



DISPUTE BETWEEN

BARBADOS

AND

THE REPUBLIC OF TRINIDAD AND TOBAGO

**REFERRED TO ARBITRATION IN ACCORDANCE WITH ANNEX VII UNCLOS
BY NOTIFICATION OF BARBADOS DATED 16 FEBRUARY 2004**

COUNTER-MEMORIAL

VOLUME

1(1)

**ARBITRAL TRIBUNAL CONSTITUTED PURSUANT TO ARTICLE 287, AND IN
ACCORDANCE WITH ANNEX VII OF
THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA**

**In the Matter of an Arbitration Between
BARBADOS and the REPUBLIC OF TRINIDAD AND TOBAGO**

Counter-Memorial of Trinidad and Tobago

Table of Contents

	Page Number
Chapter 1 Introduction	
A Barbados' New Claim	1
B The Geography of the Region and Corresponding Issues of Delimitation	5
C Structure of the Counter-Memorial	11
Chapter 2 The Factual Matrix	
A Introduction	13
B Resource Use in the Region	13
(1) Hydrocarbons	14
(2) Fisheries	15
C The 1990 Fishing Agreement	16
(1) The background to the 1990 Fishing Agreement	16
(2) The 1990 Fishing Agreement	19
D Subsequent Negotiations between the Parties	20
(1) The Maritime Boundary Negotiations	22
(i) The first round of Maritime Boundary Negotiations (19-20 July 2000)	22
(ii) The second round of Maritime Boundary Negotiations (24-26 October 2000)	23
(iii) The third round of Maritime Boundary Negotiations (10-12 July 2001)	24
(iv) The fourth round of Maritime Boundary Negotiations (30 January to 1 February 2002)	25
(v) The fifth round of Maritime Boundary	26

	Negotiations (19-21 November 2003)	
(2)	The Fisheries Negotiations	26
	(i) The first round of the Fisheries Negotiations (20-22 March 2002)	26
	(ii) The second round of the Fisheries Negotiations (24-25 March 2003)	27
	(iii) The third round of the Fisheries Negotiations (12-13 June 2003)	28
	(iv) The fourth round of the Fisheries Negotiations (19-21 November 2003)	29
E	The Commencement of the Arbitration	29
Chapter 3	Jurisdiction and Admissibility	
A	Introduction	33
B	Barbados' Failure to Comply with Necessary Pre-Conditions to Arbitration under Part XV	33
	(1) Effecting an agreement under Articles 74(1) and/or 83(1) of the 1982 Convention	35
	(2) The requirements of Article 283	38
C	Part XV of the 1982 Convention and the requirement of good faith	40
D	The Scope of Barbados' Application	43
Chapter 4	Applicable Principles of Maritime Delimitation under the 1982 Convention	
A	Introduction	45
B	Equity, Equidistance and Relevant Circumstances	47
	(1) The fundamental principle: delimitation in accordance with equity	47
	(2) The role of equidistance	47
	(3) Relevant circumstance	49
	(i) Frontal projection and the absence of cut-off	50
	(ii) Proportionality of coastal lengths	54
	(iii) Express or tacit agreement/estoppel	56
	(4) Checking the equitable character of a delimitation	58
	(i) Proportionality as a means of checking the equity of a delimitation	58
	(ii) The so-called "catastrophe" proviso: The Gulf of Maine dictum	59

Chapter 5	Relevant Sectors and Relevant Coasts	
A	The Distinction between the Caribbean and Atlantic Sectors	61
	(1) Distinguishing Different Sectors in International Practice	61
	(2) The Distinction between Caribbean and Atlantic Sectors in the Present Case	63
B	Relevant Coasts and Coastal Relationships	64
	(1) Trinidad and Tobago	66
	(2) Barbados	68
	(3) Comparison of Relevant Coasts	69
C	Conclusion	69
Chapter 6	Barbados Maritime Claim: An Assessment	
A	Introduction	71
B	Barbados' Caribbean or Western Sector: Claim Line A-B-C-D	71
	(1) The selection of Point D as the turning point	71
	(2) Barbados' claim in the Caribbean sector is unsustainable in fact and in law	72
	(3) Barbados' claim in the Caribbean sector: an overall appreciation	78
C	Barbados' Atlantic or Eastern Sector: Claim Line D-E	78
	(1) Barbados' claim takes no account of the disparity in eastern-facing coastal lengths	79
	(2) Cut-off of eastwards projection of Trinidad and Tobago's coastline	80
	(3) Regional implications: the Guinea/Guinea Bissau test	81
	(4) Disproportionate consequences	81
D	Conclusions	81

Chapter 7	The Equitable Solution	
A	The Two Sectors and the Turning Point	83
B	The Caribbean (Western) Sector	85
C	The Atlantic (Eastern) Sector within 200 n.m.	86
	(1) Relevant circumstances in the Atlantic (eastern) sector	87
	(i) Disparity in eastern facing coastal lengths	87
	(ii) Eastwards projection of the coastlines of both parties	87
	(iii) Regional implications: the Guinea/Guinea Bissau test	87
	(2) Criteria for adjustment to achieve an equitable result	89
	(3) Proportionality: the proposed adjustment produces an equitable result	90
D	The Continental Shelf beyond 200 n.m.	91
	(1) The Tribunal's jurisdiction to delimit the outer continental shelf	91
	(2) The relationship between continental shelf and EEZ rights	94
	(3) The course of the delimitation beyond 200 n.m.	101
E	Conclusion	102
	Submissions	103
	Appendix A Barbados Recognition that the Area it now claims in the Western Sector falls within the EEZ of Trinidad and Tobago	
A	Exploration for Hydrocarbons	104
B	Exploitation of Fisheries	106
C	Conclusion	112
	Appendix B Barbados Claim based on the "Traditional Flying Fishery"	
A	Introduction	113
B	Evidence of the "Traditional Flying Fishery"	114
	(1) Barbados' own evidence from the early 19 th century to the mid-20 th century period shows that there was no Barbadian fishing for flying fish off Tobago	114
	(2) The development of the Barbadian flying fish fleet	117
	(3) Barbados' case on admissions by Trinidad and Tobago	122
C	The Exploitation of Flying Fish in Trinidad and Tobago and Barbados	123
D	Conclusions	126

CHAPTER 1

INTRODUCTION

A. Barbados' new claim

- 1 In its Memorial of 30 October 2004, Barbados made a new claim to a maritime boundary.¹ In five rounds of negotiations on the maritime boundary,² Barbados had never depicted this or indeed any boundary claim. In four rounds of negotiations on a new bilateral fisheries access agreement,³ Barbados had never indicated that what was really under consideration was whether Trinidad and Tobago would be entitled to some share in the living natural resources of the *Barbadian* EEZ, 13 miles off the coast of Tobago—living resources which Barbados has never purported to regulate or conserve. Barbados' claim had never been shown on any map.⁴ Barbados' claim had never been articulated in words either. It came new-minted with the Memorial.
- 2 Barbados' new claim is inconsistent not just with its approach in nine rounds of interstate negotiations but with its prior international agreements, its other conduct vis-à-vis Trinidad and Tobago and its own legislation.⁵
- 3 Barbados' new claim is shown as **Figure 1.1**. In the Atlantic or eastern sector it involves a line (D-E) which adheres sedulously to the equidistance line—thereby cutting off the eastern-facing coastal frontage of Trinidad and Tobago. In the Caribbean or western sector it involves a line (D-C-B-A) which suddenly veers south-west to convert Tobago into a semi-enclave. No single Tobago coastline is given any effect in terms of generating EEZ or continental shelf vis-à-vis Barbados.

¹ This is depicted in Memorial of Barbados, Map 3, opposite p. 4.

² For the Minutes of the maritime delimitation rounds see Annex Volume 2(2) Part 1.

³ For the Minutes of these fisheries rounds see Annex Volume 2(2) Part 2.

⁴ The only graphic presented by Barbados during the five rounds of delimitation negotiations was a small sketch showing the equidistance line on a without prejudice basis: see Annex Volume 2(2) Part 1 No. 6.

⁵ See below, Chapters 2, 3, 6.D and Appendix A for details.

4 The island of Tobago is approximately 103 km (56 n.m.) miles in circumference.⁶ Of that distance 59 km (32 n.m.) are given zero effect in terms of generating these maritime zones vis-à-vis Barbados. In other words about 60% of the Tobago coastline generates no EEZ or continental shelf, all to the advantage of Barbados. This is not maritime delimitation; it is a maritime exclusion zone.

5 In the *Jan Mayen* case, Judge Schwebel criticised the majority in that case for rewarding a maximalist claim. He said:

“If the case between Denmark and Norway is to be considered in a fashion which places the legal entitlements of each Party on an equal plane, then both Greenland and Jan Mayen should be viewed as entitled prima facie to a 200-mile zone. These entitlements, however, being less than 400 miles apart, overlap. Thus it is within this large maritime area of overlapping potential entitlements that the line of delimitation had to be drawn. But not in Denmark’s view. For its part, Denmark claimed its full 200-mile entitlement, proposing to leave Norway none of its, whereas Norway, for its part, took a more modest approach...

The line of delimitation indicated by the Court gives the impression of rewarding Denmark’s maximalist claim and penalizing Norway’s moderation. Equitable or equal access is given to the Parties in the southerly area that matters, and the remainder of the line is indicated to conjoin with the line so to be drawn, apparently all of this to fall within the area of Norway’s claim... To arrive at this expanded apportionment, the Court has found it right to award Greenland a bonus for the length of its coast or to penalize Jan Mayen for the shortness of its. The result is to attribute almost three-quarters of the total area of overlapping potential entitlements to Denmark and a bit more than one-quarter to Norway. Why this should be seen as equitable is not clear but what is clear is that the Court’s Judgment may tend to encourage immoderate and discourage moderate claims in future.”⁷

6 Although the specific situation is different here, the basic point is the same. Barbados has made a maximalist claim. In particular any “sharing” of the areas claimed by Barbados in the western sector would, in Judge Schwebel’s words, give “the

⁶ This “circumference” is calculated by taking the length of a series of straight lines connecting the points which control the territorial sea around Tobago – i.e. it is a considerably simplified coastline. The actual length of Tobago’s coastline, including bays (but excluding small islands) is more like 73 n.m. of which 40 n.m. would not get any maritime space beyond the territorial sea, according to Barbados’ claim.

⁷ ICJ Reports 1993 p. 38 at pp. 126-7.

impression of rewarding [Barbados'] maximalist claim and penalising [Trinidad and Tobago's] moderation".

- 7 In fact the only articulated basis for Barbados' claiming 86% of the total EEZ area west of the line C-D (the sector A₁-B₁-C-D on **Figure 1.1**) is "the Barbadian fishery off Tobago". This traditional fishery is colourfully evoked; Bajan fisherfolk are said to have been voyaging there "for over 250 years".⁸ In fact this commercial fishery dates from the late 1970s, when the first two ice-boats were added to the Barbadian fleet of day-boats. Tradition develops quickly in the region, according to Barbados.
- 8 The alleged traditional fishery is examined in more detail in Appendix B, where Barbados' claims are refuted as a matter of fact.⁹ But even if in fact Barbadian boats had been present on the high seas off Tobago before 1979 (*quod non*), this would have given Barbados no rights whatever to an EEZ in this locality. Distant-water fishing, whether it occurs on the high seas or the territorial sea of another coastal State, gives no territorial or sovereign rights to the State of nationality of the vessels concerned¹⁰. All it may do, in certain circumstances, is give rise to a *droit de regard* under Article 62(3) of the 1982 Convention on the Law of the Sea (the "1982 Convention"). The 1982 Convention (by which both Parties are bound) is perfectly clear on the matter.
- 9 Barbados' claim is also flatly inconsistent with its recognition of the status of these waters as part of the Trinidad and Tobago EEZ in the 1990 Fisheries Agreement¹¹ and in diplomatic and other correspondence. Not merely were the waters concerned never claimed or treated by Barbados as its own; they were expressly recognized by Barbados as appertaining to Trinidad and Tobago, after the latter's proclamation of its EEZ in 1986.¹² The very fact that two distinct sets of negotiations were conducted on maritime delimitation and on fisheries access belies the claim Barbados now makes.¹³
- 10 Moreover Barbados offers no explanation for its claim to continental shelf rights over the seabed surrounding Tobago. Quite apart from Article 62 of the 1982 Convention,

⁸ See Memorial of Barbados, p. 53, and see generally Memorial of Barbados, Sections 3.4 and 6.1.

⁹ See below, Appendix B paras. 314-342.

¹⁰ On the proclamation of the Trinidad and Tobago EEZ in 1986 see Annex Volume 4 No. 5. Prior to that date the waters concerned had the status of high seas.

¹¹ Annex Volume 2(1) No. 7.

¹² See Appendix A, paras 291-313 for details of the series of acts whereby Barbados recognised Trinidad and Tobago's EEZ, including the areas it now claims.

¹³ See below, Chapter 2, for the history of the separate negotiations on delimitation and fisheries.

the present case is not like *Jan Mayen*, where it was common ground between the parties that the only resource at stake was the capelin stock of the southern part of the area of overlapping claims.¹⁴ In the present case the areas claimed by Barbados and proximate to the coast of Tobago have hydrocarbon potential and have been subject to exploration licensing by Trinidad and Tobago. They are potentially more important for their hydrocarbon resources than their fish. Barbados has complained about oil activity in Blocks 23 and 24, and has done so even in relation to areas outside those which it now claims.¹⁵ As the Tribunal is aware, Barbados intervened with companies which are licensees of Trinidad and Tobago, seeking to deter them from engaging in lawful activities in these areas. Barbados vigorously resisted disclosing the content of its interventions, but there is no indication that they concerned disturbance to alleged Barbadian fisherfolk engaged in their traditional avocations in these waters. The traditional “Barbadian fishery off Tobago” is not only a grab for fish; it is also (and perhaps even more) a grab for hydrocarbon resources.

11 Even if the Tribunal has jurisdiction over Barbados’ new claim and/or that claim is admissible,¹⁶ its claim is unfounded in fact and in law. But while Barbados never put forward that or any other specific claim during the delimitation negotiations, Trinidad and Tobago *did* put forward a claim in the Atlantic sector to an extension of its eastwards-facing coastal frontage.¹⁷ Although Barbados refused to present any claim of its own, there was an initial exchange on the Trinidad and Tobago proposal. It is true that these discussions did not proceed very far; in the absence of any defined claim line put forward by Barbados, Trinidad and Tobago was never placed in a position where a further counter-proposal might have been called for. But the principle of Trinidad and Tobago’s claim *was* put forward, and it is maintained in this Counter-Memorial.

12 The principle of Trinidad and Tobago’s claim can be simply stated. In the relatively confined waters of the western or Caribbean sector, there is no basis for deviating from the median line—a line which Barbados has repeatedly recognised and which is equitable in the circumstances. The position is quite different in the eastern or

¹⁴ See ICJ Reports 1993 p. 38 at pp. 70, 71 (paras. 73, 75).

¹⁵ See Annex Volume 3 No. 98.

¹⁶ See Chapter 3 below for the issues of jurisdiction over and admissibility of Barbados’ claim.

¹⁷ See below, para. 73, and Annex Volume 2(2) Part 1, No. 4.

Atlantic sector where the two States are in a position of, or analogous to, adjacent States and are most certainly not opposite. As a coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector, Trinidad and Tobago is entitled to a full maritime zone, including continental shelf. The claim that Barbados has now formulated in the Atlantic sector cuts right across the Trinidad and Tobago coastal frontage and is plainly inequitable. The strict equidistance line needs to be modified in that sector so as to produce an equitable result, in accordance with the applicable law referred to in Articles 74 and 83 of the 1982 Convention.

B. The geography of the region and corresponding issues of delimitation

13 In this context it is helpful to outline the geography of the region within which the Tribunal has to carry out its mandate. **Figure 1.2** shows the eastern Caribbean/Atlantic region as a whole, and depicts the agreed EEZ boundaries in the region, where these exist. Specifically, the following maritime boundary agreements have been concluded in the region:

- Netherlands-Venezuela: Boundary Delimitation Treaty, 3 March 1978;¹⁸
- France (Martinique & Guadeloupe)-Venezuela: Delimitation Treaty, 17 July 1980;¹⁹
- France (Martinique)-Saint Lucia: Agreement on Delimitation, Paris, 4 March 1981;²⁰
- France (Guadeloupe & Martinique)-Dominica: Agreement on Maritime Delimitation, Paris, 7 September 1987;²¹
- Trinidad & Tobago-Republic of Venezuela: Treaty on the Delimitation of Marine and Submarine Areas, Caracas, 18 April 1990 (with Exchange of Notes, 23 July 1991);²²
- France (Guadeloupe)-United Kingdom (Montserrat): Agreement on Maritime Delimitation, London, 27 June 1996;²³

¹⁸ *Netherlands Treaty Series*, 1978 No. 61, 1979 No. 11.

¹⁹ 1319 UNTS 220.

²⁰ 1264 UNTS 426.

²¹ 1546 UNTS 308; Annex Volume 2(1) No. 5.

²² 1654 UNTS 301; Annex Volume 2(1) No. 6.

²³ 2084 UNTS 66.

- France (Saint Martin/Saint Barthelemy)-United Kingdom (Anguilla): Agreement on Maritime Delimitation, London, 27 June 1996.²⁴

Figure 1.2 shows indicative median lines as well as agreed boundaries (the latter without prejudice to the final delimitations which may be agreed or decided).

- 14 As may be seen from Figure 1.2, Trinidad and Tobago and Barbados are located in the far extreme of the Caribbean Sea, constituting the south-easternmost islands of the Caribbean.
- 15 Although they are generally categorised as part of the Lesser Antilles islands, geologically Trinidad and Tobago and Barbados are unrelated to most of the other islands in the chain. The Windward Islands to the north and west (Dominica, Martinique, Saint Lucia, Saint Vincent and the Grenadines, and Grenada) are rugged volcanic islands rising from a submarine ridge. The islands of Trinidad and Tobago, in contrast, are essentially the eastward extension of the Andean coastal range of South America, while Barbados is made up of a series of coral terraces resting on a sedimentary base.
- 16 Trinidad and Tobago consist of two main islands with a number of smaller islands, islets and rocks, including some off the northern coast of Tobago. At their closest, Trinidad and Venezuela are only a little over 7 n.m. apart. Tobago is over 70 n.m. southeast of the nearest point on Grenada and nearly 85 n.m. south of the nearest island in The Grenadines.
- 17 Barbados is a single island feature. It is nearly 80 n.m. east of the nearest land territory (that of Saint Lucia). At their closest, Tobago and Barbados are approximately 116 n.m. apart.

²⁴ 2084 UNTS 72.

18 A statistical comparison of the two States shows the following:²⁵

	Total (Trinidad and Tobago)	Trinidad	Tobago	Barbados
Land area	5,128 km ²	4,828 km ²	300 km ²	441 km ²
Population (approx.)	1,262,400	1,208,300	54,100	278,289
Total coastline (simplified coastlines) ²⁶	270.2 n.m.	215.2 n.m.	55.0 n.m.	47.8 n.m.
Coastal frontage facing western sector	75.6 n.m.	52.0 n.m. (N- facing coast)	23.7 n.m. (N & NW-facing coasts)	19.4 n.m. (W & SW-facing coasts)
Coastal frontage facing eastern sector	70.0 n.m.	44.2 n.m. (E- facing coast)	25.8 n.m. (E & SE- facing coasts)	9.3 n.m. (SE- facing coast)
Archipelagic baseline facing western sector	83.2 n.m.			N/A
Archipelagic baseline facing eastern sector	74.9 n.m.			N/A

19 As is evident from Figure 1.2, the eastern coasts of Trinidad and Tobago and Barbados front onto the Atlantic Ocean rather than the Caribbean, and there is no land territory to the east for more than two thousand miles. The eastward-facing coastlines of Trinidad and Tobago, Barbados and the chain of Caribbean islands to the north of Barbados (Martinique, Dominica, Guadeloupe, Antigua and Barbuda) all front onto the open Atlantic.

20 The combined land area of Trinidad and Tobago, at 5,128 km², is more than eleven times that of Barbados and nearly twice that of Barbados, Grenada, Saint Vincent and

²⁵ For the sake of simplicity all distances are shown in nautical miles (n.m.).

²⁶ Figures for coastline lengths are for simplified coastlines constructed by joining the basepoints from which the territorial sea is measured with straight lines. If actual coastlines are used (including all sinuosities) the difference between the two total coastal lengths would be even more pronounced: 340.6 n.m. (Trinidad and Tobago) versus 53.1 n.m. (Barbados).

the Grenadines, Saint Lucia and Martinique combined. Even the island of Tobago alone (with adjacent islets) is not much smaller than Barbados. Given their distinct eastwards location and their geographical separation, there is no reason why the maritime zones of Barbados on the one hand and Trinidad and Tobago on the other hand should excessively impinge on each other.

21 The legal relevance of the geographical situation in which the parties to the present proceedings find themselves will be explained in further detail in later Chapters of this Memorial. Four preliminary points should however be made.

22 *First*, the present Tribunal's jurisdiction is, of course, limited to the two States which are parties to the present proceedings. This means that its jurisdiction *ratione loci* is limited to those areas claimed by the two States as between themselves. But it does not mean that the Tribunal may not take account of the existence and potential maritime spaces appertaining to other States in the region. As the Arbitral Tribunal said in the *Guinea-Guinea Bissau* case:

“a valid method consists of looking at the whole of West Africa and of seeking a solution which would take overall account of the shape of its coastline. This would mean no longer restricting considerations to a *short coastline* but to a *long coastline*. However while the continuous coastline of the two Guineas—or of the three countries when Sierra Leone is included—is generally concave, that of West Africa in general is undoubtedly convex. With this in mind, the Tribunal considers that the delimitation of maritime territories to be attributed to coastal States could be made following one of the directions which takes this circumstance into account. These directions would be approximately divergent. This idea, which in the present case would seem to offer an equitable result, automatically condemns the system of parallels of latitude defended by Guinea... However, it also condemns the equidistance method as seen by Guinea-Bissau. It leads towards a delimitation which is integrated into the present or future delimitations of the region as a whole.”²⁷

23 This leads to the *second* point. As the *Guinea-Guinea Bissau* Tribunal said, taking overall account of the shape of the region can only be done at a general level and in a simple manner.²⁸ But looking at the region in these terms it is evident that Trinidad and Tobago, and Barbados, are blocked to the west by the presence of land or insular territories (Venezuela, Grenada, Saint Vincent and the Grenadines, Saint Lucia) which

²⁷ (1989) 77 ILR 635, 683-4 (para. 108) (emphasis in original).

²⁸ *Ibid.*, 684 (para. 109).

face onto the Caribbean Sea. Further north, however, where each of the chain of island territories faces east or north-east, each enjoys a projection out to the 200 n.m. line and beyond which should bear (and in the delimitations so far agreed, has borne) a reasonable relation to its facing coastal frontage. The main exception to this general picture is Barbados. If equidistance were the sole criterion (which even Barbados admits it is not) the east- and north-east-facing coastal frontage of Barbados would be represented on the 200 n.m. line in a manner and to an extent which can only be considered highly disproportionate.

24 In other words, even a simple examination of the geographical situation shows that to the west there are severe geographical constraints on any delimitation. By contrast to the east and north-east there is the open Atlantic Ocean, and only a rigid application of equidistance would produce a situation where any given State is shelf-locked or zone-locked, as Trinidad and Tobago is shelf- and zone-locked by the Barbados claim. Thus as between these two States—and indeed in the region as a whole—a basic distinction between the constrained western or Caribbean sector and the relatively unconstrained eastern or Atlantic sector presents itself. Moreover the eastern-facing coastal frontage of Trinidad and Tobago (70.0 n.m.) contrasts markedly with that of Barbados (25.2 n.m., only 9.3 n.m. of which faces to the south-east, towards the area of overlapping potential entitlements). The Respondent will return to this crucial issue later in this Counter-Memorial.²⁹

25 The *third* point concerns the continuation of the sovereign rights of those States facing onto the open Atlantic to the outer continental shelf beyond 200 n.m. A particular aspect of the eastern sector is that it is uninterrupted and extends in principle to the outer edge of the continental margin as defined in the 1982 Convention. The Parties agree that in the region to the east of Trinidad and Tobago, the outer continental shelf as defined in Article 76(4)-(6) of the 1982 Convention extends significantly beyond 200 n.m. Again there must be a presumption that a rule of equidistance will not be applied so as to exclude States facing onto the Atlantic from claims to outer continental shelf. This issue will be discussed in Chapter 7.

²⁹ See Chapter 7 where the distinction between western and eastern sectors is affirmed and an equitable solution for each of these sectors proposed.

26 Barbados is evidently of a different opinion—and this involves the *fourth* preliminary point. In an apparent attempt to shelf-lock Trinidad and Tobago—and to present the Tribunal with a *fait accompli*—on 2 December 2003 Barbados concluded a treaty with Guyana designating the “Barbados-Guyana EEZ Co-operation Zone”. That zone is depicted in Map 9 in Barbados’ Memorial. It is described by Barbados as an “area of exclusive joint jurisdiction”.³⁰ It is a small (20.5 sq. n.m.) area of overlap between the 200 n.m. EEZ drawn on a basis of equidistance from, respectively, the coast-line of Guyana and that of Barbados. It is bounded to the west by the 200 n.m. line of Trinidad and Tobago, but ignores the claim of Trinidad and Tobago to continental shelf in this region. The size of the “Barbados-Guyana EEZ Co-operation Zone” relative to the actual zones in play in the region can be seen from **Figure 1.3** (which is taken from an earlier Barbados submission to the Tribunal³¹). The zone is the tiny bright green area shown in the legend as “Barbados-Guyana EEZ Co-operation Treaty area”.

27 This Tribunal is of course not called on to pronounce on the extent or location of any maritime zones appertaining to Guyana. But (subject to what will be said in Chapter 3 on questions of jurisdiction and admissibility) the Tribunal *is* called on to pronounce on the respective maritime zones of Barbados, on the one hand, and Trinidad and Tobago, on the other hand, to the full extent permitted by the 1982 Convention. Naturally the Tribunal’s decision will not be opposable to Guyana. But nor can Barbados agree with a third State that a given area of outer continental shelf does not appertain to Trinidad and Tobago. The Respondent would merely observe that the Treaty of 2 December 2003 between Barbados and Guyana³² was concluded only two months before Barbados unilaterally commenced the present proceedings and deals with an area which is small indeed compared to the other maritime areas in question.³³ There is no evidence of any actual co-operation occurring as between the two States in this area (which is not surprising considering its size and its distance from their coasts). It is respectfully submitted that the Tribunal can proceed to determine the full

³⁰ Memorial of Barbados, Section 2.4, p. 9.

³¹ Mr. R Volterra, Letter of 6 September 2004, Map 1. Annex Volume 3 No. 98.

³² Memorial of Barbados, Annex 59.

³³ In its account of the Treaty in Memorial of Barbados, paras. 22-24, Barbados forbears to mention the date of the Treaty of 2 December 2003, nor is the Tribunal informed as to why the Treaty might have been concluded at this juncture. (Indeed its conclusion was only publicly announced after the commencement of the present arbitration.)

extent of the maritime zones of the two Parties to the present proceedings, leaving the extent of the rights of third States such as Guyana to be resolved separately in accordance with the 1982 Convention.

C. Structure of the Counter-Memorial

28 This Counter-Memorial consists of six further Chapters.

29 In *Chapter 2*, the factual matrix underlying the present proceedings is outlined in some detail. The history of resource use in the region is also outlined. The background to the 1990 Fisheries Agreement is detailed and the substantial history of subsequent negotiations between the parties recounted—both as to a replacement to the 1990 bilateral Fishing Agreement and as to a maritime delimitation treaty between the parties. Finally the circumstances of the sudden submission of this claim to the Tribunal are contrasted with the version of events contained in Chapter 4 of Barbados' Memorial.

30 *Chapter 3* deals with the Tribunal's jurisdiction over and the admissibility of Barbados' claim, in particular insofar as it covers areas or issues falling outside the scope of the negotiations and exchange of views of the Parties, and outside the scope of Barbados' Notification and Statement of Claim of 16 February 2004.

31 On the basis and to the extent that the Tribunal does have jurisdiction, *Chapter 4* outlines the fundamental principles of maritime delimitation both of EEZ and continental shelf. These include the identification of relevant coasts, the principle that in open waters maritime delimitation should not be carried out in such a way as to cut off the maritime zones of either State, the relevance of proportionality in coastal lengths, etc.

32 On the basis of this account of the applicable law, this Counter-Memorial proceeds in three chapters to establish the relevant sectors and coastlines (*Chapter 5*), to refute the Barbados' claim line (*Chapter 6*) and to put forward and justify as equitable the claim put forward by Trinidad and Tobago (*Chapter 7*).

33 In order to avoid excessive detail in the body of this Counter-Memorial, two appendices are attached. *Appendix A* lists the many instances in which Barbados has recognised that the area that it now claims forms part of Trinidad and Tobago's EEZ.

Appendix B contains a more detailed account of the “traditional flying fishery” allegedly maintained by Barbados off Tobago for over 250 years.

34 This Counter-Memorial includes 6 volumes of annexes, arranged as follows:

- Volume 1(2): Maps
- Volume 2(1): Treaties and agreements
- Volume 2(2): Records of negotiations:
 - Part 1:– Maritime boundary negotiations
 - Part 2:– Fisheries negotiations
- Volume 3: Diplomatic notes and other correspondence
- Volume 4: Laws and statutory instruments
- Volume 5: Reports and other documents

CHAPTER 2

THE FACTUAL MATRIX

A. Introduction

35 Before turning to the issues of law raised by Barbados' Memorial, it is necessary to consider the factual matrix within which the present case is located. That task is particularly important in the present case, because Barbados has sought, in its Memorial, to paint a picture of the general pattern of resource use in the region and of the events over the twenty-five years prior to its unilateral decision to resort to arbitration which is at best incomplete and in places positively misleading. For example, the Memorial misrepresents both the significance and the history of the Fishing Agreement between the Government of Barbados and the Government of the Republic of Trinidad and Tobago ("the 1990 Fishing Agreement").³⁴ Moreover, in seeking to portray, in the terms most favourable to Barbados, the decision of the Barbados Government to break off all negotiations and commence arbitration proceedings, the Memorial largely omits any account of the course of those negotiations.

36 Accordingly, the present Chapter will first examine the pattern of resource use in the region (Section B). It will then give a full account of the 1990 Fishing Agreement and the circumstances leading up to its conclusion (Section C). Section D will discuss the two sets of negotiations between the Parties: on the maritime boundary (Section D(1)) and on fisheries (Section D(2)) which are relevant to the present case. Finally, Section E will set out the events leading up to the institution of arbitration proceedings by Barbados on 16 February 2004.

B. Resource Use in the Region

37 The waters and seabed of the region contain a number of important resources of which the two most prominent are hydrocarbons and fish. The region was the first in which two States concluded an agreement regarding delimitation of submarine areas. The Gulf of Paria Treaty, concluded in 1942 between Venezuela and the United Kingdom

³⁴ Annex Volume 2(1) No. 7.

(at that time the colonial Power in Trinidad and Tobago),³⁵ provided for a division of claims to sovereignty and control over submarine areas in the Gulf between the island of Trinidad and Venezuela. Its conclusion seems to have been motivated largely by concern about the possible exploitation of hydrocarbon resources but it led to the adoption of measures to control pollution and ensure freedom of navigation in the Gulf.³⁶ The Treaty provided a model for agreement between neighbouring States for the delimitation of the seabed areas between their coasts and the consequent exploitation of resources there.

(1) Hydrocarbons

38 While Barbados' Memorial concentrates upon fisheries (and bases its claim to take almost the whole of the continental shelf and EEZ appertaining to the island of Tobago on an alleged "historic fishery", about which more is said below), it must be remembered that the area in issue is also rich in hydrocarbons and that exploitation of that resource has been a major feature of the last sixty years or so.

39 The first oil discovered in Trinidad and Tobago was in land fields on the island of Trinidad. Following the conclusion of the Gulf of Paria Treaty in 1942, oil was discovered in the Gulf and in waters to the south-west of Trinidad. More recently, attention has shifted to oil and gas reserves off the other coasts of Trinidad and Tobago. Natural gas reserves were discovered off the north coast of Trinidad and exploitation began in the early 1970s. In 1980 the Ministry of Energy of Trinidad and Tobago commissioned a seismic survey in the deep water areas off the east coast. Although commercial interest was initially confined to shallow water areas, by the 1990s interest had developed in the commercial possibilities of exploiting reserves of oil and natural gas in the deeper water areas off Trinidad and Tobago.

40 Several competitive bidding rounds were held between 1995 and 2004 for blocks off the north and east coasts. A map produced by the Ministry of Energy and Energy Industries, Geological/Geophysical Section, for the 1997 Competitive Bid appears as **Figure 2.1.**

³⁵ Annex Volume 2(1) No.1.

³⁶ Charney and Alexander, *International Maritime Boundaries*, Volume I (1996), p. 639.

A further seismic survey was conducted in the deep Atlantic area to the north and east of Trinidad and Tobago in 2002 and it is expected that this area will be offered for competitive bidding in early 2006.

41 In addition, Appendix A to this Counter-Memorial sets out some of the many instances where (including in respect of hydrocarbons) Barbados has recognized Trinidad and Tobago's rights in respect of the areas that Barbados now claims. Barbados has never granted any concession of its own in the areas south of the median line to which it now lays claim and, as Appendix A demonstrates, has requested permission from Trinidad and Tobago to carry out a seismic shoot south of the median line.

(2) Fisheries

42 With regard to the other main marine resource of the area, fish, the Memorial sets out to paint a picture of Barbadian "artisanal fisherfolk" denied access to fishing grounds off Tobago, where, it is said, they and their forebears have fished since time immemorial, while the flying fish which are so important to Barbadians are said to be of no interest to the inhabitants of Trinidad and Tobago. It is a picture which bears no resemblance to reality.

43 First, Barbados' claim that its "fisherfolk" have traditionally fished the waters off Tobago is pure fiction. The reality is that it was not until the late 1970s, when the fishing industry in Barbados began to acquire ice-boats with a range sufficient to enable them to operate at distances which are never less than 58 n.m., and can be as much as 147 n.m., that Barbadian vessels started to operate in the waters to the north of Tobago which are now, for the first time, claimed by Barbados. Contrary to what is asserted by Barbados, Barbadian fishing in these waters is not historic and it is not artisanal. On the contrary, it is of recent origin and highly commercial.

44 Fortunately, however, the Tribunal need not tarry long over this question³⁷ (even though Barbados devotes a large part of its Memorial and thirty-five of its exhibits, not to mention a DVD, to it). This is because, even if the Barbadian account were correct in this regard, it would make no difference to the question whether the Tribunal has

³⁷ Nor over the discourse on the history of Barbados in early and colonial times in paras. 25-35 of the Memorial of Barbados, to which there is no need for Trinidad and Tobago to reply.

jurisdiction or, if it has, to the location of the single maritime boundary.³⁸ Accordingly, while Trinidad and Tobago has felt obliged to set out the true position, for the record, it has done so in Appendix B to the present Counter-Memorial.³⁹

45 Secondly, the Barbadian claim that Trinidad and Tobago has no interest in the flying fish resources of its own exclusive economic zone is wholly unfounded. Trinidad and Tobago – and specifically the island of Tobago – has its own fishing fleet and its artisanal fishermen have long fished the waters off Tobago for flying fish and other species. This matter will again be dealt with in Appendix B. For the present, it is sufficient to say that not only does the 2000 FAO study of Trinidad and Tobago comment on the importance of the flying fish industry to Tobago,⁴⁰ so do two papers by Wood and Samlalsingh, all of which are exhibited by Barbados as appendices to its Memorial.⁴¹

C. The 1990 Fishing Agreement

(1) The Background to the 1990 Fishing Agreement

46 The development in the late 1970s of a Barbadian flying fish fishing fleet with the long-range capacity to fish the waters off Tobago brought the question of fisheries onto the agenda of discussions between the two governments and eventually led to the conclusion in November 1990 of the 1990 Fishing Agreement by which Trinidad and Tobago gave access to its EEZ to a number of Barbadian fishing vessels. That Agreement was not a hasty compromise, pieced together to resolve a controversy regarding the arrests of Barbadian fishing vessels by the Trinidad and Tobago coastguard, as Barbados has suggested.⁴² It was the product of several years of negotiations about the terms on which Barbadian access to what were acknowledged to be Trinidad and Tobago's waters was to be granted.⁴³

³⁸ On jurisdiction, see Chapter 3, below. On the irrelevance of the claimed "historic fishing rights" to the determination of the single maritime boundary, see paras. 208-223 and the account of recent practice contained later in the present Chapter.

³⁹ Appendix B paras 314-342, "Barbados' Claim based on the "Traditional Flying Fishery'", below.

⁴⁰ Memorial of Barbados, App. 47, pp. 572-3.

⁴¹ Memorial of Barbados, Apps. 25 (at p. 277) and 41 (at p. 468).

⁴² Memorial of Barbados, paras. 80-83.

⁴³ The conclusion of a fishing agreement was envisaged as early as 1979, when a Memorandum of Understanding ("the 1979 MoU", Annex Volume 2(1) No.2) agreed by the two Prime Ministers and dealing with a wide range of bilateral matters called for such an agreement to be negotiated.

47 The issue of access to fisheries resources during this period also has to be seen in the context of the legislation adopted by both States. In February 1978, Barbados enacted its Maritime Boundaries and Jurisdiction Act 1978.⁴⁴ Section 3(1) of that Act established an exclusive economic zone, the outer limit of which was stated to be 200 n.m. from Barbados' baselines. That was, however, expressly made subject to Section 3(3), which provided that –

“Notwithstanding subsection (1), where the median line as defined by subsection (4) between Barbados and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the Zone shall be that fixed by agreement between Barbados and that other State, *but where there is no such agreement, the outer boundary limit shall be the median line.*”
(Emphasis added.)

48 Trinidad and Tobago adopted legislation regarding its EEZ in 1986.⁴⁵ Section 14 of the 1986 Act provided that the outer limit of the EEZ was a line 200 n.m. from the Trinidad and Tobago baselines. Section 15 then provided that –

“Where the distance between Trinidad and Tobago and opposite or adjacent States is less than 400 nautical miles, the boundary of the exclusive economic zone shall be determined by agreement between Trinidad and Tobago and the states concerned on the basis of international law in order to achieve an equitable solution.”

As Trinidad and Tobago explained to Barbados in the first round of the maritime boundary negotiations (which are discussed in paragraphs 61-64 of this Counter-Memorial), that provision was an incorporation into the law of Trinidad and Tobago of Article 74(1) of the Law of the Sea Convention 1982.⁴⁶

49 It was against the backdrop of these two pieces of legislation that the discussions on the adoption of a fishing agreement proceeded during the 1980s. There had been a sharp increase in the activity of Barbadian vessels off Tobago in 1982-83. In 1985 meetings were held between officials of the two governments to discuss a licensing scheme whereby Trinidad and Tobago would grant a number of Barbadian vessels permission to fish in what were treated throughout as Trinidad and Tobago's waters.

⁴⁴ Annex Volume 4 No. 4.

⁴⁵ The Archipelagic Waters and Exclusive Economic Zone Act 1986, Annex Volume 4 No.5.

⁴⁶ Annex Volume 2(2) Part 1. No.1 ,p.6.

50 On 29 April 1986, a communiqué, issued following a meeting of the two Prime Ministers, noted their agreement that negotiations would proceed on an agreement to license fishing by nationals of one State in the waters of the other.⁴⁷ That was followed by a series of meetings which considered a draft agreement⁴⁸ designed to establish a scheme whereby each State would license a number of vessels from the other State to fish in its waters.

51 The notion of cooperation regarding fisheries was again mentioned in the communiqué issued following the 1987 meeting of Prime Ministers⁴⁹ and in 1988 further talks were held at which a revised draft agreement for access to each other's waters was considered.⁵⁰ That draft was concerned with access by Barbadian vessels to the EEZ of Trinidad and Tobago, except for a closed area around Tobago. The draft provided that, with regard to the waters outside the closed area, "the Government of the Republic of Trinidad and Tobago in the exercise of its sovereign rights and jurisdiction" would grant a number of fishing licences to Barbadian vessels (Article II(1)). It also stipulated that "Barbadian vessels shall comply strictly with the fisheries laws and regulations in force in the Republic of Trinidad and Tobago while engaged in fishing activities in waters under the jurisdiction of Trinidad and Tobago" (Article IX(1)). This draft formed the basis for what became the 1990 Fishing Agreement.

52 The suggestion, made in the Barbados Memorial, that the 1990 Fishing Agreement was a hurried reaction to the arrests of some Barbadian fishing vessels is thus inaccurate. The 1990 Fishing Agreement was based on a draft that had been under discussion for some years and which was unequivocally based on the principle that Trinidad and Tobago would grant licences to a stipulated number of Barbadian vessels to fish in waters which were subject to the sovereign rights and jurisdiction of Trinidad and Tobago. These were waters in respect of which Barbados made no claim and which, in accordance with Barbados' own legislation, fell outside the Barbados EEZ.

⁴⁷ Annex Volume 3 No.2 p. 4.

⁴⁸ Annex Volume 5 No. 5.

⁴⁹ Annex Volume 3 No. 6 p. 2.

⁵⁰ Annex Volume 5 No. 9.

(2) The 1990 Fishing Agreement ⁵¹

53 The 1990 Fishing Agreement was concluded in November 1990 following talks between officials of the two governments. The principal features of the Agreement are as follows:-

(1) The Preamble acknowledges –

“the desire of Barbados fishermen to engage in harvesting flying fish and associated pelagic species in the fishing area within the Exclusive Economic Zone of Trinidad and Tobago and the desire of the Republic of Trinidad and Tobago to formalize access to Barbados as a market for fish.”

(2) Under Article II(1) the Government of Trinidad and Tobago “in the exercise of its sovereign rights and jurisdiction” agreed to license up to forty Barbadian fishing vessels to fish in its EEZ;

(3) While the limits of the EEZ are not defined, Article III (2) (i) provided for a closed area around Tobago (depicted on a map in Appendix II to the Agreement) ⁵² the entirety of which Barbados has claimed for the first time in the present proceedings. Moreover the Agreement was concluded against the background of the Barbados and Trinidad and Tobago legislation considered at paragraphs 47-48, above, so that, as a minimum, the Agreement must be presumed to cover all the waters between the Trinidad and Tobago territorial sea and the median line between Trinidad and Tobago and Barbados;

(4) Article IX(1) provided that Barbadian vessels would comply strictly with the laws and regulations in force in Trinidad and Tobago while fishing in the waters under the jurisdiction of Trinidad and Tobago;

(5) Article V created a Fisheries Commission made up of representatives of the two governments to supervise the implementation of the Agreement; and

(6) Article XII provided that the Agreement would remain in force for the calendar year 1991 and that the parties could enter into negotiations for a successor agreement.

⁵¹ Annex Volume 2(1) No. 7.

⁵² Article III (2) (i) also provided that the territorial waters of Trinidad and Tobago were to be a closed area.

54 Immediately following the adoption of this Agreement, the Minister of Agriculture, Food and Fisheries of Barbados wrote to his opposite number in the Trinidad and Tobago Government to “share with you the pleasure of the successful outcome of the recently concluded round of negotiations to finalise the Fishing Agreement between our two countries. Our negotiating teams should be congratulated on a job well done.”⁵³ He then raised one item of unfinished business, namely the extent of the “off season”. There was no hint that Barbados was unhappy with any other aspect of the Agreement.

55 The 1990 Fishing Agreement remained in force throughout 1991, although only five licences were applied for and issued. The Fisheries Commission met on five occasions during 1991. During those meetings, the Barbados delegation raised a number of issues regarding changes to the Agreement for future years⁵⁴ but the underlying principle that what was involved was access for Barbadian fishing vessels to Trinidad and Tobago’s EEZ was never questioned.

56 When the 1990 Fishing Agreement expired, Trinidad and Tobago proposed renewal⁵⁵ but this was rejected by Barbados which wanted a new agreement.⁵⁶ The two governments were unable to agree. It is noticeable, however, that the proposals for Barbados concerned such matters as the number, duration and cost of licences. At no point did Barbados question the principle that the waters to which the Agreement applied belong to Trinidad and Tobago.

D. The Subsequent Negotiations between the Parties

57 A number of attempts were made during the 1990s to restart negotiations for the conclusion of a bilateral Fisheries Agreement but it was not until early in the new millennium that formal negotiations began. Contrary to what is suggested by Barbados,⁵⁷ there were two entirely separate sets of negotiations. The first concerned the maritime boundary between the two States; the second, which only began two

⁵³ Annex Volume 3 No. 9.

⁵⁴ See, in particular, Annex Volume 3 No. 11; see also the report of the Fifth Meeting of the Commission, 23-25 October 1991, Annex Volume 5 No. 12. The principal matters raised by Barbados concerned the conditions of access for Barbadian vessels, in particular the amount of the licence fee and the limitation on the number of Barbadian vessels permitted to fish in the Trinidad and Tobago EEZ at any one time.

⁵⁵ Annex Volume 3 No. 12.

⁵⁶ Annex Volume 3 No. 11.

⁵⁷ *Memorial of Barbados*, paras. 79 and 96.

years after the first set of negotiations had commenced, concerned the conclusion of a new fisheries agreement.

58 It is surprising that Barbados, which makes a number of assertions regarding those negotiations in its Memorial, has not exhibited any of the documents relating to them, in spite of the fact that a joint report, approved by both delegations,⁵⁸ exists in respect of each round of talks held during both sets of negotiations. Trinidad and Tobago has annexed all of these joint reports to its Counter-Memorial. Each set of negotiations is briefly described below but the joint reports very largely speak for themselves.

59 What they establish is that:-

- (1) It was Barbados, not Trinidad and Tobago, which broke off negotiations and initiated arbitration;
- (2) The only mention of arbitration in the Joint Reports was a comment by Barbados that it did not envisage resort to arbitration;⁵⁹
- (3) At no point in the negotiations did Barbados produce a map setting out the boundary line which it claimed; the first time that Trinidad and Tobago saw anything resembling such a map was in September 2004, when Barbados produced the map annexed to its letter of 6 September 2004 to the Tribunal;⁶⁰
- (4) Trinidad and Tobago has consistently put forward a claim in the Atlantic Sector to an extension of its eastwards-facing coastal frontage to the outer edge of the EEZ and to a continental shelf beyond 200 n.m.;⁶¹
- (5) The fisheries negotiations were based throughout on the understanding of both parties that they were discussing Barbadian access to Trinidad and

⁵⁸ At the first round of maritime boundary negotiations held on 19-20 July 2000, the two delegations agreed to prepare joint reports of each round of negotiations "to record accurately points discussed and agreed upon so as to avoid having to rely upon memory" (Annex Volume 2(2) Part 1 No 1 p. 12). The same practice was subsequently followed with respect to the successive rounds of the fisheries negotiations.

⁵⁹ Joint Report of the First Round of Maritime Boundary Negotiations, Annex Volume 2(2) Part 1 No. 1 p. 9.

⁶⁰ Even then, the area now claimed by Barbados to the south of the median line in the western sector (as to which, see Annex Volume 3 No. 98) is marked only as giving a "general indication of Barbados fishing area south of the median line". Moreover, the area marked on that map is different from that shown as the "area of traditional Barbadian fisheries" on Map 11 in the Memorial of Barbados and the area claimed by Barbados on Map 3 in that Memorial.

⁶¹ See, e.g., the Joint Reports of the Maritime Boundary Negotiations: First Round (Annex Volume 2(2) Part 1 No. 1 p. 6; Second Report. Annex Volume 2(2) Part 1 No. 2 p. 8.

Tobago waters; there was never any suggestion by Barbados that the area in question was part of the EEZ of Barbados, and the question of sovereignty over the continental shelf in that area was never raised.

(1) The Maritime Boundary Negotiations

60 The negotiations for the delimitation of the maritime boundary were spread across five rounds of talks, which commenced in July 2000.

*(i) The First Round of Maritime Boundary Negotiations (19-20 July 2000)*⁶²

61 The first round of negotiations on the maritime boundary was held in Trinidad between 19 and 20 July 2000. Both delegations began by identifying the relevant legislation, including, in particular, the Barbados Marine Boundaries and Jurisdiction Act 1978⁶³ and the Trinidad and Tobago Archipelagic Waters and Exclusive Economic Zone Act 1986.⁶⁴ They then explained the elements of their approach to the issue of delimitation.

62 Trinidad and Tobago covered a number of points, notably:-

- (1) that it was entitled to a shelf beyond the 200 n.m. mark in the eastern (Atlantic) sector in accordance with the principles that a State should not be cut off from its natural prolongation and that one State's maritime spaces should not unduly encroach on the coast of another;⁶⁵
- (2) that the coasts of the two States are opposite in one area (the western, Caribbean sector) but adjacent in the other (the eastern, Atlantic sector);⁶⁶
- (3) that the general configuration of the coast in the Atlantic sector was concave;⁶⁷ and
- (4) that the strict application of the equidistance principle at all points would produce an inequitable result.⁶⁸

⁶² For the Joint Report, see Annex Volume 2(2) Part 1 No.1.

⁶³ Annex Volume 4 No. 4.

⁶⁴ Annex Volume 4 No. 5.

⁶⁵ Joint Report, Annex Volume 2(2) Part 1 No.1 p. 6.

⁶⁶ Joint Report, Annex Volume. 2(2) Part 1 No. 1 p. 8.

⁶⁷ Joint Report, Annex Volume.2 (2) Part 1 No. 1 p. 8.

⁶⁸ Joint Report, Annex Volume 2(2) Part 1 No. 1 p. 11.

63 Barbados responded that its essential position was that “equidistance would be the most equitable way of determining a boundary between the two countries” and added that “this principle is enacted in the Maritime Boundaries and Jurisdiction Act (1978”).⁶⁹ Barbados rejected the notion that there were special circumstances justifying a departure from the equidistance line. The Barbados delegation stated that Barbados did not envisage that there would be recourse to arbitration.

64 There was also a discussion of baselines and the points used in measuring them. Neither side advanced a map setting out its claim or indicated the limits of that claim in discussion.

(ii) *The Second Round of Maritime Boundary Negotiations (24-26 October 2000)*⁷⁰

65 The second round of negotiations on the maritime boundary was held in Barbados between 24 and 26 October 2000. There was extensive discussion of baselines and basepoints. Both States developed the points they had made at the First Round in relation to the weight to be given to different factors. Trinidad and Tobago repeated that the relationship between the two States in the Atlantic sector was one of adjacency and that the coastline here was, in effect, concave. That was rejected by Barbados, which also rejected Trinidad and Tobago’s argument that it should not be cut off from its entitlement to a continental shelf beyond the 200 n.m. line.

66 Barbados expressed general satisfaction with the progress made at the First Round of negotiations. It added that Trinidad and Tobago had so far offered a methodology for delimiting the boundary but had not offered a line. Barbados requested that Trinidad and Tobago indicate the line it was claiming, commenting that –

“...it was necessary to elicit from Trinidad and Tobago an indication of where they envisaged the potential demarcation line between the two countries. It was only in this way that both sides could have a full appreciation of any difference between them.”⁷¹

67 Barbados also suggested that both sides needed to make graphic presentations of the boundary lines which they claimed so as to enable further progress to be made in the negotiations.

⁶⁹ Joint Report, Annex Volume 2(2) Part 1 No. 1 p. 11.

⁷⁰ For the Joint Report, see Annex Volume 2(2) Part 1 No. 2.

⁷¹ Joint Report, Annex Volume 2(2) Part 1 No. 2 p. 11.

68 While the Barbados delegation expressed their disappointment that more progress had not been made in negotiating a fisheries agreement, this remark was made in the context of a discussion of a number of other bilateral issues, such as air services. There was no suggestion that a fisheries agreement formed part of the agenda for these talks. On the contrary, in relation to these matters the delegation of Trinidad and Tobago made clear that they could do no more than listen as they had no mandate to engage in negotiations on those subjects.

(iii) *The Third Round of Maritime Boundary Negotiations (10-12 July 2001)*⁷²

69 The third round of negotiations on the maritime boundary took place in Trinidad between 10 and 12 July 2001. Trinidad and Tobago began by outlining the equitable principles which it considered relevant to the delimitation, noting in particular the importance of the principle that a State should not be cut off from its natural maritime prolongation and the considerable disparity between the lengths of the coastlines of the two States. It also set out what it considered to be the relevant area. The Trinidad and Tobago delegation expressly requested that Barbados supply a map depicting the boundary line which it claimed.

70 The Barbados delegation (which, for the first time, included Mr Robert Volterra (then of the London law firm, Herbert Smith) and the hydrographer Mr Christopher Carleton) continued to maintain that the median line was the appropriate starting point for delimitation. For the first time, however, the Barbados delegation claimed that there was “a significant number of geographical, geomorphological, historical and socio-economic factors, including relevant coastal ratios, exploration, fisheries, surveillance and search and rescue, which would cause a shifting of the line in Barbados’ favour to the south of the provisional median line”.⁷³ Barbados also insisted that it was necessary to respect the legitimate interests of third States, especially Guyana, though it was equally insistent that the Treaty between Trinidad and Tobago and Venezuela was irrelevant.⁷⁴ Finally, Barbados requested that Trinidad and Tobago produce a map setting out its claimed line.

⁷² For the Joint Report, see Annex Volume 2(2) Part 1 No. 3.

⁷³ See submission (v) of Barbados in Joint Report, Annex Volume 2(2) Part 1 No. 3 pp. 7-8.

⁷⁴ See submission (xii) of Barbados in Joint Report, Annex Volume 2(2) Part 1 No. 3 p. 9.

71 The subject of fisheries was briefly raised under "other business" but was not the subject of any negotiations.

(iv) *The Fourth Round of Maritime Boundary Negotiations (30 January to 1 February 2002)*⁷⁵

72 The fourth round of talks on the maritime boundary took place in Barbados between 30 January and 1 February 2002.

73 Each delegation went into some detail about the considerations which it regarded as relevant to the delimitation, including how it considered the boundary should be determined. It was agreed that both delegations would generate separate lines on cartographic documents to be exchanged between their delegations that described their opening positions. In the case of Trinidad and Tobago, a working copy of a detailed chart showing the proposed boundary line was submitted.⁷⁶ Barbados did not, however, offer a map depicting the boundary line which it claimed.⁷⁷ There was a wide-ranging exchange of views about the relevant legal principles.

74 Barbados sought to include the issue of fisheries in the negotiations. But the Trinidad and Tobago leader said that:-

"he was also hopeful that the two sides might be able to initiate as soon as possible negotiations for a complementary fisheries Agreement, and looked forward to receiving from the Barbados Government some ideas of what it proposed in that regard, which could be examined and referred for substantial discussion to a First Round of Negotiations for a Fisheries Agreement."⁷⁸

75 While Barbados made clear that it wanted the issue of fisheries to be discussed, Trinidad and Tobago did not agree and insisted that this issue be the subject of separate negotiations. As explained below, before the maritime boundary negotiations recommenced, there were to be three rounds of the separate fisheries negotiations.⁷⁹

⁷⁵ For the Joint Report, Annex Volume 2(2) Part 1 No.4.

⁷⁶ Joint Report, Annex Volume 2(2) Part 1 No.4 p. 6 and p. 9.

⁷⁷ Joint Report, Annex Volume 2(2) Part 1 No.4 p. 10.

⁷⁸ Joint Report, Annex Volume 2(2) Part 1 No. p. 4.

⁷⁹ See paras. 79-86, below.

(v) *The Fifth Round of Maritime Boundary Negotiations (19-21 November 2003)*⁸⁰

76 The fifth and, as it turned out, final round of negotiations was held in Barbados between 19 and 21 November 2003.

77 Barbados began by noting that it had used the time since the fourth round to consider Trinidad and Tobago's proposed line and "proceeded to respond to Trinidad and Tobago's proposals by way of a presentation which it was understood was purely for the purposes of illustration". But no map was tendered showing any claim line, and no firm indication given of where Barbados considered the boundary should lie. Barbados declined to give Trinidad and Tobago a copy of the powerpoint presentation its delegates had used.⁸¹ Barbados continued to insist that the median line should constitute the starting point and that there were reasons for locating the boundary to the south of that line.

78 Trinidad and Tobago expressed concern that Barbados had still not provided an official claim line⁸² which remained to be done in future negotiations. Barbados, for its part, expressed its hope that, at the next round of negotiations, Trinidad and Tobago would respond to questions posed by its team.⁸³

(2) The Fisheries Negotiations

79 As noted above, the question of a fisheries agreement between the two States to allow the Barbadian fishing industry access to the EEZ of Trinidad and Tobago had been considered on a number of occasions since the expiry of the 1990 Fishing Agreement. Formal negotiations did not begin, however, until March 2002, after which there were four rounds of talks.

(i) *The First Round of Fisheries Negotiations (20-22 March 2002)*⁸⁴

80 The first round of the fisheries talks took place in Trinidad and Tobago between 20 and 22 March 2002. At the opening session, the Head of the Barbados delegation remarked that Barbados considered these talks to be the Fifth Round of composite negotiations on maritime matters. That interpretation was rejected by the Trinidad and

⁸⁰ For the Joint Report, see Annex Volume 2(2) Part 1 No. 5.

⁸¹ Joint Report, Annex Volume 2(2) Part 1 No.5 p. 5.

⁸² Joint Report, Annex Volume 2(2) Part 1 No. 5 p. 9.

⁸³ Joint Report, Annex Volume 2(2) Part 1 No.5 p. 7.

⁸⁴ For the Joint Report, see Annex Volume 2(2) Part 1 No.1.

Tobago delegation which insisted on the separate character of the fisheries negotiations. The Joint Report reflected the Trinidad and Tobago position and was entitled "Joint Report on the Negotiations for a Trinidad and Tobago-Barbados Fishing Agreement". This approach, which was continued in the records of the later rounds, clearly distinguishes the fisheries negotiations from the maritime boundary negotiations, the fourth round of which had been held only a few weeks earlier.⁸⁵

81 During the first round of the fisheries negotiations, the parties discussed a range of issues including the effect of CARICOM's single market upon the fisheries question. Barbados suggested that, in the absence of an agreement on the maritime boundary, Trinidad and Tobago should identify an area "unquestionably within Trinidad and Tobago's EEZ jurisdiction but outside the limits of its 12 nautical mile territorial sea, particularly off the north and northwestern coast of Tobago"⁸⁶ to which an agreement for access might apply. There was no suggestion of a Barbadian claim to the area in question which was, of course, that in which Barbados claimed its fishing industry had traditionally been active (and which is now claimed to be part of the Barbados EEZ).

82 The parties agreed to establish a technical working group and to meet again in June 2002.

(ii) *The Second Round of Fisheries Negotiations (24-25 March 2003)*⁸⁷

83 In fact, the second round did not take place until March 2003. The Head of the Barbadian delegation opened by explaining that –

"...in an effort to establish whether Barbados and Trinidad and Tobago could crystallise their respective positions, the Government of Barbados had circulated a draft Fisheries Agreement for the consideration of the Government of Trinidad and Tobago. The draft text in this respect was based on what Barbados believed would constitute a satisfactory bilateral Agreement taking into consideration historical bilateral arrangements as well as the FAO model."⁸⁸

In response, the leader of the Trinidad and Tobago delegation, Ambassador Sealy, noted, *inter alia*, that –

⁸⁵ Annex Volume 2(2) Part 1 No.4.

⁸⁶ Annex Volume 2(2) Part 2 No.1, para 21.

⁸⁷ For the Joint Report, see Annex Volume 2(2) Part 2 No.3.

⁸⁸ Joint Report, Annex Volume 2(2) Part 2 No. 3, para 3.

“an objective of these negotiations is not to add to the current plight of global fisheries but to ensure the long term sustainability of marine living resource over which Trinidad and Tobago exercises sovereign rights not only in respect of their exploration and exploitation, but also and more importantly in respect of their conservation and management.”⁸⁹

84 The Joint Report makes clear that the assertion by Trinidad and Tobago of sovereign rights in the area in question was not challenged by Barbados. On the contrary, the draft agreement ⁹⁰ tabled by Barbados –

- (1) referred back to the 1990 Fishing Agreement which recognized Trinidad and Tobago sovereign rights over the area (Preamble);
- (2) noted the obligations of the two States under UNCLOS (and other treaties) (Preamble);
- (3) stated that the parties were aware of the ongoing negotiations to demarcate the marine boundary (Preamble), and
- (4) stated that “the Government of Trinidad and Tobago shall allow fishing by Authorized Fishing Vessels [defined as vessels owned etc by Barbadians and registered in Barbados] in its maritime area” (Art. 2(1)); see also Art. 7(1) and 8).

85 So far as the area to which the draft treaty was to apply was concerned, the parties agreed that the territorial sea of Trinidad and Tobago was excluded. Discussion focussed on whether, as with the 1990 Fishing Agreement, there should be a further two mile exclusion zone in the EEZ to the north and east of Tobago.

(iii) *The Third Round of Fisheries Negotiations (12-13 June 2003)*⁹¹

86 The third round of fisheries negotiations, which took place in Trinidad and Tobago between 12 and 13 June 2003, revolved around the detail of the Barbadian draft Agreement. As in the two previous rounds, there was no hint that Barbados claimed as its EEZ the entirety of the waters to the north and north-west of Tobago up to the 12-mile limit of the territorial sea. Those were the very waters where Barbados claimed its fishermen had traditionally fished and were thus the essential subject

⁸⁹ Joint Report, Annex Volume 2(2) Part 2 No. 3, para 6.

⁹⁰ Annex Volume 2(2) Part 2 No. 3, p. 13.

⁹¹ For the Joint report, see Annex Volume 2(2) Part 2 No.5.

matter of the draft Agreement. It is difficult to see how Barbados could have negotiated in good faith on the basis of a description of those waters as belonging to Trinidad and Tobago if it was in reality laying claim to them itself. Indeed, a central feature of this round of the negotiations was that Barbados sought a moratorium on arrests within these waters (a request refused by Trinidad and Tobago) without ever suggesting that Trinidad and Tobago was illegally asserting jurisdiction in Barbadian waters.

(iv) *The Fourth Round of Fisheries Negotiations (19-21 November 2003)*⁹²

87 The fourth and as it turned out final round of the fisheries negotiations took place in Barbados during the same period as the fifth round of the maritime boundary negotiations. Although the two sets of negotiations were held on the same days, they were the subject of separate meetings. Again, the focus in the fisheries negotiations was on the Barbadian draft Agreement.

88 Article 1 of that draft, which is recorded as having been agreed, provided that –

“This Agreement lays down the principles, rules and procedures for cooperation between the Government of the Republic of Trinidad and Tobago and the Government of Barbados with regard to the use by authorized fishing vessels of Barbados in a sustainable manner of the flying fish and associated pelagic species within the Exclusive Economic Zone over which the Republic of Trinidad and Tobago exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing said marine living resources.”⁹³

89 Again, there was no suggestion that Barbados claimed the waters and seabed between the median line and the limits of the territorial sea to the north and north-west of Tobago.

E. The Commencement of the Arbitration

90 At the conclusion of the Fifth Round of Maritime Boundary negotiations and the Fourth Round of Fisheries negotiations, it was the understanding of both States, as recorded in the Joint Reports, that further negotiations would be held in 2004.⁹⁴ There had been no suggestion in any of the nine rounds of these two sets of negotiations that

⁹² For the Joint report, see Annex Volume 2(2) Part 2 No. 6.

⁹³ Annex Volume 2(2) Part 2 No. 6 App. I p. 5.

⁹⁴ Joint Report of the Fifth Round of Maritime Boundary Negotiations, Annex Volume 2(2) Part 1 No.5 p. 9; Joint Report of the Fourth Round of Fisheries Negotiations, Annex Volume 2(2) Part 2 No. 6 para. 6.

the issues of the maritime boundary and a fisheries agreement could not be settled by negotiation and there had been no discussion of arbitration.

91 On 6 February 2004, the Trinidad and Tobago coastguard arrested two Barbadian fishing vessels which were fishing in the EEZ of Trinidad and Tobago. The arrest took place to the north of Tobago and thus in precisely the area to which Barbados fishing vessels were seeking access by agreement. While Barbados requested information regarding these arrests, it did not claim that the arrests had occurred in Barbadian, as opposed to Trinidad and Tobago, waters. Barbados did, however, threaten retaliatory action against Trinidad and Tobago exports to Barbados. There was no suggestion of breaking off the two sets of negotiations. On the contrary, Barbados agreed, at Trinidad and Tobago's suggestion, to hold the next round of fisheries negotiations later in February 2004.⁹⁵

92 In an attempt to improve relations between the two countries, the Prime Minister of Trinidad and Tobago, Mr Manning, flew to Barbados on 16 February 2004, accompanied by the Foreign Minister and a team of officials, to meet with the Prime Minister of Barbados, Mr Arthur, and members of his government. They held a meeting on the morning of 16 February 2004.⁹⁶

93 In its Memorial, Barbados summarises those talks in the following brief passage:

“At that meeting, Prime Minister Manning made it clear that the Trinidad-Venezuela Treaty made the boundary problem of Barbados and Trinidad and Tobago intractable. Prime Minister Manning further stated that Trinidad and Tobago would henceforth only discuss the issue of Barbados' fishing rights in isolation from the boundary issue, leaving the negotiations on the issue of maritime boundaries in abeyance since, in his view, no progress was possible.

Barbados had made clear during the first five rounds of maritime delimitation and fishery negotiations, and, indeed, Trinidad and Tobago had agreed, that the issues of fisheries and maritime delimitation were linked and must be negotiated together. Further, Barbados had repeatedly objected to the Trinidad-Venezuela Agreement both during bilateral negotiations and publicly.”⁹⁷

This account is inaccurate in almost every respect.

⁹⁵ Letter of the Minister of Foreign Affairs of Trinidad and Tobago to the Minister of Foreign Affairs of Barbados, Annex Volume 3 No. 83, and reply Annex Volume 3, No. 84.

⁹⁶ There was no agreed joint record but a report on the meeting to the Trinidad and Tobago Cabinet is attached as Annex Volume 5 No. 29.

⁹⁷ Memorial of Barbados, paras. 95-96.

- 94 *First*, with regard to the linkage between the fisheries and delimitation negotiations, the record of the five rounds of delimitation negotiations and the four separate rounds of fisheries negotiations (not, as Barbados claims, “five rounds of maritime delimitation and fisheries negotiations”) makes it perfectly clear that the two sets of negotiations had been separate. Separate joint reports were issued and approved by both delegations and, apart from the fifth round of delimitation negotiations and the fourth round of fisheries negotiations, which occurred at the same time (though in separate sessions), the two sets of negotiations had been held at different times and in different places.
- 95 In the course of the meeting on 16 February 2004, the Prime Minister of Barbados insisted that the next round of negotiations must cover both the maritime boundary and the question of fisheries. The Prime Minister of Trinidad and Tobago responded that the two sets of negotiations had always been kept separate hitherto and that Trinidad and Tobago considered it would be possible to achieve a fisheries agreement before agreement was reached on the maritime boundary. Trinidad and Tobago was therefore prepared to link the two sets of negotiations on the basis that agreement on fisheries was not put off until solution of the boundary question. The Prime Minister of Trinidad and Tobago accordingly proposed that the two States work towards the adoption of an interim fishing agreement. There was no question of Trinidad and Tobago insisting that the negotiations of the two issues be decoupled.
- 96 *Secondly*, with regard to the 1990 Treaty between Trinidad and Tobago and Venezuela, Trinidad and Tobago finds the allegation in the Barbados Memorial to be not only inaccurate as a record of what was said at the meeting on 16 February 2004 but incomprehensible in the light of Barbados’ own record in respect of that Treaty. At the 16 February meeting, it was the Prime Minister of Barbados who raised the subject of the Treaty, claiming that it had ignored the rights of both Barbados and Guyana. At no point did the Prime Minister of Trinidad and Tobago suggest that it had made the delimitation process intractable. Nor did he break off, or threaten to break off, negotiations on that ground (or, indeed, any other ground).
- 97 Of course, the Trinidad and Tobago-Venezuela Treaty does not bind, or affect the rights of, any third State. That is clear not only as a proposition of general

international law,⁹⁸ it is expressly stated in the Treaty itself, where Article II(2) concludes with the words “no provision of the present Treaty shall in any way prejudice or limit these rights or the rights of third parties”.⁹⁹ Equally, the negotiations between Trinidad and Tobago and Barbados could not prejudice the rights of third States.

98 Moreover, Barbados omits any mention of the fact that the Government of Barbados had said nothing at all when the Trinidad and Tobago-Venezuela Treaty was concluded in 1990. It was not until ten years later, at the Second Round of Maritime Boundary negotiations, that Barbados had made any comment about the Treaty¹⁰⁰ and not until August 2001 that Barbados raised the matter in a Diplomatic Note to Trinidad and Tobago.¹⁰¹ On neither occasion did either State suggest that the Treaty made the process of delimitation of their boundary intractable. When Prime Minister Manning pointed this out to Prime Minister Arthur at the meeting of 16 February 2004, the latter did not respond.

99 *Thirdly*, the Barbados Memorial glosses over the fact that at the meeting of 16 February 2004 neither delegation stated that it was breaking off negotiations. The possibility of commencing arbitration was never mentioned. The Trinidad and Tobago delegation left the talks expecting to hear from Barbados about the press release regarding the talks and the practical arrangements for the next round of negotiations, which were due to commence on 18 February 2004. Instead, Trinidad and Tobago received a Diplomatic Note¹⁰² dated the day of the Prime Ministerial talks in which Barbados announced that further negotiations would be fruitless and that it had commenced arbitration proceedings. Barbados had already prepared a Statement of Claim and appointed an arbitrator.¹⁰³

⁹⁸ If authority is needed for so elementary a proposition, it is supplied by Article 34 of the Vienna Convention on the Law of Treaties, 1969.

⁹⁹ Annex Volume 2(1) No. 6.

¹⁰⁰ Joint Report, Annex Volume 2(2) Part 1 No. 2 p. 12.

¹⁰¹ Annex Volume 3 No. 48.

¹⁰² Annex Volume 3 No. 85.

¹⁰³ For the subsequent diplomatic correspondence the Tribunal is referred to Annex Volume 3 Nos. 5, 86-92 and 94-97.

CHAPTER 3

JURISDICTION AND ADMISSIBILITY

A. Introduction

100 Pursuant to Article 10(1) of the Rules of Procedure: “The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of the Notification or of any claim made in the proceedings.”¹⁰⁴

101 Trinidad and Tobago has already submitted an outline of its Preliminary Objections by its submission dated 23 December 2004 (made in accordance with Article 10(2) of the Rules of Procedure). In this Chapter, Trinidad and Tobago develops the objections that it has already outlined, i.e. the objections arising from Barbados’ failure to comply with the necessary pre-conditions to arbitration under section 2 of Part XV of the 1982 Convention (see Section B below), and the abusive nature of the single line claimed by Barbados in the light of its prior recognition of the exclusive economic zone of Trinidad and Tobago (see Section C below). In addition, Trinidad and Tobago re-states its reservation of rights so far as concerns any claim by Barbados to a remedy relating to fishing rights in the exclusive economic zone of Trinidad and Tobago (see Section D below).

B. Barbados’ Failure to Comply with Necessary Pre-Conditions to Arbitration under Part XV

102 In its Notification and Statement of Claim of 16 February 2004, Barbados submitted a dispute concerning the delimitation of the exclusive economic zone and the continental shelf to arbitration pursuant to Article 286 of the 1982 Convention and Article 1 of Annex VII. Article 286 provides in relevant part:

“... any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1 [of Part XV], be submitted at the request of any party to the court or tribunal having jurisdiction under this section.”

103 It follows from Article 286 that the provisions of section 2 of Part XV apply subject to the provisions of section 1.¹⁰⁵ This point is expressly confirmed by Article 1 of

¹⁰⁴ See, also, Article 288(4) of the 1982 Convention.

Annex VII so far as concerns the jurisdiction of an Annex VII tribunal. This provides in relevant part:

“Subject to the provisions of Part XV, any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification ...”.

104 The exercise of jurisdiction by an Annex VII tribunal is thus made expressly subject to “the provisions of Part XV”, which of course comprise the provisions of section 1 as well as section 2 (and, as applicable, section 3) of Part XV.

105 Article 283(1) of the 1982 Convention, which is located in section 1 of Part XV, provides:

“When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”

106 The effect of Article 283(1) is to make the exercise of jurisdiction by an Annex VII tribunal contingent upon (i) the existence of a dispute, and (ii) an exchange of views having taken place regarding settlement by negotiation or other peaceful means. The wording of this second requirement is mandatory – the parties “shall” proceed expeditiously to an exchange of views – as is confirmed by the *Virginia Commentary* and recent case law.¹⁰⁶ The importance attached to this mandatory stage is reflected in Article 283(2), which provides that the parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of a dispute has been terminated without a settlement (or where there is an issue as to implementation of a settlement). As noted in the consideration of Article 283 in the *Virginia Commentary*:

“The obligation specified in this article is not limited to an initial exchange of views at the commencement of a dispute. It is a continuing obligation applicable at every stage of the dispute. In particular, as is made clear in paragraph 2, the obligation to exchange views on further means of settling a dispute revives whenever a procedure accepted by the parties for the settlement of a particular dispute has been terminated without a satisfactory result and no

¹⁰⁵ See the *Virginia Commentary*, Vol. V, p. 38, para. 286.3.

¹⁰⁶ See the *Virginia Commentary*, Vol. V, p. 29, para. 283.1. The mandatory nature of the exchange of views under section 1 of Part XV was also implicitly confirmed both in Cases Nos. 3 and 4, *Southern Bluefin Tuna Cases, New Zealand v Japan, Australia v Japan*, Order of 27 August 1999, at para. 60, and *MOX Plant Case (Ireland v United Kingdom)*, Order of 3 December 2001, at para. 60. See also *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Order of 8 October 2003.

settlement of the dispute has been reached. In such a case, the parties would have to exchange views again with regard to the next procedure to be used to settle the dispute. There might be further resort to negotiations in good faith, or the parties might agree to use another procedure. This provision ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision, only after appropriate consultations between all parties concerned.”¹⁰⁷

107 In its Memorial, Barbados makes no attempt to demonstrate that the two pre-conditions to arbitration contained in Article 283 had been satisfied as at 16 February 2004. It may be supposed that Barbados is sensitive to its failures in this regard, and has therefore elected not to address the issue of the Tribunal’s jurisdiction. Insofar as it is Barbados’ case that the requirements of Article 283(1) are to be considered satisfied because, as of 16 February 2004, the Parties were engaged in ongoing negotiations with a view to effecting an agreement pursuant to Articles 74(1) and 83(1) of the 1982 Convention,¹⁰⁸ and such negotiations had proved unsuccessful in the view of Barbados,¹⁰⁹ that case must be rejected. The process of reaching an agreement on delimitation under Parts V and VI is not to be conflated with the existence of a dispute that is the prerequisite to any application of Part XV. Further, it is not open to a party to decide unilaterally that negotiations pursuant to Articles 74(1) and 83(1) of the 1982 Convention have failed, and to move directly (and without warning) from negotiation under these provisions to arbitration under section 2 of Part XV.

(1) Effecting an Agreement under Articles 74(1) and/or 83(1) of the 1982 Convention

108 It is evident that the process of effecting an agreement pursuant to Articles 74(1) and/or 83(1) envisages the relevant parties putting forward and negotiating differing views as to how an equitable solution is to be achieved. Such negotiations are, of course, to be conducted in good faith. As the Court held in its well-known dictum in the *North Sea Continental Shelf* cases (a passage that is cited in the *Virginia Commentary* in its consideration of both Articles 74(1) and 83(1)):

¹⁰⁷ See the *Virginia Commentary*, Vol. V, p. 29, para. 283.3.

¹⁰⁸ The ongoing nature of the negotiations as at 16 February 2004 is not subject to doubt. It was only on 18 February 2004 that Barbados acted to suspend the negotiations; Annex Volume 3 No. 87.

¹⁰⁹ See Barbados’ Diplomatic Note 18/1-1-2 of 16 February 2004 at Annex Volume 3 No. 85 (the Diplomatic Note accompanying Barbados’ Statement of Claim), where it is stated that “the full exchange of views in the correspondence and meetings and repeated efforts to secure a settlement by negotiation of this matter have proved unsuccessful”.

“... 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 that 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.”¹¹⁰

109 It is implicit from this, as well as from the general process envisaged under Articles 74(1) and/or 83(1), that the mere fact of negotiations under those provisions does not mean that the negotiating parties concerned are in a state of dispute. The parties under Articles 74(1) and/or 83(1) are seeking to reach agreement, not to defend entrenched positions. Further, given not least the breadth of the concept of “an equitable solution” and the controversy surrounding the formulation of these two provisions, it can hardly have been the expectation of the drafters of the 1982 Convention that parties would immediately effect an agreement. Thus it cannot have been intended that parties in negotiations under Articles 74(1) and/or 83(1) could be considered without more to be in dispute. Indeed, the wording of Articles 74(2) and 83(2) demonstrate that this was not the intention. Pursuant to these two provisions, it is only where “no agreement can be reached *within a reasonable period of time*” that the States concerned “shall resort to the procedures provided for in Part XV”. A reference in a legal instrument to a “reasonable period of time” must refer to some objective standard of reasonableness, not to the subjective appreciation of one of the parties.

110 This leads to an initial question in this case as to whether, as of as of 16 February 2004, it could be said that there had been a failure to reach an agreement under Articles 74(1) and 83(1) within a reasonable period of time. Any argument to this effect should be rejected. The point has already been made in preceding Chapters that at no stage in the five rounds of the delimitation negotiations did Barbados submit a line equivalent to the line now depicted at Map 3 of Barbados’ Memorial. Indeed, at no stage in the five rounds of delimitation negotiations did Barbados submit *any* depiction of a line that it was claiming. In these circumstances:

- (1) The negotiations ongoing as at 16 February 2004 were still at an early stage. Until such time as Barbados’ claim line had been submitted and discussed, it

¹¹⁰ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, 1969 ICJ Reports, 3, 47. See, also, Article 300 of the 1982 Convention.

could not be said that there had yet been meaningful negotiations as to Barbados' claim under Articles 74(1) and 83(1).

(2) Similarly, so far as concerns Articles 74(2) and 83(2), for so long as Barbados delayed in submitting a claim line, it could not be said that a reasonable period of time had elapsed so far as concerned the negotiation of that claim.

111 So far as concerns the claim to arbitration submitted by Barbados, it follows that, as of 16 February 2004, the parties were still engaged in the initial stages of effecting an agreement under Articles 74(1) and 83(1).

112 Further, even where it may be said no agreement has been reached within a reasonable period of time in bilateral negotiations under Articles 74(1) and 83(1), there are three important points to emphasise with respect to the obligation that then arises under Articles 74(2) and 83(2). First, the obligation under Articles 74(2) and 83(2) is mandatory: "shall resort". Second, the obligation falls on both States concerned in the negotiations: "the States concerned shall resort ...". It is not envisaged that one State, acting alone, will immediately and without notice resort to the procedures of Part XV. Third, and consistent with this first point, the procedures to which the parties are to resort are those established by Part XV as a whole, i.e. including section 1 as an obligatory first stage in the resolution of a dispute. In this respect, the procedures under section 1, including Article 283, envisage parties acting together to reach the settlement of a dispute, whereas section 2 envisages a party acting unilaterally e.g. in commencing an arbitration under Article 286. Thus the reference to States (in the plural) in Articles 74(2) and 83(2) confirms that the next stage in the process is to be settlement by recourse to section 1 of Part XV. It is not open to a State acting unilaterally to have resort only to the procedures of section 2 of Part XV and to bypass the procedures of section 1.

113 It may be correct that if a State declines to exchange views or to engage in any discussion, the requirements of Article 283 will be taken to have been met.¹¹¹ But that

¹¹¹ As contended by Malaysia in *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Order of 8 October 2003, paras. 39-40 and 44-45.

was at no stage the case here, as has already been demonstrated in Chapter 2 above.¹¹² Trinidad and Tobago was at all times prepared to discuss the situation; indeed it was Trinidad and Tobago which alone put forward a claim line for the purposes of discussion, at the fourth round of negotiations.

114 Thus, if as of 16 February 2004 it was Barbados' position that there had been a failure to reach an agreement under Articles 74(1) and 83(1) within a reasonable period of time, it was then obliged to notify Trinidad and Tobago of that fact and that, pursuant to Articles 74(2) and 83(2), the parties were obliged to resort to the procedures provided for in section 1 of Part XV. Barbados made no such notification.

(2) The requirements of Article 283

115 So far as concerns the first precondition to arbitration in Article 283(1), i.e. the existence of a dispute, there was no dispute between the parties as of 16 February 2004 so far as concerned Barbados' claim. The existence of a dispute of necessity envisages a degree of definition that was wholly absent so far as concerns Barbados' (unstated, unarticulated) claim. As the Court has repeatedly held:

“[i]n order to establish the existence of a dispute, ‘It must be shown that the claim of one party is positively opposed by the other’ (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, ‘Whether there exists an international dispute is a matter for objective determination’ (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)”.¹¹³

116 There could be no ‘positive opposition’ to a claim that had not yet been formulated by Barbados.

117 So far as concerns the second precondition to arbitration in Article 283(1), there was no exchange of views of any kind between the termination of the processes under Articles 74(1) and 83(1) and the Notification of 16 February 2004. To the contrary:

(1) The Notification of 16 February 2004 came entirely without warning. Prior to receipt of the Notification, there had been no intimation by Barbados that

¹¹² See paras. 92-99 above as to the meeting of Prime Ministers of 16 February 2004, refuting Memorial of Barbados, paras. 96-97.

¹¹³ See e.g. *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 100, para. 22; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, I.C.J. Reports 1998, para. 78.

it was contemplating abandoning, or had decided to abandon, the negotiations on the delimitation of a single maritime boundary, let alone some notice of a failure to reach an agreement under Articles 74(1) and 83(1) within a reasonable period of time, or of the obligation to resort to the procedures of Part XV, section 1. These necessary precursors to any exchange of views were ignored by Barbados, just as the need for the exchange of views itself.

- (2) As has already been seen, the Notification of 16 February 2004 in fact preceded Barbados' termination of the processes under Articles 74(1) and 83(1).
- (3) There could be no meaningful exchange of views aimed at settlement in circumstances where Barbados had elected not to submit any depiction of a line that it was claiming.

118 These failings are inconsistent with any good faith application of Article 283(1), as is required by Article 300 of the 1982 Convention and by settled jurisprudence, such as the *North Sea Continental Shelf* cases already referred to.¹¹⁴

119 Further, precisely the same points would apply even if – however artificially – the parties were to be taken as in a situation of dispute whilst they were in negotiations under Articles 74(1) and 83(1). It would follow from Article 283(2) that it was for Barbados to terminate the attempts at settlement of the dispute, i.e. the negotiations, and for the parties then to proceed expeditiously to an exchange of views. As the *Virginia Commentary* makes clear, Article 283(2) ensures that a party may transfer a dispute from one mode of settlement to another, especially one entailing a binding decision such as arbitration under Annex VII, “only after appropriate consultations between all parties concerned”.¹¹⁵

120 Barbados has acted in such a way as to deprive Trinidad and Tobago of the important procedural protections of Article 283, purporting to leap from negotiations under Articles 74(1) and 83(1) that were still ongoing as of 16 February 2004, to a unilateral

¹¹⁴ And see the *Virginia Commentary*, Vol. V, p. 29, para. 283.5, referring to both Article 300 of the 1982 Convention and the *North Sea Continental Shelf* cases.

¹¹⁵ See the *Virginia Commentary*, Vol. V, p. 29, para. 283.3.

commencement of arbitration under section 2 of Part XV. The requirements of Article 283 cannot, however, be bypassed in this way, and the result of Barbados' precipitate actions is inevitably that this Tribunal lacks jurisdiction over Barbados' claim and/or that Barbados' claim is inadmissible.

C. Part XV of the 1982 Convention and the Requirement of Good Faith

121 It follows from the 1990 Fishing Agreement, and other material referred to in Appendix A showing Barbados' express recognition of the exclusive economic zone of Trinidad and Tobago, that insofar as it comes to be considered at a merits stage, Barbados' claim is hopeless and must be rejected. The merits of Barbados' claim are considered in further detail in Chapter 6 below (and also, so far as concerns the underlying allegations of fact, in Appendix B to this Counter-Memorial). However, quite separate to any consideration of the merits of Barbados' claim, the claim is inadmissible because it is abusive and must therefore be dismissed. This is not simply because the claim is hopeless. Rather, insofar as (notwithstanding Barbados' failure to comply with the pre-conditions to arbitration discussed in Section B above) Barbados had a right under Article 286 to submit a dispute to arbitration, that right was to be exercised only in accordance with Article 300, i.e. in good faith and "in a manner that would not constitute an abuse of right".

122 It follows from Article 300 that the concepts of good faith and (non) abuse of rights are introduced expressly into Article 286, although these fundamental concepts must anyway be seen as inherent in any international jurisdictional agreement (whether in favour of a court or an arbitral tribunal).¹¹⁶ As noted by Zoller:

“Qu'il s'agisse du règlement judiciaire ou du règlement arbitral, on s'accorde à reconnaître qu'il existe à la charge de l'Etat, une obligation générale d'agir de bonne foi.”

“Contrairement à ce qui se passe en droit interne, le juge international est la création des parties. Il n'est pas imposé aux parties puisque ce sont elles qui décident librement d'y recourir et qui créent, hormis le cas du règlement judiciaire, l'organe appelé à trancher le différend.

¹¹⁶ This follows as a matter of basic principle, i.e. the general applicability of the principle of good faith. See, for example, the well-known dicta of the Court in *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, 253, 268. See, also, Virally, *Good Faith in Public International Law*, (1983) 77 AJIL 130, 132: “Good faith is at the foundation of *pacta sunt servanda*, since when States enter into a contract, they are always assumed to have willingly committed themselves to its terms. Thus, their will must produce the effects it has openly sought, and they must be considered effectively bound, in accordance with their declarations.”

Aussi les Etats ont-ils une double obligation dont il conviendra d'examiner les liens qui l'unissent au principe de bonne foi: *tout d'abord s'abstenir de tout usage abusif des moyens de procédure*, ensuite collaborer sincèrement avec le juge ou l'arbitre dans la recherche d'une solution à leur différend."¹¹⁷

123 The doctrine of abuse of rights is summarised by Fitzmaurice as follows:

"The essence of the doctrine [of abuse of rights] is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act arbitrarily or capriciously."¹¹⁸

124 Further, in the words of Bin Cheng:

"Good faith in the exercise of rights ... means that a State's rights must be exercised in a manner compatible with its various obligations arising either from treaties or from the general law. It follows from this interdependence of rights and obligations that rights must be reasonably exercised. The reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State, whether these interests be secured by treaty or by general international law."¹¹⁹

125 In seeking to employ Article 286 to claim a single maritime boundary line that is inconsistent with Barbados' previous recognition of the exclusive economic zone of Trinidad and Tobago, Barbados is indeed acting in a manner that is arbitrary or capricious, and incompatible with its various obligations arising either from treaties or from general international law.¹²⁰

¹¹⁷ Zoller, *La Bonne Foi en Droit International Public*, Paris, 1977, pp. 123 (emphasis added), 142. See, also, at 124: "L'exigence de bonne foi enveloppe tout le procès international, tant en ce qui concerne l'exécution de l'engagement de recourir à la juridiction internationale que le déroulement du procès lui-même."

¹¹⁸ Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, (1950) 27 BYIL 1, at pp.12-13. See, also, Daillier and Pellet, *Droit International Public*, (7th ed., 2002), at para. 139, p.219: "L'exécution de bonne foi devrait être définie comme celle qui exclut toute tentative de 'fraude à la loi', toute ruse, et exige positivement fidélité et loyauté aux engagements pris."

¹¹⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), at pp.131-132. See, also, at pp. 118-119: "While the principle of good faith prohibits the evasion of an obligation as established by the common intention of the parties, it also prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty ... the principle of good faith requires a party to refrain from abusing such rights as are conferred upon it by the treaty."

¹²⁰ For the inadmissibility of a claim under an arbitration agreement in a bilateral investment treaty, where a party seeks to approbate and reprobate in respect of the same contract, see *SGS Société Générale de Surveillance v. Philippines*, Decision on Jurisdiction, paras. 154-155. (ICSID Case No. ARB/01/13).

126 In particular, as has already been established in Chapter 2 above, Barbados has long since recognised that the area in respect of which it claims there has been a historical exercise of fishing rights (which is the sole basis for its claim of a deviation to the south of its equidistance line) is within the exclusive economic zone of Trinidad and Tobago. Notably, this recognition is contained in the 1990 Fishing Agreement, i.e. a treaty with Trinidad and Tobago.¹²¹ It follows that Barbados is acting in a manner inconsistently with the express acceptance in a valid treaty of rights that belong to Trinidad and Tobago.

127 It is of no relevance in this respect that the 1990 Fishing Agreement was of limited duration. Pursuant to Article II(1) of that Agreement, Trinidad and Tobago allowed access to its exclusive economic zone “in the exercise of its sovereign rights and jurisdiction”. Having secured a benefit pursuant to the express and unconditional recognition of Trinidad and Tobago’s sovereign rights and jurisdiction in its exclusive economic zone, Barbados cannot now seek to withdraw that recognition.¹²² Nor does the preservation of rights at Article XI of the 1990 Fishing Agreement impact on the recognition. All this provision does is to establish that the fact that fishing has been allowed in the marine area of Trinidad and Tobago cannot be used as a precedent with a view to establishing a right to future fishing in the marine areas of either party. In any event, as Chapter 2 has demonstrated, and as is further amplified in Appendix A, Barbados’ recognition of the exclusive economic zone of Trinidad and Tobago is evident from a consistent line of practice on the part of Barbados, not least in the lengthy negotiations both prior and subsequent to the 1990 Fishing Agreement.

128 Further, the line claimed by Barbados is incompatible with Barbados’ own legislation, i.e. section 3(3) of the Maritime Boundaries and Jurisdiction Act 1978. This provides in relevant part:

“... where the median line ... between Barbados and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the [Exclusive Economic] Zone shall be that fixed by agreement between Barbados

¹²¹ Annex Volume 2(1) No. 3.

¹²² See, also, *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, 6, 37, at para. 73: “... when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent on the continuing life of the treaty under which the boundary is agreed”.

and that other State; but where there is no such agreement, the outer boundary limit shall be the median line.”

129 Notwithstanding the obvious importance of this legislation to Barbados’ claim, it merits just one brief mention at paragraph 16 of Barbados’ Memorial. Barbados states: “where there was less than 400 nautical miles between Barbados and one of its neighbours, the Act extended the exercise of Barbados’ authority up to the median line pending a delimitation”. This is not, of course, what section 3(3) says. Section 3(3) establishes a principle of equidistance in default of any agreement to the contrary.

130 In the instant case, there has been no agreement between Trinidad and Tobago and Barbados fixing the outer boundary limit of the exclusive economic zone. It follows that, were Barbados to consider itself bound by its own applicable law, its claim would be to an exclusive economic zone that went no further than the equidistance line. In ignoring its own law, Barbados is inevitably acting in a manner that is arbitrary and capricious – as well as incompatible with obligations arising pursuant to its own law.

D. The Scope of Barbados’ Application

131 In its Notification and Statement of Claim of 16 February 2004, Barbados claims “a single unified maritime boundary line, delimiting the exclusive economic zone and the continental shelf between it and the Republic of Trinidad and Tobago”.¹²³

132 It should be stressed that Barbados has not claimed, and cannot claim,¹²⁴ any remedy relating to fishing rights in the exclusive economic zone of Trinidad and Tobago. There are nonetheless indications in Barbados’ Memorial (see, for example, paragraph 108 thereof) that the remedy sought by Barbados is in truth (i) a single line based on a median line and (ii) a statement from the Tribunal as to how the protection of alleged artisanal fishing could be protected by the award of non-exclusive fishing rights.

133 The Tribunal’s jurisdiction is of course limited by reference to the claim submitted by Barbados in its Notification and Statement of Claim. As the Court held in *Nauru*:

“Article 40, paragraph 1, of the Statute of the Court provides that the “subject of the dispute” must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires “the precise nature of the claim” to be specified in the Application. These

¹²³ Barbados’ Statement of Claim, para. 15.

¹²⁴ See, Article 297(3) the 1982 Convention.

provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice, adopted in 1920 (Art. 40, first paragraph), and of the text of the first Rules of that Court, adopted in 1922 (Art. 35, second paragraph), respectively. On several occasions the Permanent Court had to indicate the precise significance of these texts. Thus, in its Order of 4 February 1933 in the case concerning the *Prince von Pless Administration (Preliminary Objection)*, it stated that:

‘under Article 40 of the Statute, it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein . . .’
(*P.C.I.J. Series A/B, No. 52, p. 14*).¹²⁵

134 The same principle applies to proceedings under Part XV of the 1982 Convention.

135 It follows from this principle that the Tribunal would lack jurisdiction in respect of any remedy sought by Barbados relating to fishing rights in the exclusive economic zone of Trinidad and Tobago. Nor could the Tribunal have any such jurisdiction given the restrictions on its jurisdiction that flow from Article 297(3) of the 1982 Convention. All rights are reserved should Barbados nonetheless attempt at any stage of the proceedings to seek any such remedy.

¹²⁵ *Case concerning Certain Phosphate Lands in Nauru (Nauru/Australia), Judgment*, ICJ Reports 1992, 240, 266, at para. 69.

CHAPTER 4
APPLICABLE PRINCIPLES OF MARITIME DELIMITATION
UNDER THE 1982 CONVENTION

A. Introduction

136 In this Chapter it is proposed to set out the relevant considerations which as a matter of international law are applicable to this delimitation. Barbados discusses the applicable law rather briefly in Chapter 5 (pp. 45-51) of its Memorial. There is not much to say about Chapter 5 – except that it proceeds at a high level of generality. It contends that under international law courts and tribunals apply an equidistance/special circumstances approach so as to achieve an equitable result.¹²⁶ So far there is no disagreement between the parties. It also asserts that the starting point for any delimitation is a median or equidistance line;¹²⁷ again there is no particular disagreement on this. But it goes no further; in particular there is no discussion of relevant coasts, of relevant and irrelevant circumstances, of proportionality, of resource use or the role of agreement. In order to assist the Tribunal it is necessary to explore these issues in rather more detail.

137 The starting point in any consideration of maritime delimitation between parties to the 1982 Convention is Articles 74 and 83.

138 Article 74 provides as follows:

“Delimitation of the exclusive economic zone between States
with opposite or adjacent coasts”

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall

¹²⁶ Memorial of Barbados, para. 99.

¹²⁷ Memorial of Barbados, paras. 107-111.

make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.”

139 Article 83 provides as follows:

“Delimitation of the continental shelf between States
with opposite or adjacent coasts

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
4. Where there is an agreement in force between the States concerned, questions relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement.”

140 Nothing is to be inferred from the order in which these two articles appear in the 1982 Convention. The continental shelf is the prior institution, both as a general matter and in terms of State practice in this very region. Trinidad and Tobago has enjoyed and exercised continental shelf rights in accordance with international law, and has done so from an early stage. Moreover from the beginning these rights have been regarded as appurtenant to the coastal State, as an “inherent right” without any need for express claim or actual exercise of rights.¹²⁸ This is significant when it comes to the

¹²⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969 p. 3 at p. 22 (para. 19).

relationship between continental shelf and EEZ rights beyond 200 n.m. from the coastline or baseline of any State.¹²⁹

B. Equity, equidistance and relevant circumstances

(1) The fundamental principle: delimitation in accordance with equity

141 The core principle underlying Articles 74 and 83 is that a delimitation must be equitable having regard to the circumstances of the case, in particular the relative coastlines involved. Equidistance is a means of achieving an equitable solution in many cases, but it is a means to that end, not an end in itself.

142 This proposition goes back even to the Truman Proclamation,¹³⁰ and was endorsed by the International Court in the *North Sea Continental Shelf Cases*, the *fons et origo* of customary international law on maritime delimitation.¹³¹ Both the Truman Proclamation and the *North Sea* cases of course concerned only the continental shelf, but the same approach has been taken to the emerging concept of the EEZ to produce, in due course, an effective synthesis.

143 Thus referring to Articles 74(1) and 83(1), the International Court in the *Jan Mayen* case said:

“That statement of an ‘equitable solution’ as the aim of any delimitation process reflects the requirements of customary law as regards the delimitation both of continental shelf and of exclusive economic zones.”¹³²

(2) The role of equidistance

144 It follows from recent decisions of the International Court and of other tribunals that, the normal starting point in any delimitation is the equidistance or median line. On the other hand equidistance is not a compulsory method of delimitation and there is no presumption of equidistance. Rather the equidistance line is provisional and consideration always needs to be given to the possible adjustment of the provisional median or equidistance line to reach an equitable result.

¹²⁹ See below, Chapter 7.D.

¹³⁰ (1946) 40 *AJIL Supp* 45.

¹³¹ ICJ Reports 1969 p. 3 at p. 46 (para. 85) (“delimitation must be the object of agreement between the States concerned; and... such agreement must be arrived at in accordance with equitable principles”).

¹³² ICJ Reports 1993, p. 38 at p. 59 (para. 48).

145 Thus the International Court in the *Jan Mayen* case, having concluded that “both for the continental shelf and for the fishery zones in this case, it is proper to begin the process of delimitation by a median line provisionally drawn”,¹³³ went on to consider the factors which might require an adjustment to that provisional line:

“54. The Court is now called upon to examine every particular factor of the case which might suggest an adjustment or shifting of the median line provisionally drawn. The aim in each and every situation must be to achieve ‘an equitable result’ ...”¹³⁴

146 Similarly, in the *Qatar/Bahrain* case, having referred to the approach adopted in the *Jan Mayen* case, the International Court followed the same course, ruling that:

“For the delimitation of the maritime zones beyond the 12-mile zone it will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”¹³⁵

147 As the Court said in *Cameroon/Nigeria*:

“The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdictions is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result””¹³⁶

148 In the context of delimitations between *opposite* States, the equidistance principle has a particular significance. In the *Jan Mayen* case, where the 1958 Geneva Convention was applicable, the Court, having referred to the 1977 decision of the Anglo-French Court of Arbitration, observed that:

“If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference—at any rate in regard to

¹³³ ICJ Reports 1993, p. 38 at p. 62, para. 53. For the Court’s discussion of the appropriateness of starting from a provisional median line, see *ibid.*, at pp. 59-62, paras. 49-53, referring to the approach adopted by the Court in the *Libya/Malta (Continental Shelf (Libyan Arab Jamahiriya/Malta))*, ICJ Reports 1984, p. 13) and *Gulf of Maine (Delimitations of the Maritime Boundary in the Gulf of Maine Area)*, I.C.J. Reports 1984, p. 246) cases.

¹³⁴ ICJ Reports 1993, p. 38 at pp. 62-63, para. 54.

¹³⁵ ICJ Reports 2001, p. 40 at p. 111, para. 230.

¹³⁶ ICJ Reports 2002, para. 288.

delimitation between opposite coasts—between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.”¹³⁷

The Court went on to observe that:

“*Prima facie*, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may *prima facie* be regarded as effecting an equitable division of the overlapping area.”¹³⁸

149 Similarly in *Eritrea-Yemen II*, the Arbitration Tribunal took “as its fundamental point of departure, that, as between opposite coasts, a median line obtains”,¹³⁹ while noting the difference between the situation in confined waters and that of the “great oceans”.¹⁴⁰

(3) Relevant circumstances

150 Equidistance is thus only a “point of departure” and not an inflexible rule. In this regard it is necessary to distinguish between relevant and irrelevant circumstances. It is established that the following factors are irrelevant in maritime delimitation:

- the respective populations of the territories concerned;¹⁴¹
- their state of socio-economic development;¹⁴²
- their special need for resources that may exist in the disputed area;¹⁴³
- the conduct of the parties, unless it amounts to an express or tacit agreement.¹⁴⁴

¹³⁷ ICJ Reports 1993, p. 38 at p. 58, para. 46.

¹³⁸ ICJ Reports 1993, p. 38 at p. 66, para. 64.

¹³⁹ (1999) 119 ILR 418, at 445, para. 83.

¹⁴⁰ Ibid., at 446, para. 85.

¹⁴¹ See e.g. *Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports 1993, p. 38 at pp. 73-74, paras. 79-80.

¹⁴² See e.g. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, p. 18 at pp. 70-71, paras. 106-107; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, p. 13 at pp. 40-41, para. 50; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports 1993, p. 38 at pp. 73-74, paras. 79-80.

¹⁴³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, I.C.J. Reports 1984, p.246 at p. 342, para. 237.

In general these factors are irrelevant because the aim of delimitation is not to divide up an undivided whole or to share out resources on an *ex aequo et bono* basis but to ascertain the extent of the maritime zones already attributed in principle to the States parties in accordance with international law.¹⁴⁵

151 By contrast the following considerations are relevant in any delimitation, in particular in deciding whether and to what extent to depart from a *prima facie* equidistance or median line:

- the projection of the relevant coasts and the absence of any cut-off;
- the proportionality of relevant coastal lengths, defined as those coasts facing on to the area to be delimited;
- the existence of any express or tacit agreement as to the extent of the maritime areas appertaining to one or other party.

Something should be said briefly as to each of these.

(i) *Frontal projection and the absence of cut-off*

152 The character of the continental shelf as the natural prolongation of the land territory of State has two particular consequences in relation to delimitation of the shelf subject to overlapping claims. First, in determining the maritime zones which appertain to a State, its coasts should be taken to project frontally in the direction in which they face. Second, where there are competing claims, the delimitation should be drawn as far as possible so as to avoid “cutting off” any State due to the convergence of the maritime zones of other States.

153 In relation to the first point, the Court of Arbitration in the *St Pierre et Miquelon* case held that:

“The objections of Canada against the southern projection of the coast of Saint Pierre and Miquelon, based on an eastern projection from Nova Scotia and Cape Breton Island are not compelling. Geographically, the coasts of Nova Scotia have open oceanic spaces

¹⁴⁴ See e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen*, ICJ Reports 1993, p. 38 at pp. 76-77, paras. 82-86; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, I.C.J. Reports 1984, p.246 at pp. 303-312, paras. 126-154; cf. the approach taken by the Court in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, p. 18 at pp. 83-84, paras. 117-118.

¹⁴⁵ See e.g. *North Sea Continental Shelf*, ICJ Reports 1969 p. 3 at pp. 22-23, para. 20, a proposition repeated on multiple occasions since.

for an unobstructed seaward projection towards the south in accordance with the tendency, remarked by Canada, for coasts to project frontally, in the direction in which they face. In the hypothesis of a delimitation exclusively between Saint Pierre and Miquelon and Nova Scotia, as if the southern coast of Newfoundland did not exist, it is likely that corrected equidistance would be resorted to, the coasts being opposite. In that event it is questionable whether the area hypothetically corresponding to Nova Scotia, would reach the maritime areas towards the south appertaining to Saint Pierre and Miquelon.”¹⁴⁶

This passage was cited and applied by the domestic Tribunal in the *Newfoundland and Labrador v. Nova Scotia* case.¹⁴⁷

154 In relation to the second point, in the *North Sea Continental Shelf* cases,¹⁴⁸ Germany had expressly raised the cut-off effect of the Dutch and Danish claims as a reason why a delimitation based on equidistance should not be adopted. The International Court, having concluded that the delimitation of the continental shelf was to be conducted in accordance with “equitable principles”, stated that among those rules was to be included the principle that:

“the continental shelf of any State must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State.”¹⁴⁹

The Court observed that given the concavity of the Netherlands-German-Danish coastline, an application of equidistance would result in an inequitable result:

“in certain geographical circumstances which are quite frequently met with, the equidistance method, despite its known advantages, leads unquestionably to inequity, in the following sense:

- (a) The slightest irregularity in a coastline is automatically magnified by the equidistance line as regards the consequences for the delimitation of the continental shelf. Thus it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, then the greater the irregularity and the further from the coastline the area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be

¹⁴⁶ (1992) 95 ILR 645, 672, para. 73.

¹⁴⁷ Decision of the Tribunal in the Second Phase, 22 March 2002, p. 25, para. 1.30.

¹⁴⁸ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ Reports 1969, p. 3.

¹⁴⁹ *Ibid.*, p. 47, para. 85.

remedied or compensated for as far as possible, being of itself creative of inequity.

- (b) In the case of the North Sea in particular, where there is no outer boundary to the continental shelf, it happens that the claims of several States converge, meet and intercross in localities where, despite their distance from the coast, the bed of the sea still unquestionably consists of continental shelf. A study of these convergences, as revealed by the maps, shows how inequitable would be the apparent simplification brought about by a delimitation which, ignoring such geographical circumstances, was based solely on the equidistance method.”¹⁵⁰

The Court continued:

“in the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length.”¹⁵¹

The relevant part of the *dispositif* provides as follows:

“delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.”¹⁵²

155 The Court was clearly of the opinion that the delimitation should be conducted in such a way that Germany would not be “cut-off” from the outer zones of the continental shelf by the converging claims of Denmark and the Netherlands made on the basis of equidistance, and that such a consequence rendered use of the simple equidistance method inequitable. In the event, acting on the basis of the Court’s decision the three

¹⁵⁰ Ibid., p. 49, para. 89.

¹⁵¹ Ibid., p. 50, para. 91.

¹⁵² Ibid., p. 53, para. 101(C)(1).

States reached agreement which allowed a projection of the West German continental shelf out to the median line with the United Kingdom.¹⁵³

- 156 Similarly, in the *Tunisia/Libya* case, the question of “cut-off” was expressly raised. The Court emphasized first that:

“As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the seabed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law.”¹⁵⁴

Having determined the area relevant to the determination of the dispute (i.e. those areas which could be considered as lying off both the Tunisian and Libyan coasts),¹⁵⁵ the Court ruled that the issue of cut-off did not arise in that case, given that it had rejected the line claimed by Libya which would have had that effect.¹⁵⁶ Nevertheless, it clearly envisaged that the issue could be relevant and should be taken into account.

- 157 The Court in the *Libya/Malta* case included the question of cut-off as one in its list of the “well-known examples” of the application of “equitable principles”:

“the ... principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances.”¹⁵⁷

- 158 In the *St Pierre et Miquelon* case, the Court of Arbitration, having discussed the jurisprudence of the International Court, endorsed the Canadian formulation of the principle in the following terms: “the delimitation must leave to a State the areas that constitute the natural prolongation or seaward extension of its coasts, so that the

¹⁵³ For the texts of the two Treaties signed at Copenhagen on 28 January 1971 see 857 UNTS 109 (Germany-Denmark), 857 UNTS 131 (Germany-Netherlands); a tripartite Protocol, Copenhagen, 29 January 1971, 857 UNTS 162 provided for simultaneous entry into force of the two Treaties.

¹⁵⁴ ICJ Reports 1982, p. 18 at p. 61, para. 73.

¹⁵⁵ Ibid., pp. 61-62, para 75.

¹⁵⁶ Ibid., pp.62-63, para. 76.

¹⁵⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, p. 13, at p. 39, para. 46.

delimitation must avoid any cut-off effect of those prolongations or seaward extensions".¹⁵⁸

159 Finally, in *Cameroon/Nigeria*, the Court acknowledged that "the concavity of the coastline", such as to give rise to cut-off from the outer areas of the continental shelf "may be a circumstance relevant to delimitation",¹⁵⁹ although on the facts of that case the length of coastline which the Court had identified as being relevant for the purposes of delimitation was not held to be appreciably concave.

160 In formulating the "no cut-off" principle, it is necessary to note the proviso "as far as possible" (see paragraph 152 above). Maritime delimitation does not involve "refashioning nature",¹⁶⁰ and coasts may simply be in as such a situation (for example with large blocking territories offshore) that they cease to be relevant. That was true of the west-facing coastline of Cameroon in the *Cameroon-Nigeria* case, which was blocked by the offshore territories of Bioko (Equatorial Guinea) and, further south, São Tomé e Príncipe and their respective maritime zones.¹⁶¹ In this regard, the Court emphasized that "the geographical configuration of the maritime areas that the Court is called upon to delimit is a given. It is not an element open to modification by the Court but a fact on the basis of which the Court must effect the delimitation."¹⁶² But in respect of coasts with unobstructed access out to the open ocean the no-cut-off principle obtains.

(ii) *Proportionality of coastal lengths*

161 The relationship between the respective coastal lengths of the States involved in a delimitation is also of major relevance to the delimitation. In the *North Sea*

¹⁵⁸ (1992) 95 ILR 645, 668, para. 58.

¹⁵⁹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, judgment of 10 October 2002, para. 297. For the Court's summary of the argument of Cameroon, making reference to, *inter alia*, the opinion of the Court of Arbitration in the *Saint Pierre et Miquelon* case, para. 58 (quoted in the preceding paragraph), see *ibid.*, para. 274.

¹⁶⁰ See *North Sea Continental Shelf Cases*, ICJ Reports 1969 p. 6 at p. 49, para. 91 – a stipulation repeated in all subsequent cases: see e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, judgment of 10 October 2002, para. 295.

¹⁶¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, judgment of 10 October 2002, paras. 298-299 (in relation solely to Bioko, given the Court's identification of the relevant coastal frontage); see para. 279 for the Court's summary of Nigeria's argument (in relation to both Bioko and São Tomé e Príncipe).

¹⁶² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, judgment of 10 October 2002, para. 295.

Continental Shelf Cases, under the heading of “equitable principles,” the Court observed that one factor to be taken into account was –

“the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.”¹⁶³

162 Similarly, in the *Gulf of Maine* case, the Court relied upon the difference in the length of coast lines between the United States of America and Canada (a ratio of 1.38:1) in order to adjust the delimitation line.¹⁶⁴

163 In the *Jan Mayen* case, the Court observed that there might be situation –

“in which the relationship between the length of the relevant coasts and the maritime areas generated by them by application of the equidistance method, is so disproportionate that it has been found necessary to take this circumstance into account in order to ensure an equitable solution. The frequent references in the case-law to the idea of proportionality—or disproportion—confirm the importance of the proposition that an equitable delimitation must, in such circumstances, take into account the disparity between the respective coastal lengths of the relevant area.”¹⁶⁵

The situation in relation to the continental shelf between Greenland and Jan Mayen was one such situation. The Court expressed the opinion that –

“A delimitation by the median line would, in the view of the Court, involve disregard of the geography of the coastal fronts of eastern Greenland and of Jan Mayen. It is not a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast (cf. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Reports 1985, p. 46, para. 59), nor of ‘rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline’ (*North Sea Continental Shelf*, I.C.J. Reports 1969, pp. 49-50, para. 91). Yet the differences in length of the respective coasts of the Parties are so

¹⁶³ ICJ Reports 1969, p. 3 at p. 52, para. 98.

¹⁶⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, I.C.J. Reports 1984, p. 246 at pp. 335-336, paras. 221-2.

¹⁶⁵ ICJ Reports 1993, p. 38 at p. 67, para. 65.

significant that this feature must be taken into consideration during the delimitation operation. It should be recalled that in the Gulf of Maine case the Chamber considered that a ratio of 1 to 1.38, calculated in the Gulf of Maine as defined by the Chamber, was sufficient to justify 'correction' of a median line delimitation (I.C.J. Reports 1984, p. 336, paras. 221-222). The disparity between the lengths of coasts thus constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion, in view of the great disparity of the lengths of the coasts, that the application of the median line leads to manifestly inequitable results."¹⁶⁶

The Court accordingly adjusted the median line so that it was closer to Jan Mayen, which had the shorter coastal length. In doing so, it emphasized that "taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front", as this would mean that proportionality would swallow up all other relevant circumstances.¹⁶⁷

- 164 In the *Cameroon-Nigeria* case, the Court similarly recognized that "a substantial difference in the lengths of the parties' respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line."¹⁶⁸ On the facts of the case, however, Cameroon's relevant coastline was no longer than Nigeria's and accordingly there was no reason to adjust the equidistance line in favour of Cameroon on that basis.¹⁶⁹

(iii) *Express or tacit agreement/estoppel*

- 165 In the *Cameroon-Nigeria* case, it was argued strongly by Nigeria that the oil practice of the parties since the 1960s should be treated as determinative of the maritime boundary. In fact there was a very substantial practice in that case, involving dozens of wells and other installations on both sides. Despite this argument, the International Court held that:

"oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or

¹⁶⁶ Ibid., pp. 68-69, para. 68.

¹⁶⁷ Ibid., p. 69, para. 69.

¹⁶⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*, judgment of 10 October 2002, para. 301.

¹⁶⁹ Ibid.

tacit agreement between the parties may they be taken into account.”¹⁷⁰

It went on to find that there was no express or tacit agreement in that case, despite the existence of a considerable volume of oil practice over many years.

166 Where there is an actual agreement attributing some or all of the maritime territory claimed by a State to that State, the agreement is definitive and all an international tribunal needs to do – all it can do – is to give effect to the agreement. Such an agreement might take a number of forms. It could involve attribution of specific areas to a State, or it could involve agreement on the specific principle to be applied in delimitation. The binding force of such an agreement (in accordance with Articles 26 and 34 of the Vienna Convention on the Law of Treaties) puts an end to further inquiry as far as it extends. This is why disputes as to the existence of such an agreement assume a character of logical priority over the application of the general standards of international law applicable when an international tribunal has to carry out a maritime delimitation in the absence of agreement. Moreover in accordance with Articles 74(4) and 83(4), it makes no difference whether the agreement was concluded before or after the 1982 Convention entered into force between the two States. In either case the Agreement—as far as it goes—is dispositive.

167 In certain circumstances an agreement may be inferred from conduct, provided the conduct is clear and unequivocal. Likewise, express recognition can be the equivalent of such an agreement (as is the case with land boundaries), and can also give rise to an estoppel.

168 In the *Temple of Preah Vihear* case, the decision of the Court was based on a finding that there had been actual acceptance by Thailand of a map showing the delimitation of the frontier in 1908, which thus formed part of the treaty settlement of the frontier between Thailand and Cambodia. However, the Court observed that, in any case, the conduct of Thailand since that time would have precluded Thailand from later denying the line; the Court observed –

“Even if there were any doubt as to Siam’s acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand

¹⁷⁰ Ibid., para. 304.

is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."¹⁷¹

(4) Checking the equitable character of a delimitation

169 Once a provisional delimitation line has been drawn by a tribunal, it is normal to check the equitable character of that line to ensure that the result reached conforms with international law. One factor relevant in this regard is that of paying due regard to other delimitations in the region: this has already been referred to in Chapter 1.¹⁷² Two additional points may be mentioned here.

(i) *Proportionality as a means of checking the equity of a delimitation*

170 As noted already, the ratio of coastal frontages does not of itself establish the specific method of delimitation. As the Court of Arbitration said in the *Yemen-Eritrea case (Phase II)*:

“The principle of proportionality... is not an independent mode or principle of delimitation, but rather a test of the equitableness of a delimitation arrived at by some other means. So, as the Award stated in the *Anglo-French Channel case*, ‘it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor’.”¹⁷³

Where relevant coastal frontages are disproportionate, the use of a line other than the equidistance or median line is indicated. In addition, more precise use of coastal front ratios may be useful at the stage of confirming the equity of the delimitation arrived at by other means.

171 For example in the *Tunisia/Libya case*, the International Court used proportionality as a check to ensure the equitable nature of the delimitation provisionally arrived at. Having noted that the relevant coastline ratio of Libya to Tunisia was approximately

¹⁷¹ *Temple of Preah Vihear, Merits*, ICJ Reports 1962, p. 6 at p. 32. Cf also *Anglo-Norwegian Fisheries case*, ICJ Reports 1951, p. 116 at p. 139.

¹⁷² See above, paras 23-24.

¹⁷³ Award of 17 December 1999, 119 ILR 417, 465, para. 165, citing the decision of the Arbitral Tribunal in the *Anglo-French Continental Shelf case*, (1977) 54 ILR 6, 67, para. 101. See also *Libya/Malta*, ICJ Reports 1984 at pp. 49-50 paras. 66-67.

31:69, and that the relevant area appertaining to each State in accordance with the Court's provisional view was approximately in the ratio 40:60, the Court said that "[t]his result, taking into account all the relevant circumstances, seems to the Court to meet the requirements of the test of proportionality as an aspect of equity."¹⁷⁴

(ii) *The so-called "catastrophe" proviso: the Gulf of Maine dictum*

172 A second issue sometimes referred to concerns the proviso articulated in the *Gulf of Maine* case. There the Chamber, in line with the consistent jurisprudence, rejected the argument that the history of a fishery should be taken into account as a relevant consideration in delimitation. But it went on to refer to the contingency of "catastrophic repercussions" for the populations of the countries concerned. It said:

"It is... evident that the respective scale of activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation – cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic consequences for the livelihood and economic well-being of the population of the countries concerned."¹⁷⁵

In the event, the Chamber rejected that element as a relevant consideration in the circumstances of the *Gulf of Maine*, having regard to the *prima facie* conclusion it had reached as to the appropriate line.¹⁷⁶

173 Three points need to be made as to the "catastrophic consequences" proviso as pertinent to the present case.

- First, the Chamber in the *Gulf of Maine* case was applying customary international law; it was not exercising jurisdiction under the 1982 Convention. Under the Convention, the position of States asserting historic claims concerned with a fishery is specifically dealt with in Article 62.

¹⁷⁴ ICJ Reports 1982, p. 18, at p. 91, paras. 130-131.

¹⁷⁵ ICJ Reports 1984, p. 246 at p. 342, para. 237.

¹⁷⁶ *Ibid.*, p. 343, para. 238.

- Secondly, even if the “catastrophic consequences” proviso is applicable in principle under the 1982 Convention, it must be necessary to have regard to the interests of the populations of *both* States.
- Thirdly, it is highly unlikely that any maritime delimitation drawn in accordance with normal criteria could cause “catastrophic repercussions”, and in no case has the proviso been applied.

CHAPTER 5

RELEVANT SECTORS AND RELEVANT COASTS

174 Before turning in Chapter 6 to assess Barbados' maritime claim and, in Chapter 7, to put forward an alternative claim, it is necessary to say something more about the geographical situation. Two matters must be dealt with in particular: first, the distinction between the two sectors to the east and west of the islands needs to be particularised; secondly, the relevant coasts need to be identified.

A. The distinction between the Caribbean and Atlantic sectors

175 The geography of the region was summarised in Chapter 1, where the distinction was drawn between the Caribbean (western) and Atlantic (eastern) sectors. The claim line put forward by Barbados apparently adopts that distinction also, although in a manner which (as will be seen) is both arbitrary and inequitable.¹⁷⁷

(1) Distinguishing different sectors in international practice

176 In fact it often happens that the relevant area for a delimitation will involve first a sector where the coasts are opposite before merging into an area where they are quasi-adjacent. The point was made by the Court in the *North Sea Continental Shelf* cases when it observed that "[i]n certain geographical situations... a given equidistance line may partake in varying degrees both of the nature of a median and of a lateral line."¹⁷⁸

177 The first of the decided cases to involve such a configuration was the *Anglo-French* arbitration, where there was a clear distinction between the position of the Western Approaches and that further to the east in the English Channel towards the Straits of Dover. In the Atlantic sector, the delimitation was governed by the Geneva Convention on the Continental Shelf of 1958, and the Court of Arbitration took the view that the two categories of "opposite" and "adjacent" referred to in Article 6 of that Convention were intended to be exhaustive. In other words it rejected the French contention that there was a third omitted category of paired coastlines, neither opposite

¹⁷⁷ As demonstrated in para 206 below, the Barbados turning point, Point D, is a function of Point C, 12 n.m. off the Tobago coast, and an azimuth of 048°, for neither of which is any rationale provided.

¹⁷⁸ ICJ Reports 1969 p. 3 at p. 17, para. 6.

nor adjacent. Nonetheless it is clear that it treated the two sectors, within the English Channel and in the Atlantic, as distinct. In the Court's words:

“the actual coastlines of the two countries abutting on the continental shelf to be delimited are comparatively short; and ... although separated by some 100 miles of sea, their geographical relation to each other vis-à-vis the continental shelf to be delimited is one of lateral rather than opposite coasts.”¹⁷⁹

This “lateral” relation between the two coasts concerned an area “extending seawards from the coasts of the two countries into the open spaces of the Atlantic Ocean”.¹⁸⁰ Because relatively minor differences between the two coastlines (in this case the more westerly projection of the Scilly Isles) would be amplified with distance, they would tend more readily to constitute special circumstances than they would be if they occurred in a straightforward situation of opposite coasts.

178 A somewhat similar situation occurred in the *Gulf of Maine* case. Within the Gulf the relevant coastlines were opposite each other, whereas beyond the “closing line” of the Gulf of Maine they were in a situation more like that of adjacent coasts.¹⁸¹ Referring to the “closing line” of the Gulf of Maine, the Chamber described it in the following terms:

“The second long side of the rectangle [formed by the Gulf of Maine] does not at any point correspond to a landmass. It is formed only by an imaginary line drawn across the waters from the south-eastern point on Nantucket Island, to Cape Sable at the south-western end of Nova Scotia. The two Parties agree that this is the seaward ‘closing line’ of the Gulf of Maine. Since this line joins the two ultimate points on land on each side in the direction of the Atlantic, it effectively indicates, in the context of the delimitation area, the boundary between the inner zone, or the Gulf of Maine in the true sense, and the outer or Atlantic zone of the area in question.”¹⁸²

179 It may be noted that in both the Channel Islands and the Gulf of Maine cases, the distances between the adjacent coasts at the point of reaching the “outer area” were

¹⁷⁹ (1977) 18 UNRIAA 3, 109, para. 233.

¹⁸⁰ Ibid.

¹⁸¹ Further within the Gulf and approaching to the area of the land boundary between the United States and Canada, the coastlines were in a situation of “lateral adjacency” which has no parallel in the present case. See ICJ Reports 1984, p. 246 at p. 334, para. 216.

¹⁸² Ibid., p. 270, para. 33.

very substantial (viz. Channel Islands, 97.5;¹⁸³ Gulf of Maine, 219 n.m.¹⁸⁴). In this respect they were comparable to the situation here.

180 Again in the *Qatar-Bahrain* case, the Court distinguished between the southern area and the area further north in the Gulf, although in a context where much shorter distances were involved. As the Court said:

“In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles... More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.”¹⁸⁵

(2) The distinction between Caribbean and Atlantic sectors in the present case

181 Both Trinidad and Tobago and Barbados face west towards the Caribbean and east on to the Atlantic. Both have only very short coastlines (facing, for Tobago, northeastwards; for Barbados, southwestwards) which are in a relationship of oppositeness to each other. To the west, issues of maritime delimitation are dominated by spatial relationships with third States: for Barbados, with Martinique, Saint Lucia, and Saint Vincent and the Grenadines; for Trinidad and Tobago, with Saint Vincent and the Grenadines, Grenada and Venezuela. To the east, there is open ocean.

182 The distinction between the Caribbean Sea and the Atlantic Ocean in terms of this delimitation reflects general hydrographic usage. The International Hydrographic Organization defines the eastern limit of the Caribbean Sea in the following terms:

“From Point San Diego (Puerto Rico) Northward along the meridian thereof (65° 39' W) to the 100 fathom line, thence Eastward and Southward, in such a manner that all islands, shoals and narrow waters of the Lesser Antilles are included in the Caribbean Sea as far as Galera Point(Northeast extremity of the island of Trinidad). From

¹⁸³ (1977) 18 UNRIAA 3, 109, para. 233.

¹⁸⁴ ICJ Reports 1984, p. 246 at p. 270, para. 32.

¹⁸⁵ ICJ Reports 2000, p. 40 at pp. 91-93, paras. 169-170.

Galera Point through Trinidad to Galeota Point (Southeast extreme) and thence to Baja Point (9° 32' N, 61d W) in Venezuela.”¹⁸⁶

In accordance with this definition the seas off the east coasts of Barbados and Trinidad and Tobago are part of the Atlantic Ocean, as can be seen from the map illustrating this definition, shown in **Figure 5.1**.

183 In the present case it is appropriate to take the definition of the distinction between the Caribbean Sea and the Atlantic Ocean put forward in 1953 by the International Hydrographic Organization. On that basis the distinction between the two sectors, and the areas of EEZ falling within the area of potential overlapping entitlements, are shown on **Figure 5.2**.

B. Relevant coasts and coastal relationships

184 Against this background it is necessary to determine the relevant coasts so far as the delimitation is concerned.

185 In the text of its Memorial, Barbados does not use the terminology of relevant coasts; rather it depicts the individual points along the coasts of the two States which “contribute to the median line” and measures the distances between those points, specifically 10.202 n.m. in the case of Barbados and 4.737 n.m. in the case of Tobago.¹⁸⁷ True, the heading to this two-paragraph section does use the term “relevant coasts”, but there is nowhere in the accompanying text any analysis of that term. Matters are taken no further in Chapter 5 (paragraphs 98-111) which deals with the applicable law, nor in Chapter 6 (paragraphs 112-139) which deals with the only “special circumstance” discussed by Barbados – viz. the traditional fishery of Barbados off Tobago where they have fished “for over 250 [*sic*] years”.¹⁸⁸ In short, in the Barbados Memorial the only consideration of relevant coasts occurs in two paragraphs of a short chapter describing geographical elements, and the only mention of the term occurs in a heading.

¹⁸⁶ International Hydrographic Organization, *Limits of Oceans and Seas* (1953).

¹⁸⁷ See Memorial of Barbados, paras. 20-21 & Maps 5-8.

¹⁸⁸ Memorial of Barbados, p. 53.

186 There is a distinction in the jurisprudence between the basepoints which are used in the construction of a line and the coastal frontage which is relevant to the delimitation as a whole. That distinction is simply ignored by Barbados, which silently conflates the two. It may well be the case that a relatively few points along a coast turn out to be the actual basepoints which determine the precise location of the delimitation line – for example because they are located on immediate offshore islands or on promontories. But it is a confusion to treat those points, or the distance between them, as if they constituted the relevant coasts. For example where a dominant basepoint stands well in front of a coastline it may be discounted or even ignored – but it would be extremely odd if the length of the relevant coasts was thereby changed or extended.¹⁸⁹ Similarly situations can be imagined (especially in the case of adjacent coasts) where a single basepoint on each side determines the equidistance line – yet it would be absurd in such a case to treat the relevant coasts as having no extent whatever.

187 Fundamentally Barbados' method puts the cart before the horse. Or, one might say, it elevates the technique of drawing a median line above the array of principles which go to determine what method of delimitation should be used, and thus what kind of line should be drawn in the first place. The relevant coasts are those looking on to or fronting upon the area to be delimited; this is not the same thing as the distances between the points which determine the precise location of the line eventually drawn. Determination of the relevant coasts is an initial matter. In cases such as *Gulf of Maine* or *Jan Mayen*, the ratio of coastal frontages is determined *before* a method of delimitation is decided on, still less an actual provisional line. Barbados' method of determining the relevant coasts is misconceived.

188 The reason for its adopting this invalid method, however, is not far to seek. As will be seen from Barbados' Maps 7 and 8,¹⁹⁰ Barbados wishes to ignore the entire east-facing coasts of Tobago and Trinidad, despite the fact that its proposed line cuts right in front of those coasts. The "Co-operation Zone" between Barbados and Guyana lies well

¹⁸⁹ To take the situation of *Yemen-Eritrea (Phase II)*, the opposite coastal frontages have the same length whether or not one draws a delimitation line taking into account offshore islands or ignoring them. Yet depending on that decision the basepoints which determine the line will be quite different.

¹⁹⁰ Memorial of Barbados, Maps 7 & 8, preceding p. 9.

south of the north-eastern tip of Trinidad, and the western boundary of that Zone is drawn along the 200 n.m. line determined by basepoints on Trinidad and Tobago.¹⁹¹ In its anxiety to ignore the long east-facing coastline of Trinidad and Tobago, fronting on to the eastern sector, Barbados actually discounts a significant section of its *own* south-east-facing coast, between New Fall Cliff and Kitridge Point – as can be seen from its Map 8 and from **Figure 5.4**.

189 It is necessary then to determine *de novo* the actual coastal lengths fronting on to the areas in question.

(1) Trinidad and Tobago

190 Pursuant to section 3 of its Archipelagic Waters and Exclusive Economic Zone Act of 1986 (the 1986 Act), and expressly in accordance with the 1982 Convention, Trinidad and Tobago has declared itself to be an archipelagic State.¹⁹² Pursuant to section 6 of the 1986 Act, and in accordance with Article 47 of the 1982 Convention, the archipelagic baselines of Trinidad and Tobago consist of straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago. Barbados does not contest Trinidad and Tobago's status as an archipelagic State, nor does it contest the archipelagic baselines that have been drawn up pursuant to section 6 of the 1986 Act. The archipelagic baselines are depicted in the various maps that form part of Barbados' Memorial, and are depicted in greater detail in **Figure 5.3**.

191 As will be seen, the north-western facing frontage of Trinidad and Tobago, by reference to the archipelagic baseline, measures 83.12 n.m. To the north of this frontage lie Grenada and Saint Vincent and the Grenadines. This sector of the archipelagic baseline is drawn by reference to Chacachacare Island to the north-west of Trinidad, The Sisters off Tobago, and Marble Island off the north tip of Tobago. Trinidad and Tobago is not opposite Barbados in this sector.

192 The archipelagic baseline then follows the north/north-eastern tip of Tobago, linking Marble Island and the islands of Saint Giles and Little Tobago (Trinidad and Tobago's north-eastern frontage) before descending southwards to the south-east tip of Trinidad, Galeota point (Trinidad and Tobago's eastern frontage).

¹⁹¹ See Memorial of Barbados, Map 5, opposite p. 8.

¹⁹² Annex Volume 4 No. 5.

- 193 As appears from Figure 5.3, the archipelagic baseline along Trinidad and Tobago's north-eastern frontage measures 4.7 n.m. Along this short coastal frontage, Trinidad and Tobago is in a relationship of oppositeness with Barbados' south-west coast.
- 194 As also appears from Figure 5.3, the eastern frontage of Trinidad and Tobago faces unopposed onto the Atlantic, i.e. it is in no sense opposite Barbados. Indeed, the most southerly tip of Barbados lies a little over 100 n.m. to the north of Trinidad and Tobago's eastern frontage.¹⁹³ The actual eastward-facing coastlines are as follows:- Tobago, 32.2 n.m.; Trinidad, 56.6 n.m. This gives a total coastline of 88.8 n.m.¹⁹⁴
- 195 Another method of measuring the eastward-facing or Atlantic coastal frontage of Trinidad and Tobago would be to take the archipelagic baseline drawn off the east coast. The archipelagic baseline along Trinidad and Tobago's eastern frontage measures some 74.9 n.m.
- 196 According to Article 48 of the 1982 Convention:

“The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.”

It has not been decided whether Article 48, and the special status of archipelagic waters as internal waters under Article 49, has the result that archipelagic baselines are to be treated as coastal frontages for the purposes not only of measurement of maritime zones but also their delimitation between adjacent or opposite States—for example, in determining proportionality or disproportionality. In the case of Trinidad and Tobago, it is not necessary to decide this, as the archipelagic baselines of Trinidad and Tobago are all backed by actual coastal frontages of equivalent or even greater length.¹⁹⁵

- 197 A further alternative—since the concern here is with the easterly-projection of coasts which face more or less to the east—would be to abstract the eastwards-facing element of the coastline, i.e. to represent that significant element of the coastline as an

¹⁹³ The north-south distance from Barbados' South Point to the latitude of Saint Giles (off Tobago) is 100.6 n.m. The north-south distance from South Point to the latitude of Little Tobago is 104.5 n.m.

¹⁹⁴ These are actual coastline lengths of the two main islands (i.e. Little Tobago and other offshore islands are ignored). Simplified coastline lengths are Tobago: 21.5 n.m., Trinidad, 44.3 n.m., total 65.8 n.m.

¹⁹⁵ The position is quite different where – as in the case of the long archipelagic baseline between the islands of São Tomé and Príncipe (over 100 n.m. in length) – there is no coastal frontage whatever lying behind the baseline.

eastwards-facing projection or vector.¹⁹⁶ Measured due north to south, Trinidad and Tobago's eastern frontage measures 69.1 n.m.

198 Thus Trinidad and Tobago's coastline looking on to the eastern or Atlantic sector may be represented numerically in several ways:

*East-facing (Atlantic) coastal frontage
of Trinidad & Tobago*

Actual length	88.8
Simplified length	65.8 n.m.
Archipelagic baseline	74.9 n.m.
Length of north-south vector	69.1 n.m.

It will be seen that the differences between these ways of measuring the Atlantic coastal frontage are not great. In this Counter-Memorial, Trinidad and Tobago will use the figure of the eastward-facing archipelagic baseline. But whichever of these numbers is used, the ratio of relevant coasts in the Atlantic sector is preponderantly in favour of Trinidad and Tobago, as will now be demonstrated.

(2) Barbados

199 The western coast of Barbados lies opposite to Saint Vincent and the Grenadines. The south-western coast of Barbados is, however, in a relationship of oppositeness to Trinidad and Tobago's north-eastern coast (as already noted) and measures 5.4 n.m. from Needham's Point to South Point.¹⁹⁷ This is depicted on **Figure 5.4**. It follows that, so far as concerns the limited extent that Trinidad and Tobago and Barbados are in a relationship of oppositeness, there is no material difference in the lengths of the opposite coasts.

200 Barbados plots its median line by reference to a series of points along the south-western and south-eastern coasts of Barbados, along a length of 10.20 n.m.¹⁹⁸ This

¹⁹⁶ The term "vector" will be used to avoid confusion with other connotations of the term "projection" in maritime delimitation.

¹⁹⁷ This is the length of the coastal frontage derived from drawing straight "baselines" around this part of Barbados' coast (as Barbados has done at Map 8 of its Memorial).

¹⁹⁸ See Memorial of Barbados, Map 8.

length of coast is characterised by Barbados as “opposite Tobago”.¹⁹⁹ As already noted, however, it is self-evident, not least from Maps 6, 7 and 8 to Barbados’ Memorial, that the north-eastern coast of Trinidad and Tobago is not opposite the south-eastern coast of Barbados. The south-eastern coast of Barbados is, by contrast, in a relationship of adjacency to Trinidad and Tobago’s eastern frontage. It measures 9.19 n.m. from South Point to Kitridge Point.²⁰⁰

(3) Comparison of relevant coasts

201 To summarise, the relevant coastal lengths of the parties are as follows:

	<i>Caribbean sector Opposite coastal frontage</i>	<i>Atlantic sector Eastwards-facing coastal frontage</i>
<i>Barbados</i>	5.4 n.m.	9.2 n.m.
<i>Trinidad and Tobago</i>	4.7 n.m.	74.9 n.m.

These are depicted on **Figure 5.5**.

202 To the west, in the confined western or Caribbean sector, the relevant coasts are either opposite or lateral; however they may be described they are approximately equal. And however they may be described, these coastal lengths are short. In the open eastern or Atlantic sector, by contrast, the coastlines of the Parties are much more in a relationship of adjacency, and the coastal frontage of Trinidad and Tobago is much greater than that of Barbados (in a ratio of the order of 8.2:1). Despite Barbados’ extravagant claim based on the “Barbadian fishery off Tobago”, the principal issue in this case is the delimitation of the Atlantic (eastern) sector, and the principal feature to which effect must be given in that delimitation is the lengthy eastern frontage of Trinidad and Tobago that gives unopposed onto the Atlantic.

C. Conclusion

203 As has been seen above, Barbados treats this whole delimitation as determined by the few miles of directly opposite coastlines. This is why it makes no distinction between the Caribbean and Atlantic sectors. This is why it ignores not only the eastwards-facing coastlines of Trinidad and Tobago but even part of its *own* coastline, as

¹⁹⁹ Memorial of Barbados, para. 21.

²⁰⁰ This is the length of the coastal frontage derived from drawing straight ‘baselines’ around this part of Barbados’ coast (as Barbados has done at Map 8 of its Memorial). The actual length of the coastline is 10.03 n.m.

depicted on Figure 5.4 above. One might have thought that the relevant Barbados' coastlines were short enough not to ignore a significant portion of them. But so it is for Barbados, which argues that the fate of hundreds of miles of maritime boundary should be determined by approximately 5 miles of opposite coasts. In the *Anglo/French* case and in *Gulf of Maine*, there were substantial sectors where the coasts were undeniably in a relationship of oppositeness. Here, by contrast, the passage from offshore to the west through to the Atlantic regions would be accomplished in a short time in a motor launch. For Barbados the motor launch would apparently still be situated between opposite coasts when, at last, it reached the small area of the Zone of Cooperation far to the south-east.

CHAPTER 6

BARBADOS' MARITIME CLAIM: AN ASSESSMENT

A. Introduction

204 In the light of the criteria applicable under the 1982 Convention (as set out in Chapter 4) and the geographical relationship between the two States (as set out in Chapter 5), it is possible to assess the claim made by Barbados in its Memorial.

205 Barbados' claim is depicted in **Figure 6.1**. As noted already, the claim line is in two sectors, represented in the western sector by a line joining points A-B-C-D, and in the eastern sector by an equidistance line out to the south-east joining Points D and E. The turning point of the line is Point D.

B. Barbados' Caribbean, or Western Sector, Claim: Claim line A-B-C-D

(1) The selection of Point D as the turning point

206 In Chapter 1 of its Memorial, Barbados describes Point D as the point formed by the junction of "an azimuth of 048°" drawn from Point C and "the calculated median line".²⁰¹ In other words, Point D is not determined independently on the basis of geographical criteria; it is a function of the choice of Point C and the "azimuth of 048°". The reader has to wait until Chapter 6 in the expectation of finding a basis for the selection of these two elements which determine the turning point of the Barbadian claim-line (and thereby entail a claim of approximately 2,300 square n.m. to the north-east and east of Tobago). Yet on this, after all, Chapter 6 is silent. It speaks of the traditional flying fishery, but without any geographical precision whatever. There is no indication in the Memorial that Barbadian fisherfolk attached significance to the "azimuth of 048°", or that Point C on the windward side of Tobago was a traditional rendezvous for them on their long and arduous trips from Barbados in search of flying-fish.²⁰² Perhaps such factual and geographical elements are shrouded in the 150 years

²⁰¹ Memorial of Barbados, para. 8.

²⁰² A species withal plentiful at that time in locations much closer to their homeland.

of evidentiary night to which Barbados confesses in Chapter 6 of its Memorial.²⁰³ At any rate none of the hearsay anecdotal accounts relayed in Chapter 6 so much as mentions Barbadian fishing to the *east* of Tobago.²⁰⁴

207 Nor does Chapter 7 illuminate matters any further. We are told only that point C is “the intersection of the parallel 11°08’ N and the 12 nautical mile territorial sea limit of Trinidad and Tobago lying southeast of the island of Tobago”,²⁰⁵ and that:

“The third part of the proposed delimitation line is defined by a geodesic line from point C, following an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad at point D...”²⁰⁶

These are purely geographic descriptors, without a trace of any rationale and with no basis in any of the evidence adduced. As presented in Barbados’ Memorial, Point D is a wholly arbitrary location.

(2) Barbados’ claim in the Caribbean sector is unsustainable in fact and in law

208 In its Memorial, Barbados contends that the median line is the starting point in delimitation between two opposite States with parallel coastlines.²⁰⁷ It then contends that, in the western or Caribbean sector, the line should be “adjusted” to allow for special circumstances. This “adjustment” takes the form of awarding to Barbados 86% of the total shelf and EEZ area in the sector bounded by points A1, B1, C and D,²⁰⁸ thereby denying the island of Tobago any continental shelf or EEZ at all, save for a tiny area to the south where it is the island of Trinidad which is dominant in any event. This is not an adjustment of the median line at all: having made the pretence of starting from the median line in the western sector, Barbados asks the Tribunal to abandon it altogether and to award almost the entire sector to Barbados.

²⁰³ See Memorial of Barbados, para. 58: “Although there can be no doubt that fishermen from Barbados have fished off Tobago for centuries, there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century.”

²⁰⁴ The area to the east of Tobago is affected by strong currents. To this day most fishing is done to the west of the islands and in their lee.

²⁰⁵ Memorial of Barbados, para. 144.

²⁰⁶ Memorial of Barbados, para. 145.

²⁰⁷ Memorial of Barbados, paras. 100-111.

²⁰⁸ See above, Chapter 1.

209 In support of this extraordinary claim Barbados advances only one “special circumstance” – its assertion that its fishing industry has traditionally fished the waters in question. It is important to keep in mind that Barbados is not making a claim that the waters in question are historic waters of Barbados. It does not advance an “historic title” claim such as that put forward by Tunisia (and rejected by the Court) in the *Tunisia/Libya* case.²⁰⁹ Since Barbados’ own legislation does not even purport to apply south of the equidistance line,²¹⁰ since it has never sought to exercise jurisdiction there and since it has been negotiating with Trinidad and Tobago since the 1980s for access to these waters for Barbadian fishing vessels, any such claim would be ridiculous. The claim advanced by Barbados is that, even though Barbados has never exercised sovereignty or jurisdiction in these waters and had never laid claim to them before it commenced the present arbitration proceedings, the “historic” fishing activities of its fishing industry off Tobago means that it is entitled to the whole EEZ and continental shelf in this sector.

210 There is a short answer to this argument. Barbados’ entire case in relation to the western sector rests on the following assertions of fact:

- (1) that Barbadian “fisherfolk” have fished the waters around the northern, western and north-eastern coasts of Tobago since time immemorial and Barbados is dependent upon the flying fishery there; and
- (2) that the flying fishery in these waters is of no interest to the fishermen of Trinidad and Tobago.

As Appendix B to this Counter-Memorial demonstrates, these assertions are quite simply untrue. Barbadian fishing in these waters is of recent origin and has always been conducted on the basis that the waters formed part of the EEZ of Trinidad and Tobago. Moreover, the flying fish and other species of these waters are fished by the fishermen of Tobago and are of considerable importance to the economy of that island.

211 However, even if Barbados’ claim possessed the actual foundation in fact which it so evidently lacks, it would still be unsustainable as a matter of law for the following reasons.

²⁰⁹ ICJ Reports 1982 p. 18 at pp. 72-77, paras. 98-105.

²¹⁰ See above, para .47.

212 First, and most importantly, the present case is the first maritime delimitation case to be brought under Part XV of the 1982 Convention and must therefore be decided in accordance with the Convention. Barbados argues that the regime of the EEZ in the 1982 Convention was not intended to detract from pre-existing fishing rights. This argument is misleading. Prior to the establishment of the EEZ in 1986, the waters concerned had the status of high seas and their fisheries resources were *res communis*. It follows that even if Barbadian fishing vessels did fish in those waters, that fact did not give Barbados any sovereign rights in those waters. Moreover, Barbados' argument completely ignores the way in which the 1982 Convention deals with pre-existing fisheries.

213 Article 62 of the 1982 Convention is headed "Utilization of the living resources". It provides in relevant part that:

"1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and *the need to minimize economic dislocation in States whose nationals have habitually fished in the zone* or which have made substantial efforts in research and identification of stocks.

...

5. Coastal States shall give due notice of conservation and management laws and regulations." (emphasis added)

In other words, the 1982 Convention specifically deals with the question of historic fishing by nationals of one State in what becomes the EEZ of another State by means

of a regime of *access*, not by suggesting that such fishing activities could prevail over other considerations so as to alter the delimitation line, let alone by depriving part of another State of any EEZ or shelf at all.²¹¹

214 The application of Article 62(3) is not, of course, a matter which is before the Tribunal in the present proceedings. But the Tribunal cannot disregard its existence (as Barbados has sought to do). The fact that the 1982 Convention deals with historic fishing rights by means of a detailed regime for access to the EEZ of another State means that it would be inconsistent with the scheme of the Convention for a Part XV tribunal to treat such rights as the basis for attributing to one State an area which would otherwise form part of the EEZ and continental shelf of another State.

215 Secondly, even without Article 62 of the 1982 Convention, the jurisprudence of both the International Court of Justice and those arbitral tribunals which have considered the matter rejects the notion that fishing activities – even when genuinely capable of being described as “historic” – can produce the kind of effect on a single maritime boundary which Barbados claims in the present case. In the *Tunisia/Libya* case, the International Court noted that even the concept of historic title to waters was separate from the regime of the continental shelf.²¹²

216 In the *Gulf of Maine* case, where the Chamber was, of course, concerned with delimitation of a single maritime boundary, it referred to the argument that historically the United States or Canada had enjoyed on the Grand Banks a *de facto* predominance in fishing which each State claimed should be taken into account in delimitation. The Chamber pointed out that this earlier practice had occurred not under the modern EEZ regime but under the regime of the high seas.²¹³ Any *de facto* predominance the parties may have enjoyed over fisheries under the old law could not, in its view, be translated into a relevant consideration in the bilateral context of maritime delimitation between two coastal States. Thus there was

“no reason to consider *de jure* that the delimitation which the Chamber has now to carry out within the areas of overlapping apparent as between the respective exclusive fishery zones must result

²¹¹ The award in the *Yemen/Eritrea* case similarly treats historic fisheries as a matter of access rather than delimitation: 119 ILR 417, 442-3, paras. 72-73.

²¹² ICJ Reports, 1982 p. 18 at pp. 73-74, para. 100.

²¹³ ICJ Reports 1984 p. 246 at pp. 341-342, para. 235.

in each Party's enjoying an access to the regional fishing resources which will be equal to the access it previously enjoyed *de facto*.”²¹⁴

It was for this reason that the Chamber concluded that “the respective scale of activities connected with fishing — or navigation, defence or, for that matter petroleum exploration and exploitation — cannot be taken into account as a relevant circumstance”.²¹⁵ As to fisheries (the real issue at stake in the case) that conclusion was obvious: whatever the previous scale of activities under a different legal regime, this was irrelevant to delimitation under the new system of exclusive fisheries zones. As the Chamber explained:

“whatever preferential situation the United States may previously have enjoyed, this cannot constitute in itself a valid ground for its now claiming the incorporation into its own exclusive fishery zone of any area which, in law, has become part of Canada's.”²¹⁶

217 The Court returned to this question in the *Jan Mayen* case,²¹⁷ which Barbados notes is the only case in which access to fisheries led to an adjustment in the delimitation line.²¹⁸ It is true that the Court there held that the need to ensure access to stocks of capelin for the vulnerable communities in Greenland necessitated a departure from the median line.²¹⁹ It is, however, important to note that the context of that decision was markedly different from that of the present case. Greenland was not only a vastly larger island than Jan Mayen (so that considerations of proportionality pointed in the direction of a departure from the median line); it had a substantial population which was almost wholly dependent on fishing, whereas Jan Mayen had no fixed population at all. By contrast, in the present case, both Tobago and Barbados have substantial populations, each of which has an interest in the fishery resources of the waters between the two islands. Moreover, unlike the situation in the *Jan Mayen* case, in the present proceedings, there is ample evidence of the existence of other resources, noticeably hydrocarbons, in the area, so that fisheries could not be decisive in any event.

²¹⁴ Ibid., p. 342, para. 236.

²¹⁵ Ibid., p. 342, para. 237.

²¹⁶ Ibid., p. 342, para. 235.

²¹⁷ ICJ Reports 1993 p. 38.

²¹⁸ Memorial of Barbados, para. 136.

²¹⁹ ICJ Reports 1993, p. 38 at p. 72, para. 76.

218 It is noticeable that neither in the *Eritrea/Yemen* second phase award (in which the Tribunal rejected the contention that fishing activities should influence the delimitation line²²⁰) nor in the later decisions of the Court has there been any suggestion that, in the light of the *Jan Mayen* decision, a single maritime boundary could be affected by fisheries in the manner suggested here by Barbados.

219 Thirdly, recent decisions have suggested that historic activity, whether in the form of fishing activities or other forms of resource exploitation, could be relevant to delimitation only if they led to, or were bound up with, some form of recognition of territorial rights on the part of the State concerned. In the *Qatar/Bahrain* case, Bahrain advanced a claim based on alleged historic activities by pearl fishermen. The Court rejected the argument that this activity could be relevant to the issue of delimitation. It held that “even if it were taken as established that pearling had been carried out by a group of fishermen from one State only, this activity seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters”.²²¹ The emphasis on the need for recognition of territorial rights was similarly emphasised by the Court in its recent decision in *Cameroon/Nigeria* in relation to oil concessions.²²²

220 But in the present case there had been no claim whatever to territorial rights in the area bounded by points A, B, C and D, by Barbados prior to the commencement of the arbitration. Nor has there been any recognition of Barbadian rights by Trinidad and Tobago. On the contrary, the record shows that it is Barbados which has recognized the sovereignty of Trinidad and Tobago in this area. That recognition was explicit both in the 1990 Agreement and in the whole basis for negotiations over many years to ensure access for Barbadian vessels to Trinidad and Tobago’s waters in the very region now claimed.²²³

221 Finally, the Barbadian approach emphasises fishing activities at the expense of everything else. Indeed, no other relevant circumstances merit so much as a mention. Barbados thus ignores – and invites the Tribunal to ignore –

²²⁰ 119 ILR 417, 442-3, paras. 72-3.

²²¹ ICJ Reports 2001, p. 40 at pp. 112-13, para. 236.

²²² See above, para. 165.

²²³ See above, para. 9, and see further Appendix A, below.

- (1) the other resources of the area in question, noticeably hydrocarbons. Barbados has no claim that its nationals have traditionally engaged in activities in respect of these resources in the area bounded by points A, B, C and D, yet it expects to acquire a windfall (possibly one of enormous proportions) in relation to these resources on the back of its historic fisheries claim;
- (2) the length of the coastline of Tobago. The relevant coastline of Tobago in the north and north-west is, in fact, longer than that of Barbados. Yet Barbados ignores any consideration of proportionality and proposes to treat Trinidad and Tobago as if, in the relevant area, Tobago generated no continental shelf or EEZ all;
- (3) the principle that a State should not be cut off from its natural prolongation. The effect of the Barbadian claim is that Trinidad and Tobago would be completely cut off to the north and west.

(3) Barbados' claim in the Caribbean sector: an overall appreciation

222 Thus taking the western sector as presented by Barbados, it lays claim to 86% of that sector. It does so exclusively on the basis of a claim which does not stand up on the facts, which is inconsistent with Article 62 of the 1982 Convention, which goes far beyond anything decided in the *Jan Mayen* case, which is completely at odds with the record of Barbadian recognition of the sovereign rights of Trinidad and Tobago in the relevant area and which ignores all relevant circumstances other than the claimed Barbadian fisheries.

223 In reality, this is a manifestly 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 sector should be rejected in its entirety.

C. Barbados' Atlantic, or Eastern Sector, Claim: Claim line D-E

224 It is necessary to turn now to the second element of Barbados' claim line, that running from the turning point D to point E. This part of the line is described and justified in the following passages of Barbados' Memorial:

“... and then follows [from Point D] the median line to Point E, (the tripoint between Barbados, Trinidad and Tobago and the Co-operative Republic of Guyana...”²²⁴

“...then the line follows [from Point D] the median line south eastwards running through intermediate points on the median line numbered 1 to 8.

146. From point 8, the proposed delimitation line follows an azimuth of approximately 120° for approximately five nautical miles towards the point of intersection with the boundary of a third State at point E.”²²⁵

225 The only element of justification for the line D-E put forward by Barbados is to be found in its general argument on applicable law in Chapter 5 of its Memorial. Barbados completely ignores the fact that, in this sector, the relationship of the two coasts is one of adjacency, rather than oppositeness. Moreover, its technique is, in effect, to define out of existence any relevant circumstances (the east-facing coastal length of Trinidad and Tobago, for example) and then to affirm that an equidistance line governs. For if one starts with equidistance and then refuses or declines to consider any of the relevant circumstances, one ends with equidistance. Admittedly (unlike the selection of Point D) the equidistance line towards Point E is not merely arbitrary: an equidistance line is a function of the nearest points on the respective coasts of the parties. But to adopt an equidistance boundary in the Atlantic sector is nonetheless unfounded as a matter of international law, for the following reasons.

(1) Barbados' claim takes no account of the disparity in eastern-facing coastal lengths

226 First, to follow the equidistance line towards the tripoint with a third State (identified as Guyana but subsequently anonymised)²²⁶ takes no account at all of the disparity in eastern-facing coastal frontages. This was identified in paragraph 202 above as a ratio of 8.2:1. It is well above the threshold adopted by international tribunals as disproportionate and requiring some adjustment of a provisional median or equidistance line.

227 For example in the *Jan Mayen* case, the International Court was faced with a ratio of opposite coasts of about 9:1. The Court concluded:

²²⁴ Memorial of Barbados, para. 8.

²²⁵ Memorial of Barbados, paras. 145-6.

²²⁶ For the extent of the Tribunal's jurisdiction to the south-east see para. 27.

“the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into account during the delimitation operation... The disparity between the lengths of coasts thus constitutes a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court is of the opinion, in view of the *great disparity in the length of the coasts*, that the application of the median line leads to manifestly inequitable results.”²²⁷

228 Indeed considerably lesser differences in coastal frontage ratios have led to adjustments to an equidistance line, or the adoption of some different methodology, as in the *Anglo-French case*,²²⁸ *Tunisia-Libya*,²²⁹ *Gulf of Maine*,²³⁰ *Libya-Malta*²³¹ and *Saint Pierre et Miquelon*.²³² In failing to consider the differences in this case, Barbados has hardly begun to apply the relevant rules of international law.

(2) Cut-off of eastwards projection of Trinidad & Tobago’s coastline

229 Secondly, the Barbados’ claim-line in the eastern sector cuts right across the coastal frontage of Trinidad and Tobago. This is evident from Figure 6.1, which shows the Barbados claim line and the various areas thereby claimed. In accordance with this claim, Barbadian waters stand directly in front of and well within 200 n.m. of the coast of Trinidad and Tobago, which finds itself, as between Barbados to the north and Venezuela and Guyana to the south, essentially in the same position as the Federal Republic of Germany between Denmark and the Netherlands in the *North Sea Continental Shelf Cases*.

230 Moreover the effect of the Barbados claim line is to shelf-lock Trinidad and Tobago despite its coastal frontage of approximately 75 n.m. directly out to the Atlantic. Barbados thereby claims 100% of the outer continental shelf in the area of overlapping potential entitlements. This is evidently inequitable.

²²⁷ ICJ Reports 1993, p. 38 at pp. 68-9, para. 68 (emphasis added).

²²⁸ (1977) 54 ILR 6.

²²⁹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, ICJ Reports 1982, p. 18 at 75-77, paras. 103-5.

²³⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, I.C.J. Reports 1984, p. 246 at pp. 335-6, paras. 221-2.

²³¹ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, p. 13 at p. 51, para. 71.

²³² (1992) 119 ILR 417.

(3) Regional implications: the *Guinea/Guinea Bissau* test

231 Thirdly, the Barbados claim line ignores the regional implications for all other States to the north and south, contrary to the principle set out by the Tribunal in the *Guinea/Guinea Bissau* case.²³³ With a total east-facing coastline of 28.8 n.m.,²³⁴ and by virtue of standing slightly to the east of the chain of islands in the eastern Caribbean, Barbados claims a massive proportion of the total available EEZ and shelf areas. By contrast, the two maritime boundary agreements actually concluded to the south and north of Barbados – to the south, between Trinidad and Tobago and Venezuela, to the north between France and Dominica - have departed from the equidistance line precisely in order to take into account the general configuration of east-facing coastlines in the region, and to give at least some expression to the projection of these coastlines to an uninterrupted (if still constricted) EEZ and continental shelf. Both bilaterally and in terms of the region as a whole, the Barbados claim is evidently excessive and disproportionate.

(4) Disproportionate consequences

232 On a bilateral basis, the disproportionate effect of Barbados' claim-line can also be expressed numerically by taking the zone of potential overlapping EEZ entitlements (i.e. the total area within 200 n.m. of the baselines of both parties and north of the maritime boundary agreed between Trinidad and Tobago and Venezuela in 1990).²³⁵ The relevant area (excluding territorial sea areas of both States) is 41,760 square n.m. Barbados' claim line attributes to Barbados 28,704 square n.m. of this area or more than two thirds (i.e., 68.7%). And it does so on the basis of coastal frontages which are considerably shorter.

D. Conclusions

233 Only in recognizing the existence of two distinct sectors of the boundary is Barbados' claim line a useful basis for deciding on an equitable delimitation (and then, apparently, only by accident). In all respects Barbados' claim is inconsistent with international law criteria for delimitation: it ignores express provisions of the 1982

²³³ See above, para. 22.

²³⁴ This is the actual coastline length. The simplified coastline is 25.3 n.m.

²³⁵ As the areas to the south of this maritime boundary are not claimed by Trinidad and Tobago, the present Tribunal has no jurisdiction over them.

Convention; it ignores Barbados' express prior recognition of the claimed area as belonging to Trinidad and Tobago; it fails to give effect to coastal frontages in *both* sectors; it cuts off the natural prolongation of the Trinidad and Tobago coastline in *both* sectors; it is grossly disproportionate. It should be rejected *in toto*.

CHAPTER 7

THE EQUITABLE SOLUTION

234 As has just been seen, it follows from the criteria for an equitable delimitation, summarized in Chapter 4 above, that Barbados' claim line must be dismissed entirely as a basis for a delimitation which accords with Articles 74 and 83 of the 1982 Convention. It is necessary to start again.

A. The two sectors and the turning point

235 So far as concerns the western or Caribbean sector, Trinidad and Tobago's north-eastern coast and Barbados' south western coast remain more or less in a relationship of oppositeness over the short distance before a tri-point is reached with Saint Vincent and the Grenadines.²³⁶

236 According to Barbados, in the eastern or Atlantic sector the relevant coasts remain the short (approximately 5 n.m.) facing coastlines of Trinidad and Tobago and Barbados. But it is clear that these short lengths of coastal frontage should not be taken as controlling so as to define an equidistance line which, in Barbados' case, extends far out into the Atlantic sector, to the outer edge of Trinidad and Tobago's EEZ. As shown in Chapter 6 of this Counter-Memorial, Barbados' claim to an extended equidistance line in the eastern sector takes no account of the fact that the relevant coasts of Trinidad and Tobago and Barbados are predominantly in a relationship of adjacency, not oppositeness. Indeed, Barbados ignores part of its Atlantic-facing coastline in order more convincingly to argue that more than 100 n.m. of maritime boundary should be determined by a few basepoints on the short opposite-facing coasts of the two States.²³⁷ But as one progressively moves eastwards from the line joining the closest points between Barbados and Tobago, one is increasingly in the open Atlantic and the idea that the whole line should be determined without any regard for the lengthy east-facing coastline of Trinidad and Tobago becomes less and less credible.

²³⁶ Barbados, of course, contends that the equidistance line should be moved to the south in that sector by reason of special circumstances. The merits of that claim have already been considered and dismissed in Chapter 6.

²³⁷ See above, para 188.

- 237 It is therefore appropriate that there be a deviation away from an equidistance line to reflect the change in the predominant relationship from one of oppositeness to one of (or analogous to that of) adjacency. First it is necessary to identify the point at which that deviation should occur, i.e. the turning point in terms of an eventual delimitation line.
- 238 In the instant case, there is little difficulty in establishing where the turning point should be located. The equidistance line is “controlled” by a series of points along the north/north-eastern coast of Tobago, from Marble Island to the islands of St Giles and Little Tobago, and a series of points along the southern coast of Barbados, from Needham’s Point on the southwest coast to New Fall Cliff on the southeast coast. These are shown on Map 8 of Barbados’ Memorial and are re-presented on **Figure 7.1**. From the presumptive equidistant tripoint with St Vincent and the Grenadines to Point A on Figure 7.1, the controlling points on the Barbados coast are on the south-west (opposite) coast between Needham’s Point and South Point. Point A is the last point on the equidistance line which is controlled by points on the south-west coast of Barbados.²³⁸
- 239 Thus to the east of Point A, the sole influences on the delimitation line are the adjacent coastal frontages of Trinidad and Tobago’s eastern coast (some 74.9 n.m. in length²³⁹) and Barbados’ south-east coast (9.2 n.m. in length). This disparity in coastal frontages (on a ratio of 8.2:1 in favour of Trinidad and Tobago) already indicates the need for a deviation northwards from the median line in order to reach an equitable solution. The method by which such a deviation should be made is discussed below. But it can be seen from Figure 7.1 that, if there is to be a deviation away from an equidistance line to reflect the change from a relationship of oppositeness to one of adjacency, Point A is the appropriate turning point.

²³⁸ It is notable that, although not marked on Map 8 of Barbados’ Memorial, Point A is readily identifiable as the last of a cluster of points that generate its equidistance line. Barbados generates a handful of points on its equidistance line by reference to points along its south-eastern coast, i.e. a coast that is adjacent, not opposite, to Trinidad and Tobago.

²³⁹ See above, para 195.

B. The Caribbean (western) sector

240 The location of the bilateral maritime boundary in the western (or Caribbean) sector can easily be determined. As explained in Chapter 5 of this Counter-Memorial,²⁴⁰ the coastlines of the two States are here essentially in an opposite relationship. Moreover, the relative proximity of other States to the west means that neither Barbados nor Trinidad and Tobago can achieve anything like its full entitlement to a 200 mile continental shelf and EEZ to the west.

241 In such a situation, the median line is the means by which an equitable result will normally be achieved. As the International Court explained in the *Jan Mayen* case:

“*Prima facie*, a median line delimitation between opposite coasts results in general in an equitable solution, particularly if the coasts in question are nearly parallel. When, as in the present case, delimitation is required between opposite coasts which are insufficiently far apart for both to enjoy the full 200-mile extension of continental shelf and other rights over maritime spaces recognized by international law, the median line will be equidistant also from the two 200-mile limits, and may *prima facie* be regarded as effecting an equitable division of the overlapping area.”²⁴¹

Similarly, in its award in the second phase of the *Eritrea/Yemen* case, the Tribunal stated that “as between opposite coasts, a median line obtains”²⁴² unless there are pressing reasons to depart from it.

242 It has already been demonstrated that Barbados’ case for departing from the median line and locating the boundary far to the south does not withstand scrutiny.²⁴³ It is based entirely on a spurious claim to historic fishing rights which, even if it did rest on solid foundations of fact (which is manifestly not the case), could not have the dramatic effect for which Barbados contends.

243 Once the Barbadian claim is dismissed, where then does the boundary lie in the western sector? There is in this sector no question of cut off, since neither State can achieve anything like a 200 mile shelf or EEZ in any event: the cut-off effect is a result of island States to the west, and is not attributable to either of the Parties. There

²⁴⁰ See above, para. 202.

²⁴¹ ICJ Reports 1993, p. 38 at p. 66, para. 64.

²⁴² (1999) 119 ILR 418, 445, para. 83.

²⁴³ See above, paras. 206-221.

is no other factor which points to a line south of the median line (and Barbados has not advanced any case for adjusting the line to the south other than its spurious flying fishery argument).

244 In these circumstances there is no reason to depart, in this sector, from the normal principle that “as between opposite coasts, a median line obtains”.²⁴⁴ In the present case, the median line produces a result which is equitable and which reflects the practice of the two States.²⁴⁵

245 A median line boundary in the western sector will produce a result which broadly reflects the relative length of the relevant coasts. As explained in Chapter 5, the two coastlines are of almost equal length, that of Barbados being in a ratio to that of Tobago of approximately 53:47. Moreover the areas attributed by a median line in the western or Caribbean sector are not markedly disproportionate, as will be seen.²⁴⁶

C. The Atlantic (eastern) sector within 200 n.m.

246 Turning to the Atlantic sector, here evidently the two States face “the open waters of the Atlantic ocean”²⁴⁷ without obstruction. In these circumstances *prima facie* neither State should be considered as entitled to an EEZ which would seriously obstruct (still less totally occlude) the other State’s access to an EEZ out to 200 n.m. To put it in other terms, each State is entitled to be represented on the outer edge of the 200 n.m. zone with the prospect of participation in the regime of the outer continental shelf.

247 It was noted in Chapter 4 that an equidistance line is more likely to be equitable in the situation of opposite coasts than in a case of, or analogous to, that of adjacent coasts. In the former situation equidistance tends to reduce the impact of outstanding features or irregularities; in the latter situation it tends often to exaggerate them and to exaggerate them still more with distance from the coast. This point has been repeatedly made in the cases from the *North Sea Continental Shelf Cases* onwards.²⁴⁸ It was this factor that led the Court of Arbitration in the *Anglo-French Case* to adjust the “lateral” equidistance line to give half effect to the Scilly Islands which, because of

²⁴⁴ *Eritrea/Yemen (Phase II)*, (1999) 119 ILR 418, 445, para. 83.

²⁴⁵ See above, paras. 46-56 and 81-89. See also Appendix A, below.

²⁴⁶ See below, para. 259.

²⁴⁷ To adopt the language of the Court of Arbitration in the *Anglo-French Arbitration*, (1977) 54 ILR 6, 94, para. 200.

²⁴⁸ See above, paras. 176-177.

their situation further to the west of the equivalent French coast of Ushant, had a disproportionate effect on delimitation.²⁴⁹ On the other side of the broad Atlantic it is the easterly situation of the outlying island of Barbados which has an even more significant effect in cutting off the seawards projection of Trinidad and Tobago's coastal frontage.

(1) Relevant circumstances in the Atlantic (eastern) sector

248 Specifically the special or relevant circumstances requiring adjustment of the median line in this sector are as follows:

(i) Disparity in eastern facing coastal lengths

249 As demonstrated already, the eastern-facing coastline of Trinidad and Tobago stands in a ratio to that of Barbados of approximately 8.2:1.²⁵⁰ This is a substantial difference, well above the threshold recognised in the jurisprudence and in State practice as justifying a departure from the equidistance or median line.

(ii) Eastwards projection of the coastlines of both Parties

250 The eastward-facing coastal frontage of Trinidad and Tobago is cut off by the Barbadian claim line—which is one of the reasons that the claim line is not in compliance with the applicable law.²⁵¹ Jurisprudence from the *North Sea Continental Shelf* cases to *Saint Pierre et Miquelon* supports the conclusion that an equidistance line which has such a cut-off effect should be adjusted appropriately.²⁵²

(iii) Regional implications: the Guinea/Guinea Bissau test

251 In the *Guinea-Guinea Bissau* case the Court of Arbitration, faced with a bilateral delimitation between States, concluded that it must take into account the implications for the region as a whole. It said:

“Although the coastline concerned is easy to define, the same is not true of the zone to be considered, that is, the whole maritime area which will be affected by the delimitation ruling of the Tribunal. A delimitation designed to obtain an equitable result cannot ignore the

²⁴⁹ See (1977) 54 ILR 6, 62, para 86, 65-6, para 95, for the principle and *ibid.*, 121-4, paras. 244-251, for its application.

²⁵⁰ See above, para. 202. The disparity is larger if actual coastal lengths are taken.

²⁵¹ See above, paras. 229-230.

²⁵² See above, paras. 152-160.

other delimitations already made or still to be made in the region. Guinea-Bissau is bordered by Senegal in the north and Guinea is bordered by Sierra Leone in the south...

When in fact - as is the case here, if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits. In the present case, this is what would happen to Guinea, which is situated between Guinea-Bissau and Sierra Leone. Both the equidistance lines envisaged arrive too soon at the parallel of latitude drawn from the land boundary between Guinea and Sierra Leone which Guinea has unilaterally taken as its maritime boundary."²⁵³

252 Similar considerations apply here. In the two existing delimitations agreed between States to the north and south of Barbados, there has been an explicit recognition of the need to avoid the cut-off effect, and a corresponding departure from an equidistance or median line delimitation.

253 This is true of the 1990 Maritime Boundary Agreement between Trinidad and Tobago and Venezuela,²⁵⁴ where there was a departure from an equidistance line in order to allow Venezuela some maritime zone out into the Atlantic (the so-called "*salida al Atlantico*"). This is shown on Figure 1.3. Along the length of the 1990 delimitation line (as compared with an equidistance line), Trinidad and Tobago conceded approximately 1330 sq. n.m. to the south.

254 Equally pertinent is the delimitation between France (Guadeloupe and Martinique) and Dominica, effected by the Agreement of 7 September 1987.²⁵⁵ **Figure 7.2** shows the agreed boundary (shown in red) and also the Dominica-France equidistance lines. It will be seen that the two equidistance lines (Dominica-Guadeloupe to the north, Dominica-Martinique to the south) converge just under 63 n.m. east of Dominica. An equidistance line boundary would have left Dominica (and indeed Martinique in its turn) hopelessly zone-locked. In the agreed boundary France could be said to have accorded Dominica of the order of ca. 3,500 sq. n.m. of EEZ. In turn some of the area accorded by Guadeloupe to Dominica is in effect transferred on to Martinique. Each

²⁵³ (1985) 77 ILR 635, 677, para. 93, 683 (104); see also *ibid.*, 683-4, paras. 108-9; (1985) 25 ILM 251, 291, para. 93, 295, para. 104.

²⁵⁴ Annex Volume 2(1) No. 6.

²⁵⁵ 1546 UNTS 308 (with map); Annex Volume 2(1) No. 5.

of these territories is represented at least on the 200 n.m. line on the open Atlantic. Moreover the no cut-off principle was applied under the 1982 Agreement notwithstanding that the Atlantic-facing coastal frontages of the three territories (Guadeloupe, Martinique and Dominica) are of the same order of magnitude. In the present case that is certainly not true.

255 The 1987 Agreement is described by Prescott & Schofield in the following terms:

“When the 25 delimitations in the Caribbean Sea are considered it appears that in 12 cases the boundaries were based on the principle of equidistance while seven cases were based on the concept of equity. The remaining six cases used both equidistance and equity in different sections of the boundaries. The clearest example of this situation is provided by the agreement between Dominica and France... Geographically Dominica is sandwiched between the French territories of Guadeloupe and Martinique, Lines of equidistance between Dominica and the French islands would have restricted Dominica to a small maritime area. The two countries decided to draw two types of maritime boundaries. First, lines of equidistance would be used in the vicinity of the three islands and into the Caribbean Sea. Second, eastwards of the three islands equitable lines would be drawn to allow Dominica to possess a corridor of seas and seabed out to 200 nm.”²⁵⁶

256 In short, in a situation where Barbados stands somewhat to the east of neighbouring territories whose coastal frontages it does not occlude, a delimitation based purely on equidistance is most inequitable, and this inequity is the greater where, as with Trinidad and Tobago, the east-facing coastal frontage is in a ratio of 8.2:1 to that of Barbados. An adjustment to an equidistance line boundary is imperatively called for, on regional as well as bilateral grounds.

(2) Criteria for adjustment to achieve an equitable result

257 The question is on what basis such an adjustment is to be made. The appropriate turning point (Point A) has already been identified. It is well south of Barbados, and indeed it is at a latitude not far north of the most northerly point of the territorial sea around Tobago. As a general matter the adjustment should give adequate expression on the outer limit of the EEZ to the long east-facing coastal frontage of Trinidad and Tobago. That frontage can fairly be represented at that distance by the north-south vector of the coastline, identified above as a line 69.1 n.m. in length. It is appropriate

²⁵⁶

V Prescott & C Schofield, *International Maritime Boundaries of the World* (Nijhoff, 2005), 347-8.

to measure that vector along the outer edge of the EEZ from the equidistance line between Trinidad and Tobago and the states to the south. In this way the contribution made by Trinidad and Tobago to the *salida al Atlantico* of the east-facing mainland coasts of Venezuela (and, in turn and further south, those of Guyana) is maintained.

258 **Figure 7.3** shows such an adjustment to the equidistance line, proceeding along an azimuth of 88° from Point A to the outer or eastern edge of the EEZ of Trinidad and Tobago at Point B. This point lies 68.3 n.m. from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana median line, a distance which is comparable to the length of the north-south vector of Trinidad and Tobago's east-facing coastal frontage (69.1 n.m.). The adjustment gives Trinidad and Tobago a modest EEZ façade of 51.2 n.m., while leaving Barbados vast swathes of maritime zones to the north and north-east.

(3) Proportionality: the proposed adjustment produces an equitable result

259 The result is proportionate and equitable as between the Parties (and vis-à-vis third States), as may again be seen by reference to Figure 7.3. Taking the area of overlapping potential EEZ entitlements (an area which, excluding land territory, archipelagic and territorial waters, amounts to 41,893 sq. n.m.), this adjusted line produces the following result:

Proportion of available EEZ
within area of overlapping potential EEZ entitlements

EEZ area attributed to Barbados	20,552 sq. n.m. (49%)
EEZ area attributed to Trinidad and Tobago	21,341 sq. n.m. (51 %)

Moreover this is the *total* area of the Trinidad and Tobago EEZ, while in addition Barbados is entitled to a further EEZ area of 27,850 sq. n.m. to the north and north-east (subject to resolution of boundary issues with its neighbours to the north, and in particular with France (Martinique)).

260 No doubt judgements of proportionality are only approximate, and in accordance with the applicable law Trinidad and Tobago has not attempted to divide the area of overlapping potential entitlements by any version of coastal frontage ratios. But it is evident that for a coastline 8 times as long as that of Barbados to produce vis-à-vis

Barbados an EEZ claim of approximately equal extent can in no way be considered disproportionate. It can be seen that the application of this method divides the area of potential overlapping entitlements approximately in half; it thereby produces a result which is equitable and proportionate in all the circumstances. This complies with Article 74 of the 1982 Convention, and as such should be adopted by the Tribunal.

D. The continental shelf beyond 200 n.m.

261 The Parties have not mandated the Tribunal to draw a single maritime boundary (and, as will be shown, an express mandate to that effect is required). But there is in fact no reason for the Tribunal to draw different boundaries for EEZ and continental shelf within 200 n.m. from the relevant coasts of Trinidad and Tobago. An issue however arises as to continental shelf delimitation beyond 200 n.m. to the east. This must now be addressed.

262 In accordance with the 1982 Convention, coastal States in the region have an entitlement to continental shelf out to the continental margin defined in accordance with Articles 76(4)-(6) of the 1982 Convention.

263 As noted already, the Parties agree that in the relevant area the outer continental shelf extends a significant distance beyond 200 n.m. from the nearest coastline or baseline. The approximate extent of the outer continental shelf is shown on **Figure 1.3**, which reproduces Map 1 of Barbados' letter to the Tribunal of 6 September 2004. It will be seen that the bulk of the outer continental shelf attributed to Barbados by that (Barbadian) map occurs in southerly latitudes, and that there does not appear to be any significant area of outer continental shelf in the areas due east or north east of Barbados.

(1) The Tribunal's jurisdiction to delimit the outer continental shelf

264 The Tribunal's jurisdiction was discussed in Chapter 3. To the extent that such jurisdiction exists, it is bilateral in character, as between Trinidad and Tobago and Barbados.²⁵⁷ If the maritime boundary drawn by the Tribunal meets the line delimited by the 1990 Venezuela-Trinidad and Tobago Agreement, then the Tribunal will have completed its task. However, for the reasons given in the preceding section, this is not

²⁵⁷ See above, para 22.

the case. Trinidad and Tobago is entitled to an area of EEZ and continental shelf to the east of its coastal frontage, out to the outer edge of the maritime zones appertaining to each coastal State under international law. On this basis, in the area beyond 200 n.m. from Trinidad and Tobago there is a further issue of delimitation as between the two Parties' continental shelves. It is submitted that this bilateral delimitation is equally within the competence of the present Tribunal.

265 In the *Saint Pierre et Miquelon* case, however, the Court of Arbitration declined to deal with the question of delimitation as between France and Canada beyond 200 n.m. from the French islands. (The area concerned was well within 200 n.m. from the coastline of Nova Scotia including Sable Island). It said:

“Any decision by this Court recognizing 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 with the administration and protection of the international sea-bed area (the sea-bed 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 rights of a Party which is not before it. In this connection the Court notes that in accordance with Article 76, paragraph 8 and Annex II of the 1982 Convention on the Law of the Sea, a Commission is to be set up, under the title of ‘Commission on the Limits of the Continental Shelf’, to consider the claims and data submitted by coastal States and issue recommendations to them. In conformity with this provision, only ‘the limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding’.”²⁵⁸

266 It is true that under Article 76(8) of the 1982 Convention, the outer limit of the continental shelf is to be determined by processes involving the Commission on the Limits of the Continental Shelf established under Annex II. No doubt this Tribunal should not substitute for the Commission in determining such limits for itself. But there is no need for it to do so in order to determine as between Trinidad and Tobago and Barbados where the continental shelf boundary lies. What matters for this purpose is the establishment of a direction—an azimuth, not a terminus. International tribunals faced with a potential tripoint with some third State cannot determine the extent of the entitlement of the third State to EEZ or continental shelf, and it follows that they

²⁵⁸ (1992) 95 ILR 645, 674, paras. 78-79.

cannot determine the precise location of the tripoint. But they can and do determine the direction of the maritime boundary as between the two States over which they do have jurisdiction. Thus in *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court was unable to determine the location of the tripoint with Equatorial Guinea (which, though an intervenor, was not a party to the proceedings). The Court accordingly said that it could do “no more than indicate the general direction... of the boundary between the Parties’ maritime areas” towards the area of the tripoint.²⁵⁹ A similar process was undertaken in *Qatar-Bahrain*²⁶⁰ and by the Court of Arbitration in *Yemen-Eritrea II*.²⁶¹ Just as in these cases there was no need for a court or tribunal with jurisdiction between two States to decide on the terminal point of the maritime boundary, so there is no need for this Tribunal to determine the outer limit of continental shelf beyond 200 n.m. This is a delimitation as between Trinidad and Tobago and Barbados. It is in no way liable to interfere with the work of the Annex II Commission. As the domestic tribunal in the *Newfoundland-Nova Scotia* arbitration stated: “there does not seem to be any difference in principle between the non-effect of a bilateral delimitation vis-à-vis a third state... and its non-effect vis-à-vis the ‘international community’ or third states generally.”²⁶²

267 Moreover the passage from the award in the *Saint Pierre et Miquelon* case, cited above, seems to proceed on the basis that the function of the Commission on the Limits of the Continental Shelf is that of “recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles”. This is inaccurate. The scope of the rights of coastal States to outer continental shelf is determined in principle by Article 76 of the Convention by reference to objective criteria of distance, depth, the configuration of the shelf, etc. The function of the Commission is to form a view as to the application of these criteria on the basis of information provided by the coastal State. Its concern 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. There is no overlap between the function of the Commission and the present Tribunal,

²⁵⁹ Judgment of 10 October 2002, para. 307.

²⁶⁰ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports 2001, p. 40, at p. 116, para. 250.

²⁶¹ *Eritrea-Yemen: (Second Stage Maritime Delimitation)*, 119 ILR 417.

²⁶² *Newfoundland-Nova Scotia*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002 (available at <http://www.boundary-dispute.ca>), 45, para. 2.31, fn 90. Copies of the Award will be made available to the Tribunal.

provided the Tribunal refrains from indicating the extent of the outer continental shelf the lateral boundary of which it delimits.

268 The point can be made in another way. The “international community” is rather an interest than an entity. There is no basis to believe that the international community interest in maritime delimitation is expressed in any other terms than those of the 1982 Convention, now widely ratified. The Convention clearly distinguishes between continental shelf delimitation (including the continental shelf appertaining to coastal States beyond 200 n.m.) and the determination of the outer limit of such continental shelf. The two processes can and do coexist, and there is no indication in the Convention of any community interest in not determining maritime boundary disputes as between adjacent coastal States. If the parties to the 1982 Convention had wished to prohibit bilateral delimitation beyond 200 n.m. pending the completion of the work of the Commission on the Limits of the Continental Shelf, they would have said so. They did not, and the Commission for its part has expressly recognised “that the competence with respect to matters which may arise in connection with the establishment of the outer limits of the continental shelf rests with States”.²⁶³

269 It is respectfully submitted that there is no basis for the present Tribunal, exercising jurisdiction under the 1982 Convention, to refrain from a complete delimitation as between the Parties.

(2) The relationship between continental shelf and EEZ rights

270 The geographical position is as shown in **Figure 7.4**. This depicts the respective 200 n.m. limits of Barbados, Trinidad and Tobago and Venezuela/Guyana. It depicts the Trinidad and Tobago claim line in the present proceedings (shown as a direction out to 200 n.m.) and the 1990 Agreement boundary. It also shows the approximate limit of the outer continental shelf in this area, with the various limits referred to in Article 76 of the 1982 Convention. The orange-hatched area beyond 200 n.m. represents the outer continental shelf as shown on a graphic earlier submitted by Barbados.²⁶⁴ It will be seen that the Parties agree (a) that there is an outer continental shelf as defined in

²⁶³ Commission on the Limits of the Continental Shelf, Rules of Procedure, CLCS/40, 2 July 2004, Rule 46 and Annex I.

²⁶⁴ See para. 263 above.

Article 76 to the east, but not to the north-east, of the Trinidad and Tobago-Barbados coastal frontage, and (b) that the extent of this shelf is quite substantial.

271 To the east of Tobago, it will be observed that there is a region beyond 200 n.m. from the Tobago coast which is within 200 n.m. of Barbados. Further out, but still within the area of outer continental shelf, there is a region beyond 200 n.m. of the coast of Barbados where neither State can have any claim to EEZ but both claim continental shelf. In the intermediate zone (beyond 200 n.m. from Trinidad and Tobago but within 200 n.m. of Barbados) the issue of the relationship between continental shelf and EEZ rights arises.

272 It should be stressed that as a general matter it is not for the Tribunal to resolve whatever practical issues might (hypothetically) arise in the future in this area of overlapping zones. The Tribunal's task is delimitation, not the management of natural resources. All that is necessary for present purposes is to establish the principle that the continental shelf of State A can overlap and coexist with the exclusive economic zone of State B. This is the case, for the following reasons.

273 A key stage in the development of the legal institution of the continental shelf was the Proclamation with respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf of 28 September 1945 (the Truman Proclamation).²⁶⁵ That Proclamation was widely recognised and given effect by many States in the following years. It was quite clear as to the relation between sea-bed and water column rights. The Truman Proclamation related to "the natural resources of the subsoil and sea bed of the continental shelf". It did not affect "the character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation". At the same time the United States issued a second Proclamation with respect to Coastal Fisheries in Certain Areas of the High Seas.²⁶⁶ This second Proclamation concerned conservation and management of the living resources of the high seas and did not assert any *a priori* exclusivity of fisheries rights; it was also much less widely recognised as asserting a valid claim.

²⁶⁵ For text see (1946) 40 *AJIL Supp* 45.

²⁶⁶ For text see (1946) 40 *AJIL Supp* 46.

274 It is not necessary for present purposes to determine precisely when the institution of the continental shelf became recognised in customary international law. What is quite clear is that it was so recognised by the 1950s,²⁶⁷ and that the principal provisions of the Fourth Geneva Convention on the Continental Shelf of 1958, in particular Articles 1-3, were declaratory of general international law by that time. Every coastal State thus had inherent rights over the continental shelf as the natural prolongation of their land territory as of this time. The point was clearly recognized by the International Court in the *North Sea Continental Shelf Cases* in 1969, when referring to –

“the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, - namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (and many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is ‘exclusive’ in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.”²⁶⁸

275 The early development of the institution of the continental shelf in general international law was very much reflected in the Caribbean region. In 1942 Great Britain (on behalf of Trinidad) and Venezuela concluded the Gulf of Paria Treaty,²⁶⁹ asserting exclusive control over the “submarine areas” of the Gulf as apportioned and defined in the Treaty. These submarine areas included “the sea bed and sub-soil outside the territorial waters of the High Contracting Parties”. Subsequently the United Kingdom annexed outright the submarine areas on its side of the Gulf of Paria,

²⁶⁷ The key provisions of what became Articles 1-3 of the 1958 Convention were adopted without dissent by the ILC in 1951, and subsequently underwent only minor amendments: see *ILC Yearbook* 1951/II, 141-2.

²⁶⁸ *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports 1969, p. 3 at p. 22, para. 19.

²⁶⁹ 205 LNTS 121. See also DP O’Connell, *The International Law of the Sea* (Oxford, 1982) vol. 1, 470 & n13.

without affecting the status of the superjacent waters.²⁷⁰ Proclamations were made by the United Kingdom on behalf of various British colonies after 1948.²⁷¹

276 By contrast the rights of coastal States to an EEZ are not considered as appurtenant *ab initio* and *ipso jure* but have in practice been established pursuant to a proclamation. Trinidad and Tobago proclaimed its EEZ in 1986; Barbados' proclamation dates from 29 December 1978.²⁷² As a matter of international law, the institution of the EEZ was even then relatively new. In 1974 the International Court rejected an Icelandic claim to priority over fisheries resources within 50 n.m. of its coast, refusing to anticipate changes in the law "*sub specie legis ferendae*" before the law-maker had laid it down.²⁷³

277 When the law-maker acted to do so, through the medium of the 1982 Convention, there is no doubt that the EEZ became not only a treaty-based concept but part of customary international law, and the International Court indicated as much in subsequent decisions. But there is no expression of any intention in the 1982 Convention to repeal or eliminate existing rights to the continental shelf. On the contrary, Article 56(3) of the Convention provides that:

"The rights set out in this Article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

Thus the exercise of seabed and subsoil rights is referred to Part VI, which deals with the continental shelf. This speaks decisively against the view that EEZ rights prevail over continental shelf rights.²⁷⁴

278 Even without Article 56(3) a similar conclusion would have been reached from the coexistence in the same instrument of Part V (EEZ) and Part VI (continental shelf). It is evident that the continental shelf (measured to the outer edge of the continental margin and without reference to any 200 n.m. limit) is not absorbed by the EEZ

²⁷⁰ 142 BFSP 970.

²⁷¹ For details see O'Connell (1982) vol. 1, 473-4.

²⁷² See respectively Annex Volume 4 No. 5 and Annex Volume 4 No. 4. The proclamation was stated to be effective from 1 January 1979.

²⁷³ *Fisheries Jurisdiction* cases, *United Kingdom v Iceland*, ICJ Rep 1974 p. 3 at pp. 23-24, para 53.

²⁷⁴ On balance this conclusion is also drawn in the literature. See, e.g., MD Evans, "Delimitation and the Common Maritime Boundary" (1993) 64 *BYIL* 282: "The better view is that [UNCLOS Art 56] assures the primacy of the shelf regime over the EEZ as regards rights to the sea-bed and the sub-soil."

(measured out to the 200 n.m. line). The two legal institutions, older and newer, coexist.

279 Although it is normally convenient and practical to adopt the same delimitation for continental shelf and EEZ, in State practice there are examples where different limits have been adopted for continental shelf and EEZ or fisheries jurisdiction zones.

280 This was the case in relation to the Torres Strait Treaty entered into by Australia Papua New Guinea²⁷⁵ where the seabed boundary and the fisheries jurisdiction line run along different courses. Similarly, the 1997 Treaty between Australia and Indonesia²⁷⁶ provides for portions of the boundary where the EEZ and continental shelf boundaries diverge, so that some portions of Indonesia's EEZ are superjacent to Australia's continental shelf in the Timor and Arafura seas.²⁷⁷

281 Similarly, the agreement between the United Kingdom and Denmark and the Faroe Islands in relation to delimitation of the maritime boundaries provides for different continental shelf and fisheries boundaries, as well as a "special area" of joint jurisdiction.²⁷⁸

282 That the continental shelf and the EEZ are still distinct zones in law has been confirmed by the International Court in a series of cases. In the *Libya/Malta* case, the

²⁷⁵ Australia/Papua New Guinea, Treaty concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, Sydney, 18 December 1978 (in force 15 February 1985); 1429 UNTS 207; 18 ILM 291.

²⁷⁶ Australia/Indonesia, Treaty establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries, 14 March 1997 (not yet in force), 36 ILM 1053. Article 7 provides for reconciliation of the rights of the two States in areas where rights in relation to the continental shelf and EEZ are diverse.

²⁷⁷ For the delimitation of the continental shelf in the Timor and Arafura seas, see Australia/Indonesia, Agreement establishing certain seabed boundaries (with charts), Canberra, 18 May 1971, 974 UNTS 307; Australia/Indonesia, Agreement establishing seabed boundaries in the area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 (with chart), Jakarta, 9 October 1972, 974 UNTS 319. The "Timor Gap" treaty (Australia/Indonesia, Treaty on the zone of cooperation in an area between the Indonesian province of East Timor and Northern Australia (with annexes), Timor Sea, 11 December 1989, 1654 UNTS 105), provided for a zone of cooperation where exploration for, and exploitation of, petroleum resources would be carried out jointly, and two other areas where each side would share in the revenue from such activities. Under an exchange of notes between Australia and the United Nations Transitional Administration (UNTAET), UNTAET on behalf of East Timor assumed all rights and obligations previously exercised by Indonesia under the Timor Gap Treaty on behalf of East Timor, retroactively to 25 October 1999 until independence: Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the [Timor Gap Treaty], Dili, 10 February 2000, [2000] ATS 9; UNTS, vol. 2105; see also the Memorandum of Understanding, Dili, 10 February 2000, *ibid.* Following independence, East Timor and Australia entered into an agreement (Australia/East Timor, Timor Sea Treaty, Dili, 20 May 2002; [2003] ATS 13) providing for a "Joint Petroleum Development Area" and sharing of production. By Article 2, the agreement was expressly without prejudice to the continental shelf boundary.

²⁷⁸ Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to the Maritime Delimitation between the Faroe Islands and the United Kingdom, 18 May 1999 (Cm 4373).

Court acknowledged that “the two institutions – continental shelf and exclusive economic zone – are linked together in modern law”, but expressly denied “that the concept of the continental shelf has been absorbed by that of the exclusive economic zone”.²⁷⁹ It went on to say:

“Although the institutions of the continental shelf and the exclusive economic zone are different and distinct, the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the régime laid down for the continental shelf. Although there can be continental shelf where there is no exclusive economic zone, there cannot be an exclusive economic zone without a corresponding continental shelf.”²⁸⁰

The Court was not concerned in *Libya/Malta* with the coexistence of continental shelf rights based on natural prolongation beyond 200 n.m. from the coast of State A and the EEZ rights of State B. Nonetheless the Court clearly affirmed that “the institutions of the continental shelf and the exclusive economic zone are different and distinct”.

283 In the *Jan Mayen* case, the Court rejected a Danish contention that its function in delimiting maritime zones between opposite coasts less than 400 n.m. apart was necessarily to draw a single line. Instead it examined “separately the two strands of applicable law: the effect of Article 6 of the 1958 Convention applicable to the delimitation of the continental shelf boundary, and then the effect of the customary law which governs the fishery zone”.²⁸¹ It concluded that its proposed line constituted “in the circumstances of the case, a proper application *both* of the law applicable to the continental shelf and of that applicable to the fishery zones”.²⁸² In effect this amounted to an endorsement of the Norwegian thesis of two coincident lines.²⁸³ Neither party had argued that there was any feature which might distinguish the delimitation of the continental shelf from that of the fishery zones.

284 The matter was discussed in some detail by the Court in the *Qatar-Bahrain* case. There both parties sought a single maritime boundary (in respect of a confined area within the Gulf), and the Court had no difficulty in complying. But it was careful to point out that:

²⁷⁹ ICJ Reports 1985 p. 13 at p. 33, para. 33.

²⁸⁰ *Ibid.*, p. 33, para. 34.

²⁸¹ ICJ Reports 1993 p. 38 at p. 58, para. 44.

²⁸² *Ibid.*, p. 79, para. 90 (emphasis added).

²⁸³ *Ibid.*, pp. 56-7, para. 41.

“169. It should be kept in mind that the concept of ‘single maritime boundary’ may encompass a number of functions. In the present case the single maritime boundary will be the result of the delimitation of various jurisdictions. In the southern part of the delimitation area, which is situated where the coasts of the Parties are opposite to each other, the distance between these coasts is nowhere more than 24 nautical miles. The boundary the Court is expected to draw will, therefore, delimit exclusively their territorial seas...

170. More to the north, however, where the coasts of the two States are no longer opposite to each other but are rather comparable to adjacent coasts, the delimitation to be carried out will be one between the continental shelf and exclusive economic zone belonging to each of the Parties, areas in which States have only sovereign rights and functional jurisdiction. Thus both Parties have differentiated between a southern and a northern sector.

...

173. The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various—partially coincident—zones of maritime jurisdiction appertaining to them...”²⁸⁴

There was no question in that case of an extended continental shelf beyond 200 n.m., but the Court was nonetheless careful to distinguish between the “partially coincident” zones in question, and to preserve their specific characteristics. In particular the single maritime boundary was treated as a manifestation of the “wish” of the States concerned and not as a distinct legal institution, whether as a matter of treaty or general international law.

285 To summarize, under the 1982 Convention the continental shelf remains a distinct institution, and EEZ rights are exercisable subject to valid claims to the outer continental shelf. This legal situation is expressly recognized by Article 56(3) of the Convention.

286 It follows from these considerations that beyond 200 n.m. from the coastline eastwards of Trinidad and Tobago and Barbados, and within 200 n.m. of Barbados, Barbados has EEZ rights and both Parties have overlapping continental shelf claims which the present Tribunal is called on to delimit.

²⁸⁴ Judgment of 16 March 2001, paras. 169-70, 173-4.

(3) The course of the delimitation beyond 200 n.m.

287 In the *Newfoundland/Nova Scotia* case, a domestic tribunal was called on to apply international law to delimit continental shelf areas beyond 200 n.m.²⁸⁵ There the Tribunal said:

“Newfoundland and Labrador did, however, argue that, in determining the relevant area for the purposes of delimitation and in making any proportionality calculation, the Tribunal should ignore areas beyond 200 nautical miles. The essential reason was that under Article 76 the extent of such areas depends on geomorphological considerations, so that areas off the same stretch of coast may vary in ways that have nothing to do with coastal geography. Indeed, as can be seen from *Figure 3*, the outer continental shelf is considerably broader off the coast of Newfoundland than it is further south, off Nova Scotia. If exact measures of proportionality are to determine continental shelf delimitation, it was argued that differential breadths of outer continental shelf would be decisive. This, it was said, would be inequitable to ‘broad shelf’ coasts such as Newfoundland’s.

The Tribunal does not accept this argument for a number of reasons. One is that Article 6 in its inception applied to a continental shelf seen as a function of geomorphology, not distance; yet the drafters clearly considered that Article 6 could be applied to delimitations throughout the whole extent of a broad margin. In 1958 it would have been anachronistic to use a 200 nautical mile limit in the application of Article 6. Another reason is that the existence of a ‘disproportionately’ narrow or broad outer continental shelf could presumably be a special or relevant circumstance in a delimitation. But the main point is simply that Newfoundland and Labrador’s argument implies equating equitableness with a mathematical proportionality test – and indeed its construction of its claim line appeared to depend on high levels of mathematical concordance between ratios of coastal lengths and maritime areas. For reasons that will be explained below, the Tribunal does not accept that the criterion of general proportionality is to be applied in this rigid way, if it is applied at all.”²⁸⁶

The Tribunal delimited a line as between the two Provinces “to the point where the delimitation line intersects the outer limit of the continental margin of Canada as it may be determined in accordance with international law”.²⁸⁷

²⁸⁵ *Newfoundland-Nova Scotia*, Award of the Tribunal in the Second Phase, Ottawa, 26 March 2002, available at <http://www.boundary-dispute.ca>.

²⁸⁶ *Ibid.*, paras. 2.33-2.34.

²⁸⁷ *Ibid.*, para. 6.4 and for the actual line, *ibid.*, p. 96, Figure 8.

288 Likewise in the present case the proper course for the Tribunal is to continue the adjusted line drawn from Point A along the azimuth of 88° out to the outer edge of the continental margin as defined in Article 76, leaving the precise location of that outer limit to be determined, in due course, by the Commission on the Limits of the Continental Shelf.²⁸⁸

E. Conclusion

289 The result is the claim line shown on **Figure 7.5**. It can be described precisely as follows:

To the west of Point A, located at 11° 45.80'N, 59° 14.94'W,²⁸⁹ the proposed delimitation line follows the median line²⁹⁰ between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines

From Point A eastwards, the proposed delimitation line is a loxodrome with an azimuth of 88° extending to the outer limits of the jurisdiction of the two States in accordance with international law.

290 For the reasons given above, that claim line divides the area of overlapping EEZ and continental shelf claims of the Parties so as to achieve an equitable solution, as required by Articles 74 and 83 of the 1982 Convention.

²⁸⁸ See above, paras. 265-269.

²⁸⁹ The coordinates of Point A are related to WSG 84 and are quoted to 0.01 of a minute.

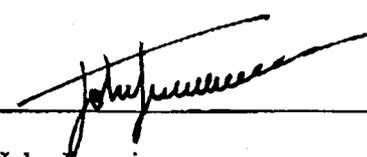
²⁹⁰ The cartographic expert for Trinidad and Tobago has had initial and useful discussions with his Barbados counterpart with a view to presenting the Tribunal with an agreed list of coordinates for the median line and only minor differences remain. However, by letter of 24 March 2005, the Co-Agent of Barbados put a stop to these efforts and stated that the coordinates should instead be the subject of submissions by the Parties.

SUBMISSIONS

For the reasons given above, and reserving the right to supplement these submissions in its Rejoinder, Trinidad and Tobago accordingly requests the Tribunal:

- (1) to decide that the Tribunal has no jurisdiction over Barbados' claim and/or that the claim is inadmissible;
- (2) to the extent that the Tribunal determines that it does have jurisdiction over Barbados' claim and that it is admissible, to reject the claim line of Barbados in its entirety;
- (3) to decide that the maritime boundary separating the respective jurisdictions of the parties is determined as follows:
 - (a) to the west of Point A, located at 11°45.80'N, 59°14.94'W, the delimitation line follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;
 - (b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88° extending to the outer limit of the EEZ of Trinidad and Tobago;
 - (c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

Signed _____


Senator John Jeremie
Agent for the Republic of Trinidad and Tobago

30 March 2005

APPENDIX A

BARBADOS' RECOGNITION THAT THE AREA IT NOW CLAIMS IN THE WESTERN SECTOR FALLS WITHIN THE EEZ OF TRINIDAD AND TOBAGO

291 As noted in Chapter 1 above, the purpose of this Appendix is to set out some of the many instances in the period prior to the inception of this arbitration where Barbados has recognised that the area that it now claims to the south of the equidistance line (in the Caribbean or western sector) falls within the EEZ of Trinidad and Tobago. The two principal areas for consideration are recognition in the context of exploration for hydrocarbons, and recognition in the context of exploitation of the flying fish fishery.

A. Exploration for Hydrocarbons

292 Barbados has never purported to claim rights to explore for hydrocarbons in the area that it now claims to the south of the equidistance line. To the contrary, it has expressly recognised that Trinidad and Tobago exercises jurisdiction over that area so far as concerns the exploitation of hydrocarbon resources.

293 Barbados exhibits to its Memorial a 1979 Licence granted by Barbados to Mobil Exploration Barbados Limited.²⁹¹ The Licence gives a right to "conduct a geological and geophysical examination over the entire Exclusive Economic Zone within the jurisdiction of the Island of Barbados (lying outside the seaward limit of the territorial waters of Barbados and extending to 200 miles or to the medium [sic] line between Barbados and any adjacent or opposite State)". This is consistent with Barbados' legislation, i.e., section 3(3) of the Maritime Boundaries and Jurisdiction Act 1978.²⁹² It is inconsistent with any claim to an EEZ beyond the equidistance line.

294 Recognition was even more clear in an exchange of correspondence over a series of seismic shoots to be carried out by a subsequent licensee of Barbados, CONOCO. As also appears from one of Barbados' own exhibits, on 28 May 1998, Barbados'

²⁹¹ Memorial of Barbados, App. 28, p. 318.

²⁹² See paras. 47 and 128 above.

Ministry of Finance and Economic Affairs approached Trinidad and Tobago's Ministry of Energy and Energy Industries with the following request:

"The Government of Barbados respectfully requests approval from the Ministry of Energy and Energy Industries of the Republic of Trinidad and Tobago to acquire approximately 250 km of regional two-dimensional seismic data. This seismic data is a small part of a programme which CONOCO is undertaking as part of their work obligation under an exploration license issued by the Government of Barbados to CONOCO.

The purpose of acquiring the data is to tie the seismic survey to existing Trinidad well control, there are currently no wells offshore Barbados. The proposed regional seismic programme is composed of two northwest-southeast oriented lines, one line is located north of Tobago (to tie the Maracas and Hibiscus wells) and the other is east of Tobago. A base map showing the lines located is included for your information.

The Government of Barbados understands that the [sic] contingent upon your approval, any data acquired in the areas under your jurisdiction, is the property of Trinidad and Tobago ..."²⁹³

295 The base map referred to appears opposite this page. It can readily be seen that the seismic line to the north of Tobago is in the area of Trinidad and Tobago's EEZ to the south of the equidistance line that is now claimed by Barbados. Yet, as of May 1998, Barbados was making an unambiguous statement that the relevant area was under the jurisdiction of Trinidad and Tobago.

296 Moreover, this is precisely how the request was understood. On 8 June 1998, Trinidad and Tobago's Ministry of Energy and Energy Industries responded as follows: "We have no objection to the acquisition of these two seismic lines (250 km) in the Exclusive Economic Zone of Trinidad and Tobago". The Ministry also established a series of conditions that formed part of its approval.²⁹⁴ Those conditions were subsequently accepted by Barbados (and by CONOCO).²⁹⁵ It is beyond question that Barbados considered it needed and was constrained by the approval of Trinidad and Tobago so far as concerned any incidental exploration activities that affected Trinidad and Tobago's EEZ.

²⁹³ Memorial of Barbados, App. 44A, p. 552A.

²⁹⁴ Annex Volume 3 No. 40.

²⁹⁵ See CONOCO letter of 27 April 1999 to Trinidad and Tobago's Ministry of Energy and Energy Industries, Annex Volume 3 No. 41.

B. Exploitation of Fisheries

297 The 1990 Fishing Agreement has already been considered in some detail in Chapters 2 and 3 above, and does not need to be dealt with in any detail here. It is nonetheless important to reiterate that, although there has thus far been no conclusion of a further bilateral fisheries agreement, Barbados' reiterated attempts to secure such an agreement since 1990 have all been predicated on its recognition of the same basic proposition: that Trinidad and Tobago exercises sovereignty over the area in which Barbados wishes to fish.

298 Thus Barbados' repeated call for a new bilateral fishing agreement, on the expiry of the 1990 Agreement and subsequently, represents a further important instance of recognition. Barbados' position in this respect was made clear to Trinidad and Tobago even prior to the expiry of the 1990 Fishing Agreement, for example, at the fifth meeting of the Barbados/Trinidad and Tobago Fisheries Commission held in October 1991.²⁹⁶ It is to be noted that the Chairman of the Commission, Barbados' Minister of Agriculture, Food and Fisheries, Mr Harris, listed a series of concerns reported at meetings held with Barbadian fishermen. These were:

- “(a) The high cost of the licence fee;
- (b) The desire for an extended fishing area;
- (c) The restrictiveness of the fishing schedule;
- (d) The limited number of licences issued;
- (e) The quantity of fish imported from Trinidad and Tobago;
- (f) Insistence that the above matters should be raised at the negotiations for a new Agreement.”²⁹⁷

299 What is absent here is any suggestion that the 1990 Fishing Agreement was concluded on a false assumption, i.e., that Trinidad and Tobago did not enjoy the authority of a coastal State over the fishing area in question.

300 At a high-level meeting in November 1991, Barbados' Minister of Agriculture, Food and Fisheries submitted Barbados' proposals for a new agreement. None of these

²⁹⁶ See Report of the fifth meeting of the Barbados/Trinidad and Tobago Fisheries Commission, 23-25 October 1991, Annex Volume 5 No.12.

²⁹⁷ Annex Volume 5 No. 12 p. 7.

proposals in any way touched on the essential tenet of the 1990 Fishing Agreement: that Barbados was being allowed access to Trinidad and Tobago's EEZ.²⁹⁸ Again at various times subsequent to 1991, Barbados sought the negotiation of a new agreement.²⁹⁹ On no occasion did Barbados seek to argue that the 1990 Agreement had been based on a false assumption. Further, it is evident that no such approaches would have been made at all had Barbados considered that the fishing area to the south of the equidistance line (in the western sector) was already within Barbados' EEZ. The same point may be made with respect to Barbados various proposals for the development of a programme of cooperation among CARICOM Member States in respect of access to their fisheries zones and management of their EEZs.³⁰⁰

301 Further, if it were correct that Barbadian fishermen exercised traditional fishing rights over the area now claimed by Barbados, one would have expected that Trinidad and Tobago's arrest of Barbadian vessels fishing in its EEZ would have been met by vigorous protest by Barbados and by its fishermen. But, on the contrary, Barbados has recognised that Trinidad and Tobago has such a right of arrest, i.e. that the waters in question appertain to Trinidad and Tobago, not to Barbados.

302 Consistent with its rights in its EEZ, Trinidad and Tobago has regularly arrested and prosecuted Barbadian vessels fishing illegally in the EEZ, although it has exercised its rights of arrest and prosecution with a restraint that reflects the general good relations between the two States.³⁰¹ So far as concerns its domestic legislation, the relevant powers are conferred by section 28 of Trinidad and Tobago's Archipelagic Waters and Exclusive Economic Zone Act 1986, which provides:

“28 (1) The persons required to in subsection (2) are empowered in the exercise of their official functions to –

- (a) stop and board, inspect, seize and detain a foreign fishing craft,
- (b) seize any fish and equipment found on board the foreign fishing craft, and

²⁹⁸ Annex Volume 3 No. 11 p. 4.

²⁹⁹ Annex Volume 3 No. 13, 19,21,23,24,28,33.

³⁰⁰ Barbados' first such proposal was made in 1987. Annex Volume 3 No. 6. Barbados' proposal was then put forward in a more developed form in 1993. Annex Volume 5 No. 15.

³⁰¹ Barbados records the arrest of crews of 18 vessels in the period 1994-2004. Memorial of Barbados, para. 86 and App. 92. It is not, however, to be thought that arrests by Trinidad and Tobago only commenced in 1994. It is not known why Barbados has chosen to start counting from 1994.

- (c) arrest the master and crew of any foreign fishing craft

in the exclusive economic zone, the territorial sea and the archipelagic waters, and may also institute such criminal proceedings against them, as may be necessary to ensure compliance with the Act and the Regulations.

- (2) The persons to whom subsection (1) applies are -
- (a) members of the Trinidad & Tobago Coast Guard;
 - (b) members of the Police Service;
 - (c) Fisheries Officers of the Ministry responsible for fisheries;
 - (d) Customs officers;
 - (e) the Harbour Master; and
 - (f) any other person authorised in writing by the Minister.”

303 When, pursuant to section 28 of the 1986 Act, Trinidad and Tobago resumed arrests for illegal fishing in its EEZ after the expiry of the 1990 Fishing Agreement,³⁰² the response of Barbados was not to protest, but rather to inform its fishermen by a Government Information Service press release of March 1992 (No. 177/92) that they should remain within the waters of Barbados and should not fish beyond the midpoint between Barbados and Trinidad and Tobago.³⁰³ As also recorded in March 1992 in Barbados' *Weekend Investigator*, the view of the Chief Fisheries Officer of Barbados was that “the fisherman's greatest defence against being arrested for illegal fishing is his log book ... that book would show the last position of the vessel”.³⁰⁴ In other words, far from asserting a right to fish in Trinidad and Tobago's EEZ, the view of the Chief Fisheries Officer was that such fishing had to be avoided if a vessel wished to fish legally.

304 It appears from the same article that this position was readily understood by Barbadian fishermen. One Barbadian “veteran boat owner” is quoted as saying:

³⁰² See, for example, the arrest of “King's Ark” on 16 March 1992. Hammond King (the Captain) and Peter Knight were each fined TT\$5,000. The fines were paid immediately. Report of the Fisheries Officer of the Tobago House of Assembly, 31 March 1992. Annex Volume 3 No. 16.

³⁰³ See Diplomatic Note No. 266 of Trinidad and Tobago, dated 27 March 1992, sent in response to this press release. Trinidad and Tobago's position was that a principle of equidistance would apply only where there was express agreement between the States. Annex Volume 3 No. 15 In its response of 1 April 1992, Barbados appeared to accept this position, albeit that it then relied on section 3(3) of its Maritime Boundaries and Jurisdiction Act 1978 and the provision there that, where there is no agreement on delimitation, the outer boundary limit of Barbados' EEZ shall be the median line. Annex Volume 3 No. 18.

³⁰⁴ See *Weekend Investigator*, March 1992, Annex Volume 5 No. 14.

“We can’t blame the Trinidad and Tobago authorities for arresting our fishermen when they fish illegally, they [the Trinidadians] are looking after their fishermen’s interests.”³⁰⁵

305 In fact, where Barbadian fishermen have been charged with fishing illegally in Trinidad and Tobago’s EEZ, they have almost always pleaded guilty to the offence. Of course their conduct is not attributable to Barbados – but the fact remains that at no time has Barbados suggested that these arrests took place other than in Trinidad and Tobago waters.

306 Barbados maintains that the arrests since 1994 have been made the subject of protest by Barbados. Yet the one document that Barbados exhibits in support of this contention, a Diplomatic Note of 13 April 1994, contains no such protest.³⁰⁶ To the contrary, by this Diplomatic Note, Barbados expressed its concern at the *severity* of the measure taken by Trinidad and Tobago following the arrest of two Barbadian vessels, namely the forfeiture of the vessels.³⁰⁷ In no sense did Barbados suggest that the arrest of the vessels and the trial of the Barbadian nationals concerned were not within Trinidad and Tobago’s rights. The Diplomatic Note reads:

“The High Commission of Barbados ... has the honour to refer to reports of the forfeiture of two Barbadian owned fishing boats by the authorities of Trinidad and Tobago. The High Commission *wishes to express its concern at the severity of this measure and wishes to open dialogue as a matter of urgency with a view to resolving this and other related issues.* Meanwhile the High Commission would appreciate receiving a full report of the arrest and trial of the Barbadian nationals.”³⁰⁸

³⁰⁵ See *Weekend Investigator*, March 1992, Annex Volume 5 No. 14. It is to be noted that, following the arrest of his vessel “King’s Ark” on 16 March 1992, Hammond King (the Captain) not only promptly paid the fine imposed but also wrote to the Fisheries Department in Tobago in the following terms: “Dear Sir, This is just a short note to say thank you to you and your staff for all your kindness and courtesies extended to me and my crew during the recent arrest of my boat “King’s Ark” and crew in Tobago. Thank you again for your cooperation. Yours respectfully, Hammond King.” Letter of 31 March 1992. Annex Volume 3 No. 17.

³⁰⁶ Memorial of Barbados, App. 44, p. 552.

³⁰⁷ The arrests took place on 8 April 1994. On 6 April 1994, Trinidad and Tobago’s Ministry of Foreign Affairs had informed Barbados’ Ministry of Foreign Affairs that fishermen from Barbados were fishing in large numbers off the coast of Tobago and that increased surveillance measures had been put in place. Annex Volume 3 No. 26.

³⁰⁸ Memorial of Barbados, App. 44, p. 552; Annex Volume 3 No. 27 (emphasis added). See, to similar effect, Barbados’ Diplomatic Note 3701 of 21 November 1997. Annex Volume 3 No. 35.

307 At the same time as making this enquiry, Barbados' Ministry of Agriculture, Food and Fisheries was warning Barbadian fishermen that they "should not fish beyond the point midway between Barbados and Trinidad and Tobago".³⁰⁹

308 Barbados consistently accepted that Trinidad and Tobago was acting within its rights in arresting the vessels, even so far as concerned their forfeiture. Thus, it is recorded in the report of the meeting between Trinidad and Tobago's Minister of Foreign Affairs, Mr Maraj, and the High Commissioner for Barbados, Mr da Silva, held on 27 April 1994 to discuss these and other arrests:

"2. The Minister exchanged pleasantries with the High Commissioner who then proceeded to state that the purpose of his visit was to mediate with a view to securing the release of the four Barbadian fishing boats which have been arrested. *He added that while the majority of Barbadians agree that the fishermen were properly fined there was concern, in the context of friendly relations between the two countries, about the forfeiture of the boats. ...*

3. *The High Commissioner conceded that it was legally permissible for the boats to be forfeited though his Government hoped that in the context of the Manning initiative and in the spirit of closer collaboration the boats would be released. ...*

4. The High Commissioner informed that if the matter were to be resolved along the lines proposed by the Government of Barbados *it would be on the clear understanding that Barbadian fishermen would stay clear off [sic] Trinidad and Tobago waters until a new fishing agreement entered into force. He expressed the hope that a new agreement could be negotiated and concluded next year.*"³¹⁰

309 The vessels were subsequently released (pursuant to a presidential pardon) in what Mr da Silva described as "an act of friendship".³¹¹ Apparently mindful of the understanding that Barbadian fishermen would now stay out of Trinidad and Tobago's EEZ, on 7 May 1994, Barbados' Ministry of Agriculture, Food and Fisheries, Mr Bowen warned that Barbadian fishermen should not fish in Trinidad and Tobago's

³⁰⁹ As reported in the Barbados Advocate on 11 April 1994. Annex Volume 5 No. 16. It is anyway evident that Barbadian fishermen were fishing in the territorial waters of Trinidad and Tobago (as opposed to the EEZ) to a far greater extent than Barbados allows for (cf. Memorial of Barbados, para. 86). Of nine Barbadian fishing vessels sighted in the period November 1991 to February 1992, all but three were within Trinidad and Tobago's territorial waters. Annex Volume 3 No. 14.

³¹⁰ Annex Volume 5 No. 17 (emphasis added).

³¹¹ As reported in the Barbados Advocate on 13 May 1994; Annex Volume 5 No. 19.

waters – even by accident – until a new fishing agreement was in place.³¹² All of this, of course, is completely inconsistent with the claim that Barbados was protesting against the arrests. It is also completely inconsistent with the claim that the waters were considered to appertain to Barbados.

310 It is certainly true that the arrest of Barbadian vessels has become a political issue. Barbados has, for example, expressed a sentiment of unfairness as to business enterprises of Trinidad and Tobago having access to the markets of Barbados, whilst the fishermen of Barbados have not had free access to Trinidad and Tobago's EEZ. However, such statements are once again predicated on a recognition of Trinidad and Tobago's rights over its own EEZ. Thus in a speech of 4 December 1999, the Barbadian Prime Minister, Mr Arthur, expressed his concern as to "the arrest of Barbadian fishermen for fishing illegally in Trinidadian waters", stating:

"The same logic that says that Barbados should open its market to Trinidadian goods, in the spirit of a commitment to regionalism, is the same logic that says that a Barbadian fisherman should be afforded access to *Trinidadian waters*, without fear nor the thought of arrest."³¹³

311 This is a broad political argument, not a legal one – and certainly not an argument for a Barbadian EEZ off Tobago. Indeed, even where more recently Barbados has protested against arrests, this has not been on the basis that such arrests were inconsistent with the sovereign rights of Barbados or the rights of its fishermen, but rather on the basis that the arrests were inconsistent with the good relations between the two States. Barbados has expressed the wish that there should be a moratorium on arrests pending the negotiation of a new bilateral fisheries agreement. Thus in a letter of 22 January 2003 from Prime Minister Arthur to Prime Minister Manning, Barbados' position was as follows:

³¹² As reported in the Barbadian Sunday Advocate, 8 May 1994; Annex Volume 5 No. 18. See also the Barbados Advocate of 11, 12 and 13 May 1994. Annex Volume 5 No. 19.

³¹³ Annex Volume 5 No. 22 pp. 14-15 (emphasis added). So far as concerns the press reporting of this speech, see The Express of 7 December 1999, Annex Volume 5 No. 23.

*“While I am very much aware that there appears to have been, in the past, a pattern of arrest and detention of Barbadian fisherfolk by the Trinidad and Tobago authorities at the start of the fishing season, I must confess at being both surprised and saddened that this state of affairs would persist under a new PNM Government under your able leadership. Such action is especially perplexing at a time when good faith efforts are underway to negotiate a bilateral fisheries agreement to manage and regulate access by Barbadian fishing boats, and when we have expressly requested that a moratorium on arrests be observed while the negotiations are in progress.”*³¹⁴

312 Trinidad and Tobago has treated Prime Minister Arthur’s comments with respect. It is a matter of real regret that, in circumstances where there has been no agreement on access to Trinidad and Tobago’s EEZ, Trinidad and Tobago has not been in a position to agree to any moratorium as this would simply remove the impetus towards reaching a binding agreement, and would also result in an unspecified period of unregulated fishing activity by the largest and most powerful fishing fleet in the region. For present purposes, however, the point is clear: Barbados has (prior to the inception of the current litigation) recognised Trinidad and Tobago’s rights of arrest and detention, while without a bilateral fisheries agreement there can be no lawful access by Barbadian fishermen into the EEZ of Trinidad and Tobago.

C. Conclusion

313 As the above instances demonstrate, the recognition of Trinidad and Tobago’s sovereign rights in the area now claimed by Barbados that is to be found in the 1990 Fishing Agreement was not the isolated and incidental event that Barbados currently seeks to portray. That recognition fits into a consistent pattern which denotes one simple fact: notwithstanding Barbados’ current claim, until the third round of maritime boundary negotiations, it was accepted and recognised by Barbados that, consistent with its own law, it had no claim beyond an equidistance line in the Caribbean or western sector.

³¹⁴ Annex Volume 3 No. 71 p. 2.

APPENDIX B

BARBADOS' CLAIM BASED ON THE "TRADITIONAL FLYING FISHERY"

A. Introduction

314 As noted in Chapter 1 above, the purpose of this Appendix B is to address the factual assertions underlying Barbados' claim based on the "traditional flying fishery", i.e. its claim that the western sector of an equidistance line should be adjusted "to take account of a special circumstance: the fact that Barbados fisherfolk have traditionally fished by artisanal methods in the waters off the northwest, north and northeast coasts of the island of Tobago".³¹⁵ For the reasons given in Chapters 2 and 6 above, there is no need for the Tribunal to determine whether this is or is not "fact". As a matter of law, Barbados' assertion is essentially irrelevant. Further, as a result of the undisputed conduct of Barbados, e.g. in its recognition of Trinidad and Tobago's EEZ by the conclusion of the 1990 Agreement, the Tribunal need look no further into issues of disputed fact.

315 It is for the sake of completeness that, in this Appendix, Trinidad and Tobago establishes that Barbados' so-called "traditional fishing by artisanal methods" off Tobago is an invention of recent origin aimed at bolstering Barbados' position in the maritime delimitation negotiations.³¹⁶ Wherever possible, in the discussion below, Trinidad and Tobago refers to the materials annexed by Barbados to its Memorial or to other materials of Barbadian origin. These materials establish one inescapable fact: Barbadian fishermen have been fishing in the waters now claimed by Barbados only since the late 1970s. There was no Barbadian fishing in the waters off Tobago before then. The reason is simple: before the late 1970s Barbadian flying fish fishermen did not have the long-range boats and other equipment to enable them to fish in the area now claimed by Barbados, i.e. in an area from (approximately) 58 to 147 n.m. off the coast of Barbados.

³¹⁵ Memorial of Barbados, para. 7.

³¹⁶ See Chapter 2 above.

B. Evidence of the “traditional flying fishery”

316 Barbados boldly asserts that “there can be no doubt that fishermen from Barbados have fished off Tobago for centuries”. It also states that “there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century”.³¹⁷ The latter statement is true; indeed, it is an understatement. There is no credible evidence of any kind, direct or indirect, for the proposition that Barbadian fishing boats fished the territorial sea or high seas off Tobago at any of these times. It is true that Barbados goes on to rely on the witness statements of various Barbadian fishermen who are, it appears, to be taken as able to testify reliably to events that took place before they were born. But it would be unusual for an international tribunal (or a municipal court) to place any weight on self-serving hearsay and multiple hearsay evidence that is uncorroborated (and is admitted to be uncorroborated) by *any* contemporaneous documentary evidence.³¹⁸

317 But there is no need for the Tribunal to dwell on Barbados’ after-the-event evidence of interested individuals. There is ample contemporaneous and other documentary evidence to show that fishermen from Barbados have *not* been fishing off Tobago for centuries, or at all, until the acquisition of ice-boats and other equipment in the late 1970s.

(1) Barbados’ own evidence from the early 19th century to the mid-20th century period shows that there was no Barbadian fishing for flying fish off Tobago

318 So far as concerns the alleged dearth of direct evidence in the period from the early 19th century to the mid-20th century, the few documents that Barbados does exhibit from this period show that – as would be expected given the boats and equipment available – Barbadian fishermen of that period were fishing for flying fish only off the coast of Barbados.

³¹⁷ Memorial of Barbados, para. 58.

³¹⁸ By way of example, Barbados relies on the witness evidence of Dennis Robinson, a Barbadian fisherman, who says at paragraph 3 of his statement: “People have fished off Tobago since before I was born and those born before me talk about it, so before they were born too.” Memorial of Barbados, App. 75. See also the witness evidence of Joseph Knight, who says at paragraph 6 of his statement: “At certain times of the year the fish near Tobago is very plentiful. I have been fishing there for all of my life. As far as I know from stories I hear from fisherfolk, this has always been the way for Barbadian fisherfolk.” Memorial of Barbados, App. 70. These are indeed “fishermen’s tales”, full of retrospective hope rather than current substance.

- (1) According to Appendix 20 to Barbados' Memorial, which is an extract from a newspaper report of 1894:

“Barbados ... is one of the favourite haunts of the flying fish. Its steep shore line afford the blue depths which the flying fish loves and permit it to range very near to land. *Thus the fishermen rarely go more than 10 or 12 miles from home.*”³¹⁹

- (2) According to Appendix 21 to Barbados' Memorial, which is an extract from “Tropical Reminiscences” (1909) by John Bezsins Tyne:

“Quite a fleet of these [Barbadian] fishing smacks, sloop and schooner rigged, may be seen any morning of the earlier months of the year, sailing away from the land [Barbados] in various directions *towards the “flying fish ground”; an indefinite term that might mean five, or fifteen miles at sea, as the boats cruise around, always keeping in sight of the island, until a shoal of fish is discovered.*”³²⁰

- (3) It is recorded in Appendix 22 to Barbados' Memorial, which is an extract from “The Yarn of a Yankee Privateer” (1926) edited by Nathaniel Hawthorne:

“I saw very few fish, with the exception of flying fish, and one could hardly escape the sight of them anywhere. *They were caught in abundance all around the Island [Barbados]*”³²¹

- (4) Although Barbados never addresses the issue of how its “traditional fisherfolk” would get to the waters off Tobago in their small sailing craft, it is evidently aware of the need for an explanation for how fish were kept fresh on the return leg to Barbados (prior to the late 1970s, when fishing with the so-called ice-boats commenced). Barbados explains that, before the 1970s, “Barbadians fishing off Tobago used other preservation methods to transport their catches home, such as salting and pickling”.³²² The sole document submitted in support of that assertion states as follows:

³¹⁹ Memorial of Barbados, App. 20, p. 191 (emphasis added).

³²⁰ Memorial of Barbados, App. 21, p. 197 (emphasis added).

³²¹ Memorial of Barbados, App. 22, p. 227 (emphasis added).

³²² Memorial of Barbados, para. 65.

“The [flying] fish is about the size of a herring. *They are caught, in great numbers, near Barbadoes [sic], where they are pickled, and salted, and used as a very common food.*”³²³

Thus, the one document on which Barbados relies to show on board salting and pickling by Barbadian fishermen in fact shows that: (i) consistent with the other accounts of the period referred to above, the fishing for flying fish took place near Barbados, and (ii) the salting and pickling took place on shore, not on board the fishing vessels.

319 What is striking is that Barbados has elected not to refer to obvious contemporaneous sources that show that in the mid-20th century period there was no Barbadian fishing for flying fish off Tobago. In a regularly cited report of June 1942 by Herbert Brown, “The Sea Fisheries of Barbados” (“Report to the Comptroller for Development and Welfare in the West Indies by the Director of Fisheries Investigation”), it is recorded:

“The dominant fishery is for flying fish, conducted from small locally built sailboats of an excellent sea going model. These boats also troll. They average 23 feet in length and six feet in draft, *and operate in deep water within five miles of the land. No motors, live wells, or ice boxes are used.*”³²⁴

320 Brown recommended that the flying fish fishery should be developed, including the “exploration of a wide area of sea for flying fish”.³²⁵ Interestingly, he also observed:

“... it is possible that the zone of greatest abundance of flying fish has moved in recent years beyond the narrow range of the existing flying fish boats. Survey by a vessel using commercial fishery methods over a wider area is necessary, especially in the areas between Barbados and Tobago. Development along these lines would require iced storage at sea and probably power.”³²⁶

321 As will be seen, this is precisely how Barbados’ flying fish fishery developed, although not until the late 1970s.

322 There is further useful contemporaneous documentary evidence in the form of two memoranda on Barbadian fishing prepared by British governmental officials in 1954, which show that although motorisation was just being introduced 12 years after

³²³ Memorial of Barbados, App. 16, p. 160 (emphasis added).

³²⁴ Annex Volume 5 No. 1 p. 2 (emphasis added).

³²⁵ Annex Volume 5 No. 1 p. 3.

³²⁶ Annex Volume 5 No. 1 p. 8.

Brown's report, fishing for flying fish remained within short distances of the Barbadian shore.

323 The first memorandum, "The Fisheries of Barbados", was prepared by Dr Hickling, the Fisheries Advisor to the Secretary of State, seemingly in 1954.³²⁷ This records how motorised boats were then being introduced, in part as a result of the destruction of many sailing boats in severe storms in 1951-1953. There is reference to the possibility of very considerable expansion in the fishery for flying fish, but there is (as could only be expected) no mention whatsoever of fishing off Tobago. There is also a discussion of the short term preservation of fish onshore, from which it appears clearly that fish were not being salted and pickled onboard as Barbados now claims.

324 In the longer and more detailed "Memorandum on the Barbados Fishing Industry for consideration by the Marketing Committee", prepared in September 1954 by W. V. Rose, Deputy Director of Agriculture, there is again no suggestion that fishing off Tobago was taking place, or that it could take place, still less that there was any "traditional right" to a high seas fishery more than 3 miles off Tobago (a completely abstract and indeed incomprehensible proposition in terms of the British understanding of the law of the sea at the time).³²⁸ There is an outline of the typical "fisherman's day", recording: "During the fishing season, (November to June), boats leave the shore at about 4 a.m. in order to reach the fishing grounds by 6.30-7. a.m."; and also that the boats started for home at around 11 a.m. or around 1 p.m., depending on the time of year.³²⁹ It is once again evident that the fishing was, and could only be, within short distances of Barbados. There is no suggestion that longer trips were taking place. The whole assumption and basis of the Memorandum is that of a local fishery, and the issue is not one of capacity or entitlement to catch fish but of the ability to preserve and market the catch.

(2) The development of the Barbadian flying fish fleet

325 Thus, it can readily be established that flying fish fishermen from Barbados have not been fishing off Tobago for centuries, because they had no means of doing so. The vessels to enable Barbadian flying fish fishermen to fish off Tobago were not

³²⁷ Annex Volume 5 No. 2

³²⁸ Annex Volume 5 No. 3.

³²⁹ Annex Volume 5 No. 3 p. 3-4.

introduced until the late 1970s. This may be established further by reference to two papers produced by experts in Barbados: “Developments in the Flying Fish Fishery of Barbados” (2001) by Christopher Parker of Barbados’ Ministry of Agriculture and Rural Development, Fisheries Division, and “The Economics of Boat Size in the Barbados Pelagic Fishery” (1989) by Wayne Hunte and Hazel Oxenford of the University of West Indies, Barbados.³³⁰ Both Christopher Parker and Hazel Oxenford were part of Barbados’ team on the Technical Working Group established as part of the negotiations aimed at the conclusion of a further bilateral fisheries agreement.³³¹ Both the papers considered below were produced long before the commencement of this litigation (and before the establishment of the Technical Working Group).

326 For the purposes of the following discussion, it is recalled that the area that Barbados claims by reference to the “traditional flying fishery” is, at its closest point, approximately 58 miles from Barbados and, at its furthest point, approximately 147 miles from Barbados.

327 According to Christopher Parker’s paper “Developments in the Flying Fish Fishery of Barbados”:

- (1) So far as concerns the fishing range of Barbadian vessels used to catch flying fish in the first half of the 20th century:

“The vessels used in the flying fish fishery during the first half of the century were small open sail boats ranging in size between 18’ to 25’, overall length, 6-8’ maximum width and with draughts of up to 6’ (Brown 1942; Bair, 1969) or 4’ 6” according to Rose (1954). ... The boats had to be manned by a crew of three, and could reach a maximum speed of 4.3 mph (Bair, 1962). The boats carried no ice onboard to preserve the catch thus the time between taking the fish onboard and returning to sell them was limited. The difficulty in manoeuvring and the comparatively slow speed of the vessels together *effectively narrowed the fishing range to within approximately 4-5 miles from shore* (Brown 1942; Bair, 1969, Willoughby, 1993).”³³²

³³⁰ Annex Volume 5 No. 11 and No. 24.

³³¹ See para. 82 above. Hunte and Oxenford are of course also experts instructed by Barbados as part of this litigation. See their report (with Mahon) at Memorial of Barbados, App. 88.

³³² Annex Volume 5 No. 24 p. 3 (emphasis added). It is presumably not Barbados’ case that the vessels used in the 19th century were more advanced and had a significantly longer range than those used in the early 20th century.

This is consistent with the documentary material annexed at Appendices 16 and 20-22 of Barbados' Memorial, and inconsistent with the claims to historic fishing off Tobago made in the text of Barbados' Memorial. It would have taken these sailing boats – sailing at their maximum speed – more than 13 hours just to reach the area now claimed by Barbados (which, at its closest point, is approximately 58 miles from Barbados).

- (2) So far as concerns the fishing range of Barbadian vessels used to catch flying fish in the 1950s and 1960s:

*“The conversion of the fishing fleet from sail to motor power started in earnest during the latter part of the 1950s ... The dimensions of the motorised pelagic fishing vessel hulls of the 1950s through the early 1960s were appreciably larger than the sailboat hulls ... They were powered by 10 to 36 H.P. engines and travelled at speeds of around 7.5 knots. ... the potential fishing range of even the lowest powered (10 H.P.) vessels was extended to about 12 miles from shore (Berkes, 1987). However, the vessels were still constrained to fishing trips of less than one day in duration, which caused them to be known as day-boats.”*³³³

Given their short range, the so-called day-boats evidently could not be used to fish in an area that, at its closest point, is approximately 58 miles from Barbados (at a speed of 7.5 knots, it would take almost 7 hours just to reach that point).

- (3) So far as concerns the fishing range of Barbadian vessels used to catch flying fish in the 1970s:

“In the 1970s 80-180 H.P. engines became common allowing a further extension of the fishing range to 40 miles from shore (Berkes, 1987) but these vessels generally fished within 30 nautical miles from shore (FAO/IC, 1982). In 1982, day-boats ranged between 6m to 12m, overall length and carried 50 to

³³³ Annex Volume 5 No 24 p. 4 (emphasis added). Barbados relies on the fact that, in 1962, Barbadian fishermen introduced a technique for catching flying fish to Tobago as evidence that Barbadians were then fishing offshore of Tobago. Memorial of Barbados, para. 61, App. 25 at 277 and App. 41 at p. 468. In fact, all this evidence shows is that, in 1962, two Barbadian fishermen moved to Tobago where they were employed on a vessel owned by two Tobagan residents. These two Barbadian fishermen were subsequently married in Tobago (to Tobagans). It appears that they employed various new techniques on the Tobagan vessel and passed onto their spouses the technique for de-boning flying fish. Memorial of Barbados, App. 25 at 277. These esoteric facts are of no relevance whatsoever to the question of where fishermen in Barbados were fishing in the 1960s.

200 H.P. engines enabling them to travel at speeds of between 10-13 knots (FAO/IC, 1982).”³³⁴

- (4) So far as concerns the fishing range of the more modern Barbadian vessels – the so called ice-boats – introduced in the late 1970s:

“The most recent, significant development in the Barbadian pelagic fleet is the introduction of on-board ice-holds. These boats are commonly referred to as ‘ice-boats’. ... The first ice-boat to enter the local fleet was a converted 10m day-boat equipped with a small ice-hold. Ironically, it met with little financial success ... *It was not until 1978 that the first truly commercial ice-boat entered the fleet (McConney, 1987).*

The increased efficiency of the ice-boat is a product of ability to stay at sea fishing for longer periods (up to around two weeks) *and to fish further from Barbados* in areas of potentially higher fish densities without fear of the catch spoiling. ... The perceived economic advantages of ice-boats over day-boats ushered in the predictable switching from day-boats to iceboats in the pelagic fishing fleet that has been occurring from the late 1970s to the present.”³³⁵

- 328 Thus it was only with the introduction of the ice-boats, i.e. from the late 1970s, that Barbadian fishermen had the means to fish in the area now claimed by Barbados. This also appears from the reports of Barbadian fishermen as recorded in the 2001 paper of Christopher Parker.

“Based on the interviews of ocean pelagic fishing boat captains conducted specifically for this report, the mean maximum distances from shore for the main classes of vessels involved in the flying fish fishery are approximately as follows:

Class 2 day-boat	–	18 miles
Class 2 ice-boat	–	121 miles
Class 3 ice-boat	–	190 miles.” ³³⁶

- 329 The Hunte/Oxenford paper on “The Economics of Boat Size in the Barbados Pelagic Fishery” highlights the dramatic impact of the introduction of ice-boats into the Barbadian fleet.

³³⁴ Annex Volume 5 No. 24 p. 4.

³³⁵ Annex Volume 5 No. 24 p. 4.

³³⁶ *Ibid.*, p.12.

“Between 1978 and 1980 two long range vessels (ice-boats) of 8 to 10 ton capacity were introduced into the Barbados pelagic fleet, and by 1984 there were 34 in operation. Fifty nine ice-boats are presently fishing and 75 are registered for the 1986/1987 fishing season. ... *These ice-boats employ the same fishing techniques for catching large pelagics and flying fish as the day-boats, but often fish 24 hours a day and fish further afield; primarily in the triangle between Tobago, Grenada and Barbados.* This current change from day-boats to ice-boats represents the second major structural transition undergone by the Barbados pelagic fleet. ...³³⁷

Most countries in the eastern Caribbean are presently expanding or intend to expand their oceanic pelagic fishing fleets, primarily by increasing fleet size but also by changing boat type (Hunte, 1985). *Thus the fisheries are moving from ‘small scale artisanal’ to ‘large scale commercial’ operations,* with considerably more capital being invested in the fleets than in the past. Large scale commercial fisheries catch more fish, but they do so at a price. Compared with small scale artisanal fisheries, they employ far fewer fishermen, the capital cost of each job on a fishing vessel is far greater, considerably more fuel is consumed overall, and typically, fewer fish are harvested per ton of fuel consumed (Thomsom, 1980).³³⁸

330 Hunte and Oxenford suggested that it could be unwise to continue the rapid expansion of the Barbadian ice-boat fleet.³³⁹ Nonetheless, according to Barbados’ Memorial, there are now approximately 190 ice-boats in Barbados.³⁴⁰ It therefore appears unsurprising that, as part of its Flying Fish Implementation Plan for the period 2001-2003, Barbados planned to “Negotiate fishing access agreements with neighbouring states for areas where fishes are abundant”.³⁴¹

331 The Parker and Hunte/Oxenford papers are supported by other scientific papers (including papers prepared by Barbados’ Ministry of Agriculture, Food and Fisheries) prepared long before the commencement of this litigation, including:

- (1) Bannerot and Harding, “Development of a New Long-Range Fishery for Flying Fish in the Southeastern Caribbean” (1986).³⁴² As recorded in the

³³⁷ The first major structural change being the change from sail to motorised vessels.

³³⁸ Annex Volume 5 No 11 p. 2.

³³⁹ Annex Volume 5 No. 11 p. 9. See also Hunte, Status of the Barbados Pelagic Fishery (1986), Annex Volume 5 No. 6, at pp. 27-30 and 32-34.

³⁴⁰ Memorial of Barbados, para. 65.

³⁴¹ See, Barbados Fisheries Management Plan, 2001-2003, Annex Volume 5 No. 25 at p. 52. This goal is expressed somewhat more cautiously in the Barbados Fisheries Management Plan, 2004-2006, which states: “Where necessary, negotiate fishing access agreements with neighbouring states.” Memorial of Barbados, App. 60, p. 731.

³⁴² Bannerot and Harding, “Development of a New Long-Range Fishery for Flying Fish in the Southeastern Caribbean” (1986).

abstract to this paper: “Barbadian commercial fishermen used sailboats until the mid-1950s when they converted to diesel-powered vessels. Flyingfish boats remained relatively small (less than 40ft. in length) and made exclusively one-day trips to fishing grounds within 40 miles of Barbados until the late 1970s.”

- (2) Hunte, Status of the Barbados Pelagic Fishery (1986).³⁴³
- (3) Calvin-Smith, Division of Marine Affairs, Trinidad and Tobago (1986).³⁴⁴
- (4) Willoughby, Ministry of Agriculture Food and Fisheries Barbados, Fisheries Division, “The Flyingfish Fishery of Barbados” in *Biology and Management Options for Flyingfish in the Eastern Caribbean*, ed. Oxenford et al (1992), confirming that ice-boats were only introduced in the late 1970s and that the range of modern day-boats is 8 to 46 km from Barbados.³⁴⁵

332 It is regrettable that Barbados has brought none of this material to the Tribunal’s attention. Barbados is invited to explain in its Reply precisely how, prior to the late 1970s, Barbadian fishermen fished for flying fish in the area now claimed by Barbados, including as to the types of vessels used and the means of preserving fish onboard.

(3) Barbados’ case on admissions by Trinidad and Tobago

333 Barbados claims that government ministers and officials of Trinidad and Tobago have recognised the traditional character of Barbadian fishing off Tobago.³⁴⁶ Two documents are offered in support. First, Barbados relies on a statement by Trinidad and Tobago’s Minister of External Affairs and International Trade, made at the signature of the 1990 Fishing Agreement, which recognises that Barbadian fishermen had been fishing off Tobago prior to 1986.³⁴⁷ This is scarcely surprising: such fishing

³⁴³ Hunte, Status of the Barbados Pelagic Fishery (1986), Annex Volume 5 No. 7 at pp. 2-4.

³⁴⁴ Calvin-Smith, Division of Marine Affairs, Trinidad and Tobago (1986), Annex Volume 5 No. 8 at p. 4: “During the late seventies to early eighties Barbadian fishermen began moderate fishing activities off Tobago.”

³⁴⁵ Willoughby, Ministry of Agriculture Food and Fisheries Barbados, Fisheries Division, “The Flyingfish Fishery of Barbados” in *Biology and Management Options for Flyingfish in the Eastern Caribbean*, ed. Oxenford et al, 1992, Annex Volume 5 No. 13 at p. 3.

³⁴⁶ Memorial of Barbados, para. 62.

³⁴⁷ Memorial of Barbados, para. 122 and App. 38.

had indeed commenced in the late 1970s. Second, Barbados relies on a statement in a paper by Trinidad and Tobago's Ministry of Agriculture, Land and Marine Resources, Fisheries Division, entitled "Trinidad and Tobago: Preliminary Reconstruction of Fisheries Catches and Fishing Effort, 1908-2002". This, unsurprisingly, does not focus on the so-called traditional fishing by Barbadian fishermen. Whilst there is a reference to boats from Barbados fishing in the EEZ of Trinidad and Tobago, this appears under the rubric "*Barbados semi-industrialised ice-boat fleet*".³⁴⁸ It is self-evidently not a recognition that the "fisherfolk" of Barbados have fished off Tobago for centuries.³⁴⁹

C. The Exploitation of Flying Fish in Trinidad and Tobago and Barbados

334 With a view to shoring up its claim (by reference to a distorted reading of the *Gulf of Maine* case), Barbados asserts that any failure to adjust the "provisional median line to the south to account for traditional artisanal fishing rights ... would entail catastrophic repercussions for the concerned segment of Barbados' population".³⁵⁰ Of course there is an immediate legal answer to this argument, which is that even significant distant-water dependence on a particular EEZ fishery would not give the distant water fishing State sovereign rights over the resource. The 1982 Convention specifically addresses the need to avoid economic dislocation in States whose nationals have habitually fished in the zone, without any suggestion that habitual fisheries by such States give them sovereign rights. This elementary legal point has been developed in Chapters 4 and 6 of this Counter-Memorial.³⁵¹

335 But quite apart from legal considerations, Barbados' argument fails *on the facts*. Barbados greatly exaggerates the economic importance to it of fishing for flying fish, while at the same time wrongly dismissing the significance of such fishing to Trinidad and Tobago. Again, a more balanced picture emerges from a close inspection of the documents that Barbados itself exhibits to its Memorial.

³⁴⁸ Memorial of Barbados, para. 123 and App. 58, at p. 659.

³⁴⁹ Cf. Memorial of Barbados, para. 7.

³⁵⁰ Memorial of Barbados, para. 138.

³⁵¹ There has been no articulation by any Barbadian or other authority that Barbadian fishermen had any preferential (still less exclusive) right to fish on the high seas. The entitlement to fish on the high seas was assumed and taken to be a common right of all, and not a traditional or any other specific right of Barbadians.

336 Whilst it is the case that, given that Barbadian fishermen now use more advanced equipment and fish in the Trinidad and Tobago EEZ, fish catches have increased in size and value, according to the FAO country profile for Barbados (one of Barbados' own documents), the contribution of *all* fisheries to Barbados' GDP was only about \$12 million, that is around 0.6% of GDP.³⁵² The figures for flying fish are evidently considerably lower, and the figures for flying fish catches from the area now claimed by Barbados would be lower still. (Barbados does not give this figure, which is the only one that would be relevant to a putative case based on "catastrophic repercussions".) It is unsurprising that, assertion and self-interested witness statements aside, Barbados has found it very difficult to portray the prospect of anything remotely approaching a catastrophe. Indeed, the country profile records that there are main-season gluts of flying fish in Barbados.³⁵³

337 The country profile also records that "overfishing [of flying fish] in years of low abundance could cause stock collapse",³⁵⁴ and it is the assessment of Barbados' own experts that under a precautionary management regime the stock should be considered as fully exploited at the present time.³⁵⁵ It is Barbados' case that its fishermen are merely following a defined route of seasonal flying fish movement between Barbados and Tobago.³⁵⁶ However, the existence and extent of any such pattern is uncertain. What is certain is the need for the proper management of the stock, which can be achieved for example through bilateral or regional fisheries agreements, but not where there is unregulated and illegal fishing by Barbadian fishermen in the EEZ of Trinidad and Tobago.

338 According to the 2000 FAO country profile for Trinidad and Tobago (again, one of Barbados' exhibits):

³⁵² Memorial of Barbados, App. 45, p. 555. These are the figures for 1998. It is not known whether Barbados has submitted more recent figures to the FAO.

³⁵³ Memorial of Barbados, App. 60, p. 729.

³⁵⁴ Memorial of Barbados, App. 60, p. 729.

³⁵⁵ See the draft Sub-Regional Fisheries Management Plan for Flyingfish in the Eastern Caribbean, prepared by Oxenford in September 2002 for the WECAFC Ad Hoc Flyingfish Working Group, Annex Volume 5 No. 27 p. 24, in addition to Oxenford at Memorial of Barbados, App. 88, p. 842. See, to similar effect, Parker, Preliminary Analysis of the Flyingfish Fishery of Barbados, Interim Recommendations (2002), Annex Volume 5 No. 26 p. 5.

³⁵⁶ Memorial of Barbados, paras. 7 and 67.

“Economic role of the fishing industry

Although it has not been fully quantified, the fishing industry plays a most important role in the economy of the country through direct and indirect employment ...”

“Development prospects

The artisanal inshore fishery sub-sector is considered to be overfished, thereby placing the resources under some threat. Development would therefore be focused on the resources offshore and in the Exclusive Economic Zone, especially for pelagics and deep sea demersal species.” ...

“The flying fish industry in Tobago has been developing over the past 10-15 years and has a good potential for growth...”³⁵⁷

- 339 Further, according to the paper by Samlalsingh et al, “The Flyingfish Fishery of Trinidad and Tobago” (1992) (one of Barbados’ exhibits), the flying fish fishery of Trinidad and Tobago is “of significant commercial importance”.³⁵⁸ As noted in a December 2000 report by Tobago’s Department of Marine Resources and Fisheries, “An Economic and Social Assessment of the Flyingfish (Pelagic) Fishery of Tobago, Trinidad and Tobago”, all coastal communities on the island depend greatly on the fishing fleet and their activities for daily sustenance, while the flying fish fishery accounts for about 70-90% of the total weight of pelagic landings at beaches on the leeward site of Tobago.³⁵⁹ This report also notes that the fishing grounds are located 5-30 n.m. from shore.³⁶⁰
- 340 The true position is that, in the past 35 years, Barbados has (notwithstanding some warnings that this was economically undesirable³⁶¹) greatly developed its flying fish fishing capabilities, whereas Trinidad and Tobago is still in the process of developing

³⁵⁷ Memorial of Barbados, App. 47, pp. 572-573 (bold as in the original). The country profile notes that Trinidad and Tobago’s offshore resources “are under some threat from illegal fishing”. Ibid. See, also, the paper by Hubert Wood “Two Case Histories of Successful Fisheries Development in Trinidad and Tobago”, cited at Memorial of Barbados, para. 72 as evidence that until the 1960s the flying fish fishery was non-existent in Trinidad and Tobago. Memorial of Barbados, App. 25, at p. 277. In fact, this paper describes the development of the flying fish fishery of Trinidad and Tobago as “a definite success story”. Ibid.

³⁵⁸ Memorial of Barbados, App. 41, p. 468.

³⁵⁹ Potts et al, Department of Marine Resources and Fisheries, Tobago, An Economic and Social Assessment of the Flyingfish (Pelagic) Fishery of Tobago, Trinidad and Tobago. Annex Volume 5 No. 28 p. 1. See also Mohammed, Fisheries Division, Ministry of Agriculture, Land and Marine Resources, Trinidad and Tobago, Investigations of Flying Fish Fishing Operations off Tobago (1997), Annex Volume 5 No. 21; Mohammed, A Preliminary Investigation of Fishing Operations and Flying Fish Fishery off Tobago (1988 to 1995), Annex Volume 5 No. 20.

³⁶⁰ Cf. Memorial of Barbados, para. 69, where Barbados asserts: “Such flyingfish as are caught by Tobagonians are largely fished close to shore.”

³⁶¹ E.g. Hunte and Oxenford, The Economics of Boat Size in the Barbados Pelagic Fishery, Annex Volume 5 No. 11; Hunte, Status of the Barbados Pelagic Fishery (1986), Annex Volume 5 No. 6 pp. 27-30 and 32-34.

its long term, sustainable exploitation of this resource.³⁶² Were Barbados to continue to be unwilling to negotiate a new fishing access agreement with Trinidad and Tobago, there might be some contraction of the Barbados' fleet. But insofar as there has been over-expansion, some contraction seems inevitable, but none of this points to a catastrophe.

D. Conclusions

341 The following conclusions may safely be drawn from the evidence, including that presented by Barbados:

- (1) Prior to the late 1970s, Barbadian fishermen had no capacity to fish, and did not fish, in the area now claimed by Barbados. Barbados' self-serving, hearsay witness evidence to the contrary should be rejected.
- (2) The introduction of the ice-boats from 1978 caused a major structural shift in the Barbadian flying fish fishing industry. From this date (only), Barbadian flying fish fishermen could and did fish further afield, i.e. generally in the triangle between Tobago, Grenada and Barbados. This was neither traditional, nor artisanal, fishing.³⁶³ Moreover, as Appendix A has demonstrated, illegal fishing by Barbadian vessels in Trinidad and Tobago's EEZ has resulted in arrests by the Trinidad and Tobago coastguard, which have not (until recently) been the subject of protest by Barbados.
- (3) Even leaving to one side the absence of any legal basis for Barbados' claim, there is no credible evidence that a failure to adjust the provisional median line to the south would entail catastrophic repercussions for Barbados or its flying fish fishermen. A continuing refusal on the part of Barbados to negotiate a fishing access agreement with Trinidad and Tobago does appear adverse to the economic interests of Barbadian fishermen. But that is a quite different matter.
- (4) The flying fish fishery is of significant importance to Tobago's fishermen.

³⁶² It cannot be for Barbados to expand its fishing capability at the expense of the fishermen of Trinidad and Tobago.

³⁶³ And, as already noted in Chapter 2 and Appendix A, throughout the 1980s and 1990s (including by conclusion of the 1990 Fishing Agreement), Barbados recognised that this new fishing was taking place in the EEZ of Trinidad and Tobago.

342 The simple reality is that, far from reflecting traditional fishing by artisanal methods in the waters off Tobago, Barbados' claim seeks to protect a recent and rapid shift from small scale artisanal to larger scale commercial operations, one aspect of which is that more advanced Barbadian vessels have – since the late 1970s – been fishing off Tobago. There is no basis for the claim either in fact or law.