Forde, who sits
here at the front table with me, who is a distinguished
former Attorney General and Minister of Foreign Affairs
for Barbados, and who for over 32 years — I believe the
longest serving Member of Parliament in the 20th century
would have represented a constituency in which fishing
really is one of the major activities in the parish in
which his constituency is found. Rather, Mr President,
allow me to adduce a short series of facts which will
demonstrate the traditional and artisan nature of
Barbados' fishing practices, the catastrophic consequences that will ensue if these practices were abruptly terminated, as well as the need for guaranteed access to the fisheries resources which is essential if an equitable solution is to be reached. The evidence clearly demonstrates the existence of a long tradition of Barbadian fishing, not just the flying fish, as I said, but also other pelagic species and, indeed turtles off Tobago. A remarkable treaty which you will hear more of dated 1749 between the Governor of Martinique and the Governor of Barbados is the earliest evidence legally of close relations between the two countries in the area of fishing, speaking, of course, giving the residents of our country the right to fish in waters off Tobago. We will trace these practices throughout the period of emancipation into the 1800s, into the first half of the 20th century and right through to the present day, through various models of fishing boats, sloops, schooners, etc, different types of fishing techniques, and an evolving social and economic landscape. All of this, Mr President, is in the context of an oral culture. I must say that it is noticeable to me that there has been an abundance of written materials, in the context of a culture which is largely oral, from so many different sources, from so many different countries, from so many different decades and, indeed, this cannot be explained away as mere coincidence. They constitute clear and credible evidence of Barbados' traditional artisanal fishery off Tobago. Today, the fishing sector, you may ask, employs approximately 6,000 persons, some 5 per cent or so of our workforce. A further 18,000 people, however, depend on it for their living. In total, the industry has estimated that it contributes some $100 million, approximately 2 per cent of Barbados' GDP. Our fishing communities, as the map in this case will show, has spread throughout the entire country and is not structured in compact entities. The economic impact of any disruption would, thus, be significant and nationwide. You can imagine, therefore,
Mr President, members of the Tribunal, that Barbados' fishing communities have been, in fact, following the development of this case with a very keen interest. Two representatives are in this room today. Ms Angela Watson and Mr Anderson Kinch, both of whom are leading spokesmen of the fishing community in Barbados.

To a significant degree their fate and that of those whom they represent rests in this Tribunal's hands. Their future livelihoods, in the words of Prime Minister Williams of Trinidad and Tobago, their fundamental rights and essential economic interests as he described the right of fishermen in a speech in 1975, rest in your hands.

Finally with regard to our case on fisheries it is important to note that Barbadian and Tobagonian fisherfolk are not in competition, and this is critical. On the contrary, as our written pleadings will show, Barbadian fisherfolk traditionally have fished beyond the 12 nautical mile limit of Tobago, whereas Tobagonian fisherfolk traditionally have fished within 12 nautical miles of their own coast. Nor do Barbadian and Tobagonian fisherfolk fish the same resource. There is a small Tobago based fishery, the majority of their fishing is for fish, not caught outside the 12 mile limit, but caught on their shores. Thus there is no competition between the two countries' fishermen. Rather, there is a well-established tradition of co-operation and goodwill among the fisherfolk of Both Tobago and of Barbados. We have never fished in the territorial sea of Trinidad and Tobago, either as defined in the old or the current international law regime. But what is most telling to me, Mr President, is the fact that until recently Barbadian fishermen went off to Tobago engaged in a completely hassle free activity of fishing. Through no fault of their own, this exercise has now become a source of major contention, and only by reason of international law and consequently domestic law this exercise has led in many cases to loss of liberty and loss of property for some of them.
It was surely never intended by the nations of the world that the law, and certainly this international treaty that we were working under in this matter, should be an instrument of oppression and deprivation. In short, Mr President, this is the plight that now confronts our fishermen. This cannot be fair and cannot be just. They are looking to this Tribunal for fairness and justice, and Barbados indeed is looking within the framework of a maritime delimitation for a guarantee of continuing access to a resource to which these people have traditionally had unfettered access.

Mr President, I have outlined the matter of fishing as applied to the traditional fishing practices of the north west, north and north east coasts of Tobago along with the adjustment of the boundary that we believe is necessary. But let me state clearly that where this aspect of fisheries is crucial to a part of our population, the matter which is of paramount significance and importance to us as a nation is the exploitation of other resources within the maritime boundaries and indeed I refer specifically to the issue of hydrocarbon resources, and our interests lie equally and perhaps even more so in relation to the access and the planning of our economic development on that basis. Our exclusive economic zone and our outer continental shelf in the south east are of the highest importance to Barbados' future development.

As I turn my attention to the eastern part of the boundary, where Barbados considers that equidistance line produces the requisite equitable solution, since in that area we contend there are no special circumstances which require adjustment. I have already mentioned earlier the nature of Barbados' economy and the extremely limited natural resources it possesses, the limited prospects for long term economic development and the consequent extreme vulnerability to external economic shocks and natural disasters. The hydrocarbon resources which preliminary research suggests exist in this area will enable Barbados
to diversify its productive base and develop its economy in a way that is presently impossible. It would allow policy options that are simply not available to the country in the same way today, and we believe that the ability to plan one's economy and to provide for one's people, taking into account all of the available living and non-living resources, is a natural action on the part of governments. It is in pursuit of these perfectly legitimate goals that Barbados has licensed the entire area of its exclusive economic zone, including that in the south east, north of the equidistance line with Trinidad and Tobago. Since 1978, when we passed a Marine Boundaries and Jurisdiction Act, Barbados has exercised jurisdiction over the north of the equidistance line. It licensed Mobil in 1979 and Conoco in 1996 to conduct exploration and exploitation activities in the entirety of our exclusive economic zone and continental shelf. We have conducted extensive oil exploration in the area to the north of the median line, now claimed by Trinidad and Tobago, for the last 30 years and indeed without objection from Trinidad and Tobago until the advent of this arbitration. In short, Mr President, Trinidad and Tobago acquiesced to and recognised Barbados' sovereign rights in this area and only objected recently. Trinidad and Tobago's claim to the north of the median line runs counter to the settled expectations of the oil concessionaires of both countries.

I should state for the benefit of the record that Trinidad and Tobago, as we know, possesses an extraordinary onshore and offshore wealth in hydrocarbons, and indeed it is one of the strongest economies in the region, and a principle supplier of liquid natural gas to the United States of America. And we do not envy them that access to wealth thus far. It is worth repeating a point here that we make in our Reply at paragraph 53: "Trinidad and Tobago has geography to thank for its abundant hydrocarbon resources. The maritime territory that it has overflows with hydrocarbon resources, unlike
Barbados'. By way of comparison whereas currently Barbados produces approximately 1,000 barrels a day of oil in a declining number of wells, Trinidad and Tobago produces almost 125,000 barrels per day with its production expanding. In terms of natural gas the imbalance is even more striking. Trinidad and Tobago produces significantly more, over four times more natural gas in one day, 2,983 million cubic feet, than Barbados does in an entire year, 718m cubic feet".

It may even be said, Mr President, by an observer and certainly not Barbados that this might be a case of those who have wanting more at the expense of those who do not have.

I wish to conclude my remarks, sir, on this subject; by informing you and the members of the Tribunal, that Barbados has, in accordance with Article 76 of the United Nations Convention on the Law of the Sea, began the process of accumulating information and prepared its submission to the Commission on the Limits of the Continental Shelf regarding the nature of its continental shelf beyond 200 nautical miles. Recent studies have shown so far that the continental shelf that is Barbados' does fulfil the conditions of Article 76 and, indeed, arrangements are in place to conduct the necessary survey work in order to provide the Commission with the relevant information by the deadline set of 2009.

I turn quickly, sir, to the Barbados/Guyana Exclusive Economic Zone Co-operation Treaty. You will be aware that in 2003 Barbados and Guyana concluded an Exclusive Economic Zone Co-operation Treaty, which provides for the exercise of joint jurisdiction within their overlapping economic zones in an area that lies beyond the 200 nautical mile arc of any third state. Under the aegis of this treaty, the parties have established a joint Non-Living Resources Commission and are negotiating for fisheries licensing and security agreements. In Barbados' view this is the kind of regional co-operation in the area of the law of the sea that is beneficial not just to the
parties but to the region as a whole. It is worth noting that, unlike the agreement between Trinidad and Tobago and Venezuela, the Barbados/Guyana treaty does not purport to apportion between the parties territory which might belong to another state. Indeed, the maritime space under the jurisdiction of the parties to the treaty falls entirely within the economic zone of the parties and completely beyond the economic zone of any other state.

I also wish to underline that Barbados and Guyana have adopted a co-operative rather than a confrontational approach to the management of the maritime space to which they both have stated a claim. It is also noteworthy that this is the first maritime boundary-related treaty between two members of CARICOM. We sincerely hope that it will not be the last.

Mr President, members of the Tribunal, I turn now to the 1990 Trinidad and Tobago-Venezuela Agreement very briefly. I have referred from time to time to this agreement, which purports to include as part of the area divided between the two countries a significant area of marine territory falling within Barbados' 200 nautical mile arc, as well as an area potentially forming part of Barbados' outer continental shelf.

I wish to emphasise the fact that, according to the terms of that agreement itself, it is not opposable to Barbados nor could it be so under the Vienna Convention on the Law of Treaties or customary international law. The non-opposability of this treaty to Barbados was made clear to Trinidad and Tobago throughout the most recent set of boundaries and fisheries negotiations between 2000 and 2003 and, as the negotiation records show, it was in fact conceded by Trinidad and Tobago. The effects of this approach if applied in the Caribbean or, indeed, elsewhere for that matter, would be problematic in many regards, to put it mildly. It is my conviction, Mr President, that the UN Convention on the Law of the Sea was designed to bring order to the oceans, to create stable regimes upon which States can rely in order to exercise their
jurisdiction and make peaceful and sustainable use of the ocean and its resources. Trinidad and Tobago has been forced to make this exorbitant claim because of the terms of its treaty with Venezuela we contend, according to which, in Trinidad and Tobago's own words, it has made a contribution to Venezuela's ambitions for a Salida Al Atlantico, a corridor to the Atlantic. The problem is that Trinidad and Tobago has contributed not just its own territory, which it is perfectly entitled to do, but Barbados' territory over which of course it has no rights. Nemo dat quod non habet is a phrase that comes to mind immediately. As I said earlier, small states such as mine rely especially on international law to create a predictable and equitable environment in which the behaviour of states is regulated not by virtue of economic or military might, but on the basis of internationally accepted and negotiated norms. It is the view of Barbados that the claims made by Trinidad and Tobago with respect to the proposed boundary in the east undermine the very basis of the law of the sea. Even if the agreement between Trinidad and Tobago and Venezuela does represent in part a legal concession by Trinidad and Tobago of its own territory to Venezuela, Barbados cannot be required to compensate Trinidad and Tobago for this concession. One state cannot be affected by its neighbour choosing to concede territory to a third state. Such a legal principle would be absurd, yet this would be the natural result of Trinidad and Tobago's regional implications argument, which turns upon the misplaced assertion that the agreement should have a domino effect upon the delimitation of maritime boundaries between Barbados and Trinidad.

Mr President, Barbados can understand why Trinidad and Tobago is making these extravagant claims. Trinidad, in our view, has clearly decided that its future lies in co-operation with its fellow oil rich neighbour Venezuela. It has abandoned its regional commitments. In the 1990 agreement with Venezuela, it may even be said to have
betrayed Guyana, Barbados and itself. But these are not my words, Mr President. These are the words of the Prime Minister of Trinidad and Tobago speaking in 1990 as leader of the Opposition. Trinidad clearly does not want to face the consequences of its concessions to Venezuela by seeking a readjustment of these concessions with Venezuela. Instead, it prefers to seek compensation from Barbados by this extravagant claim. Even if they are unwilling or unable for political and/or diplomatic reasons to present a claim that is consistent with the applicable international law, this Tribunal, Mr President, you and your members, are not constrained by similar possibilities. Thankfully, this Tribunal is a judicial body established under UNCLOS and your duty is to determine and apply the law.

I trust, Mr President, that this arbitral process - and I really mean so - will lead to better and stronger relations between the two countries. Indeed only last week our two Prime Ministers met last Tuesday on other matters of deep economic co-operation. The need for certainty is vital if both countries are to move forward with clarity and with confidence and in the spirit of deeper regional co-operation. We do not relish our being here, but it is clear that certainty and clarity is needed not only for the benefit of our fishermen, who have continued to be harassed over the course of the last decade, but, indeed, for the capacity to plan our economic development in the future, as is our right, with the certainty that when we do so that persons can, in fact, take our word and take evidence of our legal concessions as that which is rooted in law appropriately. We recognise that the two countries have a shared history and I trust and pray a shared future. We really do. I look forward, Mr President, to the resolution of these matters in a manner that allows that type of development to continue, because I truly believe that this process, to the extent that it constitutes a dispute, is the most amicable way of resolving what is a clear and intractable
difference of opinion between the two countries, but that will allow us to move forward clearly and confidently in relation to all the other areas of economic, political, social and cultural co-operation that have allowed us to formally regard each other. Even if on occasion, as in a family, there are disputes which have to be resolved by an outside party.

I thank you and look forward to your resolution of this matter and, indeed, as I said, to the Caribbean people moving forward as one, with Barbados and Trinidad continuing to play the anchor roles that we have played thus far and must do in the future.

I am obliged to you, sir.

THE PRESIDENT: I thank the distinguished agent of Barbados for her statement. Before proceeding to the next speaker, may I note that we have the support in these proceedings of the Permanent Court of Arbitration, which is represented here by Ms Anne Joyce and Mr Dane Ratliff.

Sir Elihu, are you the next speaker?

PROFESSOR SIR ELIHU LAUTERPACHT: Yes, I am. Mr President and members of the Tribunal, I am sure that you will understand the great pleasure that it gives me to be able to appear before you on this occasion. It is an honour to participate before so distinguished a Tribunal in these proceedings and to do so on behalf of Barbados and, moreover, to do so in the company on both sides of so many old friends and colleagues.

Just before I enter the substance of the matter, I shall just refer to the Judges' folder, which is a rather substantial volume, that is before you. It contains copies of the various items that will appear on your screens or may be cited by me.

My task is a relatively brief one. It is to present a short introductory tour d'horizon of the case. In order to avoid unnecessary duplication of what is to be said by my colleagues, I will however limit myself to a number of significant points.

First, a passing word about the relative positions of
the two parties. It is true that Barbados initiated the proceedings in this case. In that sense, it is formally the claimant. But it is not so in substantive terms. The issue is one of maritime delimitation, an issue which both sides approach on equal terms. It is not one in which Barbados is claiming territory that belongs to Trinidad and Tobago. Each side must, of course, establish the facts and the law on which it relies. There is no heavier burden on Barbados than there is on Trinidad and Tobago. In this connection, it must be said that, if one party disputes a fact advanced by the other, it is up to that party to disprove that fact. Mere denial is insufficient.

Secondly, a word about jurisdiction and admissibility. So far as the Tribunal's jurisdiction is concerned, there is a distinct element of unreality, indeed of absurdity, in the continuing suggestion by Trinidad and Tobago that there is no dispute between the parties ready for disposition by this Tribunal. Of the only relevant pre-condition in Article 283 of the 1982 UN Convention on the Law of the Sea, it is difficult to say in the light of the record that the parties have not proceeded expeditiously to an exchange in views regarding its settlement by negotiation or other peaceful means. There is no express or even an implied requirement that before proceeding to section 2 of Part XV, the two sides must reach an agreement that the negotiations are getting nowhere. At some point either of them is entitled to reach that conclusion and thereupon to proceed unilaterally to this compulsory procedure. That is the view that Barbados took on 16 February 2004 after five rounds of discussion on delimitation of a single maritime boundary and four rounds of discussion on related fishery matters.

If the alleged failure by Barbados to satisfy the negotiation requirements of Article 283 is to be regarded as so important as to render the present proceedings procedurally ill-founded, is it not strange that Trinidad and Tobago has not pursued with any vigour the idea of a
return to the negotiating table? Is it not strange also that, if the defect in Barbados' institution of these proceedings was so fundamental and Trinidad and Tobago thought that its view of the matter was so well-founded, that it did not ask for the preliminary objection of 23 December 2004 to be treated separately at the outset so as to bring these proceedings to an end? After all, if Trinidad and Tobago genuinely felt that its objection was well-founded, how could it in good faith have allowed the argument on the merits to proceed in such detail and to culminate in the present hearing? The Trinidad and Tobago objection should now be peremptorily dismissed.

Also to be dismissed is the Trinidad and Tobago objection to the scope of the powers of the Tribunal to award non-exclusive fishing rights to Barbados fishermen should it not recognise to the full Barbados' claim of the area to the west and north of Tobago.

I recall in this connection paragraph 223 of the Trinidad and Tobago Counter Memorial. I quote it, "In reality, this is manifestly a bad claim, devoid of any merit and apparently brought in the hope that, when it is rejected, it will nevertheless encourage the Tribunal to give Barbados some part of what it seeks. Barbados' claim in the western section should be rejected in its entirety." That is what Trinidad and Tobago have had to say.

Let us turn it around. For Barbados read Trinidad and Tobago. For Barbados' claim read Trinidad and Tobago's assertions. Then you have an exact picture of what should be thought of the Trinidad and Tobago denial of jurisdiction and admissibility. It is a manifestly bad contention, devoid of any merit and, apparently, brought in the hope that, when rejected, it will, nevertheless, encourage the Tribunal to give Trinidad and Tobago something of what it seeks.

Barbados' objection to the introduction by Trinidad and Tobago of a claim to delimit the outer continental shelf between the parties is different. This aspect of
the case was never the subject of negotiations between the parties such as to identify the dispute between them in respect of it. Trinidad and Tobago's response in this respect is, in effect, to say that any matter that it sees as connected to the issues raised by Barbados may be introduced without the need to satisfy the requirements of UNCLOS Article 283. Trinidad and Tobago invokes in this connection its theory that this is a case in which Barbados is claimant and Trinidad and Tobago is respondent and that therefore Trinidad and Tobago is not constrained by the terms of Article 283. I have already submitted that this is wrong and that both parties are in an equal position so I say no more about it.

At this point, Mr President, I should turn to the geography involved in the case. I appreciate that the Tribunal is already familiar with it to a large extent, but forgive me for making sure by presenting the geography anew.

On geology, I need say nothing since it is not disputed between the parties that the whole of the area of the seabed between them is either economic zone or continental shelf. But there are major issues between them as to the proper description to be given to the juxtaposition of the two parties and its pertinence to an impact upon the delimitation. These require close reference to the geography.

I start with the broad picture. The Eastern Caribbean and the Western Atlantic. Barbados is in the centre of the northern part of the map. The small island of Tobago to the south west and the larger separate island of Trinidad to the south west of that. Trinidad and Tobago has proclaimed itself an archipelagic state and declared archipelagic baselines. These are now marked on the map.

To the south of Trinidad and Tobago lie Venezuela, adjacent to Venezuela, further south east along the South American coast, lies Guyana, and to the south east of Guyana is Suriname. Then moving to the north west corner
of the map we see the southern most islands of the Antilles, Grenada, St Vincent and the Grenadines, St Lucia and Martinique; both Grenada and St Vincent and the Grenadines have proclaimed archipelagic base lines.

Before I go any further I should refer to a map which appears as Fig 6.1 in Trinidad and Tobago's Counter Memorial map volume. This purports to show Barbados' maritime claim. It shows Barbados with a significant extent of ocean space embraced within its 200 mile economic zone, presumably to be contrasted with the relatively small area to be enjoyed by Trinidad and Tobago under Barbados' median line delimitation. No doubt the map was inserted because of its possible prejudicial quality. Barbados does not deny that in rough terms this map is an accurate reflection on the extent of Barbados' Exclusive Economic Zone contemplated in the Barbados Maritime Boundaries and Jurisdiction Act. But what it does not show is the significant qualification that appears in section 3(3) of the Act: where there is less than 400 nautical miles between Barbados and one of its neighbours, the boundary between them is to be fixed by agreement between them. The median line operates only when there is no agreement. As there has as yet been no agreement between Barbados and any of the nearby states to the west and north west of Barbados, the map cannot be regarded as a firm or final depiction of the Exclusive Economic Zone of Barbados. For that reason the Tribunal should not allow itself to be influenced by an assumption as to the eventual size of Barbados' Exclusive Economic Zone. Moreover, as hardly needs saying, the map is not an illustration of Barbados' dispute with Trinidad and Tobago, this is limited to the area south of Barbados. The issues between Barbados and Trinidad and Tobago, should, we respectfully submit, be approached solely in terms of the area lying between Barbados and Tobago.

The distance between the south east corner of Barbados and the north east corner of Tobago is approximately 116 nautical miles. It is in this area
between and controlled by the opposite coasts of Barbados and Tobago that the delimitation is to take place.

We now add to this map the median line between the two islands. The median line is a line every point of which is equidistant from the nearest point on the base lines of the two states. The drawing of this line is, as a matter of established law, the first stage of the delimitation. It is accepted as such by Barbados. It appears also to have been accepted at one stage by Trinidad and Tobago. In more recent pleadings however, Trinidad and Tobago has replaced the construction of a median line as the first stage in the delimitation by emphasis on relevant coastlines. Nonetheless Barbados adheres to the median line as the starting point, in accordance with now well established practice. The median line stretches south-eastwards from the equidistant tri-point between the maritime area of St Vincent and the Grenadines, Barbados and Tobago. In its natural extension it stretches to a point equidistant 192 nautical miles from the nearest point on the coastlines of Barbados, Trinidad and Tobago and Guyana.

As already stated, the identification of the median line is only the starting point. Barbados proposes an adjustment to the median line in order to reach what it regards as the equitable solution.

Barbados contends that the line should be modified in the north west to encompass the area of artisanal fisheries traditionally exploited by Barbados. This modification is now shown on the map. This traditional artisanal fisheries area is coloured green. It is defined by a line starting from the tri-point of the median line between the coasts of St Vincent and the Grenadines, Barbados and Tobago, proceeds south-westwards along the median line between St Vincent and the Grenadines and Tobago, and extends along the median line between Grenada and Tobago as far as point A, which lies in the meridian of 61 degrees 15 minutes west.

It then runs south along this meridian to point B,
which is the intersection of this meridian with the 12 nautical mile territorial sea limit of Trinidad and Tobago. It then follows the 12 mile territorial sea limit of Trinidad and Tobago from point B around the northern shores of Tobago to point C, and the intersection of the parallel 11 degrees 8 minutes north and the 12 nautical mile territorial sea limit of Trinidad and Tobago lying south east of the island of Tobago.

From point C the line turns to the north east and follows a geodesic line along an azimuth of 48 degrees, until it reaches the calculated median line between Barbados and Trinidad and Tobago at point D. From that point the line follows the median line south-eastwards towards point E at the intersection with the boundary of a third state, Guyana.

The justification for the modification of the median line that is thus claimed by Barbados lies in the fact that Barbados fisherfolk have traditionally fished for flying fish and associated species in the green area, and the dependence of Barbados on that fishery. It is an important part of the Barbados economy, as Her Excellency The Attorney General has already stated. Its firm protection is essential. As a matter of international law, the existence of traditional artisanal fishing rights for an extended period can generate a vested interest or an acquired right. These have in varying degrees been recognised as constituting a relevant special circumstance requiring adjustment of a provisional median line in such cases as the Gulf of Maine, Eritrea/Yemen (Second Phase) and St Pierre and Miquelon. This point will be developed in fuller and more persuasive detail in the speech of my learned colleague Professor Reisman. In this geographical introduction I need say no more about it.

Before passing to the modification of the median line proposed by Trinidad and Tobago, there is one additional feature of the claims in this area that calls for mention.

As can be seen from the map now on the screen, the Exclusive Economic Zones of Barbados and Guyana overlap
with each other. In part of that area of overlap the two
states established in 2003 a Co-operation Zone in which
they exercise joint jurisdiction. The zone lies some
distance from the east of the Trinidad and Tobago 200 mile
limit and of the tri-point between Barbados, Trinidad and
Tobago and Guyana. Nor does it infringe upon the claims
of any other third state.

I now pass to the modification of the median line
proposed by Trinidad and Tobago. For this purpose it is
necessary to turn to map 19. This shows two Trinidad and
Tobago claim lines. The first is a line put forward by
Trinidad and Tobago during the fourth round of
negotiations in early 2002. It starts, as does Barbados'
line, from the equidistance tri-point with St Vincent and
the Grenadines and follows the median line in a south-
eastwards direction for 19.3 nautical miles until it veers
off in a north-easterly direction as far as the 200
nautical mile limit, measured from the north eastern point
of Tobago.

However, by the time of its Counter Memorial,
Trinidad and Tobago had developed a new theory, based upon
a distinction drawn between what it claims are the two
sectors of the boundary, the Caribbean or western sector
and the Atlantic or eastern sector. The distinction is
based on the assertion that the line in the western sector
can be justified as a median line, constructed by
reference to base points on the opposite coasts of
Barbados and Tobago respectively; while the line in the
eastern sector has a different basis altogether. This is
illustrated on map 22 now before you. Here we see point A
presented by Trinidad and Tobago as the eastern most
equidistant point capable of construction from base points
on the opposite facing coasts of Barbados and Tobago.
South eastward of that point it is still possible to
extend the median line by constructing it from base points
on the coasts of Barbados and Tobago. However, Trinidad
and Tobago rejects this possibility. Instead it uses its
point A as the point of departure for a loxodrome with an
azimuth of 88 degrees, extending slightly north east to
the outer limit of its claimed economic zone.

Beyond the limit of the claimed economic zone of
Trinidad and Tobago, the respective continental shelves of
the two states are delimited by the extension of the same
line to the outer limits of the continental shelf.

How does Trinidad and Tobago seek to justify this
departure from the median line? It does so by moving to a
delimitation involving not opposite but adjacent coasts;
Barbados and Trinidad and Tobago are, it claims, no longer
opposite each other, they are next to each other. And
because they are next to each other, or adjacent, the
basis of delimitation eastward into the Atlantic must be,
so Trinidad and Tobago contends, their Atlantic-facing
coastlines.

The detailed legal response to this remarkable
contention will be provided by my colleagues. However, in
the context of these observations on geography I need only
invite the Tribunal to note the elements of artificiality
of this new construct. First, it is presented as a
special circumstance justifying a variation of the median
line, but actually it is not a special circumstance, it is
first and foremost, an attempt to refashion geography. It
rests on a theory of coastal frontage. But of what is
this the coastal frontage? It cannot be the frontage of
the island of Tobago, because that faces in the wrong
direction, towards the south east. If extended it would
generate the continental shelf towards the South American
coastline. Anyway, it is far too short to support the
claim to the inner continental shelf area let alone to the
outer area.

As a second possibility one must consider the
possibility of the archipelagic baseline stretching from
the south east corner of Trinidad and Tobago north
eastward towards and reaching the north east corner of
Tobago. But again this is a south east facing line. No
band of continental shelf constructed upon it could
support the present claim of Trinidad and Tobago. So
there remain two other ways in which to look at the
Trinidad and Tobago invocation of the coastal front. The
first is to see it as generating not a band of continental
shelf extending seawards between parallel lines drawn from
its extremities, as now shown on the map, but as a basis
for a claim that radiates outwards, rather like a fan.

However, if one accepts a coastal front as the basis for a
radiated claim by Trinidad and Tobago, why should not the
same concept of radiation apply to the claim of Barbados
based upon its south east facing coastline?

Also, where on the Trinidad and Tobago coastal front
is the location of the base or hinge of the fan? Its
location can make a significant difference to the spread
of the fan.

So one is left with the Trinidad and Tobago approach
of proportionality, namely that the areas of the claims of
the parties must be proportional to the length of their
relevant coastlines. But that is to disregard the
established judicial view that the function of
proportionality is not to support a claim but only to test
whether a claim established by other means can be accepted
as an equitable solution. In other words the relevance of
the concept of proportionality is to determine whether
there is any substantial disproportionality. Trinidad and
Tobago has not demonstrated that its approach provides an
equitable solution; it has merely asserted it. But it is
not self-evident. The fact is that Trinidad and Tobago's
arguments are evolutionary in character. They have
developed and altered during the two stages of written
pleadings and even now in Trinidad and Tobago's outline of
oral argument they are presented in different terms.

In the Counter Memorial three relevant circumstances
are mentioned requiring adjustment of the median line in
the Atlantic. They were listed as (1) disparity in
eastern facing coastal lengths; (2) eastward projection
of the coastlines of both parties; and (3) regional
implications, the Guinea-Guinea Bissau test.

In the Rejoinder however, the relevant circumstances
have become five in number. (1) The fact that the coasts of both states are unobstructed; (2) the fact that Trinidad and Tobago's coastal frontage is in approximate ration of 8:1 to Barbados'. (3) The fact that equidistance would cut off Trinidad and Tobago well short of the 200 nautical mile line and clearly violate the principle of non-encroachment; (4) the fact that a modified equidistance line giving expression to the natural prolongation eastward on the Trinidad and Tobago coastal frontage would not encroach to any significant degree on the equivalent expression of Barbados' much smaller coastal frontage; and (5) the fact that such a modification would be consistent with the only other agreements concluded in the immediate region and would then lead towards a delimitation which is integrated into the present or future delimitation of the region as a whole.

Now, in the outline of oral argument, the relevant circumstances are listed as (1) coastal frontages; (2) non-encroachment (3) the regional dimension and (4) oil practice and Barbados' argument on estoppel and acquiescence. If for any reason, God forbid, there were to be more pleadings in this case, it is not to be excluded that the inventive ingenuity deployed on behalf of Trinidad and Tobago would produce additional relevant circumstance. However, I venture to suggest that whatever the number of so-called relevant circumstances invoked by Trinidad and Tobago, they cannot override the commanding simplicity of Barbados' extension of the median line south eastward from point A.

There are, however, three aspects of Trinidad and Tobago's claim that I have not yet mentioned and which should not be overlooked. The first is Trinidad and Tobago's attempt to introduce as a relevant fact its 1990 delimitation agreement with Venezuela. As can be seen the agreed delimitation line between Trinidad and Tobago and Venezuela cuts across the south eastern corner of Barbados' economic zone, and into the area of extended
continental shelf belonging to Barbados. Barbados is not a party to the agreement and, as hardly needs saying, is not bound by it. Indeed Trinidad and Tobago acknowledges this. Yet Trinidad and Tobago contends that the existence of this treaty is a relevant circumstance mitigating against the south eastward extension of the median line asserted by Barbados. Barbados requests the Tribunal to reject this contention.

Moreover, we should not forget that the Trinidad and Tobago government specifically affirmed in the delimitation negotiation with Barbados that it could only be conducted on the basis of the continuing operation of the Trinidad and Tobago-Venezuela treaty. By itself this stance introduced a basic element of intractability into the situation which condemned to failure any further continuation of the negotiations until they ended in February 2004.

The second matter to which reference must be made is Trinidad and Tobago's contention that where there is an overlap between Barbados' Exclusive Economic Zone as a direct projection seawards of Barbados' maritime rights and Trinidad and Tobago's extended continental shelf, Trinidad and Tobago's continental shelf rights must be treated, so Trinidad and Tobago asserts, as superior to or overriding Barbados' exclusive economic zone rights. For this proposition Trinidad and Tobago produces no specific authority, but argues that as the legal concept of the continental shelf existed before the concept of the economic zone, the later acknowledgment in international law of the economic zone cannot deprive neighbouring states of their pre-existing continental shelf rights. With respect, this is an unsustainable proposition, and it should come as no surprise that there is little if any support for it.

For one thing, it has to be recalled that the concept of the economic zone emerged into customary international law well before it appears in the 1982 Law of the Sea Convention. It was already a prominent feature of the
1974 and 1975 Law of the Sea negotiations in Caracas and
Geneva. In 1978 Barbados' Maritime Boundaries and
Jurisdiction Act included provisions regarding the
economic zone clearly on the basis of customary
international law; not a convention that had not yet been
concluded. The fact that Trinidad and Tobago did not
legislate for its own economic zone until 1986 pursuant to
the 1982 Convention does not mean that it was not entitled
to an economic zone under customary international law
before that date. More to the point is the fact that we
are looking at a situation in which both states are
parties to, and bound by, the 1982 Law of the Sea
Convention. This is now the sole determinant of their
rights to maritime zones. The law relating to the
economic zone is laid down in Part V of the Convention.
Article 36 provides expressly that the sovereign rights of
a coastal state extend to the natural resources of the
seabed and subsoil of the economic zone. The statement of
rights is extensive and comprehensive. The law relating
to the continental shelf on the other hand is laid down in
the next part of UNCLOS, Part VI. There is a logic to the
sequence between Parts V and VI. It is that the content
of Part V is not subject to the content of Part VI.

Contrary to what Trinidad and Tobago argues, the
terms of Article 56 of UNCLOS do not speak decisively
against the view that economic zone rights prevail over
continental shelf rights; Article 56 refers only to the
exercise - and I emphasise the word exercise - that is to
the manner in which they may be used. Article 56 does not
accord a priority to continental shelf rights.

Nor is there anything in Part VI, especially Article
77, expressed to override the rights of the aggrieved
states under Part V. Moreover, in general terms the
concept of the continental shelf is less expansive than
the concept of the economic zone. The rights of the
coastal state in the economic zone extend beyond the
exploration of the resources of the seabed and subsoil,
while the rights of a coastal state in the continental
shelf are limited to the exploration and exploitation of those resources. In short Barbados submits that there really is no basis for the assertion that extended continental shelf rights trump neighbouring economic zone rights.

It has to be said, and this is my final point, that the Trinidad and Tobago case appears to proceed on the theory that an accumulation of many weak arguments should prevail over the single strong Barbados argument, namely that the median line should be adjusted by reference to a single special circumstance, that is to say Barbados' dependence upon the traditional artisanal fishing grounds south of the median line.

There are two consequences of the Trinidad and Tobago approach. One is that Trinidad and Tobago has not presented a single consistent explanation of the methodological basis on which it rests its claim to adjustment of the median line. I have already referred to the various ways in which the Trinidad and Tobago arguments have been deployed. Unless remedied, and Barbados looks forward to hearing some remedial explanation, the absence of a consistent argument imbues the Trinidad and Tobago claim with an arbitrary quality that necessarily excludes any genuine equitable solution.

The second consequence is that Trinidad and Tobago, in its conclusions and submissions, ultimately appears to get itself into rather a muddle. Let us look at the conclusions in Chapter 6 of the Trinidad and Tobago Rejoinder. In paragraph 2(2) Trinidad and Tobago requests the Tribunal "to reject the claim line of Barbados in its entirety." Then, in paragraph 2(3) it asks the Tribunal to decide that the boundary is to be determined as follows: (a) to the west of their point A, the delimitation follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of St Vincent and the Grenadines. For the purpose of this point I am about to make I need not repeat the terms of paragraphs 3b and c.
Let us look at the Barbados claim line. In part it also follows the median line. We have marked on the map the point A at which Trinidad and Tobago claim turns north-eastwards away from the median line. As can immediately be seen, there is a section of the median line that is common to both claims. Yet Trinidad and Tobago has asked the Tribunal to reject the claim line of Barbados in its entirety. If the Tribunal does this it will take a bite of approximately 16 nautical miles out of that part of the median line that also forms part of the Trinidad and Tobago claim line. If the median line southeast of Barbados point D cannot form part of the Barbados boundary how can it form part of the boundary for Trinidad and Tobago? The Trinidad and Tobago submission contains no qualification that can cover this gap. One might have expected that Trinidad and Tobago's submission would have included the words "save for that part of the Barbados claim line that coincides with the Trinidad and Tobago claim line", but it does not. Perhaps Trinidad and Tobago may ask the Tribunal for leave to amend its submission on the ground that its real intention is clear, but Barbados is entitled to observe that a submission that contains such a defect is a reflection of a more fundamental malaise by which the complexities of the Trinidad and Tobago case are enfeebled to the point of ineffectiveness.

Mr President, I have now said enough by way of summary introduction of Barbados' case, and if you are contemplating taking the coffee break presently I would respectfully ask you to call on those of my colleagues who will address the question of jurisdiction. In the first place Mr Fietta will introduce the evidence of Ms Teresa Marshall, the Permanent Secretary of the Barbados Ministry of Foreign Affairs. She will testify to certain aspects of the conduct of the negotiations between the parties which have been put in issue by Trinidad and Tobago. And after she has given her evidence Professor Reisman will present the legal arguments on the question of jurisdiction. I thank you, Mr President, and members of
the Tribunal.

THE PRESIDENT: Thank you very much, Sir Elihu. We will now adjourn for a coffee break and resume at 11.45.

(Short Adjournment)

MR FIETTA: Mr President, members of the Tribunal, Barbados will now present Teresa Marshall to provide evidence in accordance with its final communication on witnesses dated 26th September 2005.

Mr President, would you like the witness to be sworn in?

THE PRESIDENT: Please.

TERESA MARSHALL, Affirmed

Examination in Chief by Mr Fietta

MR FIETTA: Please state your full name?

A. My name is Teresa Ann Marshall.

Q. Ms Marshall has copies of her two affidavits before her. They also appear a tabs 22 and 23 of your Judges' folder.

The first affidavit is dated 1st June 2005. The second affidavit is dated 17th September 2005.

Ms Marshall, have you read the two affidavits before you?

A. I have.

Q. Is the signature at the end of each of those affidavits yours?

A. Yes.

Q. Did you wish to make any changes to either of the affidavits?

A. No.

Q. Do they constitute your testimony?

A. They do.

Q. Mr President, members of the Tribunal, I would like to ask your permission for each of Ms Marshall's affidavits to be added to the record?

THE PRESIDENT: They may.

MR FIETTA: Thank you. Ms Marshall, please state your occupation.

A. Currently, I am the Permanent Secretary for Foreign Affairs at the Ministry of Foreign Affairs and Foreign
Trade of Barbados.

Q. How long have you worked at the Ministry?
A. I joined in August 1974, so that makes it just over 31 years.

Q. How long, Ms Marshall, have you been Permanent Secretary?
A. Since January 1999.

Q. How many rounds of negotiations were there between Trinidad and Tobago and Barbados between 2000 and 2003 on the related issues of maritime delimitation and fisheries?
A. Starting in 2000, there were in total nine rounds of negotiations.

Q. How many of those rounds did you attend?
A. I attended all nine, all parts of it.

Q. Which party hosted the first round of the negotiations in July 2000?
A. The first round took place in Port-of-Spain, Trinidad, at the Crown Plaza Hotel.

Q. Were those negotiations tape recorded?
A. They were. They were tape recorded and I can attest to that because I myself saw the tape in the tape recorder. The reason I did so was because the main conference room was also used as the Barbados breakout room and before we began our first session of consultations, I stopped our chief negotiator, Sir Harold, and asked him not to begin the session until we had checked to make sure that the tape was stopped and that we had asked the technician to leave the room. There were other members of the delegation that were present and heard those comments.

Q. Can you confirm that those tape recording were not taken by Barbados?
A. They were not taken by Barbados. The set up in the room was done by the host country, Trinidad and Tobago.

Q. The second round of negotiations was hosted by Barbados in October 2000, is that correct?
A. Correct.

Q. Did the Government of Barbados have those negotiations tape recorded?
A. We did.
Q. Why?
A. In terms of our conference set up, any time there are meetings, bilateral or multilateral, the standard set up that our protocol and conferences division organises is for microphones, an amplifier and a tape recorder and in instances where there is going to be a record and a need to check against memory and notes it is standard practice that a tape is run during the sessions.

Q. So the recording would have been obvious to all persons?
A. Yes. In each instance that the taping was done at the Barbados end, the technician and the machinery similar to this, but of course a lot smaller, was visible inside the room where the meeting was taking place. The technician actually sat in the room and changed the tapes as we proceeded.

Q. Ms Marshall, in your long experience of working for the Ministry of Foreign Affairs of Barbados, is it normal practice for inter-governmental negotiations of this type to be tape recorded?
A. Certainly, it is. In CARICOM it is done at all meetings, except the retreat of caucus of heads of Government where only heads are present.

Q. Could you please explain the process by which the transcripts of this negotiations hosted by Barbados and produced by Barbados, which the Tribunal now has before it in the evidence, were produced?
A. As I said before, these were for internal use, for the records internally. The first set of meetings the transcriber was the confidential secretary at the Ministry of Foreign Affairs who was assigned to our chief negotiator, Sir Harold St John. After that individual went on study leave and the transcriber was a former public servant, retired public servant, who had been a court transcriber and who was hired specifically to fulfil this role because we had lost our in-house capacity. But that individual had been a secretary at the Cabinet Office and was therefore an individual of confidence and trust who had signed the Official Secrets Act and who would
obviously know that these things were for internal use only.

Q. Ms Marshall, I would like to move on to the meeting between the Prime Ministers of Barbados and Trinidad and Tobago that took place on 16th February 2004, immediately prior to the commencement of this arbitration. Did you attend that meeting between the Prime Ministers?

A. I did.

Q. Did anyone else on the Barbadian delegation here today attend that meeting?

A. The Attorney General was present, Mr Robert Volterra was present, Mr Tyronne Brathwaite was present.

Q. I wonder if you could describe for the Tribunal the events of the months that led up to that meeting, please.

A. Well, I should begin by saying that the meeting took place in an atmosphere of extreme tension. There had been a build up for several weeks. In December, I think it was, the Commonwealth heads of Government met in Abuja and, as is the tradition within CARICOM, the CARICOM heads had a private caucus. At that meeting it was reported back to us by our Prime Minister that Prime Minister Manning had been challenged by both himself and by the Prime Minister of Guyana regarding the prejudicial effect of the 1990 Trinidad and Tobago and Venezuela agreement and he had agreed that he would take the matter back to his Cabinet.

So, first and foremost, we were expecting some kind of reaction from Prime Minister Manning, following the fulfilment of his promise to raise the matter again with his Cabinet.

Very soon after that there were several pronouncements in the newspapers quoting Prime Minister Manning as saying that he was taking the dispute to CARICOM. We were totally confused by this because we had not been consulted on this. As far as we knew, we were awaiting word from him as to the results of his Cabinet deliberations.

Thereafter there was an arrest of two fishing vessels which escalated tensions considerably. Then there was a
letter from the Trinidadian Foreign Minister, Foreign Minister Gift, in reply to a letter we had sent in November suggesting that we reconvene the session of the negotiations for maritime delimitation and fisheries. His letter suggested that we should proceed only with fisheries since the other matter was somewhat more complicated.

All of this suggested to us that we were reaching a crisis situation.

At the same time we discovered that Trinidad and Tobago had signed an unitisation agreement with Venezuela and that they were proposing to start exploration along the entire boundary line, including in parts that we believed encroached on to our territory.

There were concessions about to be granted for exploration in some of those areas that we thought we had a legitimate claim to. So, all in all, there was a fairly strong concern on our part that Trinidad and Tobago was moving in a direction that would pre-empt any possibility of a resolution of the dispute and, to the contrary, that they were attempting to separate the fisheries aspects and leave the delimitation aspects in abeyance while, at the same time, attempting to exploit what could very well be ours.

Q. Ms Marshall, who was it that proposed that the meeting should take place?
A. Which meeting is this?
Q. The meeting between the Prime Ministers on Monday, 16th February.
A. As I recall it, it was proposed during a telephone conversation between Prime Minister Manning and Deputy Prime Minister Mottley. I was told that Prime Minister Manning had called Deputy Prime Minister Mottley and had requested a meeting on the Sunday, but, since our Prime Minister was not available, it was fixed for the Monday. The initiative came from the side of Trinidad and Tobago.
Q. That call requesting the meeting was made on which day?
A. On Sunday, 15th.
Q. Given the concerns that you have outlined that Barbados had had ....
A. I am sorry, can I Correct that?
Q. Yes.
A. Saturday evening the call was made for Sunday and then it changed to Monday, but I think the first phone call was made on Saturday evening.
Q. Given the concerns generally that you have explained that Barbados had in relation to the status of negotiations with Trinidad and Tobago, what did you do in the short number of hours in between the telephone call proposing the meeting and the meeting itself?
A. Well, as you can imagine, and as I have described, the situation was escalating. We had had the arrest of the fishermen in circumstances where we had hoped we had reached an understanding that these things would no longer occur. We had tremendous commentary in the press about the arrests and we had commentary, as I have said, about taking a dispute to CARICOM and that commentary came from the Prime Minister of Trinidad and Tobago. We were so concerned that we decided that we needed to have meetings over the weekend. This was prior to our receiving the phone call to say that the Prime Minister was arriving. We met on the Saturday and the Sunday and we flew in one of our experts to discuss the implications of what was evolving.
Q. Moving on to the meetings between the Prime Ministers itself, I will not take you through the details of your recollection which appear in your affidavit, but what did Prime Minister Manning of Trinidad and Tobago say about the outcome of the Trinidad and Tobago Cabinet's review of the 1990 Treaty to which you referred a second ago?
A. He confirmed that the Cabinet had reviewed the Treaty, but that it was law and Trinidad and Tobago had to abide by the law and, therefore, there was no possibility of them reneging on the Treaty.
Q. What was the response of Prime Minister Arthur of Barbados?
A. The Prime Minister reiterated the points that he had made earlier, to the effect the Treaty was prejudicial to both Guyana and Barbados, that it took territory from both of us, that it could not possibly be opposable to Barbados or Guyana and that it was necessary for Trinidad and Tobago to understand that this Treaty could not in any way affect the outcome of our own delimitation process.

Q. How did Prime Minister Manning respond to that?

A. Prime Minister Manning reiterated that the Treaty stood. He said very specifically that if we wanted to take him to an international Tribunal we could do so. He also said that the matter was intractable and suggested that we leave maritime delimitation aside and that we proceed with fisheries. Prime Minister Arthur then, as I recall, pulled one of the copies of the joint report and pointed to paragraphs from our chief negotiator which had stressed that the two matters were inextricably linked and could not be separated in that arbitrary manner.

Q. How did the meeting between the Prime Ministers end on that day?

A. I would say that at the wrap up it was agreed that we would see if there was any possibility of issuing a statement at the end of the day, because, of course, there was quite a lot of expectation on the part of the press, with two Prime Ministers meeting in fairly tense circumstances, but we broke fairly abruptly. Prime Minister Arthur invited Prime Minister Manning to stay for lunch. He said, "no thank you" and his delegation left. I would say that it was a fairly abrupt ending.

Q. And immediately after the meeting what happened then?

A. Immediately after the meeting we went to a breakout room that we had prepared for our delegation. Prime Minister Arthur called our chief negotiator on the phone because he was ill and could not come. They conferred, we conferred. I would say that there were probably eight or ten of us who had just come from the meeting. We all went into this room. We all looked at our notes. We all said, "Did you hear him use the word "intractable"? Everybody agreed.
Others said, "Did he say we should take him to an international Tribunal?" Everybody agreed that they had heard that. We then asked the Prime Minister for instructions because there was to be a report to Cabinet that afternoon and the Prime Minister instructed us to proceed to write a Cabinet note detailing what had happened and suggest to the Cabinet that they make a determination as to whether or not we should pursue our dispute settlement given the circumstances. We drafted the Cabinet note precisely at that point. It would have been within ten minutes of the conclusion of the meeting that we wrote the note to Cabinet.


THE PRESIDENT: Thank you, Mr Fietta. Do we move now to the argument of Mr Reisman?

PROFESSOR GREENWOOD: May I cross-examine Ms Marshall, please?

THE PRESIDENT: Of course, you may.

PROFESSOR GREENWOOD: Thank you.

Cross-examination by PROFESSOR GREENWOOD

PROFESSOR GREENWOOD: Ms Marshall, you say that you attended, as you put it, all nine rounds of negotiations.

A. Yes.

Q. But there were, in fact, two separate sets of negotiations, were there not - five rounds on the maritime boundary and four on fisheries?

A. I do not think that we ever agreed to that. If you look at the round where we began talking in detail about fisheries, you will see that it has no name, because Barbados insisted that it was really the fifth round of negotiations and Trinidad and Tobago insisted that it was the first round of fisheries and it ended up being called "a round". I would not say that there were specifically five rounds of one and four rounds of the other. Neither side agreed, and we certainly insisted from day one, that because of the aspects of fisheries that were involved in delimitation the two matters could not be separated.

Q. I had hoped that there were going to be a clean set of the
pleadings in front of you for you to refer to. I do not know whether the PCA have these ready now. I did ask about these yesterday. (Handed) If you could look, first of all, at Trinidad and Tobago's Counter Memorial volume 2, part 2, which is the joint records of meetings. The next volume that I will need is volume 3 of the Reply of Barbados. Would you turn to the second part of that, the large figure 2, first of all to tab 1? Could you just read what the title of that joint report is?

A. I am not sure that I have it.

Q. It is divided into two parts. There is a large figure one and then there are six insets after that. Then there is a large figure with six insets following that one. If you will go to the first inset at the big figure two. Could you just read the title of that joint report, please?

A. "The joint report on the negotiations for Trinidad and Tobago and Barbados fishing agreement, Port-of-Spain, Trinidad, 20th to 22nd March 2002".

Q. Thank you. Just turn back, please, to inset 4 in the previous bundle. That is the previous round of negotiations, the last negotiations of January 30th to February 1st, 2002.

A. Correct.

Q. Would you just read the title of that?

A. "Joint report on the fourth round of negotiations for a maritime boundary delimitation treaty between the Government of Barbados and the Government of the Republic of Trinidad and Tobago, Barbados January 30th to February 1st 2002".

Q. Thank you. There is no suggestion here that the first set of fisheries negotiations are, in fact, the fifth round of ongoing negotiations?

A. Well, you are not giving me much time, but, if you look in that report itself, I am sure that I can find Sir Harold's comments where he objected to the notion that it was a separate process.

Q. Indeed, it is paragraph 3 of the first round of fisheries negotiations.
A. Correct.
Q. Would you read the last sentence of paragraph 3?
A. Can I read the one before that?
Q. By all means, yes.
A. The sentence before from the Barbados negotiator said, "Fisheries should not therefore be viewed as a separate process". The sentence you asked me to read coming immediately thereafter says, "The Trinidad and Tobago delegation, on the other hand, considered this round to be the first round of fisheries negotiations".
Q. There is clearly a difference between ....
A. As I said, there was a difference of position.
Q. Would you turn to tab 3, the immediately following tab. And the title there?
A. "Joint report of negotiations to conclude the Barbados/Trinidad and Tobago bilateral fisheries agreement. Barbados March 24th and 25th 2003".
Q. Thank you. Again, no numbering?
A. No numbering.
Q. Tab 5, please.
A. "Joint report of the third round of negotiations for the conclusion of a new fisheries agreement between the Governments of Trinidad and Tobago and Barbados. Port-of-Spain, June 12th and 13th". Of course, this was the Port-of-Spain, so the preparation of the report would have been done by the host country.
Q. Indeed, it would. Would you turn to page 8, please, of that minute? Can you confirm that is Sir Harold St John's signature at the bottom of it?
A. Correct.
Q. It was accepted by the Barbadian delegation, this report?
A. Yes.
Q. Lastly, can you turn to tab 6? Would you read the title, please?
A. "Joint report of the fourth round of negotiations for the conclusion of the new fisheries agreement between the Government of Barbados and the Government of Trinidad and Tobago. Bridgetown. November 19th to 21st 2003".
Q. This is a minute prepared by the Barbadian team, because the meeting was held in Barbados, identifying this as the fourth round of fisheries negotiations?
A. Correct.

Q. Would you turn to volume 3, please, of the Barbados Reply? Please go to tab 40. Would you identify what the document is?
A. It is the Nation Newspaper which is a Barbados newspaper.
Q. That I think is tab 39. Tab 40.
A. "Statement of the Government of Barbados on the status of fisheries of negotiations between the Governments of Trinidad and Tobago".

Q. Was this prepared by your Ministry?
A. Yes, this is a press release from the Prime Minister, correct.

Q. Were you personally involved in preparing it?
A. I would have seen it. I do not think that I drafted it personally.

Q. Would you go to the third paragraph on the first page, please, beginning with "Barbados has been engaged" and just read that?
A. "Barbados has been engaged in formal negotiations with Trinidad and Tobago since March 2002 in an effort to arrive at a mutually satisfactory bilateral fisheries agreement to replace the previous one-year agreement which expired in 1991. To date we have held four rounds of negotiations and have made considerable progress on the drafting of a new text. At our most recent round held in November last year it was agreed that a further round would take place at a date and time to be mutually agreed. Immediately thereafter by diplomatic note of November 26, 2003, the Ministry of Foreign Affairs and Foreign Trade of Barbados formally proposed the convening of the next round in the latter half of February 2004. There has as yet been no response to that note from the Ministry of Foreign in Trinidad and Tobago".

Q. In view of the point that you have just made about these being nine rounds of negotiations on the same topic, could
you explain why two weeks before those negotiations were broken off, your Ministry told the press that there had been four rounds of negotiations on fisheries?

A. There were four rounds within the context of a delimitation process which dealt specifically with the topic of fisheries.

Q. The delimitation process is not mentioned here.

A. No. I would think it fair to say that the Republic of Barbados was more interested and more intrigued by the fishing situation since it involved fishing communities and fishermen being arrested. Therefore, in terms of the press, there was very little coverage of what was in essence a complicated matter of delimitation of which they had very little understanding or interest, but in fisheries they did and this is a press release.

Q. Thank you very much. I do not want to ask anything else about that. I will probably come back to that particular document in a minute, but could you go to tab 36 in the same volume, please? Could you just confirm that this is a transcript of the talks entitled "Boundary delimitation negotiations and fisheries talks held in Barbados on 19th to 21st November 2003"?

A. It is.

Q. This is a transcript made from the tape recording that you explained was made by the Barbadian team.

A. Yes.

Q. Would you turn, please, within that to page 575 in the volume? The comment of Mr Volterra at the bottom of page 575 - would you just read the four lines on that page?

A. "Permanent Secretary Marshall and Ambassador Sealy, I will open the presentation with a few preliminary remarks. The first of which is to apologise to everybody who is here for the fisheries discussions. I am sorry if this is very boring for you and largely [blank]. Thank you for your patience in any event". Would you like me to explain the circumstances of that remark?

Q. I would like you to explain what is represented by the four dots - from the word "largely", actually.
A. I presume that either the transcriber could not understand Mr Volterra's Canadian accent or it was a change in the tape.

Q. I have listened to the tape, and I have more practice, perhaps, of Mr Volterra's Canadian accent, the word that is missing is "irrelevant".

A. OK.

Q. You have not listened to the tape yourself?

A. I have not listened to the tape myself.

Q. Had you read the transcript yourself?

A. I have scanned the transcript. I have not had the chance to read the whole thing in detail.

Q. May I ask when you read the transcript?

A. This particular one?

Q. Yes.

A. Probably a couple of months ago.

Q. When was the transcript made?

A. I have no idea. You would have to ask one of my delegation members.

Q. Were the transcripts made at the time that the meetings were being held?

A. Not all of them, because, as I said, the individual in the Foreign Ministry who had the training to work with the Dictaphone went on study leave and then we had to find a replacement so some of the tapes were there for a while before they were transcribed.

Q. You said in your second witness statement that the purpose of making tape recordings was the need to check against memory and notes.

A. Correct.

Q. That was the way that you put it in examination in chief.

A. Correct.

Q. When was there a need to check against memory and notes?

A. We played the tapes several times during breakout sessions when we were preparing the joint reports.

Q. So it was important, was it, in assisting with the preparation of a joint report?

A. Yes, to confirm what has been said, especially in
instances where we wanted to be very precise in how we recorded what was said.

Q. Ms Marshall, help me with this. If it was important in preparing the joint report and you thought that Trinidad and Tobago were making tape recordings at the sessions that they hosted, why did you not ask for those tape recordings so that they could help you prepare your joint report of the Trinidad sessions?

A. Because from the very first session a methodology was adopted which I found unusual, which was that there was not a drafting group which sat together and came up with an agreed record but that each side retired to its breakout room and determined what it wanted to record as having been its position. The word "joint" is really a misnomer. What we had was something that reflected our position and what Trinidad provided was one that reflected their position. The only thing that we did was to make sure that what was reflected on their side was not misleading and they did the same with ours. In essence, we were more concerned in getting our comments correct.

Q. I can understand that, but if you found it helpful to listen to tape recordings of the meetings held in Barbados in order to perform that task, I cannot see why it would not have been equally helpful to have listened to the tape recordings of the sessions in Trinidad.

A. I think that the majority, in total, were held in Barbados. The very first session that was held in Trinidad was a very preliminary session where we were all feeling our way. There was only really, apart from that one session, that would have been held in Trinidad and Tobago. I am assuming that if we had had instances where our notes did not reflect what we thought was our position, we would have requested that the tapes were played, as we would assume they would have if they wished to do so.

Q. Ms Marshall, if you look at tab 1.3 in the Counter Memorial volume 2.2, which is the joint records volume that you were looking at a moment ago, that is the third
round of maritime boundary negotiations. Where were they held?
A. Trinidad and Tobago.
Q. Thank you. The fourth round are held in Barbados. That is the next tab.
A. Yes.
Q. The fifth round was in Barbados.
A. Correct.
Q. Then turning to the fisheries negotiations, tab 2(i), first round in Trinidad?
A. Yes.
Q. The second round in Barbados.
A. Yes.
Q. The third round in Trinidad?
A. Yes.
Q. The fourth round in Barbados?
A. Correct.
Q. So it is roughly 50:50?
A. Correct.
Q. Except that you cannot have it as 50:50 if there are nine sessions, I accept that.
A. Fisheries was, however, working from a text, a draft agreement.
Q. I realise that, but does that make a difference to whether it was tape recorded or not?
A. No, but it makes a difference as to whether you need to check, because, if you are taking down suggested amendments to a text in front of you, you will probably have more accurate notes, because there are a number of you taking down the same words.
Q. But then, in terms of the sessions held in Trinidad and Tobago, at no stage did you or any members of your team ever ask to check the tapes that you thought were being made.
A. No.
Q. And at no stage did anyone from Trinidad and Tobago ever ask you for the tapes that were made in Barbados.
A. They did not ask me personally. I do not know if they
Q. Is there, in fact, any evidence whatever that the Trinidad and Tobago team realised that they were being tape recorded?

A. Well, you will see from the affidavit of the technician that he was approached at one stage by a member of the Trinidad and Tobago team. I would think that it would be hard to ignore equipment of that size in the meeting room and the technician and a pile of tapes that he was putting. Because they were cassettes, when he put them on top of each other, it was a substantially large pile, because, as you know, cassettes record an hour at a time. If you have a session for two or three days, you end up with a large pile of tapes. I do not think that it was a mystery to anybody that that taping was proceeding.

Q. You pointed to the equipment over there as an example.

A. Yes. I said that it was slightly smaller than that.

Q. That is actually audio equipment, that is the tape recorder.

A. Yes.

Q. So it is quite easy to confuse the two, is it not?

A. Not necessarily. Most of us in the Caribbean use slightly lesser technology with a cassette recorder going around and it is right that there is one box with the cassette recorder and one box for the amplifier. A very simple set up.

Q. Judging from the interference that I am getting in my left ear from the speaker system over here, technology is rather superior in the Caribbean.

A. I think that the interference comes from people who will not switch off their cell phones.

Q. I need not take you to the documents as such. You have read the witness statement of Mr Bidaisee, the hotel manager at the Cascadia Hotel?

A. Yes.

Q. And the affidavit of Mr Eden Charles.

A. Correct.

Q. Both of which state that no tape recordings were made in
Trinidad and Tobago.

A. Correct.

Q. Have they misunderstood the situation?

A. Well, I cannot speak for them. I can speak for myself. I can tell you that I saw the tape at the Crown Plaza. It is very interesting that there is no statement from the management of Crown Plaza. I note that that manager of Cascadia simply says that he did not provide equipment for taping. I cannot say what Mr Eden Charles swore to, but I can say that I swore to what I knew and what I saw and what members of my delegation also confirmed that they saw.

Q. We can ask those questions of Mr Eden Charles, of course.

A. I am certain you will.

Q. Can we turn to the comment you make in your second witness statement, please? You made the point a moment ago in answer to one of my questions that these were rather strange joint records.

A. Correct.

Q. You say that they were highly selective records, in essence the joint reports reflect what each of the parties wished to have recorded as its official statements of the negotiations that had taken place.

A. Correct.

Q. To the extent that the joint reports reflect statements made by Trinidad, they are what Trinidad and Tobago wanted to be in the record.

A. Yes.

Q. And, conversely, to the extent that they attribute remarks to the Barbadian delegation that is the position that Barbados wants to have recorded?

A. If you look at the records you will see that there are sub-headings for the delegation of Trinidad and Tobago and for the delegation of Barbados. If Trinidad and Tobago in its comments inferred something as a position of Barbados, we would have challenged it if it did not represent our views, but generally speaking each side drafted the part that came under the heading saying "for the delegation of
Barbados" or "for the delegation of Trinidad and Tobago". Therefore, the Barbados side would never have drafted the language that appeared on the heading for Trinidad and Tobago.

Q. But you would have been the determining factor in what appeared under the statements of Barbados.

A. Correct.

Q. Would you turn to tab 1.1 in that volume of the joint records, please?

A. Can you tell me the volume again?

Q. The joint records, volume 2.2 of the Trinidad and Tobago Counter Memorial, the large tab 1 and then the small tab 1 within that.

A. Yes.

Q. Would you go to page 11, please? Under the heading, "From the perspective of Barbados", this is, to use the words in your witness statement, what Barbados wished to have recorded as its official statements.

A. Yes.

Q. Would you read the first paragraph, please, beginning "essentially"?

A. "Essentially the Barbados position is that the principle of equidistance would be the most equitable way of determining a boundary between the two countries. Indeed, this principle is enacted in the Marine Boundaries and Jurisdiction Act 1978. Barbados considered that the relevant coastlines were opposing coastlines and not adjacent coastlines as proposed by Trinidad and Tobago. Barbados therefore proposed a median line solution for arriving at a boundary. Barbados did not recognise any special circumstances as put forward by Trinidad and Tobago which would justify deviation from the median line position".

Q. Thank you very much. Over the page, at page 12, please, the third full paragraph, beginning, "Barbados has also pointed out", would you read that, please?

A. "Barbados also pointed out that the geological and geographical features of the Barbados ridge constituted a
factor which could have a bearing on the delimitation process. Moreover, the practice since the seventies has been an observance of the median line between the two countries by fishermen and coast guard officials on patrol and search-and-rescue missions.

Q. Thank you. An observance of the median line between the two countries by fishermen. That was what Barbados wanted to have recorded?
A. An observance of the existence of the median line.
Q. That is not what it says. "The practice since the seventies has been an observance of the median line between the two countries by fishermen ..." That was the considered position of the Barbadian delegation, was it?
A. That was the statement at the beginning of the proceedings in round one.
Q. Thank you. Earlier on on that page, would you just read the paragraph immediately below that, "both delegations also agreed"?
A. "Both delegations also agreed on the preparation of a joint report at the end of each round of negotiations to record accurately points discussed and agreed upon so as to avoid having to rely upon memory".
Q. So the agreement was, was it not, that the joint record would be the definitive record of the meetings?
A. Yes.
Q. There is no reference to tape recordings?
A. No.
Q. No reference to checking against anything else?
A. No.
Q. You said both in your witness statements and in your answers in examination in chief a few minutes ago that between 29th January and 5th February the Prime Minister of Trinidad and Tobago commented on the existence of a dispute between Barbados and Trinidad and Tobago.
A. Correct.
Q. What did you understand that dispute to be or, rather, to be more precise, what did you understand the Prime Minister of Trinidad and Tobago to mean when he used the
term "dispute"?

A. Well, to be quite frank we were mystified by what he meant, because there were several comments both in the printed media and on the television where he mentioned referring the dispute to CARICOM or he said CARICOM, but we assumed that he meant the CARICOM secretariat. There was a lack of definition and our interpretation since it came immediately after the Abuja meeting which was in December, our interpretation was that it had to do with the delimitation process.

Q. That is interesting. If you turn to Barbados volume 3, please, tab 40, Barbados Reply volume 3, tab 40, that is the press statement of 2nd February which we have already talked about.

A. Which was for the consumption of the general public which was more interested in fisheries.

Q. Yes, but I would just like to see how you put it to the general public, because I am sure that your Government would not have dreamt of misleading them. If you go to the first paragraph, "Our two Governments have reached agreement", would you read the final sentence of that first paragraph? Perhaps you had better read the whole of the first paragraph, perhaps that would be more appropriate.

A. Yes, because that last sentence does not make sense unless you read the first phrase. "The Government of Barbados has noted with concern recent statements attributed to the Prime Minister of Trinidad and Tobago, the Honourable Patrick Manning, referring in Saturday's press, which suggests that following informal discussions in Nigeria our two Governments have reached an agreement to refer the ongoing fisheries negotiations to the CARICOM secretariat".

Q. Thank you. What was at issue was the reference of ongoing fisheries negotiations to the CARICOM secretariat - is that correct?

A. Except that fisheries was not discussed in Abuja, delimitation was.
Q. With the greatest of respect, that is not what was said here, is it?
A. I agree.
Q. Thank you. Then the reference to "the negotiations" in the next paragraph ... Actually, read the second paragraph in its entirety, that may clarify matters for the Tribunal.
A. "The Government of Barbados wishes to make it clear that there was no bilateral meeting in Nigeria between the two Prime Ministers. Although the matter of fisheries arose incidentally during the caucus of CARICOM heads, there was never any discussion between the two parties to the negotiations regarding the possible intervention of the CARICOM secretariat".
Q. Could we just stop you there for a minute? You said that there was never any discussion, but you have misread that, have you not? "There was never any decision" is what it says.
A. No, it says that it arose incidentally. The discussion in Abuja as reported to us was on the ....
Q. Unless we have different copies of it, the final sentence of that paragraph reads, "Although the matter of fisheries arose incidentally during the caucus of CARICOM heads, there was never any decision between the two parties".
A. Yes.
Q. You said "discussion between the two parties" when you read it out. This paragraph again is a reference to a discussion of fisheries which did not result in a decision.
A. I would not call it a discussion if it arose incidentally.
Q. Well, the matter of fisheries arose incidentally.
A. Correct.
Q. Fair enough. If we go over the page, please, would you read the first paragraph on page 2?
A. The one beginning "While"?
Q. Yes, please.
A. "While they acknowledged that there are still outstanding issues, Barbados believes that with good faith on both
sides these can be resolved through the negotiating process. In this belief the Barbados Government has kept in place a high-level negotiating team with a comprehensive negotiating mandate to bring the matter to some satisfactory resolution. Neither side has indicated that the talks have broken down and there is, in fact, a clear determination as evidenced in the minutes of our last round to reconvene the talks at the earliest opportunity”.

Q. Thank you. And the paragraph after that, please.
A. "We would therefore find it perplexing given these circumstances if steps were taken at this time to request the intervention of CARICOM secretariat in an issue which is still very much the subject of active bilateral negotiations. Having just concluded a substantive meeting in November at which progress was made and follow up mutually agreed upon, Barbados sees no need now to refer the matter to the CARICOM secretariat. We have taken no steps to do so nor have we received any formal indication that Trinidad and Tobago has taken or intends to take such action. As the matter stands, we are awaiting a response to our diplomatic note to fix a mutually-convenient date for the next round". Of course, this is dated February 2nd and the diplomatic note arrived on February 9th said specifically let us stop fisheries and let us leave delimitation aside.

Q. Yes, I quite accept that, Ms Marshall, but that is not the question I was about to ask you. The question I was about to ask you was as things stood on the 2nd February the Government of Barbados is treating what Prime Minister Manning said as relating to fisheries?
A. I would not say that we de-linked the two. We had concerns about the both.
Q. But this statement mentions -----
A. The statement talks about fisheries.
Q. And indeed it says lower down the page from the very outset of the negotiations Barbados proposed the establishment of a joint technical working group.
A. Yes.

Q. That could only refer to the first round of fisheries negotiations?

A. Yes. Correct.

Q. If it is a single process that statement is patently untrue. In this statement you treat Prime Minister Manning's suggestion about referring the matter to CARICOM as relating to fisheries. You also state in terms that considerable progress had been made at the last round of fisheries negotiations and you were awaiting the opportunity for a further round of negotiations.

A. At that point we were. Three days later fishermen were arrested.

Q. At this point there was no suggestion of a deadlock arising out of the earlier rounds of negotiation?

A. At that point as far as we were concerned, there was no deadlock. Then Prime Minister Manning talked about referring matters to the CARICOM Secretariat and then there were the arrests of the fishermen and then we were notified that there was a unitization agreement, that concessions were being offered. Then we were told by Prime Minister Manning at a meeting which I attended that the matter of delimitation was intractable.

Q. We will come to the question of what Prime Minister Manning said at the Prime Ministers' meeting on the 16th February in a few minutes, but let us just stay with this document for a minute. It is not true to say that then Prime Minister Manning suggested a reference to CARICOM because the whole purpose of this statement on the 2nd February was to react to an earlier suggestion about reference to CARICOM.

A. Correct.

Q. So the CARICOM suggestion came before the 2nd February statement.

A. Yes. In fact there were two or three statements beginning at the end of January.

Q. And in the light of what was said by Prime Minister Manning about going to CARICOM the Government of Barbados
issued a statement saying We do not think the fisheries matter should be taken to CARICOM. The fisheries negotiations have not broken down, and there is no mention of the maritime boundary.

A. Correct.

Q. Shall we go to the Prime Ministers' meeting please, your first affidavit. In paragraph 2 of that first affidavit you say that "to our surprise and concern on the 29th January and again on the 5th February 2004 public statements were made by Prime Minister Manning to the effect that a dispute existed between the two countries. He stated publicly there is the battle and there is the war." What did you understand him to mean by that?

A. We did not know what he meant.

Q. He then stated that Trinidad and Tobago intended to refer the dispute to the CARICOM secretariat and we assume that that is the fisheries dispute. Barbados subsequently protested against this but Prime Minister Manning stated publicly that we would lodge our statement of case with CARICOM. At the same time there appeared to be some ambiguity about what he intended. Is that right?

A. Correct.

Q. You stand by that?

A. Yes. I do not know if you were privy to all of the press statements and all of the clippings on the television but it was not that crystal clear when Prime Minister Manning spoke exactly what he was referring to in each instance, and there was a genuine concern on our part that he was referring at some points to delimitation, and there was a further concern that if he was suggesting that the matter be taken to the CARICOM secretariat that it would not be a matter that would be resolved in the short term.

Q. Could I ask you to go to tab 43 in the same bundle as you are in at the moment, volume 3 of the Barbadian Reply. Five paragraphs up from the bottom would you just read that, please?

A. "Asked specifically if CARICOM was to be used to resolve the dispute Manning said No, no, no, we are not inviting
anybody into our affairs yet".

Q. Thank you. And the very first paragraph at the top of that page, this article from the Trinidad and Tobago Express.

A. Yes. "Prime Minister Patrick Manning yesterday insisted that Trinidad and Tobago would take the fishing dispute with Barbados to CARICOM".

Q. And then paragraph 4, perhaps it would be a good idea to read that as well, because it does suggest what was meant by the battle and the war.

A. "If we allow small issues to sidetrack us then we will not be able to achieve the major objectives that we set for ourselves and on which our populations elected us. It is for me a very small matter and I do not propose to allow it to interfere in cordial relations in the region".

Q. Thank you very much. Can we go to the Prime Ministers' meeting please.

A. It would be nice if we could finish one thing and then turn to the other. I am not used to this, I must say.

Q. I apologise for the fact that you have had to keep looking at different volumes of documents, the documents are scattered through I think 18 volumes all told, but I think we can put that one volume to one side, and would you look at Trinidad and Tobago Counter Memorial, volume 5, reports and other documents. If you could turn to tab 29. Could you tell us what that document is?

A. Notes of Cabinet, reported visit of the Prime Minister of Barbados on 16th February 2004.

Q. This is a note to the Trinidad and Tobago Cabinet.

A. Yes.

Q. Have you read this?

A. No, I have not.

Q. You referred in your examination-in-chief to a similar document, a note to the Cabinet, which you helped to prepare for the Cabinet of Barbados.

A. Correct.

Q. That document is not in evidence in these proceedings.

A. Constitutionally our Cabinet notes are not public
Q. But presumably you also kept notes of that meeting of the Prime Ministers?
A. We did.
Q. Have you refreshed your memory from those notes --
A. Yes, all of them.
Q. -- before drafting your first witness statement?
A. I looked at my notes, yes. I consulted with others who were present. I looked at my notes and I consulted with others who were present and they looked at their notes. As I say the report was written contemporaneously, immediately following the meeting itself.
Q. Which report?
A. The note to Cabinet was written immediately following the meeting of the two Prime Ministers, within ten minutes.
Q. Was that the note which in correspondence with the Permanent Court of Arbitration it was originally suggested by Counsel for Barbados that Barbados would be putting before the Tribunal in its additional evidence?
A. I do not think so.
Q. Because there is a reference there to contemporaneous notes?
A. It might be notes of officers at the meetings; it would not have been the Cabinet notes because as I said the Attorney General would have to advise me but I believe that constitutionally we are not permitted to bring Cabinet notes into the public domain under any circumstances.
Q. Would you please read paragraph 5, which is at the bottom of page 1 and the top of page 2 in this Trinidad and Tobago note to the Cabinet.
A. "In his opening remarks Prime Minister Manning indicated that the administration in Port-of-Spain considered the proposed imposition of a licensing regime a hostile act and he expressed the hope that even at this late stage the government of Barbados would reconsider the course of action contemplated. While the proposed action of the government of Barbados could give rise to a dangerous
deterioration in bilateral relations the government of the Republic of Trinidad and Tobago had taken a conscious decision to do nothing that would cause such a deterioration. Prime Minister Manning also referring to diplomatic note dated 14th February received from the Ministry of Foreign Affairs and Foreign Trade of Barbados which in both tone and content the administration in the Port-of-Spain found objectionable. The Prime Minister emphasised that it was the view of Port-of-Spain that the issue of access by Barbados boats to the fisheries resources of Trinidad and Tobago was eminently solvable".

Q. Does that concur with your recollection of what was said at the meeting?

A. Certainly they discussed the licensing. This is not related to the communication on fisheries, this is related to trading goods, and Barbados was imposing a licensing regime, not a quota system or a restriction, but a licensing regime to monitor and Trinidad and Tobago was obviously somewhat perturbed by this, and at the point in time when the meeting took place they had not yet been made aware of the nature of the regime that was to be imposed. I would say that Prime Minister Manning - I would not say that the words eminently solvable were used, but I do recall that Prime Minister Manning said that the boundary delimitation issue was intractable. The Venezuela treaty complicated the matter and that should be left aside and that they should proceed to see if they could come to a resolution on fisheries. I do not remember the words eminently solvable, and I certainly did not write them down.

Q. Fair enough. Leaving aside the licensing regime which I accept is a different matter, that last sentence that you have just read "the Prime Minister emphasised that in the view of Port-of-Spain the issue of access by Barbados boats to the fisheries resources of Trinidad and Tobago was eminently solvable", whether he used the words eminently solvable or not is that an accurate reflection of what was said and an accurate reflection of the
sentence?
A. I think he implied that there was a possibility of proceeding to an agreement on fisheries. However you will have to recall that this is taking place approximately a week after yet more Barbadian fishing boats had been arrested, and this is taking place approximately a year after the same two Prime Ministers met and came to an agreement on fisheries ---
Q. Ms Marshall, I am merely asking where ---
A. And more arrests took place.
Q. I am merely asking whether this was what was said, not the background of the negotiation.
A. I would say something to that effect was conveyed.
Q. Thank you. Would you turn to paragraph 14, please. Paragraph 14 appears on page 4 at the top, beginning the proposal by Prime Minister Manning. Would you please read that out?
A. I am sorry, I am going to have to ask you to read it because my throat is getting sore.
Q. Would you like some water?
A. I have some water. "The proposal by Prime Minister Manning for an interim agreement on fisheries was made in the context of a recognition of the Trinidad and Tobago position that the issue could be solved, but Trinidad and Tobago had never agreed to link fisheries and maritime boundary delimitation negotiations and that Trinidad and Tobago is now agreeable to link in the two negotiations on the understanding that the delimitation negotiations are likely to be more protracted than the fishery negotiations. At this point Prime Minister Arthur turned to Deputy Prime Minister Mottley and asked that it be recorded that Trinidad and Tobago was of the view that the fisheries issue could be solved before a final resolution is achieved on maritime boundary delimitation."
Q. Thank you. Again is that an accurate reflection of what was said?
A. That is not how I recall it.
Q. How do you recall it?
A. I do not recall any mention of a final resolution being achieved on maritime boundary delimitation. I recall a very distinct attempt to separate the two and say let us proceed on fisheries and leave the other matters aside.

Q. And did somebody record as Prime Minister Arthur asked Deputy Prime Minister Mottley should be done, that Trinidad and Tobago was of the view that the fisheries issue could be solved before a final resolution of maritime boundary delimitations?

A. It is not in my notes to that effect. I do not know if it is in others, but Deputy Prime Minister Mottley is here.

Q. Yes, but of course she is not a witness and cannot give evidence any more than others who were in the room at the time can do.

A. But you also have to be aware of the fact that Deputy Prime Minister Mottley was sitting next to the Prime Minister and right opposite from Prime Minister Manning, and therefore if he turned to her and said something it is not likely that any of the note takers in the back row would have heard precisely what was said. So therefore I cannot verify that. And this paragraph in any event is an interpretation rather than a factual transcription.

Q. But would you accept that this interpretation - it does not purport to be a factual transcription - would you accept that this interpretation is difficult to reconcile with the suggestion that the Trinidad and Tobago side considered the negotiations had broken down?

A. I would accept that this as drafted would convey that suggestion, but I would also reiterate that this is not our interpretation of what was said or what was intended.

Q. In your evidence you said that Prime Minister Manning said that the maritime boundary dispute as opposed to the fisheries dispute was intractable. Did he use that precise word, intractable?

A. Yes, he did.

Q. Why is it that you remember that?

A. We all remembered it. It was such a striking use of the word, that when we went next door to draft our Cabinet
paper we said over and over again he said intractable. We asked each other and everybody said are you sure, and everybody said yes, he said intractable.

Q. You have read the witness statement of Mr Laveau?
A. I have.
Q. He was also at the meeting?
A. Yes.
Q. He does not recall that word being used or anything like it.
A. No. It is significant though that Mr Laveau was not part of the negotiating team and had not attended any of the negotiating sessions. I found it significant that the witness statement from Trinidad and Tobago would come from the Prime Minister's protocol officer rather than from a senior member of the team who had been at all the negotiations and who would understand the nuances of the discussions.

Q. That is very interesting, but of course if it is a matter of giving evidence as to what was said at the meeting between the Prime Ministers it does not matter two hoots whether the person concerned was at any of the previous meetings or not, does it?
A. I would not say so if you are taking notes on material you are familiar with.
Q. You would remember whether the word intractable was used, would you not?
A. You would take better notes if you ----

MR VOLTERRA: Mr President, I would just ask that counsel for Trinidad and Tobago allow the witness to finish her statement. Thank you.

PROFESSOR GREENWOOD: It is actually not a statement, Mr President, as I recall it, it is the answer to a question, and I was trying to ensure that it was indeed the answer to the question I was asking rather than a statement about something else. You would be able to remember the word intractable being used whether you had been at previous meetings of the negotiating team or not?
A. Probably. It would depend on what you were looking for.
For example I took very few notes on the matter of trade discussions because they were not relevant to what I was following, and other officers took notes on the trade discussions.

Q. But you have said yourself that the members of your delegation found the use of this word particularly striking.

A. Correct.

Q. So is it not striking that somebody from the Trinidad and Tobago delegation does not recall that sentence being used at all?

A. It depends, as I say. If it were an individual familiar with the negotiations and the build up to the negotiations that word would have been striking.

PROFESSOR GREENWOOD: Thank you very much, Mr President.

I have no further questions.

THE PRESIDENT: Thank you, Professor Greenwood. Do you have any further questions.

MR VOLTERRA: Mr President, Barbados has no redirect questions. I have no doubt that the PCA in its usual efficiency has kept track of the time of the cross-examination. Barbados certainly has and we will pass that on for it to be deducted from Trinidad and Tobago's time allocated.

THE PRESIDENT: Thank you, and thank you, Ms Marshall. We have come to a felicitous point to adjourn, and we will resume at 3 o'clock.

(Adjourned for a short time)

THE PRESIDENT: Professor Reisman.

PROFESSOR REISMAN: Mr President, may I say before I start that I mean no disrespect by sitting, but this is a rather small hearing room and I am afraid that, if I stand it will appear that I am towering over, which is exactly the opposite of the situation.

Mr President, members of the Tribunal, it is a great honour to appear before this distinguished Tribunal on behalf of Barbados. I have been asked to address you on Trinidad and Tobago's objections to jurisdiction and also on our objection to Trinidad and Tobago's belated claim to
part of the ECS or extended continental shelf.

Attorney General Mottley has reviewed the history of the negotiations between the parties, including the most recent negotiations over the past five years. A verbatim transcript of negotiations which were conducted in Barbados is part of the record before you. There is some disagreement between the parties as to whether the meetings in Trinidad and Tobago were also recorded, but it is abundantly clear from the records, more than half of the negotiations that you have before you, that all of the issues that Barbados presented in its notice of arbitration and in its Memorial were thoroughly discussed in the course of those five years. Five years is a long time and it would have been quite odd if all of those issues had not been thoroughly discussed, and it would certainly have said something about the feasibility of further negotiations. It is evidence that the negotiations had deadlocked to the point that Trinidad and Tobago itself spoke of going to arbitration and the intractability of the maritime boundary.

The issue is not whether Barbados and Trinidad and Tobago concluded separately or agreed jointly that there were no further possibilities for fruitful negotiations. If there had to be a bilateral decision then the right to invoke arbitration would have been meaningless. In applying the relevant cases dealing with this issue, Southern Blue Fin Tuna, MOX Plant, Land Reclamation, Malaysia and Singapore and Nigeria/Cameroon, one of the parties always felt that there should be more and still more negotiation. In each of those cases the Tribunal found that the other state was entirely entitled to make its own judgment as to whether further negotiations would be fruitful, or whether it was time to go to arbitration. Barbados was more than entitled to conclude that negotiations could not accomplish its minimum goals, even though Trinidad and Tobago seemed to believe that further negotiations were convenient for it and could accomplish whatever goals it may have had.
Just consider the outstanding differences that emerged over five years. The parties disagreed as to the scope of what was in dispute. Barbados had wanted to negotiate the maritime boundary and fishery rights together, since in its view they are inseparable. Indeed, I will explain later that where the maritime boundary lies depends on whether there is agreement on fishing. Trinidad and Tobago opposed that and sought to segregate the boundary issues form the special circumstance of Barbadian artisan fishing. Despite assurances from Trinidad and Tobago's highest levels, arrests of Barbadian fisherman continued and, indeed, occurred just as Prime Minister Manning, apparently, told his Cabinet that everything could be resolved by negotiation. Prime Minister Manning in Trinidad and Tobago's Cabinet notes finally seemed willing to integrate fishing and maritime delimitation but just after he told Barbados that the boundary issue was intractable. Indeed, Mr President, it was.

There was a fundamental disagreement as to the very existence of the special circumstances of Barbadian artisan fishing, not to speak of its legal implications. The parties disagreed as to the method to be deployed in delimitation and apparently they still do.

In its Counter Memorial, Trinidad and Tobago finally seems to accept the delimitation method which it had rejected through the negotiations only apparently to retreat from it once again in its Rejoinder. Trinidad and Tobago complains that explicit maps were not delivered by Barbados. That is not correct. But, in any event, the method proposed by Barbados, one which is the procedure of contemporary international law, generates an unequivocal delimitation line which serves as the provisional boundary subject to the demonstration of any relevant special circumstances. That is one of the advantages and attractions of the median line special circumstances rule and one of the reasons why international jurisprudence after a number of unsuccessful experiments with other
techniques has come to adopt it. The method was the message and Trinidad and Tobago was under no doubt whatsoever as to where Barbados' line ran. Indeed, Trinidad and Tobago consistently rejected the applicability of the median line special circumstances method for precisely that reason and not on theoretical, academic or aesthetic grounds. They were against the method because they did not like the outcome that the method generated.

The question is whether Barbados was entitled to conclude that issues had been joined and they could only be resolved to its minimum satisfaction by reference to arbitration.

Mr President, a party that suddenly finds itself the object of a law suit when there had been no anticipation or indication or intimation of a dispute may feel aggrieved and in such circumstances many legal systems, including international law, may say that, if it is appropriate in the circumstances to parties, "Why don't you go back and see if you can work this out and only if you can't come back to us with a clearly delineated dispute?". That is the thrust of Part XV of UNCLOS. But, Mr President, can anyone seriously contend that that was the situation that obtained between Barbados and Trinidad and Tobago at the time Barbados initiated the arbitration? Can anyone who has looked at the written submissions exchanged in this arbitration seriously contend that the differences between the parties are not clear, are not stark and that five years of fruitless negotiation have demonstrated that the time for third party decision has come? Yet Trinidad and Tobago has argued that Barbados failed to engage in sufficiently lengthy negotiations with a view to reaching a settlement without having recourse to arbitration. In its Counter Memorial Trinidad and Tobago actually states "The negotiations ongoing as at 16 February 2004 were still at an early stage" - "were still at an early stage". The Tribunal has before it evidence of five years and nine rounds of related negotiations,
many more years of informal exchanges before that, and in Trinidad and Tobago's view "negotiations were still at an early stage".

Mr President, one is reminded of Marvell's sonnet "To a Coy Mistress", "Had we but world enough in time".

The parties disagree about the substance, the scope and the characterisation of dispute, but far from casting doubt on jurisdiction, this disagreement only further reinforces the existence of the dispute that falls squarely within the Tribunal's jurisdiction, for surely whatever else those records establish it cannot be doubted that they disclose a legal dispute as that term is understood in the case law. In view of the clear impasse, it would be very odd indeed for the Tribunal to disclaim jurisdiction as Trinidad and Tobago prays for want of a sufficiently lengthy exchange of views in favour of the now certainly futile gesture of directing the parties to return to negotiations and, in any event, that is not what the Convention requires, as I would like to explain.

The parties continue to disagree on several jurisdictional issues of law, but they agree on the essential policy expressed by Part XV, whether characterised, as a strict jurisdictional pre-condition or otherwise, the parties agree that the Convention's policy is to maximise the resolution of disputes by agreement and, therefore, to ensure that the parties engage in good faith reasonable efforts to resolve their differences by negotiations and consultations before the institution of some form of binding dispute resolution. Indeed, this policy permeates the entire Convention, not only Part XV; Articles 74 and 83, which authorise resort to binding dispute resolution refer in their first clause to the circumstances where "no agreement can be reached within a reasonable period of time". Mr President, members of the Tribunal, all of the quotations and references to the documents are in your Judges' folders, I will not mention them in each case. Before instituting the adversarial proceedings, the parties should exchange views according
to Article 283 and negotiate not only with a view to
settlement, which both sides may recognise as unlikely,
but also to clarify the issues and the respective views of
the parties on them for the benefit for a future Tribunal.
By application of this essential policy, it is clear that
the Tribunal has jurisdiction to decide issues submitted
to it by Barbados and it is equally clear, we submit, that
it lacks the jurisdiction to determine the eleventh hour
claim to extend the continental shelf.

Mr President, it would be wasteful of the Tribunal's
time to recite in detail in this phase of the arbitration
what the documentary evidence submitted by the parties
establishes about the nature and scope of the issues
framed over the course of five years and nine rounds of
related negotiations. I would draw the Tribunal's
attention to section 2(2) of our Reply for a summary of
that evidence which you will also find in your folders.
Let me emphasise the key points.

First, while Trinidad and Tobago insist on a hermetic
separation between the fisheries and maritime delimitation
issues, and notwithstanding the nominal structure of the
negotiations, Barbados made absolutely clear from the
outset that it viewed these two issues as fundamentally
inextricably intertwined. This makes perfect sense for a
paramount interest of Barbados throughout the negotiations
has been to ensure that whatever form the final maritime
boundary ultimately takes, its artisan fisherfolk will
continue to enjoy their traditional right of access to
economically-essential fishing regions off the coast of
Tobago. The only times when Barbados indicated as a
negotiating position that it might accept a median line
throughout the entire boundary was precisely when the
accommodations of its fishing requirements seemed
imminent.

The Tribunal should appreciate that when the parties
differed as to the proper scope and subject of the
negotiations the extent to which fisheries and
delimitation issues were linked or distinct this was not a
formality with procedural technicality. It went to the very heart of the dispute. Trinidad and Tobago by denying the connection between the two effectively rejected Barbados' position on both issues.

The second point is just an abstraction of the long negotiations. Throughout the negotiations, the parties disagreed not only on the ultimate issue of where to draw the boundary, its precise location, but on initial methodology, how to draw the boundary in conformity with the Convention and general international law. Barbados maintained then, as it does now, that international law establishes a clear methodology. First, identify a provisional median line between the opposing coasts and then determine whether any relevant special circumstances requires its adjustment. Trinidad and Tobago insisted throughout the negotiations on applying what it called "equitable principles, relevant circumstances rule". Since the institution of this arbitration, Trinidad has apparently conceded that it had been negotiating based on an incorrect or unsupported position for it now seems to agree that the Tribunal's first task should be to identify the provisional median line, although I should say that it appears to have retreated somewhat from this position in its Rejoinder. The parties continue to disagree among other things about the existence and influence of potential relevant circumstances, whether the two states lie only in a position of coastal opposition, as Barbados thinks is self-evident, or partly in a position of coastal opposition and partly coastal adjacency as Trinidad and Tobago maintains, the role, if any, of disproportionality and the relevance, if any, of the Trinidad and Tobago-Venezuela agreement. In its Counter Memorial, Trinidad and Tobago asserted that "there was no dispute between the parties as of 16 February 2004", but the voluminous record before the Tribunal and the diametrically opposed positions of the parties speaks for itself. Whatever may be said of the merits of the parties' claims, the existence of the legal dispute or, perhaps more
accurately, disputes giving rise to jurisdiction cannot in
our view be doubted.

But Trinidad and Tobago still continues to deny the
existence of a dispute or at least the existence of a
dispute for a sufficiently reasonable period of time. In
its Rejoinder it describes a very formal and technical
definition to the term "dispute", for it denies that
parties negotiating under Articles 74 and 83 can be said
to be in a state of dispute. Were they in dispute, so the
argument runs "parties seeking to effect an agreement
would always be in a state of dispute, save in the unusual
situation when they instantly agree on all matters".

As we emphasised in our Reply, what this means in
practical terms is that parties negotiating disputed
issues in an effort to reach an amicable solution must
according to Trinidad and Tobago's view at some point
artificially enter into what I would call for lack of a
better term pre-dispute negotiation under Articles 74 and
83 and then again to begin with what they might term the
dispute proper process, at which point the parties must
re-exchange all of the views and positions articulated in
the course of years of negotiation. This time however
explicitly under the rubric of Article 283. This dispute
proper exchange of views must then also continue for a
reasonable period of time. One would assume for at least
another five years at least because that did not
constitute a reasonable period of time for the first pre-
negotiation or pre-dispute phase, and it is only then, Mr
President, that one party may finally invoke its rights to
compulsory dispute resolution. In Trinidad and Tobago's
arithmetic the five years is only an early stage. Imagine
how long negotiations are to continue before they amount
to a reasonable period of time.

We would respectfully refer the Tribunal to the
record for evidence that Barbados did indeed make quite
plain its proposed boundary line in graphic form, but it
is surely implausible to think that the existence of a
legal dispute as opposed to what Trinidad and Tobago would
presumably characterise as non-dispute negotiations turns exclusively on Barbados' introduction of that graphic depiction at one of the rounds of negotiation. International law has never suggested the need for such an artificial and arbitrary jurisdictional trigger where, as the records before the Tribunal plainly establish, both parties understood perfectly well the nature and scope of the matters in contention. The paramount policy of Part XV - to ensure that the parties engage in meaningful, good faith efforts to resolve their disputes by negotiation before one invokes its compulsory dispute resolution rights - we submit, is fully satisfied with respect to Barbados' claim. Again the record speaks for itself here. Barbados negotiated formally with Trinidad and Tobago for more than five years and informal exchanges stretch back for two decades. Barbados remained prepared to continue to negotiate notwithstanding Trinidad and Tobago's refusal to acknowledge, for example, the propriety of the provisional median line relevant circumstances test. Notwithstanding its episodic and needlessly provocative harassment of Barbadian fisherfolk, notwithstanding Trinidad and Tobago's discussions with Venezuela about licensing the exploitation of hydrocarbons in regions clearly claimed and long claimed by Barbados as its maritime space. At that time Barbados also had reason to believe that Trinidad and Tobago intended imminently to exercise its right to denounce its obligation to submit to third party dispute resolution under Article 298 paragraph 1; precisely to avoid this Tribunal's jurisdiction, as Trinidad and Tobago is straining to do in this very procedure. Then on February 16 2004 Prime Minister Manning made a visit to Barbados at which he declared the maritime delimitation issue intractable. It was at that meeting as Ms Marshall has testified in her affidavit that Prime Minister Manning stated "are you saying that you are going to take us to an international Tribunal? If so by all means, go ahead." Only then did Barbados institute arbitration.
The Convention cannot reasonably be construed to require that a state refrain from instituting proceedings in these circumstances.

I would like to emphasise at this point, as Barbados made clear in its Reply, that the authorities relied on by Trinidad and Tobago in support of its construction of pre-conditions to jurisdiction not only fail to support that construction. They make it clear that international law generally and the Convention in particular, does not impose such formalistic pre-conditions. All the cases cited by Trinidad and Tobago, Southern Blue Fin Tuna, MOX Plant, Straits of Johor, stand for the same fundamental proposition, that as the Law of the Sea Tribunal said in Southern Blue Fin Tuna "A state party is not obliged to pursue procedures under Part XV section 1 when it concludes that the possibilities of settlement have been exhausted". In other words as a matter of law, even if Prime Minister Manning had not characterised the central issue of maritime delimitation as intractable, thereby effectively making clear that his government's position in future negotiations would be rigid, and even if he had not tauntingly dared Barbados to take Trinidad and Tobago to arbitration, Barbados had every right under the Convention's jurisprudence and general international law to conclude for itself that further exchanges of views, in the words of Singapore/Malaysia "could not yield a positive result" and therefore to invoke its right to arbitration. The international court affirmed the same principle as a rule of general international law in Cameroon/Nigeria. It would be unreasonable to suppose that the Convention requires a state party having concluded that further negotiations are exchanges of view would be unproductive, to then begin a new exchange of views under Article 283 which surely it would find futile and thus immediately terminate.

Mr President, members of the Tribunal, in its Rejoinder Trinidad and Tobago faults us for characterising its theory of jurisdiction as manifestly absurd or
unreasonable, but then faults us again for failing to look at the travaux of the Convention to resolve the issue. We believe that the pertinent text of UNCLOS, interpreted in accordance with Article 31 of the Vienna Convention, produces a perfectly reasonable result requiring no reference to the travaux of the treaty. It is Trinidad and Tobago's proposed interpretation that is absurd. It is, Mr President, a tactic reminiscent of Baron Van Munchausen for a party to impose an absurd reading on a clear text, and then to use its own absurd concoction as a warrant to rummage through an enormous travaux in search of a document that ostensibly supports its position. And what international conference does not include some absurd statements?

Barbados' point is that the plain reading of the text of the Law of Sea Convention does not lead to a manifestly absurd and unreasonable view, which we think Trinidad and Tobago still apparently advances whereby one party can subvert the third party dispute resolution obligation of Part XV unilaterally by simply insisting on further negotiations or declaring that Article 283 negotiations as opposed to so-called pre-dispute Article 74 and 83 negotiations have not yet begun, and then conveniently taking the opportunity to denounce unilaterally its obligation to submit to arbitration.

There is no need to look to the travaux to appreciate that this reading cannot be correct. A plain reading of the text would not and does not yield an absurd implausible result.

Yet even were it necessary to look to the travaux to resolve this jurisdictional issue it should be emphasised first that the Virginia Commentary on which Trinidad and Tobago relies is not travaux. Nor does it support Trinidad and Tobago's position. As we noted in our Reply, the Commentary correctly ascribes to the drafters an intention to ensure proper consultations between all concerned parties to a dispute, and indeed the Commentary explains that Article 283 originated in the insistence of
certain delegations that the primary obligation should be that the parties to a dispute should make every effort to settle the dispute through negotiation. Barbados would respectfully draw the Tribunal's attention to another paragraph of the Commentary, not quoted by Trinidad and Tobago, which emphasises that, consistent with general principles of domestic and international law alike, "the obligation is to negotiate", not to reach an agreement or settlement, that this means that the parties should "make reasonable proposals for the settlement of a dispute", but by no means permits parties to "present ultimatum to the other party, or demand that it unconditionally surrender its point of view".

Parenthetically I would note that Trinidad and Tobago's refusal to acknowledge the proper methodology during the course of five years as well as the declaration of its Prime Minister describing the issue as intractable, certainly sounds like an ultimatum, and Trinidad and Tobago's efforts, sporadic though they may have been, to exclude Barbadian fisherfolk from the waters which they have traditionally fished when this was a critical subject of negotiation, would certainly sound like an ultimatum to those to whom it was directed.

But above all, however erudite the Virginia Commentary may be, and even if it did support Trinidad and Tobago's view, it does not and cannot transform the plain meaning of the Convention's text from a clear unilateral right to invoke compulsory dispute resolution in the event that a settlement cannot be reached into "no more than a bilateral negotiation subject to the unilateral veto of one party". And that, Mr President, members of the Tribunal, would be the upshot of adopting Trinidad and Tobago's view; and it would render Part XV's dispute resolution provisions virtually worthless. After all, it is always open to two states to agree ex post to submit a dispute to arbitration. A convention would not go out of its way simply to reaffirm this. It gives states' parties an ex ante guarantee that, should negotiations and
consultations fail, third party dispute resolution will be available at the initiative of either one of them, and that is of course a principal reason why states enter the Convention.

The sole excerpt from the actual travaux that Trinidad and Tobago includes in its written pleadings is we believe equally misleading. I refer to the isolated statement in the summary prepared by the conference president, which Trinidad and Tobago quotes in its Rejoinder, that "an exchange of views is also prescribed whenever any procedure for settlement has failed to bring about a settlement". In the first place, this statement refers to a version of the text not ultimately adopted by the drafters of the Convention, but substantively read in context it is clear that the document refers to an exchange of views being prescribed not as a stringent jurisdictional pre-requisite but, as the next paragraph clarifies, as part of the liberal and flexible structure for dispute settlement which "does not limit in any way the method that the parties may wish to utilise".

Mr President, members of the Tribunal, the only pertinent question raised by the conjunction of Article 74 and 83 on the one hand and Article 283 on the other, is one of good faith and reasonableness; that is did the parties negotiate in good faith for a reasonable period of time before one instituted binding third party dispute resolution? The Virginia Commentary anticipates that disputes may arise over what constitutes a reasonable period of time in the context of these provisions, and it opines that "a conciliation commission must be presumed to have the competence to decide on this issue when it addresses the merits of the dispute". And of course this Tribunal has the competence to decide whether, given the voluminous record, the parties negotiated for a reasonable period of time. While the travaux offer little guidance on this issue it is worth noting that the initial draft on the settlement of disputes employed as a negotiating text in 1975 in a different part of the Convention referred to
an obligation of the parties to "first seek a solution through consultation, negotiation, conciliation or other such means of their own choice" and providing "if the dispute has not been resolved by such means within one month" - within one month - "of its commencement any party to the dispute may institute proceedings". Surely five years of formal negotiations, preceded by more than two decades of disagreement cannot be thought unreasonable, particularly where one of the parties declares that the negotiations have reached an impasse, invites the other party to go to arbitration, and actively, if ineffectively, excludes the traditional artisanal fisherfolk of the other from their fishing grounds when that is one of the issues under negotiation.

Mr President, I turn to Trinidad and Tobago's objection to jurisdiction based upon an alleged lack of good faith. Trinidad and Tobago's Rejoinder disclaims any objection based on bad faith or abuse of rights to be found in Barbados' decision to initiate arbitration. But it claims that Barbados is guilty of an abuse of rights because its positions in this arbitration are allegedly incompatible with its purported prior recognition of Trinidad and Tobago's exclusive economic zone and because of certain parts of its domestic legislation. We believe that this is false on its own terms and irrelevant. It is false because the supposed recognition consists of a creative mosaic of a selected assortment of statements made during the negotiations, somewhat mysteriously coupled with what Trinidad and Tobago sees as the implications of a one-year provisional arrangement embodied in the 1990 modus vivendi on fishing rights. Some of Barbados' statements express a willingness to consider recognising Trinidad and Tobago's claim to exclusive economic zone. Trinidad and Tobago's objection here betrays a misunderstanding of what negotiation entails and as a result explains its own intransigence in the negotiations. In North Sea Continental Shelf, the court said, "The parties are under an obligation to enter
into negotiations with a view to arriving at an agreement
and not merely to go through a formal process of
negotiation as a sort of prior condition for the automatic
application of a certain method of delimitation in the
absence of agreement. They are under an obligation so to
conduct themselves if the negotiations are meaningful,
which will not be the case when either of them insists
upon its own position without contemplating any
modification of it”. Mr President, far from being a sign
of bad faith or abuse of rights, the fact that Barbados
was willing to explore alternative arrangements
illustrates that it was negotiating in good faith,
attempting to reach a fair compromise even though it did
not agree with Trinidad and Tobago's claim.

It is false and it is irrelevant. It is irrelevant
because even were Barbados' statements construed as
recognition of Trinidad and Tobago's claimed exclusive
economic zone, it does not show bad faith, still less an
abuse of rights, for Barbados to take a contrary position
in this arbitration. An abuse of rights, Trinidad and
Tobago argues, occurs, to quote Jennings and Watts from
Oppenheim, "when a state avails itself of its right in an
arbitrary manner in such a way as to inflict upon another
state an injury which cannot be justified by a legitimate
consideration of its own advantage".

A legal claim made in an arbitration is not by any
stretch of the term an injury. It is not arbitrary even
were it contrary to a position taken by Barbados during
settlement negotiations. In both domestic and
international litigation, parties frequently advance
arguments or take positions contrary to those taken for
purposes of settlement negotiations. Consider the draft
Canadian/US Treaty for the Gulf of Maine, which was
adopted by the Canadian Parliament but failed the US
Senate. It did not preclude the parties from advancing
wholly different claims in the subsequent litigation.
Indeed, it could not preclude them. Meaningful
negotiations import a willingness to accept less than
legal entitlement in order to reach a settlement. When negotiations fail and arbitration or adjudication ensues, parties are entitled to insist upon their full legal rights without regard to contingent concessions which they might have been willing to make in the preceding negotiation. That entitlement does not make the subsequent litigation positions arbitrary and it certainly does not make them actions that "cannot be justified by legitimate consideration of the state's own advantage", to quote the Jennings and Watts summary. If that were the case, Mr President, there could be no incentive to explore options for compromise and negotiations would degrade to each side stating and restating its own position.

I would like to turn to the one-year provisional modus vivendi of 1990. It contains an express preservation of rights clause that forecloses any argument that Barbados recognised Trinidad and Tobago's claimed exclusive economic zone - this is an express provision. Trinidad and Tobago argues in its Rejoinder that the context of the modus vivendi somehow or other vitiates the plain meaning of the clause, quoting the relevant context for Article 11, that is the preservation of rights, is constituted by the central provisions of the agreement, that is Article 2, entitled "Access to exclusive economic zone of Trinidad and Tobago". The title of Article 2 does not define the context, object and purpose of the treaty, all of which quite clearly concern access to fisheries, not maritime boundary delimitation. And what theory of treaty interpretation, Mr President, says that the chapeau of one provision in the Treaty can completely negate the explicit meaning of another provision?

Mr President, members of the Tribunal, plain meaning is plain meaning. And the 1990 modus vivendi provides absolutely no support for Trinidad and Tobago's claims. Trinidad and Tobago also argues that Barbados' domestic law precludes it from making the claims that it has submitted to this Tribunal. Three points must be made here. First, Trinidad cannot allocate to itself an
authoritative right to interpret Barbados' laws and, if it is going to interpret them, it should do so accurately. The law on which Trinidad and Tobago bases its abuse of rights objection, as we said in our Reply, creates default principles pending agreement. It does not preclude Barbados from entering into agreements establishing its own exclusive economic zone other than by a median line. Second, the issue is not the median line, for even Trinidad and Tobago has now accepted that a projection of a median line is international law's provisional methodology, though it has replaced its former methodology with a rather incredible claim that Barbados and Trinidad are not opposite each other but somehow adjacent. The issue is the scope to be applied to the special circumstance which by its nature requires a third-party decision maker. Third, even were Barbados law construed as Trinidad and Tobago suggests, no international precedent suggests that espousing a position in an arbitration which differs from the municipal law that was necessarily provisional pending authoritative determination by a third-party decision maker rises to the level of an arbitrary and capricious injury to another state.

Mr President, members of the Tribunal, I would like to turn now to Trinidad and Tobago's objection to the scope of Barbados' application.

During the negotiations, Barbados had requested recognition of non-exclusive fishing rights for its traditional artisanal fisherfolk in the disputed areas in which they had fished. Trinidad and Tobago consistently rejected the request and began to pursue a policy of excluding Barbadian artisanal fisherfolk from these grounds and they thereby created a situation which constitutes a special circumstance, as we will elaborate later in our presentation.

We are now in a maritime boundary delimitation arbitration in which the international legal methodology is median line special circumstances. When Barbados
establishes that this special circumstance attains, the Tribunal will have at its disposal a spectrum of remedies, ranging from an adjustment of the median line, as in Jan Mayen, to the establishment of an appropriate regime for Barbados’ fisherfolk in waters which the Tribunal would then determine pertained to Trinidad and Tobago, as in Eritrea-Yemen. Barbados is requesting an adjustment of the median line as in Jan Mayen for we believe that it is the most appropriate remedy. But the crafting of a remedy is the province of the Tribunal and our specific prayer cannot preclude the Tribunal's competence to award a remedy at another point on the spectrum. As long as it is less than what Barbados has requested, it will still be infra petita. Barbados does not request an award of non-exclusive fishing rights, the possibility raised during the course of separate negotiations, but it does not agree that a hypothetical award of this sort would exceed the Tribunal's competence. In fact, in the jurisdictional context, Barbados would respectfully draw the Tribunal's attention to the relevance of non-exclusive fishing rights as a special circumstance. We submit that artisanal fishing by Barbadian fisherfolk in waters to the west of the median line and the manifest dependence of the Barbadian fishing community and the national economy upon such fishing constitutes a special circumstance that must be considered in the delimitation of the maritime boundary. As I noted earlier, one of the intractable issues between the parties in the course of the long negotiations that preceded this arbitration was the inseparability of the artisanal fishing access and maritime delimitation issues. By insisting on treating these issues as distinct and unlinked, Trinidad and Tobago utterly rejected our fundamental position on both issues. Its refusal to recognise artisanal fishing rights was a rejection of the boundary claim. Trinidad and Tobago's refusal and its continued, if episodic, efforts at excluding our fisherfolk from their traditional waters generated a special circumstance. This issue is an
inseparable part of boundary delimitation and, to use the language of the ICJ in the Fisheries Jurisdiction case, arises "directly out of the question which is the subject of that application". When this species of special circumstance has been established, an international Tribunal has two options: either to adjust the boundary, as occurred in Jan Mayen, or to install a regime protecting the artisanal fishing, the predicate of the special circumstance, as occurred in Eritrea-Yemen.

The negotiations and exchanges of views preceding Barbados' institution of arbitration clearly established the Tribunal's jurisdiction to decide.

Mr President, members of the Tribunal, for the same reason Trinidad and Tobago's claim to an extended continental shelf which was advanced in the form of a clear claim for the first time after the institution of this arbitration falls outside the Tribunal's jurisdiction.

Trinidad relies on the broad language of UNCLOS article 286 as its basis for jurisdiction, but that provision, as Trinidad itself argues, is subject to the general requisites for the activation of a jurisdiction by exhausting certain prescribed procedures and, we would add, by the competence of a Part XV Tribunal to take up a particular issue.

If it please the Tribunal, I will take you to these issues in turn. Despite five years and nine rounds of negotiations, the parties never exchanged views or engaged in negotiations within the meaning of UNCLOS on Trinidad's claim to an extended continental shelf reaching beyond 200 nautical miles from its territorial sea, for the simple reason that until this arbitration began Trinidad and Tobago never presented the claim. To mention an issue in passing is not to exchange views. But to exclude something explicitly is to exclude it and to remove it from the spectrum of possible disputes. In the fifth round of negotiations, Trinidad and Tobago confirmed that its claim line stopped at the 200 nautical mile arc. That
is what Trinidad and Tobago said. It is part of the transcript that records exactly what was said and it is not taken out of context.

Trinidad and Tobago now claims that it intended to raise the issue in further negotiations, but was precluded by the initiation of this arbitration. Five years was ample time and opportunity to make this claim. Indeed, if it were making the claim, to make it in numbing detail. Assertions made after the fact of would have and should have are not evidence of what happened. The transcript is evidence of what Trinidad and Tobago is claiming and the transcript tells us that Trinidad and Tobago was only claiming up to 200 nautical miles. In fact, Barbados could not even have foreseen that Trinidad and Tobago might submit a claim to Barbados' extended continental shelf, given that Trinidad and Tobago's 200 nautical mile arc falls within Barbados' 200 nautical mile arc. Trinidad and Tobago did not even reach the extended continental shelf. Only in relation to the drawing of a single maritime boundary, which includes the special circumstance of artisanal fishing, was there a full exchange of views. The dispute submitted to the Tribunal therefore does not and cannot, we submit, include a newly-minted claim to an extended continental shelf.

Mr President, there is an additional and more serious obstacle which goes to the competence of the Tribunal. The Tribunal under Part XV lacks jurisdiction and competence over Trinidad and Tobago's claim to an extended continental shelf, because adjudication of such claim would prejudice the right of states not parties to this arbitration. Article 76, paragraph 8, provides in relevant part that it is the Commission which shall make recommendations to coastal states on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal state, on the basis of these recommendations, shall be final and binding. "The recommendations shall be final and binding".
Trinidad and Tobago contends that the Commission's function is to form a view as to the application of these criteria on the basis of information provided by the coastal state, but, according to Trinidad and Tobago, the Commission's function is exclusively with the location of the outer limit of the shelf not with any question of delimitation inter se as between adjacent coastal states. But we would ask, can any sensible distinction be drawn between these two?

In its Rejoinder, Trinidad argues that refusing to decide its extended continental shelf claim would create a gap in Part XV, which, according to Trinidad and Tobago, "was intended to be comprehensive". But, of course, Part XV was not intended to be comprehensive, as Trinidad and Tobago acknowledges in the footnote to its statement in the text and Trinidad's statement of concern for a comprehensive solution rings false when it says in paragraph 72 of its Counter Memorial that it is not for the Tribunal to resolve what it calls "practical issues that might arise in the future". Southern Blue Fin Tuna is compelling authority for fidelity to the text of Part XV and the general principle of consent to jurisdiction.

Mr President, members of the Tribunal, delimitation of the continental shelf in excess of 200 nautical miles from the territorial sea of either party would compromise common rights or heritage of mankind to the seabed, the ocean floor and its subsoil, matters that the Convention entrusts to the exclusive competence of other organs of that area. In St Pierre and Miquelon the Tribunal addressed this issue directly. I would like to read several sentences from it. You will see on the screen the entire selection.

"Any decision by this court recognising or rejecting any rights of the parties over the continental shelf beyond 200 nautical miles would constitute a pronouncement involving a delimitation not between the parties but between each one of them and the international community, represented by organs entrusted for the administration and
protection of the international seabed area (the seabed beyond national jurisdiction) that has been declared to be the common heritage of mankind. This court is not competent to carry out a delimitation which affects the right of a party which is not before it."

Barbados submits that the Tribunal in St Pierre and Miquelon had it exactly right: claims to the extended continental shelf do not fall within the competence of this Tribunal.

Mr President, members of the Tribunal, before I conclude I would like to mention very briefly Barbados' jurisdictional objection to Trinidad and Tobago's so-called regional implications theory.

This Tribunal has jurisdiction over Barbados and Trinidad and Tobago and is empowered by virtue of their adherence to UNCLOS to delimit their maritime boundary. It may certainly look to the practice of states, including nearby states, as evidence of a general practice accepted as law, in the language of article 38.1(b) of the ICJ Statute, but it cannot look only at bits of that practice. It does not have jurisdiction to delimit the maritime boundaries of any other states nor do any of those states have the legal power to delimit the boundaries of Barbados. We will return to this matter when Barbados presents its detailed objections to the substance of the so-called theory of regional implications.

Mr President, members of the Tribunal, this concludes Barbados' presentation with respect to jurisdiction. May I ask the Tribunal now to call upon Mr Volterra.

THE PRESIDENT: Thank you, Professor Reisman. Mr Volterra, please.

MR VOLTERRA: Thank you, Mr President. I anticipate that my intervention will last about 45 minutes, so, with your indulgence, I will try to choose a moment about half way through to have the coffee break. If I forget and go on, do not hesitate to interrupt me.

Mr President, members of the Tribunal, I have the honour to present Barbados' submissions to this
distinguished panel on the related issues of estoppel and acquiescence. Barbados' submissions on estoppel and acquiescence can be distilled into five propositions. One, the doctrines of estoppel and acquiescence apply and are determinative in the present case. Two, to the north of the median line the evidence on the record confirms that Barbados has exercised its sovereign rights and jurisdiction in the area now claimed by Trinidad and Tobago for a prolonged period of time and in a notorious manner, without protest from Trinidad and Tobago. Three, the Tribunal is therefore precluded from considering Trinidad's claims to the north of the provisional median line. Four, to the south of the median line the evidence on the record establishes that Barbados has never acquiesced with Trinidad and Tobago's recent and limited activities in the area claimed by Barbados and, therefore, five, the Tribunal is not precluded from considering Barbados' claim to the south of the provisional median line.

I will address each of these propositions in turn. First, the applicability of the doctrines to the present case. Section 6.3 of Barbados' Reply discussed the legal authority for the proposition that the doctrines of estoppel and acquiescence apply as a matter of law in the present case. I incorporate that analysis here by reference but I do not propose to repeat it because, ultimately, the parties do not appear to be at odds on the issue of the applicability of estoppel and acquiescence as legal doctrines in the case.

At first glance, Trinidad and Tobago's position on the question of the applicability of estoppel and acquiescence appears inconsistent. On the one hand, Trinidad and Tobago contends that the doctrines cannot apply to its claim to the north of the median line as a matter of law. On the other hand, the concepts of estoppel and acquiescence were first introduced to the arbitration by Trinidad and Tobago itself in relation to Barbados' claims to the south of the median line. In
fact, on closer analysis, Trinidad and Tobago's objections to the doctrines appear to be limited to questions of fact in relation to Barbados' oil activities to the north of the median line in the area that Trinidad and Tobago now claims.

Thus, for example, at paragraphs 165 of its Counter Memorial and 178 of its Rejoinder, Trinidad and Tobago relies upon passages from the Cameroon-Nigeria and Nova Scotia-Newfoundland cases in relation to its arguments about Barbados' oil activities in relevant area. Trinidad and Tobago's reliance on the rationes of those cases is misplaced. In those cases, the existence of oil activities was being evaluated as a relevant circumstance, seeing whether it required an adjustment of the provisional median line. The Tribunals in those cases held that such oil activity did not constitute a relevant circumstance. And they did so expressly on the basis of the facts before them.

In the present arbitration, Barbados is not seeking to use the existence of its oil activities or of its other multitudinous non-oil activities in the relevant area to the north of the median line to adjust the provisional median line.

Barbados is not seeking to use estoppel or acquiescence as a sword. On the contrary, Barbados is seeking to use the existence of its various activities as a shield from Trinidad and Tobago's attempt to adjust the provisional median line to the north. The absence of any protest by Trinidad and Tobago over a long period of time has confirmed the settled expectations of Barbados and other states in the region as to Barbados' rights to the north of the median line in the area belatedly claimed by Trinidad and Tobago.

They have also confirmed the settled expectations of oil companies operating in the region. That includes companies that are concessionaires of Barbados in this area to the north of the median line, whilst at the same time being concessionaires of Trinidad and Tobago well to
the south of the median line and I should add well away from the area of Barbados' claims.

In the Fisheries case, the United Kingdom was silent for 60 years about Norway's legislative activities relating to its maritime rights. The International Court of Justice held that to be a sufficiently prolonged abstention for it to conclude that the United Kingdom had acquiesced to the existing state of affairs. Trinidad and Tobago in our case was silent for 30 years in the face of Barbados' abundant activities. Barbados submits that that period is likewise a sufficiently prolonged abstention to require this Tribunal to conclude that Trinidad and Tobago has acquiesced to Barbados' jurisdiction in the area that it has belatedly claimed.

This brings me to Barbados' second proposition. Barbados has consistently exercised sovereign rights and jurisdiction in the relevant area to the north of the provisional median line without protest from Trinidad and Tobago. Trinidad and Tobago has responded to Barbados' arguments on this point by focusing on the evidence of Barbados' oil activities in the relevant area. However, Barbados' exercise of sovereign rights and jurisdiction over this maritime area has taken a number of different forms. The Tribunal has before it in this arbitration evidence of Barbados' exercise of sovereign rights and jurisdiction to the area to the north of the median line now claimed by Trinidad and Tobago in relation to no less than five spheres of activities. I have listed them on your screen and this list can be found at tab 42 of the Judges' folder.

The first is Barbadian legislation. The second Barbadian Coast Guard patrolling activities. The third Barbadian oil exploration. The fourth the Barbados-Guyana Joint Co-operation Zone Treaty and its implementation. The fifth Barbados' programme for submitting its extended continental shelf claim to the Commission on the Limits of the Continental Shelf. Although Trinidad and Tobago seeks to reinterpret the legal effect of certain of these
spheres of activities and has chosen to ignore the rest, the evidence remains on the record unchallenged. I will overview this evidence briefly.

Barbados' domestic legislation asserts a clear and consistent claim to sovereignty to the north of the median line. Its Maritime Boundaries and Jurisdiction Act of 1978 provides that, in the absence of any agreed EEZ boundaries with its maritime neighbours, the outer limit of Barbados' exercise of sovereign rights and jurisdiction in relation to an EEZ is the median line. This Act can be found at tab 43 of your Judges' folders. This three decades old piece of legislation is clearly incompatible with Trinidad and Tobago's claim to the north of the median line. Yet not once has Trinidad and Tobago protested it, despite knowing of its existence. Indeed, in its pleadings related to Barbados' claim to the south of the median line, with respect to the artisanal fishing of Barbados' fisherfolk, Trinidad and Tobago even seeks to rely on the Act. Furthermore, since 1979 Barbados has enacted a wide range of domestic legislation. The effect of this legislation is to provide a comprehensive regulation of all forms of activity in the maritime territory to the north of the median line, including the area now claimed by Trinidad and Tobago. Trinidad and Tobago has never protested any of this legislation. For its part, Trinidad and Tobago has failed to submit evidence of any Trinidadian legislation that purports to exercise jurisdiction over the area that it, or indeed Barbados, claim in this arbitration, either to the north or to the south of the median line.

The delimitation line proposed by Barbados is thus in no way incompatible with Trinidadian legislation. In contrast, Trinidad and Tobago's proposed delimitation line is incompatible with Barbados' long settled legislation.

Barbados' Coast Guard has been conducting routine patrols for no less than three decades in the area now claimed by Trinidad and Tobago. Those patrols have been conducted for such usual purposes as maritime safety,
national defence and security and fisheries management. More recently, they have also been conducted pursuant to Barbados' international obligations as provided in the Barbados Guyana Joint Co-operation Zone Treaty.

In its Reply, Barbados submitted an affidavit of the Head of its Coast Guard, Lt Commander David Dowridge. His affidavit can be found at tab 44 of your judges' folder. Lt Commander Dowridge described the history of Barbadian coast guard patrolling in the relevant area to the north of the median line now claimed by Trinidad and Tobago. Trinidad and Tobago chose not to address this evidence in its Rejoinder. It has chosen not to examine Lt Commander Dowridge at this hearing. It has submitted no evidence of its own to challenge Barbados' evidence on this point, and it has made no assertion that Trinidad and Tobago's Coast Guard has patrolled the area that it now claims to the north of the median line. I put it to the Tribunal that this evidence stands entirely unchallenged.

The map before you now on the screen is map 13 of the Reply. Tab 45 of the folder. For more than 30 years Barbados and companies acting exclusively under its jurisdiction have engaged in oil exploration, exploitation and resource management activities to the north of the median line. This includes in the area belatedly claimed by Trinidad and Tobago. Trinidad and Tobago never protested this activity until after the commencement of the most recent round of bilateral negotiations. Not a word until after the negotiations started.

Trinidad and Tobago's own pleadings confirm that its acquiescence in this respect was consistent with the settled expectation of global oil companies including its own concessionaires.

The first seismic work in the area to the north of the median line now claimed by Trinidad and Tobago took place in 1974. The scope and extent of some but not all of the exploration activities conducted by Barbados since 1974 in that area is illustrated on the map before you. Barbados first granted a licence that included the
relevant area in 1979. That was to a subsidiary of Mobil Oil. In 1996 Barbados granted a new concession over the same area to a consortium comprised of subsidiaries of Conoco and TotalFinaElf. All three of these companies were and are concessionaires of Trinidad and Tobago, although well to the south of the median line and off the island of Trinidad.

Trinidad and Tobago was aware of the existence and extent of these Barbadian concessions, yet it did not protest them.

Mr President, members of the Tribunal, Barbados and its concessionaires have invested considerable human and financial resources in the area to the north of the median line now claimed by Trinidad and Tobago. By way of example, from 1996 to 2004 Conoco and Total spent approximately $65m on reconnaissance, seismic testing and exploratory drilling under their Barbados concession. Trinidad and Tobago seeks to play down Barbados' investment in oil activities. Its Rejoinder at paragraph 174 mocks the sum of $65m as being insignificant. This sum, Barbados submits, may be insignificant for Trinidad and Tobago. Barbados would not disagree that Trinidad and Tobago's hydrocarbon industry is considerably larger than Barbados' to date. Nor would Barbados deny that Trinidad and Tobago's oil and gas industry produces enormous wealth for Trinidad and Tobago. In comparison with its energy investments, $65m must indeed seem modest to Trinidad and Tobago. Certainly the evidence before the Tribunal, is that the fortunes of geography have provided Trinidad and Tobago with abundant hydrocarbon resources. However, although the imbalance in the two countries' natural resources is undisputed, that does not mean that $65m is an insignificant expenditure for Barbados.

Barbados' Memorial and Reply have described the Barbados Guyana Joint Co-operation Zone Treaty, signed in 2003. It is at Tab 46. The Co-operation Treaty is consistent with international law and it violates no third party rights. The Barbados Guyana Joint Co-operation Zone
is located entirely within Barbados' and Guyana's EEZ and entirely beyond 200 nautical miles from the coast of any third party. Maps 9 and 10 of the Memorial show this clearly. Tab 47 of the judges' folder.

This is map 10 from the Memorial and shows the parameters of the Barbados Guyana Joint Co-operation Zone. That zone represents an exercise of sovereign rights in jurisdiction by Barbados albeit jointly with Guyana, in relation to a part of its maritime territory that falls outside the jurisdiction of any third state. And the Tribunal will no doubt have noted that the Co-operation Zone lies both to the north and to the south of the Barbados-Guyana median line.

Barbados' agent has identified to the Tribunal that Barbados and Guyana have subsequently engaged in a number of activities to implement that treaty. As described under the terms of the treaty they have arranged to continue to do so in the future.

Finally, Barbados has undertaken a submission programme in relation to the Commission on the Limits of the Continental Shelf, the CLSC. The origin of this programme in Barbados dates back to the mid-1990s. At that time the Commonwealth Secretariat began to assist its developing state members including Barbados to take steps to protect and manage their natural resources and other interests within their maritime territory. This included making submissions to the Commission on the Limits of the Continental Shelf on extended continental shelf rights. Barbados responded to this by taking the initiative, inter alia, to begin its CLSC programme. At Barbados' request the Commonwealth Secretariat sponsored the United Kingdom Hydrographic Office to conduct a technical study of Barbados' base points and maritime territorial entitlements. That report was produced for Barbados in 1999 and shortly thereafter Barbados began the process of preparing its submissions to the CLSC in relation to its entitlement to an extended continental shelf. Barbados subsequently engaged geological and geomorphological
experts to begin the laborious and costly process of preparing its CLSC submissions. That process is currently ongoing and of course relates to all of Barbados' entitlement to the extended continental shelf abutting its full 200 nautical mile EEZ limit.

Barbados has expended significant time and resources on this programme. In contrast Trinidad and Tobago has not even claimed to have begun a CLSC submission programme or to have undertaken any such activities. The Tribunal is entitled to conclude that if Trinidad and Tobago had such a programme it would have said so. This must lead to the inescapable conclusion that Trinidad and Tobago has engaged in no such activities to date. As the Tribunal is no doubt well aware, the deadline for CLSC submissions is but a few years away. Trinidad and Tobago's failure even belatedly to have started a CLSC submission programme is inconsistent with the new claims that it is making in this arbitration.

The Tribunal is entitled to conclude from this evidence, or lack of evidence, that Trinidad and Tobago recognises that in truth it has no plausible claim to appropriate Barbados' EEZ and extended continental shelf.

Trinidad and Tobago seeks to re-interpret some of the evidence that I have just reviewed, but it has not otherwise challenged it or presented evidence of its own to contradict it. In its Rejoinder at page 75, Trinidad and Tobago attempts to obfuscate the facts by asserting that neither it nor Barbados has engaged in significant oil activities in the area now claimed by Trinidad and Tobago to the north of the median line. I have already described Barbados' significant oil activities over the past three decades and more. Trinidad and Tobago's evidence of its purported activities in that area is that, in 2003, at the same time that it was supposedly negotiating in good faith with Barbados, and very shortly before this arbitration was commenced, it proposed to conduct seismic testing to the north of the median line.

Trinidad and Tobago makes much of this and Barbados
has five observations to make in relation to that
evidence. First, the proposal was only made several years
after the start of the most recent round of negotiations
between the parties. It was part of a pattern of
aggressive and provocative tactics being used by Trinidad
and Tobago in relation to the delimitation shortly before
the start of the arbitration. And both Barbados’ agent
and Ms Marshall spoke to the facts pertinent to this case
leading up to the commencement of the arbitration.

Second, Barbados protested this proposal.

Third, the proposal includes area to the north of the
median line over which Trinidad and Tobago makes no claim.
This proposed seismic programme goes well beyond to the
north and west of where its 88 degree azimuth is located.
It therefore cannot be said to have been contemplated by
Trinidad and Tobago a titre de souverain.

Fourth on Trinidad and Tobago's own evidence before
this Tribunal a number of its own concessionaires wrote to
Trinidad and Tobago to warn it that this proposed seismic
testing would violate Barbados' maritime territory to the
extent that it took place north of the median line. Those
were Trinidad and Tobago's own concessionaires.

Finally Trinidad and Tobago has submitted no evidence
that it ever actually undertook its proposed seismic
testing. The most that Trinidad and Tobago's evidence
shows is that when it proposed to undertake seismic
activity to the north of the median line, including areas
over which it makes no claim, that oil companies protested
this proposal as a violation of their rights and of
Barbados' territory, and that in the end Trinidad and
Tobago somehow acquired – and that is the term used by
Trinidad and Tobago – seismic data to the north of the
median line. There is no evidence that it was acquired as
a result of a seismic programme operated by Trinidad and
Tobago, as opposed to having been purchased commercially.

Other than its claim to have engaged in seismic
activity to the north of the median line in 2003, Trinidad
and Tobago has submitted no evidence of having undertaken
any other activities north of the median line.

It appears to have been the constant working assumption of the authorities of Trinidad and Tobago until at least 2003 that the maritime boundary between Barbados and Trinidad and Tobago followed the median line throughout its course. For example, before you now is the cover page of a 2003 Trinidad and Tobago government maritime report. See Tab 49. This report was prepared by the Fisheries Division of the Trinidad and Tobago Ministry of Agriculture, Marine and Land Resources. The map that is magnified for you now on the screen is the illustrated reference point for this document. It clearly shows that the boundary between Barbados and Trinidad and Tobago is the median line. Barbados does not of course agree with the boundary illustrated on the map, to the extent that it fails to recognise the special circumstances which are the basis of Barbados' sovereign rights and jurisdiction to the south of the median line, and to the extent that it appears to endorse the line derived from the 1990 Venezuela/Trinidad and Tobago Agreement. But it is another example of Trinidad and Tobago having publicly recognised that Barbados has jurisdiction to the north of the median line.

This public recognition appears to have extended even to its negotiations with Venezuela over their boundary back in 1990 and before. I would like to direct the Tribunal's attention to tab 48 of the judges' folder and may I ask you to extract the map that you will find located there for the next part of my presentation.

This is a blow up of the map that was submitted at tab 6 of Barbados' supplementary evidence submission. A copy of it is also shown on the screen in front of you. This map is Trinidadian and dates from 1990. Its provenance is the current Prime Minister of Trinidad and Tobago. In 1990 Prime Minister Manning, as he now is, circulated this map showing the history of the then just concluded maritime boundary delimitation negotiations between Trinidad and Tobago and Venezuela. This map
shows a number of interesting things. The bottom left hand of the map shows the continental land mass of South America. You can see Venezuela and Guyana shown there. Above them are the islands of Trinidad and Tobago. The interesting information on the map is found in the middle. It is interesting because it provides us with an insight into the history of the Trinidad and Tobago and Venezuela negotiations. Thus, if you look at the middle, you can see what was Venezuela's first proposal for a maritime delimitation with Trinidad and Tobago. If you look towards the northern most line that goes across the middle of the map, you will see that it is clearly marked as Venezuela's proposal number one. That is the line that is in the middle of the map, it is the northern most line but then cuts across underneath the second most northern line. That second line is Venezuela's second proposal and that is similarly labelled. It is similarly labelled as "Venezuela's proposal number two". Below that, Trinidad and Tobago's proposal is also labelled along the line to the south of Venezuela's proposals.

What is immediately striking, of course, is that all of these proposed delimitation lines stop at the Barbados/Trinidad median line - all of them.

The final line chosen as their bilateral boundary is shown on this map as stopping at the Barbados/Trinidad median line as well. That is the darkest line on the map. The idea to extend that line beyond the median line appears on the basis of this map to have been such a late afterthought that it has not been printed on the map, but only appears represented as a rough hand sketch on the right side of the map. Barbados will be making its more detailed submissions in relation to the 1990 line tomorrow. It is of course not opposable to Barbados, nor does it have any effect on this arbitration. Nonetheless, this map, showing the record of the history of negotiations between Trinidad and Venezuela, appears to indicate that until the very last moment they both recognised that Trinidad and Tobago's territory and, thus,
its ability to concede territory to a third state was
circumscribed by its median line with Barbados.

I have now finished with this piece of evidence for
the moment. You may wish to put it back at tab 48. You
will be relieved to know that I have about half a page
before I am going to propose the coffee break, Mr
President.

This review of the evidence leads to Barbados' third
proposition. Barbados has submitted evidence covering a
period of more than 30 years of its consistent and regular
exercise of sovereign rights and jurisdiction in the area
to the north of the median line now claimed by Trinidad
and Tobago. This continuing exercise of sovereign rights
and jurisdiction was never contested by Trinidad and
Tobago until after the start of the recent bilateral
negotiations on fisheries and delimitation. On the
contrary, Trinidad and Tobago has consistently recognised
and acquiesced in Barbados' jurisdiction over this area.
Barbados and others have relied on that to their material
detriment. This evidence confirms Barbados' third
proposition: Trinidad and Tobago's recognition and
acquiescence gives rise to an estoppel as a matter of
international law. It prevents Trinidad and Tobago from
now asserting any legal claim over maritime territory to
the north of the median line and the Tribunal is, thus,
precluded from considering these claims.

Mr President, it might be appropriate now before I
turn to consider the evidence related to the claim of
Barbados to the south of the median line to take a coffee
break.

THE PRESIDENT: Thank you so much, Mr Volterra. We will resume
at twenty-to-five.

(Short Adjournment)

THE PRESIDENT: Mr Volterra, will you resume please.

MR VOLTERA: Thank you, Mr President. Members of the
Tribunal, just to reiterate, I am talking about issues of
estoppel and acquiescence. I started off by talking about
Barbados' five propositions, that the doctrines are
applicable and determinative in this arbitration, that the
evidence to the north of the median line shows that
Barbados has consistently exercised sovereign rights and
jurisdiction without protest from Trinidad and Tobago. I
just concluded that meant that the Tribunal was precluded
from considering Trinidad and Tobago's claims to the north
of the provisional median line. I am about to talk about
points 4 and 5 which are No 4 looking at the south of the
median line, the evidence there, and showing that Barbados
never acquiesced to Trinidad and Tobago's recent limited
activities in the area, and then concluding therefore that
the Tribunal is not precluded from considering Barbados'
claim there. I just went through the various evidence of
Barbados in relation to its activities in the relevant
area to the north of the median line, the legislation, the
Barbadian coast guard patrols; the oil exploration, the
Joint Co-operation Zone Treaty and Barbados' programme for
submitting its extended continental shelf claim to the
Commission on Limits of the Continental Shelf.

Mr President, I now turn to Barbados' fourth
proposition, and the body of evidence that is related to
Barbados' claim to the south of the median line.

Trinidad and Tobago argues that Barbados is estopped
from making a claim for an adjustment to the provisional
median line to the south. It will not surprise the
Tribunal to know that Barbados confirms its submissions to
date that there is no evidence to support the assertion
that the doctrines of acquiescence and estoppel apply here
in fact.

The factual circumstances in relation to Barbados' claim to the south of the median line stand in stark
contrast to those related to Trinidad and Tobago's claim
to the north of the median line. Trinidad and Tobago's
few attempts to exercise sovereign rights and jurisdiction
in the area to the south of the median line that belongs
to Barbados are recent. The evidence confirms that
Barbados has never acquiesced in any of these activities
in either word or deed. As a result Barbados cannot be
estopped from making its claim for an adjustment of the median line to the south.

In its Counter Memorial Trinidad and Tobago refers to what it claims are "many instances where Barbados has recognised Trinidad and Tobago's rights in respect of the areas that Barbados now claims". However, even a brief examination of the evidence relied upon to support that claim both exposes it as empty and confirms that Barbados never recognised Trinidad and Tobago as exercising any form of sovereign rights or jurisdiction in the area concerned. In the context of hydrocarbons, Barbados protested against Trinidad and Tobago's three and only attempts to engage in oil activities in the relevant area to the south of the median line. Trinidad and Tobago offered concessions off Tobago in 1996, 2001 and 2003; and of course those later two offers came well after the start of the most recent bilateral negotiations. Barbados protested those attempted concessions and the evidence before this Tribunal unambiguously confirms that no oil company disregarded Barbados' protests and took up Trinidad and Tobago's offers.

Similarly the single piece of correspondence between the parties concerning a seismic programme to be undertaken by a Barbados licensee in 1998 around the coast of the island of Tobago does not assist Trinidad and Tobago either. That correspondence did no more than recognise that "any data acquired in the areas under Trinidad and Tobago jurisdiction is the property of Trinidad and Tobago". That correspondence did not prescribe what the parameters of those Trinidad and Tobago areas might be. Trinidad and Tobago asks the Tribunal to read into the plain language of that letter the very conclusion for which it seeks to use the letter as evidence. Trinidad and Tobago tries to do the same thing with the plain language of Barbados' various oil concessions. It requires a vivid imagination and a liberal re-writing of those documents to support the self-serving interpretation proposed by Trinidad and Tobago.
In the context of fishing the record before the Tribunal is again unchallenged. Barbados took immediate steps to counter-act Trinidad and Tobago's illegal arrests in 1989, and again between 1994 and 2004, of Barbadian fisherfolk fishing off Tobago.

Of course since the start of this arbitration Trinidad and Tobago has stopped arresting the Barbadian fisherfolk fishing off Tobago.

Trinidad and Tobago claims at paragraph 297 of its Counter Memorial that all of the fisheries negotiations between the parties since 1990 had been predicated on Barbados' recognition that Trinidad and Tobago had sovereignty in all the maritime areas to the south of the median line. Trinidad and Tobago bases its argument in this respect on the 1990 Barbados/Trinidad and Tobago fishing agreement. As described by Professor Reisman shortly before me, this was no more than a one year modus vivendi, and as he described, just as with the Barbados oil documents, the plain language of the 1990 modus vivendi does not support Trinidad and Tobago's self-serving current interpretation.

Trinidad and Tobago seeks to read into the plain language of the fishing agreement the very conclusion that it now asserts. However, Trinidad and Tobago has been forced to concede - for example I refer you to the Counter Memorial at paragraph 53 sub-paragraph 3 - that the fishing agreement nowhere defines the limits of the parties' EEZs. If there were any doubt, Article 11 of the fishing agreement is unequivocal in contradicting Trinidad and Tobago's claims in this arbitration.

For those of you who want to follow the documents, I am going to be referring to a series of documents, three in a row, starting at tab 50. The first one is this modus vivendi, this 1990 modus vivendi, and you will find Article 11 at tab 50. It is also up on the screen. It reads: "Nothing in this agreement is to be considered as a diminution or limitation of the rights which either contracting party enjoys in respect of its internal
waters, archipelagic waters, territorial sea, continental shelf or exclusive economic zone. Nor shall anything contained in this agreement in respect of fishing in the maritime areas of either contracting party be invoked or claimed as a precedent”.

There is nothing in this language that gives comfort to the mistaken view that the fishing agreement shows an acceptance by Barbados of Trinidadian sovereign rights and jurisdiction in any specific territory; nor indeed the reverse.

In the same manner Trinidad and Tobago also seeks to rely on the records of the recent negotiations between the parties on fisheries and maritime delimitation. However, the draft fishing agreement that was proposed by Barbados during those talks contained as its Article 16 a preservation of rights clause identical to Article 11 of the 1990 fishing agreement - tab 51. Professor Reisman again referred to that document.

Article 16 of the draft agreement proposed by Barbados is identical to the Article 11 preservation of rights clause found in the 1990 modus vivendi.

Lest there be any misunderstanding about what Trinidad and Tobago thought that meant, the effect of Article 16 of the recent proposed fishing agreement, which is the same as Article 11 from the modus vivendi, was agreed. The meaning was agreed between the parties, and it was expressly recognised by Trinidad and Tobago at the time. See Tab 52. You there find Trinidad and Tobago's contemporary position referring to the preservation of rights clause in Article 16, which is obviously the same as Article 11 and therefore their understanding must have been the same.

I quote it: "it was agreed that the agreement should include a provision indicating that the fishing agreement should in no way effect the parties respective maritime jurisdictional claims."

Mr President, members of the Tribunal, frankly it is difficult to imagine language that could be clearer in its
contradiction of Trinidad and Tobago's current argument than that contemporary statement. That statement alone undercuts Trinidad and Tobago's arguments entirely on this point.

In the same way the various warnings that were given by Barbados to its fisherfolk following the sporadic arrests by Trinidad and Tobago in 1989 and between 1994 and 2004 do not constitute recognition that the area to the south of the median line claimed by Barbados is part of Trinidad and Tobago's EEZ.

The evidence in relation to the parties' activities to the south of the median line supports Barbados' fifth and final proposition; that the Tribunal is not precluded from considering Barbados' claim there. Trinidad and Tobago does not have a prolonged claim over the area in question. There is no evidence of any domestic Trinidad and Tobago legislation to that effect, and Barbados has protested against each of the few recent and limited activities engaged in by Trinidad and Tobago in this area.

In short, there is no evidence that Barbados has acquiesced to Trinidad and Tobago's current claim in the area.

Mr President, this brings me towards the end of my intervention. Barbados' prolonged and notorious exercise of sovereign rights and jurisdiction in the area to the north of the median line now claimed by Trinidad and Tobago called for a timely reaction from Trinidad and Tobago if it wished to object to Barbados' rights over the area. Trinidad and Tobago's first and only protest came a few years ago, well after the dispute had materialised and only in relation to oil activities. During the interim for three decades Barbados, its oil concessionaires, other states and others relied upon that lack of objection. Trinidad and Tobago's belated claim seeks to disrupt the settled expectation of even its own oil concessionaires. Its failure to protest constitutes acquiescence to Barbados' sovereign right to jurisdiction to the north of the median line. Trinidad and Tobago is thus estopped
from making a belated claim to that area. In contrast, as I have just discussed, the Tribunal is not precluded from considering Barbados' claim to the south.

Mr President, members of the Tribunal, I conclude my remarks with four closing observations. First, if Trinidad and Tobago were awarded any maritime territory to the north of the median line, it would be incompatible with Barbados' legislation, Barbados' Coast Guard patrolling practice, oil activity, the expectation of oil companies on both sides, the Barbados-Guyana Treaty and Barbados' CLSC submission programme.

Second, if Trinidad and Tobago were not awarded any maritime territory to the north of the median line, it would not be incompatible with any Trinidad and Tobago legislation. It would not be incompatible with any Trinidad and Tobago Coast Guard patrolling practice, pre-dispute oil activities or CLSC programmes for the simple reason that there were no such or, indeed, any Trinidadian activities in that area.

My third observation is that, by way of contrast, if Barbados were awarded maritime territory to the south of the median line, it would be compatible with both Barbados and Trinidad's legislation, as well as the fishing practices of the fisherfolk of both countries.

Finally, and most importantly, if Barbados' sovereign rights and jurisdiction to the south of the median line were not confirmed, it would be incompatible with Barbados' traditional artisanal fishing activities off Tobago.

Mr President, members of the Tribunal, I thank you for your attention and I invite you, Mr President, to call upon my colleague, Professor Reisman, who will begin Barbados' presentation on the relevant circumstances that require an adjustment of the provisional median line to the south.

THE PRESIDENT: Thank you so much, Mr Volterra. Professor Reisman.

PROFESSOR REISMAN: Thank you, Mr President, members of the
Tribunal. If I may paraphrase John Donne, no part of international law is an island entire of itself. Maritime delimitation practice has taken account of general transformations in public international law, as it must. In particular, the delimitation practice of Tribunals has manifested an acute sensitivity to the consequences of new boundaries and maritime zones in areas theretofore high seas in three often related circumstances. First, where there has been a long-term fishing practice; second, where affected individuals rely on the sea for artisanal fishing, and, third, where affected states or parts of their populations will likely suffer catastrophic consequences because of the putative boundary or maritime zone changes.

Where the facts show traditional use and artisanal reliance on the sea by individuals or the potential for catastrophic consequences for a state, or both, international Tribunals have taken one of two approaches. Either they have adjusted the provisional boundary generated by the general principles of maritime law, so as to ensure the ultimate boundary will accommodate this special circumstance by guaranteeing access to the artisanal fisherfolk who rely on the relevant waters, or they have established a regime to ensure that those fisherfolk and the affected state enjoy continued access for the limited purpose of artisanal fishing. Barbados submits that the facts here clearly warrant an award that follows one of these two legal approaches. Barbados' prayer is for the first, but the second is infra petita.

Specifically, it is Barbados' case in this arbitration that the Barbadian traditional artisanal fishery off the north west, north and north east coasts of Tobago, upon Barbados' fishing communities are dependent throughout much of the fishing season, requires adjustment of the median line to the south. The area of adjustment required is shown on map 3 of Barbados' Memorial and map 22 of its Reply and is reproduced here. It is of course also in your judges' folders.
Barbados' case for this special circumstance comprises three core factual submissions. First, Barbadian fisherfolk have been fishing off the island of Tobago for centuries. Second, Barbadian fishing communities, which form a substantial part of the working population of the island's small economy, are dependent upon fishing in the area claimed off Tobago, particularly for flying fish. Any delimitation that left Barbadian artisanal fisherfolk unable to fish in that area would have catastrophic repercussions for the communities concerned. And third, the fisherfolk of Trinidad and Tobago do not fish in the area claimed by Barbados and, thus, are in no way dependent upon it for their livelihoods. In other words, the adjusted median line proposed by Barbados would ensure equitable access by the fisherfolk of both Barbados and Tobago to the fisheries upon which their respective livelihoods depend.

Mr President, my colleagues, Sir Henry Forde and Mr Fietta, will speak to each of these factual submissions in turn. Sir Henry will address the first and second submissions and that will conclude our presentation for today. Tomorrow morning, Mr Fietta will further address the second submission and then move on to the third submission.

For our convenience, Mr President, members of the Tribunal, Sir Henry and Mr Fietta will direct you where appropriate to evidence appearing in your Judges' folders, but please note that where passing reference is made to issues of fact, they will not speak all of the specific references to the relevant evidence. Full references will, however, appear in footnotes to the transcript and will be provided to the President of the Tribunal and to Trinidad and Tobago. It goes without saying, Mr President, that all of the evidence concerned has already been submitted to the Tribunal and to Trinidad and Tobago in accordance with the Rules of Procedure.

Mr President, with your permission, I will now hand over to Sir Henry Forde, who will address the history of
the maritime fishery of Barbados and, in particular, the history of its traditional artisanal fishery off Tobago. He will then describe the catastrophic consequences that would be felt by the fishing communities of Barbados and by Barbados as a whole if the Barbadian fisherfolk were to lose access to that fishery. As Attorney General Mottley mentioned, Sir Henry is a former Foreign Minister and Attorney General of Barbados.

Mr President, may I ask you to turn the floor to Sir Henry.

THE PRESIDENT: Thank you, Professor Reisman. Sir Henry, please.

SIR HENRY FORDE: Thank you, Mr President. It is for me, Mr President and members of the Tribunal, a distinct honour to address you as part of the team representing the government and people of Barbados in this historic case, the outcome of which is of paramount importance to the fisherfolk and people of Barbados. My assignment is essentially to address two of Barbados' three core factual submissions in relation to the special circumstance that requires adjustment of the median line to the south. My first submission is that Barbadian fisherfolk have been fishing off the island of Tobago for centuries. The second is that Barbadian fishing communities today are overwhelmingly dependent on the fishery off Tobago, particularly the fishery for flying fish. Mr President, I have had the distinct honour of representing the people of the constituency of Christchurch West in Barbados' Parliament for some 32 years. My constituency was on the outskirts of our capital city of Bridgetown. It included several landing areas for fishing boats and many of my constituents earned their living from the sea. This is typical of almost every constituency in Barbados. Owing to the small size of the island, urban and rural are intimately intermingled, but the sea is never far away.

Permit me first to make some brief observations by way of background to this essential part of Barbados' case. Maritime fishing has always played a central role
in the culture, society and economy of the island. Historical records of Barbadian fishing date back to pre-colonial times when Arawak Indians inhabited the island. Following the arrival of the first British settlers in the early part of the 17th century and the subsequent growth of the colonial plantation system, fishing became a mainstay of the Barbadian economy. Fresh and salted fish provided an essential source of protein for the island's slave population. It is well known that slaves participated widely in fishing activities, often spending long periods at sea in their fishing boats. Indeed, following emancipation in 1838, fishing offered former slaves one of the very few real alternatives to work on the plantations and became an extremely important source of income for the black population of the island, such that, in 1868, a white Barbadian named John Bezsin Tyne described the black fisherfolk as the chief fishermen on the island and observed that they caught far more fish by that time than their comparatively poor white counterparts. [John Bezsin Tyne, Tropical Reminiscences (1909), unpublished manuscript, Barbados Museum and Historical Society. (Memorial of Barbados, Vol. 2, Appendix 21, at p. 196)]

Throughout the island's history, the flying fish has provided the bulk of the Barbadian fisherfolk catch. The British observed widespread fishing by Barbadians for flying fish as early as 1722. It was observed that the season "goes off" at the autumnal equinox. To this day the equinox marks the beginning of the flying fish season off Tobago for Barbadian fisherfolk. By 1770 visitors to the island were noting that in Barbados "everything is dear but flying fish". [Edward Thompson, Sailor's Letters Vol. II, Dublin, (1770). (Memorial of Barbados, Vol. 2, Appendix 10, at p. 58)] In 1812 an American prisoner of war on the island wrote that "one could hardly escape the sight of them anywhere". [The Yarn of a Yankee Privateer, edited by Nathaniel Hawthorne, New York: Funk and Wagnell’s 1920). (Memorial of Barbados, Vol. 2, Appendix
But the widespread harvesting and consumption of flying fish was unique to Barbados. For this reason, by the end of the 18th century flying fish were known in Europe as "Barbados' pigeons". [Edward Thompson, Sailor's Letters Vol. II, Dublin, (1770). (Memorial of Barbados, Vol. 2, Appendix 10, at p. 58)]

As we can see from this extract which appears at tab 55 of your Judges' folder, in 1868 John Bezsin Tyne commented that the catch of this delicate flavoured fish is an industry peculiar to Barbados and observed that 30 years after emancipation the flying fish industry gave employment to hundreds of boats built and equipped for the purpose, "each of which is manned with two to five men, according to its size". By 1894 in an article appearing at page 56 of your Judges' folder, a US newspaper was able to report that the flying fish fishery had been for many years the mainstay of a large part of the population of Barbados and a source from which the most popular food known on the island was derived. Again, it was observed that about 200 boats were engaged in the fishery. Today maritime fishing remains as essential as ever to the Barbadian economy and national diet. Primarily, it is a source of employment in a society with historically high levels of unemployment. Indeed, nearly 5 per cent of island's working population, equating to approximately 6,000 people are employed in one way or another in the maritime fishery, whether as fisherfolk or in associated employment as fish boners, scalers, processors or sellers, as fishing boat builders, gear suppliers or boat mechanics. [Fisheries Management Plan 2004-2006, Fisheries Division, Ministry of Agriculture and Rural Development, Barbados, section 2.2. (Memorial of Barbados, Vol. 3, Appendix 60, at p. 686)] They make up a diverse and vibrant fishing community.

Equally important, Mr President, is the contribution that fish continues to make to the diet of Barbadians providing them with a relatively cheap and healthy supply of protein. According to the Food and Agricultural
Organisation's statistics that appear at table 57 of your folder, the per capita annual consumption of fish is 31.8 kilograms in Barbados, more than four and a half times the annual consumption of Trinidad and Tobago, which is only seven kilograms. [FAO Report (2000). (Memorial of Barbados, Vol. 3. Appendix 47, at p. 569)] Indeed, more than 80 per cent of Barbadians eat fresh fish every week. [FAO Field Document, Robin Mahon and Stephen Willoughby, "Impacts of Low Catches on Fishermen, Vendors and Consumers in Barbados", FAO Barbados (1990). (Memorial of Barbados, Vol. 3, Appendix 39, at p. 436)]

The maritime fishery sector is equally vital to the foreign exchange regime. It reduces the need for Barbados to import foreign foods for domestic consumption and thus helps us to regulate our balance of payments. What is more, the flying fish remains uniquely integral to the culture, society and well being of the island and its people. Flying fish constitutes almost two thirds of the annual Barbadian fish catch by weight and over 90 per cent of the island's fisherfolk are directly reliant upon the flying fish fishery for their livelihoods. [Fisheries Management Plan 2004-2006, Fisheries Division, Ministry of Agriculture and Rural Development, Barbados. (Memorial of Barbados, Vol. 3, Appendix 60, at p. 729)]

Barbados is constrained to import flying fish to supplement the local catch in order to meet the huge demand for the fish across the island. Trinidad and Tobago observes at paragraph 90 of its Rejoinder that the value of the flying fishery to Barbados is around Barbados $37 million – that is about US $18.5 million – per year. But this figure completely ignores the value of the dolphin, the principal predator of the flying fish which is fished simultaneously. When the value of the dolphin fish is added, the overall value increases to approximately 51 million Barbados dollars, more than 25 million US, per year. [The value of Barbados' Fisheries: a preliminary assessment, Fisheries Division, Ministry of Agriculture and Rural Development,
Barbados (Reply of Barbados, Vol. 3, Appendix 60, at p. 724)]  This figure represents the equivalent of more than US $4000 for each person employed in the maritime fishery, a sector in which incomes are unfortunately well below the Barbadian national average and where poor communities live on extremely narrow margins. Yet Trinidad and Tobago in its Counter Memorial accuses Barbados of greatly exaggerating the economic importance to us of fishing for flying fish. This dismissive attitude pervades Trinidad and Tobago's response to Barbados' argument about fisheries as a special circumstance in this case. But the allegation of Trinidad and Tobago simply bears no relation to the reality, as shown by the weight of the evidence that is before this Tribunal.

The fundamental importance of the flying fish to the social and cultural, as well as the economic, fabric of Barbados is perhaps best summarised by the fact that Barbados has for centuries been known as "the land of the flying fish". Flying fish is the national dish of Barbados. As you can see from the examples shown on these slides, which appear at tabs 58 to 60 of your folder, the flying fish appears on all of the country's bank notes, as well as on a wide variety of its coins, and stamps. Given the fact that the flying fish is known throughout the Caribbean region as the national symbol of Barbados, Trinidad and Tobago's assertion that Barbados has sought to exaggerate the importance of it is completely unsustainable.

Mr President, members of the Tribunal, it is against this background that Barbados' case on the artisanal fishery off Tobago as a special circumstance requiring adjustment of the median line stands to be decided. This is because the fishery off Tobago today, just as it had always done, provides an essential source of the Barbadian catch of flying fish and other associated species that prey upon it, such as the dolphin fish.

I will now move on to address the first of Barbados' three core factual submissions. Barbadian fisherfolk have
been fishing off the island of Tobago for centuries. The season for flying fish off Tobago runs from November to July. During the months of November to February and June to July flying fish and associated species are very scarce off Barbados. This seasonal scarcity is a natural phenomenon because of the regular migratory patterns of the flying fish. Barbian traditional artisanal fisherfolk followed, and continue to follow, this natural movement in the months of scarcity. The historical record clearly demonstrates that significant numbers of Barbadian fishermen, using fishing sloops or small schooners, were already fishing off the coasts of Tobago as early as the first half of the 18th century. At that time Barbados was a British colony, and it remained so until independence in 1966, and Tobago was a French colony. One such Barbadian fisherman, Stephen Charnock, was accused in 1724 of having raided a French party in Tobago and having made off with its wares. This is the deposition that was taken from Charnock in relation to the incident. It appears at tab 61 of your folders. In it Charnock explained that he believed that he had a right to fish in and about the island of Tobago, an assertion that was subsequently corroborated by the Governor of Barbados in his report of the incident on 16 November 1724. That report, which appears at tab 62 of your folders, described how Charnock had set out from Barbados in his sloop to fish off Tobago immediately prior to the incident.

It is well known that from the early 18th century and throughout the colonial period there was substantial and unregulated maritime traffic between Barbados and Tobago. Whilst some Barbadians travelled freely to the waters off Tobago to fish in the rich fishing grounds there, others travelled freely to the island itself, which provided the primary source of timber for Barbados. As a result there developed what one historian from Trinidad and Tobago has called a "long enduring association between Barbados and Tobago" where Barbados came to rely upon a constant supply of timber from the island of Tobago until well into the
This association between Barbados and Tobago, which was founded upon the need for Barbadians to access the rich natural resources of Tobago and its near-by waters, was formally recognised as early as 1749 in a Treaty between the French Governor of Martinique and the British Governor of Barbados. The transcript of the treaty appears at tab 63 of your folders. It provided that, pending final resolution of the question of which colonial power had sovereignty over Tobago, "it shall be permitted to both nations to go to the island of Tobago to wood, water and fish." Such was the widespread importance of their continued right to fish off Tobago that all the people of Barbados were informed of the treaty by way of a public notice known as a broadsheet, which was posted at churches and other public places throughout the island. The public notice appears at tab 64 of your folders. It reported that an agreement had been reached that "the subjects of both nations shall be permitted to frequent the island of Tobago there to wood, water and fish, as likewise to build huts of straw for shelter against the injuries of the weather during the short abode that they may be obliged to make while wooding or fishing".

Mr President, I would like to focus for a moment on the second part of this passage, since it is particularly enlightening as to the nature of Barbadian fishing activities around Tobago throughout the 18th century. The passage is directed at those Barbadian fisherfolk who had occasionally been obliged to land on Tobago during bad weather for the purposes of shelter. It is reasonable, I submit, to infer that during all but the worst weather Barbadian fisherfolk fishing off Tobago would therefore not land on the island at all, but instead, as fishermen tend to do, they would return home with their catch direct from the fishing grounds. After all, it was only in Barbados that they had a market for their catch.

In the year following the 1748 Fishing Treaty, a British colonial official writing home from Barbados
confirmed that Englishmen continued to fish off Tobago and to use small huts there as they had been doing for years. This material appears at tab 65 of your folders.

In both its written pleadings and its outline for this hearing, Trinidad and Tobago contends that Barbadian fisherfolk were utterly incapable of fishing off Tobago until the seventies. To the contrary, I submit that the serial evidence demonstrates clearly that Barbadians were capable of fishing off Tobago and were, in fact, doing so in the early part of the 18th century. Just as the fisherfolk of Barbados were capable of fishing off Tobago at the beginning of the 18th century, they were capable of doing so throughout the 19th and 20th centuries and, as we shall see, they continue to do so in substantial numbers today at the beginning of the 21st century.

By 1814 the question of sovereignty over Tobago had been finally settled in favour of the British. The maritime space bounded by Grenada, St Vincent and the Grenadines, St Lucia, Barbados and Tobago, each of which is highlighted on this slide, in time effectively became a British colonial lake, governed from Barbados for most of the 19th century. Barbadians were allowed to travel freely between the islands, particularly following emancipation in 1838, and Barbadian fishing activities off Tobago naturally continued. Traditional artisanal fishing by its nature does not generate elaborate and detailed record keeping. The paucity at that time of direct documentary evidence of the practice is, therefore, unsurprising. Furthermore, it should be recalled that during the 19th and early 20th centuries there was a single British administration throughout the region, a lack of regulation of maritime traffic and a lack of educational opportunities among the bulk of the population, particularly the poorest of that population. Oral tradition generally took the place of written history. The fact that Barbadians continued to fish off Tobago throughout the British colonial period is demonstrated by at least five independent factors. First,
the commentary of leading historians in the region confirms the unique ocean-going nature of the Barbadian fishing fleet throughout the colonial period. Thus, Dr Karl Watson, who is Senior Lecturer in the Department of History at the University of the West Indies, states (in an extract appearing at tab 66 of your folders) "Of all the English speaking West Indian islands during the colonial period, Barbados had the most developed fishing industry. Whereas the other islands concentrated their efforts on in-shore or reef fishing, Barbados from as early as the 17th century employed a fleet of ocean-going vessels which engaged in fishing for pelagic or deep water species". This demonstrates that the Barbadian fishing fleet did not suddenly change from being a comparatively sophisticated and longer-range fleet in the 18th century into being a simple, unsophisticated in-shore fishing fleet throughout the British colonial period as Trinidad and Tobago invites this Tribunal to believe. Rather, the Barbadian fishing fleet remained throughout that time one that included longer-range fishing sloops alongside common-day boats. It was those longer-range sloops that continued to fish off Tobago throughout the 19th and early 20th centuries just as they had throughout the 18th century. The reason for this is that, as one Tobagonian historian has observed, Barbadians have always been "oriented to the sea" in contrast to their neighbours on Tobago.

The second factor that shows that Barbadians continued to fish off Tobago throughout the British colonial period is the contemporaneous record of the time. This demonstrates the mixed nature of the Barbadian fishing fleet during colonial times, with boats that varied enormously in size and fishing range. We have already seen that in 1868 John Bezsin Tyne commented that hundreds of boats in the Barbadian fishery were manned with two to five men, according to their size. This confirms Dr Watson's observation about the comparative sizes of some of the Barbadian fishing
vessels, since a five-man sloop or schooner is very
different to a two-man day boat fishing near the shore.

The third factor is the oral histories of the
Barbadian fisherfolk which are recounted in many of the
affidavits that Barbados has submitted to this Tribunal.
It would be remarkable for any historian in any part of
the world to ignore this very valuable source of
evidence when researching the history of Barbados'
fishering people throughout the British colonial period
and particularly throughout the 20th century. After
all, the fisherfolk of those times did not keep records
in writing, having received only in some cases a basic
formal education and in many none at all. They passed
on information through the generations by word of mouth,
just as many societies around the world would have done
throughout history. Furthermore, no fishing boat logs
or other administrative records of fishing boat
movements were kept at the time. In all these
circumstances the assertion of Trinidad and Tobago at
paragraph 316 of its Counter Memorial that it would be
unusual for an international Tribunal to place any
weight upon the oral testimony of Barbadian fisherfolk
is completely misconceived. It is based upon what I
describe as a narrow and outdated perspective that all
history must be derived from contemporaneous written
records.

Mr President, in the available time I cannot
recount all of the relevant passages from the affidavits
of the Barbadian fisherfolk and their representatives
confirming the fact that Barbadians have fished off
Tobago for centuries. But we invite the Tribunal to
read the passages at your leisure. Suffice it to say,
though, that many of the affidavits address the issue
along similar lines, including some by fisherfolk who
have been fishing for more than 50 years, long before
the 1970s. Trinidad and Tobago has not adduced the
evidence of even a single witness to rebut this
consistent historical account, which is striking given
that there will be many still alive in Tobago whose memories should stretch back that far.

The fourth factor that shows that Barbadians continued to fish off Tobago throughout the British colonial period are the comments made on the record by the Ministers and officials of Trinidad and Tobago itself. Such comments are unsurprising given the notorious nature of Barbadian fishing activities off Tobago throughout history. Thus for example the Minister of External Affairs and International Trade for Trinidad and Tobago, in a speech given at the signing of the 1990 fishing modus vivendi between Barbados and Trinidad and Tobago, referred to the fact that, as a result of the adoption by his country in 1986 of the UN Convention of the Law of the Sea, those fishermen of Barbados who used to fish in waters adjacent to the territorial sea of Trinidad and Tobago found that they were no longer fishing in the high seas but in the exclusive economic zone of Trinidad and Tobago. This text appears at tab 67 of your folders.

Similarly a recent report of the Fisheries Division of Trinidad and Tobago's Ministry of Agriculture Land and Marine Resources stated in a section referring to fishing off Tobago that "traditionally boats from Barbados have fished in the EEZ of Trinidad and Tobago primarily for flying fish and associated large pelagics." This appears at tab 68 of your folders. Barbados does not of course agree with the references in those quotations to the waters concerned forming part of the EEZ of Trinidad and Tobago, but the essential point is that the Ministers and competent officials of both parties in this case have recognised that Barbadians have traditionally, to quote their words, fished off Tobago in the area claimed by Barbados to the south of the median line.

The fifth factor that shows that Barbadians continued to fish off Tobago throughout the British colonial period is the fact that, as soon as Trinidad
and Tobago gained independence from Britain in 1962, documentary records of that practice resurface. By that time, a report published by the government of Trinidad and Tobago, which appears at tab 69, describes how Barbadians were beginning to introduce to Tobagonian fisherfolk their ancient Barbadian techniques of fishing for flying fish. Around the same time Barbadians also introduced the people of Tobago to the special Barbadian technique for boning the fish.

But in addition to all of this evidence confirming that Barbadians continued to fish off Tobago throughout the many years of British colonial administration, common sense also indicates that this must have been the case. After all, we have established that Barbadians were already fishing in significant numbers off Tobago throughout most of the 18th century. The abundance of the fish off Tobago at certain times of the year were thus well known to Barbadians by the time that Tobago became a British colonial possession in 1814. We have also established that the flying fish that are so abundant off Tobago at those times of the year were a staple of the diet of the Barbadian population throughout the 19th and early 20th centuries.

The scientific evidence submitted by Barbados furthermore confirms what historical and clear documentary evidence establishes, and what every Barbadian fisherman has known for centuries, namely that the flying fish seasonally aggregate in the waters off Tobago and therefore that throughout much of the year it is necessary to follow the fish to Tobago. Finally, the evidence clearly establishes that Barbadians were fishing off Tobago at the time of Trinidad and Tobago's independence from Britain in 1962. In those circumstances it is inconceivable that Barbadians were not involved in any way in fishing in the traditional fishing grounds off Tobago during the long period of unified colonial jurisdiction and governance.

Mr President, members of the Tribunal, Trinidad and
Tobago maintains, at paragraph 84 of its Rejoinder on the basis of a paper written in 1962 by a post graduate student at a Canadian university, that it is inconceivable that Barbadians could have fished off Tobago for flying fish at the times alleged by Barbados. Barbados contends that this theoretical assertion is utterly unsupported. That same student's paper demonstrates that by the early 20th century Barbadian fisherfolk were sailing in their schooners to fish snapper off the coast of Brazil and then returning to Barbados with their catch. Those fishing grounds are located off the coast of Brazil over 700 miles away from Barbados, or more than six times the distance between Barbados and the traditional artisanal fishery off Tobago. It would have been remarkable for Barbadians to be fishing that far from home for fish of unsubstantial demand in Barbados whilst at the same time leaving completely unfished the rich flying fish fishing grounds off Tobago, fishing grounds that had been known to Barbadians for centuries.

Barbados' second core factual submission stands independence of its first submission, Mr President. It is that the Barbadian fishing community, which forms a substantial part of the working population of the island's small economy, is today dependent upon fishing in the area claimed off Tobago, particularly for the flying fish. I will address the bulk of Barbados' submission on this critical aspect of the case today, and tomorrow with your permission, Mr Fietta will complete that submission before moving on to address the third core factual submission.

Before I address the second core factual submission permit me to make some introductory remarks about the island of Barbados as it is today, its economy and its people.

We possess and live on a very small land territory, Mr President, only 166 square miles. And we refer to it fondly as "Bin" or "the Rock". This physical reality is
at the base of Barbados' extreme vulnerability to external shocks, both economic and environmental. You have seen the devastation wrought in recent times in the United States and the Indian sub-continent by natural disasters. Barbados' location on the outskirts of the Atlantic hurricane belt means that on a yearly basis it is periodically exposed to the threat of extreme storms and their environmental, economic and social consequences.

The second physical reality that has shaped our island home of Barbados, particularly over recent times, is its relative lack of natural resources. Unlike our neighbour, and our friend, Trinidad and Tobago, Barbados' on-shore natural resources are few. Barbados' small on-shore hydrocarbon industry produces an average of 1,000 barrels of oil per day. By contrast Trinidad and Tobago produces approximately 125,000 barrels of oil per day. Comparisons of natural gas production between Barbados and Trinidad and Tobago are even more striking. Trinidad and Tobago produces four times more natural gas in one day than Barbados does in one year. [See Reply of Barbados, para. 53, and evidence appended thereto.] Even Barbados' centuries-old sugar industry is in systemic decline and no longer provides the levels of employment that it did in the past. [See Reply of Barbados, para. 52, and evidence appended thereto.]

Today Barbados' principal source of wealth is its people and we are a determined people. The tourism industry in Barbados, predicated largely on the quality of the environment and of the service provided, is one of the principal engines of growth of the economy. Although it has met some natural success, this Tribunal I am sure will appreciate the vulnerability of such a sector to factors well beyond our control, of which the recent and dramatic rise in oil prices is merely one example.

Against this background the fisheries sector in Barbados plays a crucial role in maintaining the economic and social equilibrium by which the island has
been able over the years to sustain itself, to remain stable and to be a true democracy. I will not repeat the various details and statistics to which I referred earlier in connection with the numbers employed in the fishery sector, the economic value of that sector or the persistently high levels of consumption of fish throughout Barbados. But I must address the issue of the Barbadian communities that are so dependent on the fishery off Tobago as a source of their livelihoods throughout much of the year.

Barbados' maritime fishing communities are spread out throughout much of the island, as this map shows. A copy of the map is also included at tab 70 of your folders. The tiny island state of Barbados is in a sense a small fishing community or sometimes I call it our own fishing village. Each of those small squares on the map represents a discrete small community populated by fisherfolk, although the number of fisherfolk concerned varies enormously from place to place. The reason for the wide distribution of fisherfolk throughout the island is simple. The small island of Barbados has a well developed road infrastructure. No point in the island is more than five and a quarter miles from the coast. In addition property prices inland are generally far lower than those in most coastal areas, and thus more affordable to many of those who work in the maritime fishery. Recent decades have therefore witnessed a dispersal of the island's fisherfolk away from some of the more traditional coastal communities. There is an equally diverse distribution of fish landing areas throughout Barbados. They are dotted along the west, south and east coast of the country and create when the fish is landed small, temporary but constantly renewed pockets of economic activity. Nevertheless it is certainly the case that discrete fishing communities do still exist in Barbados. This can be illustrated by reference to more detailed maps of the most densely populated areas of the fishing
population on Barbados, in the parishes of Christ Church and St Michael, and these more detailed maps, Mr President, appear at tab 71 and 72 of your folders. For example Silver Sands in Christ Church is the home of some 80 fisherfolk, Black Rock in St Michael is the home of some 84 fisherfolk. These figures do not include the many more in each community who are dependent on the fisherfolk, but it is no coincidence that the greatest concentration of fishing communities in Barbados is located on the southern and western sides of the island where the waters are calm, the coast is sheltered and the fishing grounds for flying fish, particularly those off Tobago, are that much more proximate.

Within these economically disadvantaged communities, the fisherfolk and their dependants live on extremely narrow margins. So do the vast majority of those in associated employment. An on-the-spot survey of fisherfolk conducted in May of this year by the fisheries division of the Barbadian Ministry of Agriculture and Rural Development showed that the overwhelming majority of Barbadian fisherfolk earn less than two-thirds of the national average. An income of that level is barely sufficient to cover the most basic costs of living in Barbados. Without access to the fishery off Tobago, the people of Barbados' fishing communities would face a complete loss of their livelihoods for substantial parts of the season. Many would be forced to abandon fishing altogether, since the annual cost of running and maintaining their boats and fishing gear would not even be covered by their drastically reduced income for much of the year. The same would be true of many in associated employment. All these people would be forced to look for alternative means of earning a living, even though for many fishing is all they know. But the simple fact is that there are no obvious alternative sources of employment for the people in the communities concerned or on the island as a whole.
Small economies such as ours are peculiarly susceptible to employment rigidities, and with around 10 per cent of the working population of Barbados currently unemployed this percentage would be bound to grow as a result of any loss of access to the fishery off Tobago. [In December 2004 the average unemployment rate in Barbados was 9.8 per cent of the total workforce. Central Bank of Barbados, Economic Press Release, Review of the Economy for the First Three Months of 2005, at pp. 1, 3. (Reply of Barbados, Vol. 3, Appendix 57, at pp. 707, 709)]

Records do exist of the value and amount of the fish caught and landed in Barbados as a whole, but of course those records do not identify the precise location where the fish were caught, whether off the coast of Barbados or Tobago. Indeed until Trinidad and Tobago began arresting Barbadian fishermen in the traditional fishing ground off Tobago in 1989, Barbadian fisherfolk had no reason to plot their positions in relation to the median line between Barbados and Tobago. However, it is established as a fact that 80 per cent of the value of the annual Barbadian fish catch is composed of flying fish and their dolphin fish predators. It is also established that throughout much of the season, from around November to February and June to July, when those fish are scarce around Barbados, Barbadian fisherfolk travel in significant numbers down to the traditional fishing grounds off Tobago to catch them. So the fundamental importance of the traditional fishery off Tobago to the Barbadian fishing communities and to Barbados as a whole is completely self evident.

The contemporary importance of the traditional fishery off Tobago is confirmed by the affidavit and video evidence of the Barbadian fisherfolk and their representatives. As many of the fisherfolk say in their affidavits before the Tribunal, during large periods of the fishing season the fisherfolk are dependent upon the fisheries off Tobago to maintain themselves, their
families and the fishing communities of Barbados.

Mr President, these sentiments are echoed by Angela Watson, the President of the Barbados National Union of Fisherfolk Organisations, who I am glad to say is here with us, and available if she is needed in any way; and who has stated that the fisherfolk of Barbados could not survive and provide for their families without continued access to the fishery off Tobago.

The contemporary importance of the traditional fishery is confirmed also by the results of the survey of fisherfolk conducted earlier this year to which I referred earlier. Crew members from 31 iceboats representing approximately one-sixth of the entire ice boat fleet were interviewed during the survey. More than 80 per cent of them said that they fish near Tobago during those periods when the fish are scarce off Barbados; and perhaps most tellingly of all, the contemporary importance to Barbados of the traditional fishery off Tobago is confirmed by the fact that, notwithstanding the risk of arrest, imprisonment and prosecution by the authorities of Trinidad and Tobago, Barbadian fisherfolk continue to fish in large numbers in the traditional fishing ground. Indeed they have continued to do so consistently since Trinidad and Tobago recommenced sporadic arrests in 1994. The reason for this is obvious; as the uncontradicted affidavits of the Barbadian fisherfolk make clear, there is no alternative, because at certain times of the year when the flying fish and associated species are plentiful off Tobago, fishing for these species is not viable in Barbados; indeed Angela Watson has stated that the fisherfolk must continue fishing off Tobago because, as she says, they must in order to survive and barely survive. It is inevitable that any loss of access to the traditional fishing grounds off Tobago would entail catastrophic repercussions for the fishing communities of Barbados. Hundreds, possibly thousands of those who depend on fishing year round for their livelihoods will
find themselves without any prospect of income for substantial parts of the year, resulting in widespread unemployment and poverty, particularly in some of the communities that I have highlighted earlier.

What is more, loss of access to the traditional fishing grounds off Tobago would also entail very serious repercussions for the social and cultural identity of Barbados. Reduced flying fish catches would strike at the very heart of the nation, the land of the flying fish. The traditional national diet of affordable fresh fish would disappear for the vast majority of the population for substantial parts of the year, something which has never happened before in the history of our island, and a significant sector of traditional Barbadian society which has formed an integral part of the fabric of the island for centuries would be threatened with economic ruin and ultimately possible disappearance.

For all these reasons, Mr President, and members of the Tribunal, Barbados asks that the Tribunal adjust the provisional median line to the south in the manner indicated in paragraphs 141-145 of Barbados' Memorial so as to ensure that Barbadians are secured continued access on an equitable basis to their traditional fishing ground off Tobago.

Mr President and members of the Tribunal, I thank you for your patience. Mr Fietta will tomorrow address you further with your leave on some ancillary aspects of the contemporary Barbadian fishery off Tobago. He will then move on to address Barbados' third core factual submission, namely that the fisherfolk of Tobago do not fish in the area claimed by Barbados. I thank you, Mr President.

THE PRESIDENT: Thank you so much, Sir Henry. I think then we shall adjourn for the evening and resume tomorrow at 10 a.m. Good night.

(Adjourned till tomorrow morning at 10 o'clock)