

International Dispute Resolution Centre
Fleet Street
London, England

Tuesday, 18th October, 2005

ARBITRAL TRIBUNAL CONSTITUTED UNDER
ANNEX VII TO THE UNITED NATIONS CONVENTION
ON THE LAW OF THE SEA

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In the matter of an arbitration between

BARBADOS

and

THE REPUBLIC OF TRINIDAD AND TOBAGO

- - - - -

Before:

JUDGE STEPHEN M SCHWEBEL (The President)
PROFESSOR VAUGHAN LOWE
MR IAN BROWNLIE CBE QC
PROFESSOR FRANCISCO ORREGO VICUNA
SIR ARTHUR WATTS, KCMG QC

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PROCEEDINGS - DAY TWO

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ATTENDANCES

Barbados was represented by:

Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General and Minister of Home Affairs, Agent for Barbados

Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham & Watkins

Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate

Professor Michael Reisman, Counsel and Advocate

Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus, Paris

Sir Henry Forde QC, Counsel and Advocate

Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins

Mr Adrian Cummins QC, Counsel

Dr David Berry, Counsel

Ms Megan Addis, Counsel, Latham & Watkins

Ms Teresa Marshall, Permanent Secretary, Foreign Affairs

Mr Edwin Pollard, High Commissioner for Barbados in London

Mr Anthony Wiltshire, Minister/Counsellor at the Barbados High Commission, London

Mr Francois Jackman, Senior Foreign Services Officer

Mr Tyronne Brathwaite, Foreign Services Officer

Mr Christopher Parker, Fisheries Biologist, Fisheries Division

Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations, BARNUFO

Mr Anderson Kinch

Mr Oscar Price, Information Technology Support, Latham & Watkins

Ms Phillippa Wilson, Information Technology Support, Latham & Watkins, London

Mr Dick Gent, UK Hydrographic Office

Dr Robin Cleverly, UK Hydrographic Office.

Ms Michelle Pratley, Assistant, Latham & Watkins

Ms Claudina Vranken, Assistant, Latham & Watkins

The Republic of Trinidad and Tobago was represented by:

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

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

1 THE PRESIDENT: Good morning. Will it be Mr Fietta who begins
2 this morning?

3 MR FIETTA: That is right.

4 THE PRESIDENT: Please.

5 MR FIETTA: Mr President, members of the Tribunal, good morning.

6 I am greatly honoured to appear before this distinguished
7 Tribunal on behalf of Barbados in this historic
8 arbitration. It falls to me to complete Barbados' factual
9 submissions in relation to the Barbadian traditional
10 artisanal fishery off the north west, north and north east
11 coasts of Tobago. As the Tribunal will recall, it is
12 Barbados' case that the fishery upon which Barbados'
13 fishing communities are dependent throughout most of the
14 fishing season constitutes a special circumstance
15 requiring adjustment of the provisional median line. The
16 area of adjustment required is illustrated in each of
17 Barbados' written pleadings and is reproduced here on a
18 map that appears at tab 53 of your Judges' folder. The
19 Tribunal will also recall that, as Professor Reisman
20 explained yesterday in his introduction to Barbados'
21 submissions on the traditional artisanal fishery,
22 Barbados' case rests upon three core factual submissions.

23 Each of these three submissions stands independent of the
24 other. They are shown once more, for ease of reference,
25 on the slide before you.

26 They are: first Barbadian fisherfolk have been
27 fishing off the island of Tobago for centuries; second,
28 Barbadian fishing communities, which form a substantial
29 part of the working population of the island's small
30 economy, are dependent upon fishing in the area claimed
31 off Tobago, particularly for flying fish; and, third, the
32 fisherfolk of Trinidad and Tobago do not fish in the area
33 claimed by Barbados and are, thus, in no way dependent
34 upon it for their livelihoods.

35 10.15

36 Mr President, yesterday afternoon Sir Henry Forde
37 described the historical and contemporary importance to
38 Barbados of its maritime fisheries and, in particular, the

1 flying fish fishery. He then gave a detailed account of
2 Barbados' case in relation to the first two of these core
3 submissions. He outlined how the historical record
4 clearly demonstrates that Barbadian fishermen were already
5 fishing off Tobago as early as the first half of the 18th
6 century. He explained that Barbadians continued to fish
7 off Tobago throughout the period of British colonial rule
8 that extended from 1814 until the independence of both
9 Trinidad and Tobago and then Barbados in the 1960s.
10 Indeed, Sir Henry highlighted that, by the early 20th
11 century, Barbadian fishermen were sailing schooners to the
12 coast of Brazil to fish in areas that were more than six
13 times further away from Barbados than the traditional
14 fishery off Tobago. Perhaps, most significantly of all,
15 he described in a way that perhaps only a Barbadian
16 statesman who has represented fisherfolk constituents for
17 32 years in Parliament could describe, the catastrophic
18 repercussions that any loss of access to the traditional
19 fishery off Tobago would entail for Barbados' fishing
20 community, as well as for the social and cultural identity
21 of the island known for centuries as "the land of the
22 flying fish".

23 Mr President, members of the Tribunal, this morning I
24 shall briefly focus on some specific aspects of the
25 contemporary Barbadian fishery off Tobago, building upon
26 Sir Henry Forde's presentation. I shall then move on to
27 address Barbados' third core factual submission.

28 The first specific aspect of the contemporary
29 Barbadian fishery off Tobago is its self-evidently
30 artisanal nature. The fishery has been artisanal since
31 Colonial times, when much of it was constituted by the
32 slave population of Barbados pre-emancipation and by the
33 liberated black population of Barbados following
34 emancipation in 1838.

35 Today the fishery of Tobago, like Barbados' maritime
36 fisheries generally, remains focused upon local small
37 scale enterprises within the Barbadian fishing
38 communities. the Government of Barbados has been an

1 active supporter of the fishery, encouraging collaboration
2 by the promotion and support of local fishing
3 organisations.

4 The fisheries are operated by about 190 small boats,
5 crewed by two to three fisherfolk, known locally as ice
6 boats due to the fact that they carry an ice hold for easy
7 storage of the catch.

8 Many of these boats are simply converted day boats.
9 The size and ice hold capacity of these vessels varies,
10 though very few are longer than 40 feet or capable of
11 transporting more than five tons of fish plus ice. The
12 vessel shown here in an image that appears at tab 73 of
13 your folder is one of the larger ice boats in the fleet.

14 This image is a freeze frame from the DVD video on
15 Barbados' fishery off Tobago which was submitted with
16 Barbados' Memorial and which is included in your judges'
17 folder at tab 74.

18 The vast majority of Barbadian ice boats are wooden
19 hulled, though some have fibreglass hulls. The method
20 that the ice boats use for catching flying fish is the
21 same traditional method used by the day boats. Schools of
22 flying fish are attracted to the boat by a process called
23 "chumming", whereby wicker chum baskets and floating
24 bundles of dried sugar cane blades are released overboard
25 to act as fish attraction devices. As the fish accumulate
26 they are caught easily.

27 The recent half century has witnesses three
28 significant developments in the boats and gear used to
29 catch flying fish. The first was the introduction of gill
30 nets in the 1950s. The second was motorisation of the
31 schooner fleet shortly afterwards following Hurricane
32 Janet around the same time. And the third was the
33 widespread installation of ice holds in the 1970s.

34 Nevertheless the Barbadian fishery off Tobago remains
35 an artisanal one, indeed it is illustrative to compare and
36 contrast that fishery with the industrial deep ocean
37 fishery operated by Taiwanese boats out of Port-of-Spain
38 in Trinidad. That fishery is operated by a Taiwanese

1 owned company called National Fisheries Company (1995)
2 Limited. The scale of that fishery is demonstrated by a
3 letter from that company to the Permanent Secretary of the
4 Ministry of Agriculture, Land and Marine Resources for
5 Trinidad and Tobago dated 20th September 1999. This
6 appears at tab 75 of your judges' folder.

7 That letter enclosed a list of vessels utilising the
8 port in Trinidad at the time. As of September 1999, it
9 would appear from this list that at least 48 vessels were
10 operating out of Trinidad. There is some dispute between
11 the parties as to the precise characteristics of the
12 vessels concerned, but even Trinidad and Tobago accepts
13 that approximately half of the Taiwanese vessels are
14 between 50 and 70 metres, or between 164 and 229 feet, in
15 length and have a fishing hold capacity of between 100 and
16 200 tonnes. [Rejoinder of Trinidad and Tobago, para. 90,
17 footnote 134]

18 This compares with the total fish catch of the entire
19 Barbadian artisanal fleet of approximately 2,500 tonnes
20 per year for all species and an average catch of flying
21 fish in Barbados of between 1,500 and 2,000 tonnes per
22 year. [Memorial of Barbados, Vol. 3, Appendix 60 at p.
23 729] In other words, each of the giant vessels operating
24 out of Port-of-Spain is capable of landing almost 10 per
25 cent of the entire annual Barbadian fish catch for all
26 boats each time it returns to Trinidad.

27 In the Eritrea-Yemen case, the arbitral tribunal
28 indicated at paragraph 106 of its award in the second
29 stage of the proceedings that artisanal fishing is to be
30 contrasted, as a matter of law, with industrial fishing.
31 This slide appears at tab 76 in your Judges' folder. To
32 group the small Barbadian ice boats with the enormous
33 Taiwanese vessels operating out of Trinidad for the
34 purpose of this legal distinction would be patently
35 absurd. Nevertheless, Trinidad and Tobago attempts to do
36 so at paragraph 341 of its Counter Memorial, apparently on
37 the basis that the Barbadian boats now operate with
38 rudimentary cold-storage facilities on board. Barbados

1 submits that such a feature of technological improvement
2 cannot suddenly transform a fishery that is so obviously
3 of an artisanal character into the large scale or
4 industrial fishery described by the tribunal in the
5 Eritrea-Yemen case.

6 A second specific aspect of the Barbadian traditional
7 fishery off Tobago is its seasonal nature. Sir Henry
8 Forde has already noted that as early as 1722 the season
9 for fishing for flying fish was recorded as going off at
10 the autumnal equinox. The precise seasons today vary from
11 year to year depending on the movement of the flying fish,
12 but Barbadian fisherfolk will generally go to the waters
13 off Tobago to fish around the months of November to
14 February and June to July. That this is the case is
15 confirmed by the affidavits of the fisherfolk and their
16 representatives. [See for example, affidavit of Emmerson
17 Pinder (Memorial of Barbados, Vol. 4, Appendix 86, at p.
18 832); affidavit of Stanton Thomas (Memorial of Barbados,
19 Vol. 4, Appendix 90, at p. 960); affidavit of Angela
20 Watson (Memorial of Barbados, Vol. 4, Appendix 91, at p.
21 963)] It is explained also by the fisherfolk who appear
22 in the D.V.D. video on Barbados' maritime fishing that was
23 submitted with Barbados' Memorial. We are now going to
24 show you a short clip which shows what the fisherfolk say
25 about the seasonal importance of the traditional fishery
26 off Tobago.

27 **(Video shown)**

28 Mr President, the consequences of any loss of the
29 traditional fishery off Tobago have been described vividly
30 and in detail by Sir Henry Forde, but this is what the
31 fisherfolk themselves had to say about the likely
32 consequences.

33 **(Video shown)**

34 It is noticeable, Mr President, that Trinidad and
35 Tobago has said very little in rebuttal to Barbados' case
36 on the contemporary importance of the Barbadian fishery
37 off Tobago. Essentially, its response appears to be to
38 accuse Barbados of exaggerating that importance and to

1 observe dismissively that, notwithstanding all the
2 unchallenged evidence of Barbados, there would be no
3 catastrophe if Barbadians were to be prevented by the
4 Tribunal's delimitation from being able to fish in their
5 traditional fishing grounds.

6 Trinidad and Tobago's approach was demonstrated most
7 recently by the fact that it dedicated only two paragraphs
8 of its Rejoinder to this essential aspect of Barbados'
9 case. In doing so, it restricted itself to four points on
10 the contemporary aspects of Barbados' fishery of Tobago.
11 The first point appears at paragraph 89 of the Rejoinder,
12 where Trinidad and Tobago asserts that Barbados
13 drastically increased its fishing capacity in the 1980s
14 and 1990s. But that assertion is quite simply incorrect.

15 Trinidad and Tobago confuses increased capacity with
16 increased efficiency in the artisanal fleet. Barbados
17 would not deny the installation of ice holds on some
18 Barbadian vessels has improved fishing efficiency over the
19 period to which Trinidad and Tobago refers. But virtually
20 every artisanal fishery in the world has benefited from
21 modest improvements in efficiency over the past 20 to 30
22 years.

23 At paragraph 90 of its Rejoinder, Trinidad and Tobago
24 then goes on to make three more points on the contemporary
25 aspects of Barbados' fishery off Tobago.

26 The first of these is that Barbados confuses the
27 importance to it of its fishery generally, and the
28 specific importance of the flying fish fishery. The
29 simple answer to this assertion is that Barbados does not
30 do this at all in its written pleadings. But, in any
31 event, Barbados trusts that the submission presented
32 yesterday by Sir Henry Forde made abundantly clear the
33 specific importance that must be attached to the flying
34 fish fishery. As has been demonstrated, that fishery
35 provides a greater volume of the Barbadian catch than all
36 the other fisheries combined. It has a unique social and
37 cultural importance in Barbados and it is vital to so many
38 in the Barbadian fishing communities.

1 The second point made by Trinidad and Tobago at
2 paragraph 90 of its Rejoinder is the following. "The
3 claim that the best evidence of the contemporary
4 importance of flying fish fishery is the witness
5 statements of the Barbadian fishermen cannot be taken
6 seriously". Aside from pointing out the rather
7 contemptuous nature of this evaluation of the evidence
8 that has been submitted by 15 Barbadian fisherfolk,
9 Barbados would simply make two observations. First, it is
10 hardly as if the witness evidence in this case of the
11 fisherfolk stands alone. Rather the evidence of the
12 contemporary importance of the flying fish fishery to
13 Barbados and, more importantly, of the fishery off Tobago
14 is overwhelming.

15 10.30

16 Barbados' second observation is that Trinidad and
17 Tobago has submitted virtually nothing to rebut the
18 substance of that evidence. For example, Trinidad and
19 Tobago has submitted no witness evidence to counter the
20 evidence of the Barbadian fisherfolk. Nor has it
21 submitted any other material that casts doubt on the
22 critical importance of the fishery to Barbados. And,
23 despite questioning the credibility of the fisherfolk's
24 evidence, Trinidad and Tobago has not called a single one
25 of those witnesses for the purposes of cross-examination.

26 The third point made by Trinidad and Tobago at
27 paragraph 90 of its Rejoinder does not concern the
28 contemporary aspects of the Barbadian fishery off Tobago
29 at all. Rather it concerns the details of the Taiwanese
30 vessels that fish out of Trinidad. I have already
31 addressed this issue as part of my description of the
32 artisanal nature of the Barbadian fishery off Tobago.

33 But let us not be distracted by these marginal
34 issues. The contemporary importance to Barbados of its
35 traditional artisanal fishery off Tobago has been
36 demonstrated clearly by the evidence submitted by Barbados
37 and by the presentation that has been given by Sir Henry
38 Forde.

1 Mr President, members of the Tribunal, I shall now
2 move on to address Barbados' third core factual submission
3 in connection with its special circumstance.

4 It is that the fisherfolk of Trinidad and Tobago do
5 not fish in the area claimed by Barbados to the south of
6 the median line and are in no way dependent on it for
7 their livelihoods. A critical fact for the purpose of the
8 Tribunal's analysis of Barbados' special circumstance, we
9 would submit, is that it is only Barbadians that fish in
10 significant numbers in the traditional artisanal fishery
11 to the south of the median line. Trinidadians do not fish
12 around Tobago at all. Tobagonians do fish around Tobago,
13 but the vast majority fish from small pirogues or small
14 boats that remain close to the shore within the 12-mile
15 limit. That this is the case is confirmed by the FAO's
16 year 2000 fishery country profile for Trinidad and Tobago.

17 This appears at tab 77 of your Judges' folder. The FAO's
18 paper indicates in a section describing the Tobagonian
19 fishing fleet that about 95 per cent of the vessels in the
20 fleet are small boats or pirogues of less than nine metres
21 length overall. In this slide, "LOA" refers to length
22 overall. They are powered by outboard motors and involved
23 in day fishing. The very limited reach of the Tobagonian
24 fisherfolk is confirmed also by the affidavits of many of
25 the Barbadian fisherfolk and by the affidavit of Angela
26 Watson, President of Barbados' National Union of
27 Fisherfolk Organisations. It is again worthy of note that
28 Trinidad and Tobago has produced no witness evidence from
29 its fisherfolk to refute this fact, nor to challenge the
30 statements of Barbados' witnesses to the effect that
31 Barbadian and Tobagonian fisherfolk fish in different
32 places and have always enjoyed a good relationship, partly
33 for that very reason.

34 Finally, the fact that the fisherfolk of Tobago fish
35 almost exclusively close to shore is confirmed by the
36 statements made by Trinidad and Tobago officials
37 themselves as recently as 2003 during one of the
38 negotiating sessions between Barbados and Trinidad and

1 Tobago, to which I shall refer in a moment.

2 There are at least four reasons that explain why the
3 fisherfolk of Tobago remain close to shore. First, as Sir
4 Henry Forde has already mentioned with reference to the
5 writings of a Tobagonian historian David Niddrie,
6 Tobagonians do not have any significant ocean going
7 history or culture. Niddrie writes in a passages that
8 appears at tab 78 of your judges' folder "deep sea fishing
9 boats are not part of the Tobago scene. Men will venture
10 out a short distance from the shore and use a line to
11 catch quality fish, but they will not lose sight of land.

12 What must be accepted is that Tobagonians differ from
13 their Barbadian and Grenadine neighbours in not being
14 oriented to the sea". The words of a Tobagonian
15 historian.

16 Second, the Tobagonian fisherfolk are constrained by
17 the short range and limited seaworthiness of their small
18 vessels.

19 Third, there is no incentive for the fisherfolk of
20 Tobago to voyage more than 12 miles from shore, since the
21 fish that are in highest demand in Tobago are reef fish,
22 which are found in abundance close to land. [Affidavit of
23 Angela Watson. (Memorial of Barbados, Vol. 4, Appendix
24 91, at p. 964)] Those flying fish that are fished by
25 Tobagonians either for the very limited local market or
26 more likely for export to Barbados, are largely caught
27 close to the shore. Indeed, Sir Henry Forde has already
28 described how the people of Tobago did not fish for flying
29 fish at all until the 1960s, when visiting Barbadian
30 fishermen trained the locals in traditional Barbadian
31 methods for catching and boning flying fish.

32 Given the persistent low demand for flying fish in
33 Trinidad and Tobago there is simply no prospect of
34 Tobagonian fishermen in the foreseeable future being able
35 to sell flying fish in significant volumes at home. So
36 they are likely to continue concentrating on fishing for
37 the reef fish found in the inshore fishery within 12 miles
38 of the shore.

1 Trinidad and Tobago has dedicated only three
2 paragraphs in an appendix to its Counter Memorial, and one
3 short paragraph of its Rejoinder to describing the extent
4 of fishing activities out of Tobago. Nevertheless it has
5 sought to argue in these proceedings that Tobagonians fish
6 up to 30 miles off shore, still only about half way to the
7 median line at its closest point. But these claims lack
8 credibility. Both the FAO and Trinidad and Tobago itself
9 have very recently referred to the fisherfolk of Tobago as
10 fishing almost exclusively within the 12 mile limit. For
11 example, during the round of fisheries negotiations held
12 between the parties in March 2003 the officials of
13 Trinidad and Tobago proposed that any fishing agreement
14 should not extend within 12 miles of the Tobagonian
15 shoreline. [Joint report of negotiations between Barbados
16 and Trinidad and Tobago, 24 to 25 March 2003. (Reply of
17 Barbados, Vol. 3, Appendix 29, at p. 397)] This proposal
18 was intended to protect the Tobagonian fishery close to
19 shore, because, as the officials put it, it would prevent
20 any difficulty or competition for resources between the
21 fisherfolk of Tobago and those of Barbados. Barbados was
22 entirely content with this proposal of Trinidad and Tobago
23 since Barbadian fisherfolk do not fish within 12 miles of
24 Tobago. Indeed such an arrangement formed an integral
25 part of the 1990 fishing agreement between the parties in
26 the form of the so-called "closed area" under that
27 agreement that prevented Barbadian fisherfolk from fishing
28 within 12 miles of the shore.

29 Thus the adjusted median line proposed by Barbados in
30 this arbitration would be entirely consistent with current
31 fishing practices and would ensure equitable access to the
32 fishing grounds off Tobago, both for the fisherfolk of
33 Barbados and for the fisherfolk of Tobago. That line
34 reflects the natural equilibrium that exists between the
35 fisherfolk of the two islands; in stark contrast to the
36 Trinidad and Tobago claim line, the unadjusted median
37 line, in the area round Tobago. Indeed, as Sir Henry
38 Forde described in detail yesterday any delimitation that

1 failed to take account of the artisanal fishing activities
2 of Barbadians off Tobago would entail catastrophic
3 repercussions for Barbados and its fishing communities,
4 restricting access to a resource that has always been at
5 the very heart of the economic, social and cultural make-
6 up of the nation, the land of the flying fish.

7 Mr President, members of the Tribunal, with your
8 permission I will now hand over to Professor Reisman, who
9 will address you on the legal basis of Barbados' case for
10 adjustment of the median line to the south. Thank you.

11 THE PRESIDENT: Thank you, Mr Fietta. Professor Reisman.

12 PROFESSOR REISMAN: Thank you, Mr President. Mr President,
13 members of the Tribunal, in a boundary delimitation case
14 between coastally opposite states the accepted
15 international methodology is to draw a provisional median
16 line and then to determine whether the existence of a
17 special circumstance warrants the adjustment of that line.

18 Sir Henry yesterday and Mr Fietta this morning have
19 demonstrated the dependence of Barbados upon access to
20 waters in which its artisanal fishermen have traditionally
21 fished and the consequences for them and for the Barbadian
22 economy if those waters were to be closed. My task is to
23 explain how the long-term practices and dependencies of
24 Barbadian artisanal fisherfolk are recognised by
25 international law as non-exclusive rights, how the denial
26 of those rights has created in their case a special
27 circumstance and the remedies which international
28 tribunals have applied for this species of special
29 circumstance.

30 Contemporary international law recognises and
31 protects the non-exclusive rights, particularly where, as
32 here, they accrue to individuals who are members of
33 functional and inter-generational groups and not solely to
34 the state of their nationality. The traditional artisanal
35 fishing practices of Barbadian nationals over an extended
36 period created a non-exclusive right that vests in both
37 Barbados and its nationals as individuals and that is the
38 special circumstance that calls for an adjustment to the

1 provisional line. Because Trinidad and Tobago continues
2 to deny or mis-perceive the right claimed by Barbados, I
3 would like to begin by clarifying its nature and scope.

4 Non-exclusive rights, unlike exclusive rights, arise
5 by virtue of the use or exploitation of a resource or
6 territory by individuals who need not be acting on behalf
7 of a state. To quote Sir Gerald Fitzmaurice, "Whereas
8 claims to exclusive rights founded on the acts of
9 individuals can only be maintained if the individuals were
10 authorised either in advance or ex post facto by the
11 adoption and ratification of the acts, such would not
12 appear to be the case where all that is involved is a
13 claim to possess and to be entitled to continue to enjoy
14 rights of a non-exclusive character." [Sir Gerald
15 Fitzmaurice, "The Law and Procedure of the International
16 Court of Justice, 1951-54: General Principles and Sources
17 of Law", (1953) 30 BYIL 51, 181] That, Mr President, is
18 precisely the case here. For all that is involved is a
19 claim by Barbados and its nationals to be entitled to
20 continue to enjoy non-exclusive access to waters off the
21 coast of Tobago where Barbadian nationals have
22 traditionally practised artisanal fishing. In its
23 Rejoinder, Trinidad and Tobago concedes that such a non-
24 exclusive use of waters which were formally res communis,
25 part of the high seas, can give rise to rights under
26 international law. [Rejoinder of Trinidad and Tobago,
27 para. 121] But it continues to dispute their relevance,
28 first by denying that non-exclusive rights accrue to the
29 state as well as to its nationals, and then by
30 mischaracterising Barbados' claim as one of an exclusive
31 right.

32 With your permission, I would like to address each of
33 these assertions in turn. As to the first point, Trinidad
34 and Tobago argues in its Rejoinder that "non-exclusive
35 rights to fish in the EEZ of another state are not
36 sovereign rights and it is only sovereign rights which are
37 in issue in the present proceedings". [Rejoinder of
38 Trinidad and Tobago, para. 139]

10.45

With respect, this assertion is doubly mistaken. Non-exclusive rights accrue to both the sovereign and its nationals as individuals and, while our proceedings certainly implicate the rights of sovereigns, contemporary international law no longer disregards the human rights consequences for individuals of claims by states. After hearing Sir Henry and Mr Fietta, I cannot see how anyone in this chamber can fail to see the human rights stakes in this case.

It is all the more remarkable and anachronistic to hear Trinidad and Tobago assert dismissively in its Rejoinder that "the law of human rights is entirely beside the point as that has nothing to do with the attribution of sovereign rights between two or more states with rival claims". Under modern international law, the potential wholesale deprivation of the essential economic resources on which thousands of Barbadians rely for their subsistence and welfare is surely not beside the point.

Barbados and Trinidad and Tobago are parties to the pact of San Jose, the Inter-American Human Rights Convention of which more will be said later.

But let me return to Trinidad and Tobago's first contention that non-exclusive rights do not accrue to sovereign states. The passage from Sir Gerald's classic article in the British Yearbook which Trinidad and Tobago and Barbados alike cite as authority makes clear that non-exclusive rights, while required by virtue of the conduct of individuals which need not be authorised in advance or ratified ex post by a sovereign, nonetheless accrue to the sovereign. With specific reference to the example of non-exclusive fishing rights, Sir Gerald explains that, where national vessels of a state have been accustomed for an extended period to fish in an area formerly *res communis* "their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available" albeit on a non-exclusive basis. Non-

1 exclusive rights, as Barbados has maintained from the
2 outset, differ from exclusive rights in that they vest in
3 both the sovereign and its nationals as individuals.
4 Again, this means that contemporary international human
5 rights law is emphatically not beside the point. Both
6 sovereign and individual rights are at issue in this
7 arbitration.

8 Artisanal fishing rights, as Barbados demonstrated in
9 its Reply, enjoy a strong foundation in state practice. I
10 would respectfully draw your attention to paragraphs 118
11 to 121 and especially footnote 161 of our Memorial and to
12 paragraphs 408 to 410 and especially note 550 of our
13 Reply. Of course this material is in the folders (tabs 80
14 and 81). Briefly, as the Eritrea-Yemen tribunal
15 explained, artisanal fishing denotes traditional fishing
16 practices of a national, ethnic or cultural group by
17 contrast to large scale industrial fishing. [Eritrea/Yemen
18 (Second Stage: Maritime Delimitation), 119 ILR 417, para.
19 106] Because artisanal fishing rights vest in
20 individuals as individuals and not only as subjects of a
21 sovereign state, international law, even before the advent
22 of modern international human rights law, had provided for
23 the survival of the rights notwithstanding the re-
24 characterisation of maritime zones. That, after all, is
25 the unambiguous meaning of the passage from Fitzmaurice
26 which he supports with both general principles of law and
27 an analysis of the Anglo-Norwegian Fisheries judgment that
28 where non-exclusive fishing rights exist another state can
29 only acquire sovereign title to waters formerly res
30 communis "subject to the acquired rights of fishery in
31 question which must continue to be respected". What
32 international law required in 1953 when Sir Gerald wrote
33 those words is equally, if not more, imperative today. It
34 is beyond cavil that individuals not only states now enjoy
35 rights that contemporary international law protects. I
36 would respectfully refer the Tribunal to paragraph 414 of
37 our Reply, which quotes from Eritrea-Yemen and its
38 recognition of this principle with reference to

1 traditional artisanal fishing rights. Of course, copies
2 are in your folder (tab 82).

3 Indeed, because these rights vest in individuals as a
4 species of property upon which, moreover, many rely for
5 their subsistence and welfare, it would be contrary to
6 well-established principles of international human rights
7 law to permit one state to violate them or to allow two
8 states to join together to destroy or negotiate them out
9 of existence without regard for the dramatic impact that
10 this would have on Barbadians who, as Sir Henry and Mr
11 Fietta have just shown, constitute a significant
12 percentage of the workforce of Barbados. Trinidad and
13 Tobago remarkably devotes a single sentence to the
14 international human rights implications outlined in
15 Barbados' pleadings, anachronistically declaring them
16 "beside the point" simply because this is an inter-state
17 dispute. [Rejoinder of Trinidad and Tobago, para. 139]
18 By the way, even were it correct to dismiss individual and
19 particularly human rights as irrelevant to a dispute
20 between sovereigns, the non-exclusive artisanal fishing
21 rights at issue here also vest in Barbados as a sovereign.

22 Artisanal fishing rights, while acquired by individuals
23 who may act without prior or ex post authorization of a
24 state, nonetheless accrue to both those individuals and to
25 the state of their nationality, the latter, that is, the
26 state often being the only entity in international law
27 with the *jus standi* to protect those rights.

28 As I mentioned earlier Trinidad and Tobago's
29 Rejoinder also mischaracterises Barbados' claim with
30 respect to these rights. Repeatedly Trinidad and Tobago
31 says that despite the non-exclusive character of artisanal
32 fishing rights Barbados is in fact claiming exclusive
33 rights to the relevant maritime zones. Paragraph 124 of
34 the Rejoinder for example accuses Barbados of "extending
35 Fitzmaurice's thesis about non-exclusive rights into a
36 claim to exclusive rights", and paragraph 125 refers to a
37 claim that Barbados does not make, that "when the waters
38 in question acquire the status of EEZ and cease to be res

1 communis", which I would note parenthetically is the
2 question we are addressing and not a fact, "the artisanal
3 fishing rights of Barbados overrode the pre-existing
4 sovereign rights of Trinidad and Tobago over the
5 Continental Shelf". In the first place the waters in
6 question all parties agree were formerly part of the high
7 seas, not within the sovereignty of Trinidad and Tobago.
8 But, with respect, Trinidad and Tobago's assertions here
9 reveal a more fundamental misapprehension of Barbados'
10 claim.

11 Barbados does not now and never has asserted an
12 exclusive right based on the traditional artisanal fishing
13 practices of its nationals, nor certainly does it claim
14 that this right overrides or takes precedence over other
15 putative sovereign interests. It is only because Trinidad
16 and Tobago refuses to accommodate this non-exclusive right
17 by recognising a regime of access for some 600 Barbadian
18 nationals to continue to fish in the maritime zones at
19 issue that a special circumstance arises that requires an
20 adjustment to the provisional median line in favour of
21 Barbados.

22 What Barbados said with reference to the scope of
23 this Tribunal's jurisdiction is equally critical to an
24 appreciation of its substantive claim. Had Trinidad and
25 Tobago simply acknowledged the rights of Barbadian
26 fisherfolk to continue to eke out their humble livelihoods
27 on their modest boats in these waters in the same way that
28 Trinidad and Tobago acknowledges they have done, unimpeded
29 by Trinidad and Tobago until recently, for generations,
30 rather than impeding them with the unsustainable claim
31 that such rudimentary artisanal fishing is industrial and
32 poses a threat to conservation, Barbados would have
33 neither grounds nor need to insist on an adjustment of the
34 median line so as to enclose the waters in question in
35 Barbados' EEZ. But states, like individuals, must live
36 with the consequences of their actions. Trinidad and
37 Tobago must live with the special circumstance that its
38 own refusal to accommodate a valid and modest claim of

1 artisanal fisherfolk created.

2 Mr President, in a moment I will explain how
3 international tribunals faced with comparable claims have
4 ensured that traditional artisanal fishing rights will
5 continue to be protected and respected, but I must pause
6 here to emphasise another equally crucial point. Trinidad
7 and Tobago continues to insist that whatever the status of
8 Barbados' artisanal fishing rights in the past, its
9 declaration of an exclusive economic zone in 1986,
10 followed by the entry into force of the Convention in 1994
11 simply terminated those rights. Mr President, the
12 Convention neither expressly nor implicitly terminates or
13 purports to terminate traditional artisanal fishing rights
14 that pre-existed its entry into force.

15 The Convention contains no provision that can be
16 construed to terminate critical economic rights by
17 implication. In the first place as a general principle,
18 international law strongly disfavours the termination of
19 rights by implication, and a fortiori indispensable
20 economic rights that receive reinforced protection under
21 international human rights law. Article 62 of the
22 Convention, which Trinidad and Tobago simultaneously
23 describes as "not before the Tribunal" and yet is
24 implicitly terminating the non-exclusive rights of
25 Barbados and its nationals [Counter Memorial of Trinidad
26 and Tobago, para. 214], says nothing about traditional
27 artisanal fishing rights. It deals only with
28 circumstances in which a coastal state finds itself unable
29 to "harvest the entire allowable catch", and instructs
30 states as to how to allocate the surplus of their living
31 resources.

32 Trinidad and Tobago nevertheless reverts to Article
33 62 in a misleading effort to characterise Barbados' claim
34 as one that would necessarily require "the sacrifice of
35 sovereign rights over the EEZ". Again the right at issue,
36 a non-exclusive right to fish in regions where Barbadians
37 had traditionally engaged in artisanal fishing, does not
38 by definition require the sacrifice of sovereign rights.

1 It is only because Trinidad and Tobago has adamantly
2 refused to permit access to the waters in question for the
3 limited purpose of protecting this non-exclusive right of
4 a small number of artisanal fisherfolk that its asserted
5 sovereignty must now give way, but in any event the
6 Convention's text to the extent it implicitly addresses
7 non-exclusive artisanal fishing rights clearly favours
8 their survival. Let me explain.

9 Article 293, paragraph 1 establishes as a default
10 rule that principles of general and customary law apply to
11 the extent "not incompatible" with the Convention. A
12 paramount general principle of international law, the
13 inter temporal principle, requires, to quote Jennings and
14 Watts' Oppenheim, that a treaty be interpreted "in the
15 light of general rules of international law in force at
16 the time of its conclusion". [Oppenheim's International
17 Law (Jennings and Watts, eds, 9th ed. 1992), 1281]
18 Because the Convention is silent on the issue Article 293
19 paragraph 1 requires that it be construed to respect pre-
20 existing rights, including especially non-exclusive rights
21 indispensable to the economic welfare of thousands of
22 individuals. That alone should suffice to refute any
23 assertion that the Convention can be construed to
24 terminate these rights by implication; but as we
25 emphasised in the Reply, in so far as the Convention
26 alludes to traditional or historic fishing rights which
27 resemble but should not be equated with non-exclusive
28 artisanal fishing rights, it strongly favours their
29 survival.

30 10.00

31 May I refer the Tribunal to paragraphs 401 to 406 of
32 our Reply and in particular to the commentary of Professor
33 Attard quoted in paragraph 404. Copies are in your files
34 (tab 86). Were there any doubt remaining, the
35 Eritrea/Yemen Tribunal's recent award puts it to rest.
36 That tribunal recognised that, "by its very nature", a
37 regime of traditional artisanal fishing is "not qualified
38 by the maritime zones specified under the United Nations

1 Convention on the Law of the Sea". [Eritrea/Yemen (Second
2 Stage: Maritime Delimitation), 119 ILR 417, para. 109]
3 May I repeat, Mr President, "not qualified by the maritime
4 zones specified under the United Nations Convention on
5 the Law of the Sea".

6 Mr President and members of the Tribunal, as I said
7 earlier, public international law recognises two ways in
8 which a maritime boundary delimitation tribunal may
9 guarantee the protection of artisanal fishing rights,
10 either by establishing a regime of access to ensure that
11 artisanal fisherfolk may continue to exercise their rights
12 in the relevant area or by recognising those rights as a
13 special circumstance and therefore adjusting the
14 provisional line to accommodate them. Regrettably,
15 Trinidad and Tobago's refusal to consider a negotiated
16 regime of access pushes the Tribunal towards the latter
17 approach. In so far as that approach infringes on
18 Trinidad and Tobago's claim to sovereignty over the
19 maritime zones in question, that is a plight entirely of
20 its own making.

21 At least since North Sea Continental Shelf, [North
22 Sea Continental Shelf Cases (Federal Republic of Germany
23 v. Denmark; Federal Republic of Germany v. The
24 Netherlands), ICJ Reports 1969, p. 50, para. 93]
25 international tribunals have recognised that access to
26 fisheries can constitute a special circumstance in the
27 application of the equidistance special circumstance rule
28 governing maritime boundary delimitation between opposite
29 states. I would refer the Tribunal to paragraphs 134 and
30 135 of our Memorial, which include the International
31 Court's decision by a Chamber in the Gulf of Maine and by
32 the Plenary Court in Jan Mayen, the arbitral awards in
33 Eritrea-Yemen and in St Pierre and Miquelon, as well as
34 treatises by highly-qualified publicists.

35 Whenever a putative maritime boundary delimitation
36 implicates access to essential fisheries, the relevant
37 question, as the Court said in Jan Mayen, is "whether any
38 shifting or adjustment of the median line, as fishery zone

1 boundary, is required to ensure equitable access to the
2 fishery resources for the vulnerable fishing communities
3 concerned". [Maritime Delimitation in the Area Between
4 Greenland and Jan Mayen (Denmark v. Norway) ICJ Reports,
5 1993, p. 38, para. 75] Mr President, I interposed a verb
6 "is" to make that read as a sentence, but, as you see by
7 referring to the original text, no distortion was
8 introduced. In St Pierre and Miquelon, the tribunal said
9 that "having decided upon the delimitation in accordance
10 with the geographical factors, the Court still has an
11 obligation to assure itself that the solution reached is
12 not radically inequitable" - here it is quoting Gulf of
13 Maine - meaning "likely to entail catastrophic
14 repercussions for the livelihood and economic well being
15 of the population of the parties concerned". The Tribunal
16 will recall that in Gulf of Maine, where, as here, areas
17 of the high seas had formerly been open to the fishermen
18 of two states, one of which made greater use of the
19 resources than the other, [Delimitation of the Maritime
20 Boundary in the Gulf of Maine Area (Canada v. United
21 States), ICJ Reports 1984, p. 341, para. 235] the Court
22 acknowledged as a "legitimate scruple" which could in
23 certain circumstances justify an adjustment to the
24 provisional median line, the concern that "the overall
25 result even though achieved through application of
26 equitable criteria and the use of appropriate methods for
27 giving them concrete effect should unexpectedly be
28 revealed as radically inequitable, that is to say as
29 likely to entail catastrophic repercussions for the
30 livelihood and economic well being of the population of
31 the countries concerned." [Ibid, para. 237]

32 The Chamber's ultimate determination of the maritime
33 boundary obviated this concern. It said "There is no
34 reason to fear that any such danger will arise in the
35 present case on account of the Chamber's choice of
36 delimitation line or more especially the course of its
37 third and final segment".

38 So the Chamber did not have to explore further the

1 potential international implications in such
2 circumstances, but the Chamber plainly recognised that
3 access to fisheries can at times constitute a special
4 circumstance justifying an adjustment to the provisional
5 median line. Then the Plenary Court confirmed this
6 principle in Jan Mayen, where it characterised Gulf of
7 Maine as a case in which it potentially had to "consider
8 whether any shifting or adjustment of the median line, as
9 fishery zone boundary, would be required to ensure
10 equitable access to the capelin and fishery resources for
11 the vulnerable fishing communities concerned". [Maritime
12 Delimitation in the Area Between Greenland and Jan Mayen
13 (Denmark v. Norway) ICJ Reports, 1993, p. 38, para. 75] In
14 Jan Mayen, where the Court did find it necessary to
15 resolve the conflicting overlapping claims of Denmark and
16 Norway to certain fisheries, it took account of this
17 special circumstance and in order to ensure Denmark
18 "equitable access to the capelin stock" determined that
19 the median line should be "adjusted or shifted eastwards".
20 [Ibid, para. 76]. Because Trinidad and Tobago continues
21 to deny the clear principle applied in Jan Mayen or at
22 least purports to limit its application to the supposedly
23 distinguishable facts in that case, I would respectfully
24 draw the Tribunal's attention to several features of that
25 judgment.

26 First, while Trinidad and Tobago characterises Jan
27 Mayen as a "wholly exceptional case limited to its facts",
28 the Court's judgment contains no hint of such limitation.

29 Far from it. As I noted earlier, the Jan Mayen Court
30 characterised the relevant question as "whether any
31 shifting or adjustment of the median line as fishery zone
32 boundary, is required to ensure equitable access to
33 fishery resources for the vulnerable fishing communities
34 concerned". Far from suggesting that Jan Mayen posed a
35 unique extraordinary circumstance Jan Mayen actually
36 represents a softening of the catastrophic repercussions
37 test suggested by the Chamber in Gulf of Maine. Jan
38 Mayen, in other words, lowered the threshold for

1 adjustment to the maritime boundary based on the special
2 circumstance of access to essential fisheries from
3 circumstances where the failure to adjust the provisional
4 boundary would entail "catastrophic repercussions for the
5 livelihood and economic well being of the population" to
6 the softer standard of "ensuring equitable access to [I
7 would add relevant fishery resources] for the vulnerable
8 fishing communities concerned".

9 Judge Schwebel, who participated in Gulf of Maine,
10 Jan Mayen and Eritrea-Yemen, indicated in a separate
11 opinion in Jan Mayen that he did not concur in the
12 boundary adjustment in the absence of a showing of
13 "catastrophic repercussions required by Gulf of Maine".
14 But Judge Schwebel joined the unanimous decision in
15 Eritrea-Yemen, which had re-framed the test of a line,
16 that could be inequitable were it to "produce a
17 catastrophic or inequitable effect on the fishing activity
18 of its nationals or detrimental effects on fishing
19 communities and economic dislocation of its nationals".
20 According to Eritrea-Yemen, then, the necessary effect has
21 been focused more narrowly on either "a catastrophic or
22 inequitable effect on the fishing activity of its
23 nationals" or "detrimental effects on fishing communities
24 and economic dislocation of its nationals". This is a
25 more subtle and inflected test. It is of course our
26 submission that the evidence which has been adduced in our
27 submissions and presented orally yesterday and today
28 entitles Barbados to a boundary adjustment on either the
29 more stringent or the more nuanced test. Hence, the
30 unremarkable fact that only in Jan Mayen did the Court
31 find it necessary to adjust the provisional median line on
32 this basis does not, we submit, imply that the principle
33 implied in Jan Mayen is limited to the facts of that case.
34 Ordinarily, it is true, access to essential fishing
35 regions can be adequately guaranteed by a regime of
36 limited access obviating the need for an adjustment of the
37 provisional line. That is because ordinarily states can
38 negotiate in good faith a mutually-acceptable solution of

1 this sort. Trinidad and Tobago's refusal to accommodate
2 the legitimate non-exclusive rights of Barbados' artisanal
3 fisherfolk creates circumstances comparable to those in
4 Jan Mayen, that is where failure to adjust the boundary
5 will entirely deny equitable access to the relevant
6 fishery resources for the vulnerable fishing communities
7 concerned.

8 As Sir Henry showed you yesterday, Barbados' reliance
9 on access to the fisheries off the coast of Tobago, the
10 longstanding artisanal fishing practices of hundreds of
11 its citizens upon which further thousands in the economy
12 critically rely, renders Barbadian fisherfolk a vulnerable
13 fishing community and brings this case squarely within the
14 rule applied in Jan Mayen. In both Eritrea-Yemen, which I
15 will return to in greater detail shortly, and St Pierre
16 and Miquelon, the tribunals did not need to resort to the
17 Jan Mayen rule because alternative arrangements adequately
18 protected the fishing rights at issue. In Eritrea-Yemen
19 an award that included a regime of access for the exercise
20 of traditional artisanal fishing rights; in St Pierre and
21 Miquelon an agreement whereby each state gave "access to
22 the nationals of the other in the fishing zones under its
23 jurisdiction on the basis of full reciprocity." [Case
24 Concerning Delimitation of Maritime Areas Between Canada
25 and the French Republic (St Pierre & Miquelon), Court of
26 Arbitration, 10 June 1992, 95 ILR 645, para. 85]

27 Since Trinidad and Tobago's fishermen only fish its
28 territorial waters, as Mr Fietta has just demonstrated,
29 while Barbadian fisherfolk fish in the areas beyond
30 Trinidad and Tobago's territorial seas, Barbados' proposal
31 is especially equitable in terms of adjusting the maritime
32 boundary to give effect to the special circumstances of
33 fishing for fisherfolk of both of the countries.

34 Third, whereas Jan Mayen involved overlapping claims
35 by two states, each of which used the fishery resources in
36 question, the case for an adjustment is even more
37 compelling here where one state's reliance on continued
38 access to the relevant fisheries far outweighs the modest

1 uses of the other and, moreover, rather than an area of
2 overlapping claims the Tribunal in this case must
3 determine equitable access to a maritime regime that was
4 formally *res communis* and in which Barbados' artisanal
5 fisherfolk, but not Trinidad and Tobago's, fished.

6 Finally, even applying the more stringent
7 catastrophic repercussions test in Gulf of Maine,
8 Barbados' claim should prevail. In its Rejoinder,
9 Trinidad and Tobago characterises this assertion as
10 "fanciful and unsupported by the evidence". [Rejoinder of
11 Trinidad and Tobago, para. 142]

12 Mr President and members of the Tribunal, I submit
13 that that statement's falsity is now clear in the light of
14 Sir Henry's presentation and the presentation by Mr Fietta
15 this morning.

16 Under either the Jan Mayen or the Gulf of Maine
17 standard an adjustment in favour of Barbados to protect
18 the traditional artisanal fishing rights of its nationals
19 would be appropriate and, indeed, warranted by
20 international law in the absence of an alternative
21 arrangement to guarantee these crucial economic facts.

22 Mr President, this brings me to the Eritrea-Yemen
23 arbitration, an award which some members of this Tribunal
24 and persons in this Chamber know very well. As I noted
25 earlier, tribunals faced with comparable conflicts over
26 access to fisheries in the context of a boundary
27 delimitation have two legal options at their disposal:
28 either adjust the provisional maritime boundary to ensure
29 equitable access for the vulnerable population, as in Jan
30 Mayen, or establish a regime of non-exclusive access to
31 guarantee that population its right to continue to
32 exercise fishing rights in the newly-classified maritime
33 zone, as in Eritrea-Yemen. Barbados has not expressly
34 advanced a claim to a non-exclusive access regime, as in
35 Eritrea-Yemen, though it was a compromise that it had
36 sought and tabled during negotiations. The reason is, as
37 we noted in our jurisdictional pleadings, in view of the
38 arrest and other harassment of its fishermen by Trinidad

1 and Tobago, even during the negotiations, Barbados has
2 reason to doubt Trinidad and Tobago's good faith in this
3 regard. The Tribunal should appreciate that an award that
4 includes a regime of non-exclusive access rights would be
5 fully within its jurisdiction and competence. The Eritrea
6 Tribunal, which included several judges and two former
7 presidents of the ICJ, confronted comparable claims to
8 non-exclusive fishing rights in the context of competing
9 territorial claims to sovereignty over certain islands in
10 the Red Sea and maritime delimitations between Eritrea and
11 Yemen. The Tribunal found it appropriate in that context
12 to preserve "certain aspects of a res communis" and
13 consequently "to ensure that the traditional fishing
14 regime of free access and enjoyment for the fishermen of
15 both Eritrea and Yemen shall be preserved for the benefit
16 of the lives and livelihoods of this poor and industrious
17 order of men". [Eritrea/Yemen Arbitration (First Stage:
18 Territorial Sovereignty and Scope of Dispute), 9 October
19 1998, para. 126, 128 (Permanent Court of Arbitration
20 1998), (2001) 40 ILM 900, at pp. 920-921]

21 11.15

22 Again, it is important to recognise that the
23 Eritrea/Yemen Tribunal expressly rejected any assertion
24 that the entry into force of the Convention on the Law of
25 the Sea had terminated the pre-existing, albeit non-
26 exclusive, artisanal fishing rights. [Eritrea/Yemen
27 (Second Stage: Maritime Delimitation), 119 ILR 417, para.
28 107] On the contrary, the Tribunal made clear that those
29 rights must survive the reclassification of maritime zones
30 by UNCLOS and endeavoured to arrive by an equitable means
31 to guarantee their continuing exercise. Trinidad and
32 Tobago appears to concede in its Rejoinder that a
33 comparable regime of non-exclusive access could be
34 appropriate.

35 Parenthetically I would note that, having rejected
36 the Tribunal's authority to adjust the median line to
37 accommodate the relevant circumstance of the artisanal
38 fishing rights, Trinidad and Tobago is virtually compelled

1 to acknowledge the propriety of the regime of access.
2 Otherwise it is left in the legally untenable position of
3 denying that this Tribunal has any means at all at its
4 disposal to protect economically indispensable fishing
5 rights in the course of a maritime delimitation. No
6 international tribunal, neither the Plenary International
7 Court in the Jan Mayen or the Chamber in Gulf of Maine,
8 nor the arbitral Tribunals in St Pierre and Miquelon and
9 Eritrea/Yemen, none has ever suggested that it lacked the
10 jurisdiction, power or competence to protect such vital
11 fishing rights by some means. It would we believe be
12 remarkable and unprecedented for this Tribunal now to find
13 that it lacks the same powers. Absent an adjustment to
14 the median line, the vested rights of Barbados and its
15 fisherfolk must be protected by other means. Such an
16 award would be neither ultra vires the Tribunal's
17 competence nor ultra petita, for it falls squarely within
18 the scope of Barbados' claim.

19 Mr President, members of the Tribunal, this concludes
20 Barbados' presentation with respect to the special
21 circumstance requiring an adjustment of the provisional
22 median line. My colleague Mr Volterra would continue but
23 perhaps the Tribunal might like to use this as a moment
24 for the coffee break.

25 THE PRESIDENT: Thank you so much, Professor Reisman. We will
26 have our coffee break for 15 minutes.

27 MR BROWNLIE: Professor Reisman, before we rise, I just
28 wanted to have one point considered by your delegation, so
29 I am asking a question through the Honourable Attorney
30 General of your delegation. You do not have to answer the
31 question as it were immediately. The question is, is it
32 the case that, in the Jan Mayen case, which you considered
33 very extensively, either of the parties relied upon the
34 doctrine of traditional fishing rights? That is my
35 question. If you would clarify whether it is the view of
36 the delegation of Barbados that either party in the Jan
37 Mayen relied upon the doctrine of traditional fishing
38 rights. Thank you.

1 PROFESSOR REISMAN: Thank you very much, Professor
2 Brownlie, for the question. The delegation will respond
3 to you.

4 THE PRESIDENT: Thank you. We will resume at 25 to 12.

5 **(Short adjournment)**

6 11.40

7 THE PRESIDENT: Ladies and gentlemen, there was an enquiry as
8 to whether the Tribunal would be agreeable to stopping
9 this morning at 12.30 and resuming at 2.30, and we are
10 agreeable. Mr Volterra.

11 MR VOLTERRA: Thank you, Mr President. I have cannot promise
12 that it will be exactly at 12.30, but I appreciate the
13 flexibility on the Tribunal's part.

14 Mr President, I have the honour today to present
15 Barbados' submission addressing the reality that underlies
16 Trinidad and Tobago's claim line. Barbados and Trinidad
17 and Tobago have asked the Tribunal to delimit a single all
18 purpose boundary between their respective maritime
19 territories. In relation to the lines proposed by both
20 states, the proposing party thus claims maritime territory
21 for itself on one side of the line and, because the claims
22 are expressed as single all purpose boundaries, the
23 proposing party also claims to exclude the other party
24 from that same side of the line. And so Barbados is
25 claiming for itself maritime territory to the north of a
26 single all-purpose boundary line that it has proposed. As
27 part of that claim Barbados has also therefore claimed
28 that Trinidad and Tobago can enjoy no sovereign rights or
29 jurisdiction to the north of that line. For its part
30 Trinidad and Tobago is claiming for itself maritime
31 territory to the south of the single all purpose boundary
32 line that it has proposed and, as part of that claim,
33 Trinidad and Tobago has also therefore claimed that
34 Barbados can enjoy no sovereign rights or jurisdiction to
35 the south of that line.

36 In its Rejoinder Trinidad and Tobago describes its
37 line as "simple", and also "graphically a straightforward
38 one". At the same time Trinidad and Tobago implies that

1 Barbados' claim is complex. In Barbados' submission the
2 reverse is true.

3 The Tribunal will have appreciated from Sir Elihu's
4 presentation yesterday the simplicity of Barbados' claim.

5 By way of contrast Trinidad and Tobago's claim is
6 anything but straightforward, despite being superficially
7 simple. You have it on the screen before you now.

8 Trinidad and Tobago's claim line starts at the tri-point
9 with St Vincent and the Grenadines. It initially follows
10 the median line until it deviates dramatically to the
11 north at an arbitrary location that Trinidad and Tobago
12 calls point A and then proceeds eastward following an
13 azimuth of 88 degrees. By choosing an arbitrary starting
14 point and drawing a line in a straight direction one may
15 appear to present a simple claim, but nothing could be
16 further from the truth in the present instance. What
17 underlies Trinidad and Tobago's proposed delimitation
18 line, in particular its superficially anodyne 88 degree
19 azimuth, is a confused tangle of overlapping maritime
20 zones, covert boundaries, novel legal propositions and
21 unarticulated yet aggressively asserted ambitions to
22 territory.

23 11.45

24 Trinidad and Tobago's claim encompasses a bewildering
25 multiplicity of maritime claims to different maritime
26 areas. If endorsed by this Tribunal, it would result in a
27 jigsaw puzzle delimitation between parties that would
28 create half a dozen maritime zones using eight
29 delimitation lines. As Sir Elihu described yesterday,
30 Trinidad and Tobago's legal arguments in this arbitration
31 shift like the desert sands. Thus, in one pleading
32 Trinidad asserts that in international law coasts are
33 relevant only in relation to the area onto which they
34 project frontally. When Barbados exposes Trinidad's case
35 as fatally flawed on that assertion, Trinidad changes its
36 argument, indirectly and without acknowledgement, to an
37 assertion that coasts somehow radiate like fans.

38 To date Trinidad and Tobago has chosen not to discuss

1 the details of its unprecedented claims to the north of
2 the median line. It prefers to focus only on the fact
3 that it is made up of one straight line. That will not be
4 good enough for the Tribunal. Trinidad and Tobago's claim
5 calls for close examination.

6 Mr President, members of the Tribunal, I am going to
7 go through a series of slides. They will appear on the
8 screens in front of you. Copies of certain of these
9 slides, the principal points along the way in my
10 discussion, appear at tabs 94 to 101 of the Judges' folder
11 for Day 2.

12 Trinidad and Tobago's first claim is in relation to
13 the delimitation of the parties' overlapping EEZs. You
14 see it on the screen before you. This is the first
15 segment of Trinidad and Tobago's delimitation line. It
16 runs from point one, which is the tri-point of St Vincent
17 and the Grenadines, Barbados and Trinidad and Tobago, to
18 Trinidad and Tobago's random Point A, which is along the
19 parties' median line.

20 Trinidad and Tobago claims the entirety of the area
21 below the median line as its EEZ, save for the maritime
22 territory that it has conceded to Venezuela. That is
23 shown in the shaded area below the median line.

24 The next segment of Trinidad and Tobago's claim line
25 then runs from its Point A, along the azimuth of 88
26 degrees, to Point 2 on the map. You see it on the screen
27 in front of you. That is the first segment of the
28 azimuth. Point 2, of course, is the intersection of the
29 azimuth with Trinidad and Tobago's 200 nautical mile arc.

30 Trinidad and Tobago claims as its EEZ the maritime
31 area to the south of this segment of its claim line, and
32 it is shaded in the map before you. However, Trinidad and
33 Tobago claims for itself only the area to the north of the
34 line that results from the 1990 Agreement with Venezuela.

35 Therefore, although this is not shown or addressed
36 directly in Trinidad and Tobago's pleadings, the boundary
37 line of this part of Trinidad and Tobago's EEZ claim in
38 fact runs from Point 2 on the 88 degree azimuth, southward

1 along Trinidad and Tobago's 200 nautical mile arc to Point
2 6, which is the intersection of Trinidad and Tobago's 200
3 nautical mile arc with the Trinidad and Tobago-Venezuela
4 Agreement line, then back to the median line at Point 7,
5 Point 7 being the intersection of the Trinidad and Tobago-
6 Venezuela line with the parties' median line. This leaves
7 an area of overlapping Barbados and Trinidad and Tobago
8 EEZ entitlement to the south that Barbados claims for
9 itself and from which Trinidad and Tobago claims Barbados
10 is excluded: that white area to the south of the 1990
11 line.

12 Trinidad and Tobago's second claim relates to
13 maritime space in an area that is agreed by both parties
14 to be beyond Trinidad and Tobago's 200 nautical mile arc
15 but within Barbados' 200 nautical mile EEZ limit. This
16 maritime space lies to the south of the next segment of
17 Trinidad and Tobago's 88 degree azimuth. That segment
18 runs from Point 2 to Point 3 on the map in front of you.
19 Point 2 is the intersection of the azimuth with Trinidad
20 and Tobago's 200 nautical mile arc. Point 3 is the
21 intersection of the azimuth with Barbados' 200 nautical
22 mile limit. The area shaded now on your map is the area
23 claimed here by Trinidad and Tobago for itself.

24 This is possibly the most bewildering part of
25 Trinidad and Tobago's claim. It is perhaps no coincidence
26 that it is the one for which Trinidad has chosen to
27 provide the least explanation. Trinidad and Tobago cannot
28 claim the area as its EEZ, because it lies more than 200
29 nautical miles from its coast. Trinidad and Tobago thus
30 only claims sovereign rights there over the seabed and
31 subsoil as part of its purported extended continental
32 shelf entitlement. Trinidad and Tobago implies that its
33 proposed delimitation line contemplates a division of the
34 sovereign rights in this particular area between it and
35 Barbados, with Barbados enjoying rights over the water
36 column. However, Mr President, members of the Tribunal,
37 as I noted at the beginning of my presentation, the
38 parties are agreed that the Tribunal is to determine the

1 course of a single all-purpose maritime boundary. That
2 necessarily means that Barbados would be precluded from
3 exercising any sovereign rights or jurisdiction to the
4 south of Trinidad and Tobago's claim line. That is, in
5 this section to the south of the azimuth that runs between
6 Point 2 and Point 3, including this piece of Trinidad and
7 Tobago's jigsaw puzzle.

8 It thus follows that Trinidad and Tobago's claim line
9 would exclude Barbados from an area of maritime territory
10 that would otherwise be Barbados' EEZ. Because Trinidad
11 and Tobago can only claim the seabed and subsoil here, the
12 result would be a curious legal vacuum created in relation
13 to the water column. It is unclear what would be the
14 legal result under UNCLOS of this novel proposition.
15 Perhaps Trinidad and Tobago contemplates that the high
16 seas regime would enter to fill the void for the water
17 column. If so, this would result in the anomalous
18 situation whereby maritime territory within a single
19 state's exclusive EEZ limit was subject nonetheless to the
20 regime of high seas.

21 This result squarely contradicts the hierarchy of
22 legal norms within UNCLOS, something that my colleague,
23 Professor Reisman, will discuss in great detail in
24 Barbados' final submission today.

25 In any event, turning back to Trinidad and Tobago's
26 claim line, Trinidad and Tobago has again failed to show
27 the full boundary line demarcating its actual claims. In
28 relation to the section before you on the screen, the
29 actual boundary line runs southward from Point 3 along
30 Barbados' 200 nautical mile EEZ limit to Point 5 on the
31 map. Point 5 is the intersection of Barbados' 200
32 nautical mile limit with the Trinidad-Venezuela Agreement
33 line. Then south westward along that line to Point 6 on
34 the map, which is the intersection of the Trinidad-
35 Venezuela Agreement line with Trinidad and Tobago's 200
36 nautical mile arc. Then northwards along that arc to
37 Point 2 on the map. But, of course, Trinidad does not
38 address any of these additional boundary lines in its

1 pleadings.

2 The next segment of Trinidad and Tobago's 88 degree
3 azimuth, its proposed delimitation line, constitutes the
4 northern boundary of its third claim. This third claim
5 constitutes an attempt by Trinidad and Tobago to use the
6 present proceedings to secure for itself an extended
7 continental shelf in the area immediately abutting
8 Barbados' EEZ limit. You can see the area shaded in on
9 your screen right now. The delimitation line relating to
10 this part of Trinidad's claim runs along the azimuth of 88
11 degrees between Point 3 and Point 4, with obviously the
12 extension of the azimuth continuing to the edge of the
13 continental shelf extension entitlement. It then follows
14 the line described in the Venezuela-Trinidad Agreement and
15 its extension south westward to Point 5, which is the
16 intersection of the Trinidad-Venezuela Agreement line with
17 the 200 nautical mile line of Barbados' EEZ. Then
18 northward along that line to the limit of its intersection
19 with the azimuth.

20 The complications arising from Trinidad and Tobago's
21 claims do not end there. Trinidad and Tobago, as I said,
22 does not claim territory to the south of the 1990
23 Trinidad-Venezuela Agreement line for itself. Thus,
24 superficially at least, its claim seeks only to drive a
25 wedge through Barbados' maritime territory to the south
26 and east of the 1990 Venezuela-Trinidad line. The wedge
27 created by Trinidad and Tobago's claims would leave part
28 of Barbados 's EEZ and extended continental shelf
29 separated to the south of what Trinidad and Tobago claims
30 for itself, along with the Barbados-Guyana EEZ Co-
31 operation Zone.

32 Barbados claims those areas as part of its maritime
33 territory, but Trinidad and Tobago necessarily claims that
34 Barbados is excluded from all of those areas by virtue of
35 its single all-purpose boundary running along the 88
36 degree azimuth. The map currently before you shows the
37 maritime area bounded in the south by the median lines
38 between Barbados and Trinidad and Tobago and Barbados and

1 Guyana and to the north by Trinidad and Tobago's proposed
2 single all-purpose boundary line. Mr President, members
3 of the Tribunal, this is the area from which Barbados
4 would be excluded by Trinidad and Tobago should its claim
5 be accepted.

6 It is not only Barbados that would be deprived of its
7 territory, of course, pursuant to Trinidad and Tobago's
8 proposal. Were the Tribunal to endorse directly or
9 indirectly the 1990 Trinidad-Venezuela Agreement and the
10 line that it produced, the implications for Guyana are
11 obvious.

12 This analysis of Trinidad and Tobago's claim was laid
13 out openly in Barbados' Reply. It invited a reasoned
14 response from Trinidad and Tobago to explain the disorder
15 that underlies its deceptively simple claim line and to
16 acknowledge the legal confusion that infects its many
17 segments of claim. That Trinidad and Tobago's Rejoinder
18 fails to respond other than in two respects. The first is
19 a grudging apology hidden at the bottom of footnote 228 on
20 page 72 of its Rejoinder. That can be found at tab 102 of
21 the Judges' folder from today. That apology
22 disingenuously states "the co-existence of zone and shelf
23 rights is not an invention of Trinidad and Tobago, it is a
24 function of the co-existence of the relevant parts of the
25 1982 Convention".

26 Trinidad and Tobago's postulation of the co-existence
27 of rights between different states on one side of a single
28 all-purpose maritime boundary has yet to be explained.
29 That apology certainly does not do it. Instead Trinidad
30 and Tobago has chosen to tell the Tribunal that, well,
31 yes, its claim might result in a complex mire of zones and
32 boundaries but Trinidad and Tobago does not have to
33 address this chaotic result, because it is the inevitable
34 consequence under UNCLOS if the Tribunal draws a line as
35 Trinidad and Tobago would have it. In other words, first
36 you do what Trinidad and Tobago wants and then the legal
37 principles sort out the consequences. Most international
38 lawyers would surely agree that the law works in precisely

1 the opposite way. In Trinidad and Tobago's submissions
2 the Tribunal encounters not a claim based on a considered
3 international law theory, but a claim in desperate search
4 for anything looking like a legal theory to support it.
5 As has been exposed over the last two days, no sooner has
6 Barbados exposed Trinidad and Tobago's legal arguments as
7 false, then Trinidad and Tobago reaches for yet another
8 one.

9 Consider Trinidad and Tobago's very pleadings.
10 Barbados exposed in its Reply the bewildering disarray
11 generated by Trinidad and Tobago's proposed line and
12 analysed it much as I have gone through with you in the
13 maps on your screens just now. Trinidad and Tobago failed
14 to respond with the two exceptions as I noted, the first
15 was the grudging apology I just described. The second
16 response I will turn to now.

17 It was a material change in Trinidad and Tobago's
18 argument but it was one that Trinidad chose not to bring
19 to the attention of the Tribunal. So let us look at it
20 now. This is map 7.4 of Trinidad and Tobago's Counter
21 Memorial. It can be found at tab 103 of the Judges'
22 folder. May I suggest that you might want to have that
23 map to hand. It is tab 103 and map 7.4 of Trinidad and
24 Tobago's Counter Memorial. As you can see, it depicts the
25 area of EEZ entitlement and the areas of potential
26 extended continental shelf entitlement. The EEZ area is
27 shaded in the dark blue and the ECS area is hashed. The
28 tribunal will note that the area in the middle of the map
29 to the south of the 1990 Trinidad-Venezuela line, but to
30 the north of the Barbados-Trinidad median line and the
31 Barbados-Guyana median line and within Barbados' 200
32 nautical mile EEZ limit is shaded in that dark blue. I
33 have selected this map 7.4 by way of example but it is no
34 accident. Every single relevant map in the Counter
35 Memorial shows the same thing as between EEZ and
36 continental shelf extension entitlement.

37 12.00

38 The Tribunal can conclude from this that at the time

1 it wrote its Counter Memorial Trinidad and Tobago
2 considered that this area, that is the area within
3 Barbados' 200 nautical mile arc and south of the 1990
4 line, was EEZ and not ECS. That is certainly what it
5 shows. That is certainly what they assert by way of this
6 map.

7 However, Barbados subsequently analysed the
8 implications of Trinidad and Tobago's proposed single all
9 purpose boundary line in its Reply that followed the
10 Counter Memorial. Barbados demonstrated the various
11 defects that would result from Trinidad and Tobago's
12 proposed line. Rather than address Barbados' arguments in
13 a responsible fashion Trinidad and Tobago tried to conceal
14 some of the defects so as to fudge the problem.

15 I direct the Tribunal's attention back to the box in
16 the middle of the EEZ at the centre of map 7.4. This area
17 is now zoomed in on the screen in front of you and it is
18 just a zoom in of that central area I have been discussing
19 on Trinidad and Tobago's map 7.4. No one could have an EEZ
20 to the north east half of that box except Barbados. You
21 see the dotted line of Trinidad and Tobago's arc that
22 comes from the top of that highlighted section down to
23 join the western boundary of the Barbados Guyana Co-
24 operation Zone. Trinidad and Tobago's 200 mile arc would
25 stop it short. So too Guyana and Venezuela's 200 nautical
26 mile limits stop short of that area. Thus, if it is EEZ,
27 the territory can only belong to Barbados. Trinidad and
28 Tobago's recognition that this area is EEZ and thus
29 Barbados' is irreconcilable with Trinidad and Tobago's
30 single all purpose boundary.

31 This might just have been an accident, but let me
32 show you now what Trinidad and Tobago did when it realised
33 that it was confronted with this problem. This is map 5.1
34 of the Rejoinder of Trinidad and Tobago. It can be found
35 at tab 104 of the judges' folder. Look at what Trinidad
36 and Tobago has done, realising its error which was
37 expressed in the Reply, Trinidad and Tobago altered the
38 areas in its map that describe EEZ and ECS. You can look

1 on the screen in front of you and see what they have done.

2 In effect, Trinidad and Tobago retracted this apparently
3 unintended recognition of Barbados' sovereign rights and
4 jurisdiction and the implicit admission of the failure of
5 its proposed boundary line.

6 Because Trinidad and Tobago's proposed single all
7 purpose boundary line could not co-exist with the
8 Barbadian EEZ in that area below the 1990 line, Trinidad
9 and Tobago simply changed its maps without telling the
10 Tribunal or Barbados. All the relevant maps in the
11 Rejoinder follow this same retraction.

12 On the screen I have put the highlights of the
13 relevant area of the two sets of maps. The top are the
14 maps that come from the Rejoinder and the bottom the maps
15 that come from the Counter Memorial. A graphic showing of
16 this juxtaposition that is on your screen can be found at
17 tab 105 of your folder for future reference. I invite the
18 Tribunal to compare the two sets of maps.

19 Trinidad and Tobago did not bring this to your or our
20 attention. It did not seek to describe this deliberate
21 alteration as a typographical or technical error, or an
22 oversight in the Counter Memorial maps; it did not
23 describe what it did at all. Instead Trinidad and Tobago
24 attempted to make the change unnoticed. This can only
25 serve to reinforce the inevitable conclusion.

26 I have not pointed this out to the Tribunal in order
27 to assert that Trinidad and Tobago is somehow bound or
28 estopped by these maps in its pleadings; not at all, and
29 that is not Barbados' case. Rather, the Tribunal is
30 entitled to consider this visual retraction as
31 confirmation of the manner in which Trinidad and Tobago
32 has approached its maritime delimitation claim. The
33 Tribunal is entitled to conclude that Trinidad and Tobago
34 has not approached its claim by way of a careful studied
35 construction of a legally coherent delimitation line based
36 on a projection seaward from the land, every step and
37 implication of every zone measured carefully against the
38 law. To do so would be to have done what Barbados did in

1 its Reply and what I have just done for you. Instead, it
2 appears that Trinidad and Tobago has decided what
3 territory it wants and then just drawn an arbitrary line
4 around it. Or perhaps, Mr President, a little bit more
5 than what it actually wants, hoping that it will get
6 something by way of compromise.

7 If one follows orthodox methodology from the coast
8 out to the extended continental shelf, analyzing carefully
9 each step according to international law, Trinidad and
10 Tobago's proposed delimitation line looks about as
11 comfortable as a cat in a bath tub. That Trinidad and
12 Tobago appears not to have arrived at this realisation
13 until its Rejoinder speaks volumes.

14 Trinidad and Tobago's justification for its proposed
15 line, as Sir Elihu pointed out and as I mentioned at the
16 beginning of my pleadings, has changed from pleading to
17 pleading as Trinidad and Tobago lurches from one
18 internally inconsistent rationalisation to another in
19 reaction to Barbados pointing out the flaws in its
20 retrospective legal argument. The Tribunal will no doubt
21 recall the elegant undulation of the visual depiction that
22 Sir Elihu used to show Trinidad and Tobago's radiating
23 coast theory. Sir Eli and I almost had a falling out over
24 that image. I thought that it looked like the waving of a
25 fan. Sir Eli thought that it reminded him of the
26 shimmying of a belly dancer. He obviously leads a more
27 exciting life than I do.

28 I confess, Mr President, that I am looking forward to
29 my colleague Mr Paulsson's presentation, which will follow
30 mine presumably after lunch, because Sir Eli and I agreed
31 that Mr Paulsson would have the final word on whether it
32 was a fan or a belly dancer. In any event may I suggest
33 when you listen to him you keep a mind to Sir Eli's
34 graphic.

35 Trinidad and Tobago's pleadings appear to suggest,
36 and appear to suggest seriously, that the Tribunal should
37 adopt Trinidad and Tobago's approach by first deciding to
38 give Trinidad and Tobago maritime territory to the north

1 of the median line and then try to rationalise it under
2 UNCLOS by proceeding backwards from the single all purpose
3 boundary line back to the land. All of this is sadly
4 reminiscent of that famous quotation of Groucho Marx
5 "Those are my principles and if you don't like them, well,
6 I have others for you". Barbados submits that the
7 Tribunal should treat these disposable arguments for what
8 they are.

9 Below the surface, part of what Trinidad and Tobago
10 is asking the Tribunal to do is to take from Barbados
11 maritime territory that is located both to the north of
12 the median line and to the south east of the 1990
13 agreement line, the agreement between Trinidad and Tobago
14 and Venezuela. That is another result of Trinidad and
15 Tobago's claim being expressed as a single all purpose
16 boundary line along the 88 degree azimuth. There is thus
17 a dispute between the parties in relation to all of the
18 maritime territory that Barbados claims, and from which
19 Trinidad and Tobago seeks to exclude Barbados.

20 In the Rejoinder, Trinidad and Tobago describes its
21 claim and chides Barbados for not having given an
22 explanation for what Barbados considers to be the true
23 purpose of Trinidad and Tobago's claim line. Frankly
24 Barbados finds it difficult to believe that Trinidad and
25 Tobago has really failed to understand what was plainly
26 stated in Barbados' pleadings, not to mention during the
27 rounds of bilateral negotiations. But for the avoidance
28 of doubt let me summarise.

29 Barbados submits that Trinidad and Tobago's claim
30 line is, inter alia, a cover for Trinidad and Tobago
31 attempting to impose Trinidad and Tobago and Venezuela's
32 agreement on Barbados; to compel Barbados to contribute,
33 to use Trinidad and Tobago's term, its maritime territory
34 to Venezuela's self proclaimed Salida Al Atlantico; to
35 force Barbados to compensate Trinidad and Tobago for
36 Trinidad and Tobago having ceded part of its potential
37 maritime territory claims to Venezuela; to have the
38 Tribunal endorse all of the above in a legally binding or

1 at least practically binding way; to take away Barbados'
2 possibly only prospective hydrocarbon zone in which
3 Barbados has been engaging in oil exploration activities
4 for the past three decades; and to establish a confused
5 patch work of five different and sometimes overlapping
6 maritime zones that have yet to be explained to the north
7 of the median line using a number of explicit and
8 concealed boundary lines.

9 All of these and more have been described in plain
10 language in Barbados' written pleadings. I have
11 summarised them on the screen and they can be found at tab
12 106 of the Judges' folders. I shall only give a brief
13 overview of them now.

14 Trinidad and Tobago's problem in relation to its
15 maritime boundary delimitation with Barbados is the
16 compact that it reached with Venezuela in 1990. Under
17 international law and Article 3 of that very 1990
18 agreement, it is not opposable to Barbados or any other
19 third country. Yet Trinidad and Tobago seeks to rely on
20 it and the line produced as the foundation of its claim.
21 The 1990 treaty between Trinidad and Venezuela is not part
22 of this arbitration. It is not subject to the
23 jurisdiction of the Tribunal and certainly the
24 jurisdiction of the Tribunal cannot be limited by the
25 existence of the line produced by that agreement.

26 The following observations I make about it therefore
27 are made only to emphasise the irrelevance and invalidity
28 of that agreement with respect to third states.

29 In 1990 Trinidad and Tobago and Venezuela agreed to
30 partition as between themselves certain maritime
31 territory. The Trinidad/Venezuela agreement line that
32 demonstrates their ambitions included maritime territory
33 beyond 200 nautical miles from their coasts. Not only
34 that, they agreed to appropriate to themselves a maritime
35 area that lies not only beyond 200 nautical miles from
36 their coasts but within 200 nautical miles of both
37 Barbados and Guyana's coasts. The Trinidad/Venezuela
38 agreement disregarded entirely the existence of Barbados

1 and Guyana in a geographical, political and legal sense.
2 It purported to apportion to Trinidad and Venezuela
3 maritime territory that was subject to the legitimate
4 sovereign rights and jurisdiction of Barbados and Guyana.

5 To the north of the Barbados-Guyana and Barbados-Trinidad
6 median lines, the Trinidad Venezuela agreement represents
7 a purported concession, and "concession" is the
8 terminology used by Trinidad and Tobago, by Trinidad to
9 Venezuela of maritime territory that belongs to Barbados.

10 To the south and east Trinidad and Tobago is seeking
11 nothing less than the Tribunal's assistance in
12 accomplishing its and Venezuela's ambition to acquire the
13 maritime territory of Barbados and Guyana. If Venezuela's
14 ambitions to the south and east of the 1990 line are only
15 modest compared to Trinidad and Tobago's ambitions to the
16 north as expressed in this arbitration, the implications
17 for Barbados' maritime territory and Guyana's land and
18 maritime territory are clear.

19 To the north of the median lines between Barbados and
20 Guyana and Barbados and Trinidad, Trinidad and Tobago is
21 constrained by the well established general principle of
22 law of nemo dat quod non habet. Trinidad was clearly not
23 competent to concede this territory to Venezuela.

24 In its Rejoinder at paragraph 196, Trinidad and
25 Tobago refers to an article by Nweihed. I am going to
26 call him Nweihed and I apologise for it because I am sure
27 he would not pronounce it that way. He wrote a commentary
28 in volume 1 of Charney and Alexander on the 1990 Trinidad
29 Venezuela agreement. A copy of the article is located for
30 you at tab 107 of your judges' folder. The quotation
31 relied upon by Trinidad and Tobago in its pleading refers
32 to the 1990 line as being a search for equity that avoided
33 addressing the thorny territorial issues facing Guyana and
34 Venezuela.

35 12.15

36 Trinidad and Tobago seeks to rely on the article by
37 Nweihed to show that independent observers considered that
38 Trinidad's concession northward from its median lines to

1 Venezuela was reasonable. What Trinidad and Tobago fails
2 to note is that the supposedly reasonable concession was
3 made by Trinidad to Venezuela in relation to territory
4 that falls on Barbados' side of the Trinidad-Barbados
5 median line. In his article, Nweihed at no point
6 considers the implications for Barbados of the 1990
7 Venezuela Trinidad agreement.

8 Nweihed's article focuses its analysis of the
9 political, strategic, historical and legal considerations
10 of the 1990 agreement entirely on the implications of the
11 1990 line for Guyana. At no point did this analysis refer
12 to Barbados. The only passing reference to Barbados in
13 the article is one single technical note that refers to
14 the outer turning point of the 1990 line as being more
15 than 200 nautical miles from Barbados. That was a
16 technical observation and contained no editorial comment
17 or evaluation.

18 Nweihed concluded that the Agreement was an adroit
19 way for Trinidad and Tobago to avoid the claims between
20 Venezuela and Guyana. Mr President, members of the
21 Tribunal, it does not follow from this that Nweihed
22 considered that it was a reasonable or equitable thing for
23 Trinidad and Tobago to do what it did in so far as
24 Barbados' entitlement was concerned. The author says no
25 such thing. It is clear that it was never in his
26 contemplation. Trinidad and Tobago has merely taken a
27 quotation from the article out of context.

28 The truth is that the current Government of Trinidad
29 and Tobago knows full well that its claims in this
30 arbitration to the north of the median line are untenable.
31 It has been handed a fait accompli and has apparently
32 decided that to take the initiative to revisit the
33 Venezuelan pact would be so embarrassing politically or
34 impossible economically that it is willing to absorb the
35 legal embarrassment in which it finds itself. It is
36 interesting to contrast Trinidad and Tobago's current
37 statements about the line produced by its 1990 Agreement
38 with the statements made by Trinidad and Tobago's current

1 Prime Minister back in 1990. The agent of Barbados
2 referred to these briefly in her opening remarks. At the
3 time of the signing of the Trinidad-Venezuela Agreement,
4 the current Prime Minister of Trinidad and Tobago, Patrick
5 Manning, was the leader of the Opposition. He described
6 the 1990 Agreement and its purported concession as
7 maritime colonialism. He publicly castigated the pact.
8 He unambiguously called it a "very dangerous course of
9 action". Referring to the idea of Trinidad and Tobago
10 agreeing to Venezuela's maritime ambitions, Prime Minister
11 Manning emphatically denied that the territory was
12 Trinidad and Tobago's gift to give. He publicly declared
13 on the record, and this is at tab 108 of your judge's
14 folder, "there are other countries involved, Barbados and
15 Guyana, and Trinidad and Tobago could not unilaterally
16 take any decisions that would lead to granting to
17 Venezuela its request into the Atlantic Ocean". Prime
18 Minister Manning was correct. Trinidad and Tobago has no
19 right to give away to Venezuela what did not belong to it,
20 namely, and as far as we are concerned in this
21 arbitration, the territory of Barbados.

22 Nor does Trinidad and Tobago have the right to take
23 for itself the territory of Barbados.

24 The map before you on the screen now is found at tab
25 6 of Barbados' supplementary materials and this is the
26 largest size version of that map. I took you to it in
27 some detail yesterday. You will recall that it is at tab
28 48 of the Judges' folder of day one. I will in a few
29 moments ask you to take that map out, so you may wish to
30 prepare yourself for that. As I said, it is the same map
31 to which I took you yesterday. It is the map that was
32 publicly exhibited and given to the press by Prime
33 Minister Manning, as he now is, in 1990 when he was
34 denouncing the Agreement. It was a leak. It shows the
35 area of Trinidad and Tobago's maritime territory that
36 Trinidad and Tobago conceded to Venezuela. That area is
37 the dark shading on the map. It lies to the west of the
38 Trinidad and Tobago-Guyana-Barbados tri-point and median

1 lines. As I noted yesterday, all of the various proposed
2 delimitation lines on that map during the history of the
3 negotiations between the parties, as well as the shading
4 of what was conceded or what they thought they were
5 conceding until the last minute, stops at the limit of
6 Trinidad and Tobago's maritime territory which is depicted
7 in the median lines between Barbados and Trinidad and
8 Tobago.

9 It is not only the principle of *nemo dat quod non*
10 *habet* that applies here. The Trinidad-Venezuela Agreement
11 was a pact between two states to violate the legal rights
12 of third states. The current Government of Trinidad and
13 Tobago is well aware of the illegal effect intended by the
14 Trinidad-Venezuela Agreement on Barbados and Guyana. I
15 ask you not to put the map away yet.

16 Again, I just want to take you to one more quote from
17 the current Prime Minister of Trinidad and Tobago, made in
18 1990. It is on your screen now and it is also at tab 109.
19 He said that "the signing by the Prime Minister of
20 Trinidad and Tobago on a Venezuelan map done in Spanish
21 and the tabling in the Parliament of Trinidad and Tobago
22 of this map, which clearly identifies Guyanese territory
23 as Venezuelan territory articulates a new and startling
24 position for Trinidad and Tobago in this matter." Given
25 this, there is little wonder that the 1990 Agreement has
26 had a corrosive effect on Trinidad's relationships with
27 its CARICOM neighbours. In its written pleadings,
28 Trinidad and Tobago seeks to play down the reactions of
29 Barbados and Guyana and other states, not just to this
30 1990 Agreement but also to Trinidad's recent attempts
31 (starting in 2003) to have it become effective against
32 them.

33 The Tribunal heard yesterday Teresa Marshall's
34 evidence in person of the confrontation that occurred
35 between Prime Minister Manning of Trinidad currently and
36 the rest of the CARICOM heads of Government led by
37 Barbados and Guyana at the Abuja Commonwealth Conference
38 in December 2003. You heard how he was confronted. You

1 heard how he then agreed to submit the 1990 Agreement to
2 the Trinidad Cabinet for it to reconsider Trinidad's
3 support for the agreement. You heard how the Trinidad and
4 Tobago Cabinet subsequently reconfirmed Trinidad and
5 Tobago's commitment to the Agreement and how Prime
6 Minister Manning of Trinidad told Prime Minister Arthur of
7 Barbados that Trinidad considered itself bound by that
8 Agreement as a matter of law and that, no matter how
9 Trinidad and Tobago might wish it were otherwise, it
10 cannot voluntarily act to contradict it.

11 But the current Prime Minister knows the prejudice
12 caused to its neighbours by the 1990 Agreement. In 1990
13 he stated that by entering into that Agreement Trinidad
14 had "prejudiced Barbados and has given tacit approval to
15 Venezuela's claim to approximately one third of Guyana's
16 territory".

17 In its pleadings Trinidad and Tobago has asserted
18 that there is nothing in the 1990 Agreement or the line
19 that it produced that prejudiced Guyana's maritime or land
20 territory interests. But the evidence before this
21 Tribunal contradicts this assertion.

22 I would like to direct your attention back again to
23 the 1990 Trinidadian map of the history of its
24 negotiations with Venezuela. As I said, I talked to you
25 yesterday about a number of the lines on the map. Now I
26 would like you please to look at the map and find the
27 median line described between Venezuela and Guyana. Not
28 surprisingly, you can see it clearly marked. It is the
29 dotted line running up perpendicularly from the land
30 boundary between Venezuela and Guyana. On one side is
31 written Venezuela and on the other side is written Guyana.

32 I apologise to the tribunal because I have no doubt that
33 yesterday when you were looking at this map you already
34 noticed the two lines on this map that also run out from
35 the coast of South America. Of course, these two lines
36 lie to the east of the Venezuela-Guyana land boundary and
37 median line. At the seaward end, these lines join at
38 various critical points along the 1990 line as

1 perpendiculars to the coast. The Tribunal will no doubt
2 recognise the similarity between this aspect of the 1990
3 Trinidadian map and map 7 from Barbados' Reply, which is
4 entitled "Map 7 showing the relationship between Trinidad-
5 Venezuela Agreement line and Venezuela's land claims
6 against Guyana". A copy of that map, map 7, can be found
7 in your Judges' folder for today at tab 111. I will ask
8 you to leave that map up for the moment. You can see what
9 was happening in those lines. The Venezuela-Guyana
10 maritime boundary clearly is shown on this map and it
11 comes from the termination point of the land boundary.
12 What happens if the land boundary were somehow shifted a
13 little bit to the east? Well, you can see the dark line
14 immediately to the east of that median line. That is what
15 would happen if Venezuela were able to shift the line to
16 the east. It would lead to a perpendicular median line
17 that went up and joined the 1990 line just around where
18 the 1990 line jigs to the north. It is not difficult to
19 conclude from this that this line was made to jig to the
20 north at that particular junction deliberately with this
21 shift in land boundary contemplated. Similarly you will
22 see the dotted line a little bit further east. That comes
23 at another critical juncture in what Venezuela and
24 Trinidad and Tobago thought they were conceding or not
25 conceding.

26 Map 7, which is tab 111 of your Judges' folder from
27 today, is merely an extrapolation of this process that
28 this Trinidadian map confirms was undertaken by the two
29 parties at a certain point in their negotiations with each
30 other: how to match up their maritime ambitions with
31 Venezuela's land ambitions in relation to Guyana. It
32 certainly fits easier as part of a jigsaw puzzle than the
33 jigsaw puzzle that falls to the south of Trinidad's 88
34 degree azimuth.

35 UNCLOS does not allow Trinidad and Tobago to extend
36 its territory as it now claims, nor to, in effect, do so
37 by way of conceding territory to a third state.
38 Throughout the bilateral negotiations with Barbados,

1 Trinidad and Tobago expressly recognised to Barbados that
2 it was not bound by the Trinidad-Venezuela Agreement. As
3 the records of the negotiations attest, particularly the
4 recordings to which Trinidad takes such great objection,
5 Trinidad nonetheless tried to get Barbados to acquiesce in
6 both the Trinidad-Venezuela Agreement and its illegal
7 effects. Barbados refused to do this. Indeed, it was
8 this central aspect of the dispute between the parties
9 that apparently caused Prime Minister Manning to declare
10 to the Prime Minister of Barbados in February 2004 that
11 the boundary dispute between those two countries was
12 intractable and that Trinidad and Tobago was not prepared
13 to negotiate further on it.

14 In this arbitration Trinidad has acknowledged again
15 that the Trinidad-Venezuela Agreement is not binding on
16 Barbados and that, in effect, it can have no part in this
17 delimitation. However, Trinidad and Tobago insinuates
18 that Barbados somehow has a moral obligation to join
19 Trinidad and Tobago in conceding its territory to
20 Venezuela. It is in this manner that Trinidad and Tobago
21 seeks to introduce the Agreement through the back door as
22 an instrument for dispossessing Barbados, including under
23 the rubric of purported regional circumstances, as my
24 colleague Professor Reisman will speak to this afternoon.

25 Trinidad and Tobago brazenly admits that the
26 foundation of its claim is to seek endorsement from the
27 Tribunal of its attempt to give part of Barbados' maritime
28 territory to Venezuela. Thus, in explaining its claim at
29 paragraph 257 of its Counter Memorial, Trinidad and Tobago
30 concludes as follows. I put this up on your screen. It
31 is also found at tab 112 of the today's folder. Trinidad
32 and Tobago explains "in this way [following its claim
33 line] the contribution made by Trinidad and Tobago to the
34 salida al Atlantico of the east facing mainland coast of
35 Venezuela is maintained". The placement of Trinidad and
36 Tobago's proposed single all-purpose boundary means that
37 Trinidad and Tobago claims that Barbados is excluded from
38 exercising sovereign rights and jurisdiction over the

1 maritime territory that Barbados claims to the south of
2 that line, as I mentioned at the outset of my remarks.
3 Thus, the parties are clearly in dispute over this
4 maritime territory. Barbados claims it as its own, and as
5 part of the Barbados-Guyana Co-operation Zone, and
6 Trinidad and Tobago claims that it is entitled to exclude
7 Barbados from that area and to concede it to Venezuela in
8 part.

9 Trinidad and Tobago cannot rely on the 1990 Agreement
10 explicitly or implicitly to prevent the Tribunal from
11 delimiting the parties' boundary up to the tri-point with
12 Guyana. The 1990 agreement stands in marked contrast to
13 the Barbados Guyana EEZ Co-operation Zone Treaty. The Co-
14 operation Zone, shown in highlight on your screen, does
15 not appropriate the maritime territory of any third state.

16 It is consistent with UNCLOS in all respects. The entire
17 area of the Co-operation Zone falls beyond the 200
18 nautical mile arcs of any third state, but within the 200
19 nautical mile arcs of Barbados and Guyana. As a result
20 the only states with rights to the territory under
21 customary international law and UNCLOS within the Co-
22 operation Zone are those two neighbouring states; and
23 indeed the maps produced by Trinidad and Tobago in its
24 Counter Memorial would be consistent with that view.

25 Barbados and Guyana, as the only states with
26 territorial rights in the area concerned, were fully
27 entitled to enter into the EEZ Co-operation Zone Treaty as
28 part of their lawful exercise of sovereign rights and
29 jurisdiction. Barbados' Agent has already outlined to the
30 Tribunal a number of the actions taken by Barbados with
31 its neighbour to implement the treaty. The EEZ Co-
32 operation Zone Treaty, as she emphasised, and the
33 activities undertaken according to its terms, reflect a
34 co-operative effort by two neighbouring CARICOM countries
35 to exercise joint jurisdiction peacefully in an area of
36 maritime space that is beyond the jurisdiction of any
37 third state.

38 Mr President, this brings me to the conclusion of my

1 intervention, with not much time to spare. But suffice to
2 say it is Barbados' submission that the manner of Trinidad
3 and Tobago's defence and covert promotion of its 1990
4 agreement in this arbitration reveals its position very
5 clearly. In its Rejoinder, Trinidad and Tobago stated, in
6 relation to its attempt to appropriate territory by the
7 1990 agreement (tab 113) "as to the appropriation of
8 maritime territory Trinidad and Tobago made what was in
9 its view a reasonable settlement in respect of EEZ and
10 Continental Shelf claims".

11 Barbados does not doubt that Trinidad and Tobago was
12 well pleased with whatever benefits it achieved from
13 entering into this pact with Venezuela. It may well have
14 been reasonable for Trinidad and Tobago to concede part of
15 its own maritime territory to Venezuela. That is not
16 something on which Barbados will comment. It may be that
17 the Trinidad-Venezuela agreement represents a legal
18 concession by Trinidad and Tobago in so far as it relates
19 to its territory to the south of the median line with
20 Barbados. It was legally intolerable and indeed
21 intolerable in every way for Trinidad and Tobago to
22 purport to concede part of Barbados' territory. And
23 Barbados made this position known to Trinidad and Tobago,
24 including from the outset of the bilateral negotiations
25 between them. Given the undisputed fact that the
26 Trinidad-Venezuela agreement is not opposable to Barbados
27 and cannot in any way affect the rights of Barbados, the
28 Tribunal should disregard Trinidad and Tobago's overt and
29 covert reliance upon the agreement in its entirety when
30 coming to delimit the maritime boundary in the present
31 case.

32 To conclude, Trinidad and Tobago's claim attempts to
33 extend its boundary well beyond both its legal and
34 geographical limits. Its claims extend beyond its 200
35 mile arc, bypassing through Barbados' EEZ and into the
36 high seas beyond, and in so doing Trinidad and Tobago
37 would create a jigsaw puzzle of bewildering maritime zones
38 that it has yet to explain. It would have the effect,

1 inter alia, of cutting off Barbados from its EEZ and
2 creating a novel regime of extended continental shelf and
3 high seas within a single state's EEZ. It would result
4 apparently in an area of joint sovereignty and
5 jurisdiction, yet to the south of a single all purpose
6 boundary line.

7 Trinidad and Tobago, to Barbados' greatest concern,
8 would curtail Barbados' ability to proclaim the potential
9 extended continental shelf rights that it has from the
10 edge of its EEZ, and would curtail its EEZ to the north of
11 the median line in the area in dispute, to which Barbados
12 is entitled by geography and international law.

13 Trinidad and Tobago has attempted to hide its claims
14 behind a seemingly simple single all purpose boundary
15 line. When that proposed boundary is examined closely, it
16 is revealed as confused, complicated and ultimately
17 unworkable.

18 I thank the Tribunal for its attention. Mr
19 President, may I suggest, with the indulgence that has
20 been kindly shown by the Tribunal and our colleagues from
21 Trinidad and Tobago, that we might break early for lunch
22 and after that may I suggest that you call upon Mr
23 Paulsson to make Barbados' next presentation.

24 THE PRESIDENT: Thank you so much, Mr Volterra. The Tribunal
25 will now adjourn and meet again at 2.35.

26 (Adjourned for a short time)

27 THE PRESIDENT: Mr Paulsson.

28 MR PAULSSON: Thank you very much. I am grateful for the
29 privilege of addressing your Tribunal on behalf of
30 Barbados. Yesterday, my Professor, Michael Reisman, found
31 a way to explain to you that he was showing his respect
32 for the Tribunal by addressing you from a seated position.

33 I hope that I am being respectful in standing at
34 attention before you today, which only shows that respect
35 can be demonstrated in a number of ways and, perhaps, we
36 have not exhausted the possibilities. I recall from my
37 childhood having observed a legal system in West Africa
38 where the supplicant was expected, indeed required, to

1 address the Tribunal in his oral submissions entirely from
2 a kneeling position. This method should not be dismissed
3 out of hand. It has certain advantages, not so much as a
4 matter of respect - I can promise you that respect for the
5 decision maker in Loffa County in the North Western corner
6 of Liberia in the 1950s was a foregone conclusion - but as
7 a matter of highly-pragmatic and effective incentive to
8 brevity. I shall keep this in mind, Mr President, as I
9 deal with four series of propositions which make Trinidad
10 and Tobago's proposed line a legal impossibility.

11 First, the jurisprudence is clear and consistent to
12 the effect that equidistance is the primary method of
13 delimitation and this is as true as between adjacent
14 coasts as it is between opposite coasts. Therefore,
15 nothing of legal significance would follow from Trinidad
16 and Tobago's energetic attempts to classify and re-arrange
17 geography. In any event, it is a geographical fact that
18 Barbados and Trinidad and Tobago are opposite. They are
19 not adjacent, they are not contiguous or "in a position of
20 adjacency" as our opponents would suggest. No legal gloss
21 can refashion geography. Geography is given. Geography
22 controls.

23 Secondly, any pretension that the coastal length of
24 the sole island of Trinidad is relevant in this
25 delimitation is belied by the fact that the island of
26 Trinidad does not contribute any base points to the
27 delimitation line. This means that the coast of the
28 island of Trinidad produces no entitlement opposable to
29 Barbados. That is the end of the matter.

30 Thirdly, when one considers the actual lengths of the
31 parties' relevant coast lines, those relevant ones are
32 those that are in frontal opposition. The ratio is 2.6 to
33 1 in Barbados' favour. You will have seen this map in our
34 legal submissions and it appears again in your Judges'
35 folder at tab 114.

36 Now, if we were for an instant and for arguments sake
37 to adopt Trinidad and Tobago's logic and, thus, compare
38 the distance between the extreme northern point and the

1 extreme southern point of each of the three islands
2 without pausing one instant to worry about which coasts
3 are relevant, the ratio produced is around three and a
4 half to one. Nowhere near the extreme disproportions
5 present in the Libya-Malta and Jan Mayen cases.

6 Fourthly, and finally, Trinidad and Tobago's reliance
7 on the concept of cut-off is misplaced. It is predicated
8 on the argument that Trinidad and Tobago ought to have
9 "unobstructed access to the ocean to the south of
10 Barbados". But this is simply to ignore Barbados'
11 competing entitlement to that area and, therefore, simply
12 to ignore Barbados' existence altogether.

13 I shall deal with each of these topics, if it pleases
14 the Tribunal, in turn. None of them, you may be pleased
15 to hear me say, requires extended development. To save
16 time I will omit routine cross-references and ask that
17 they be inserted into the transcript. We live in the age
18 of transparency and, if it is of interest to our
19 opponents, they may have my speaking notes to check.

20 Opposition and adjacency. Let me start by recalling
21 the case of our opponents. In its most succinct form it
22 is to be found in paragraph 6 of the Trinidad and Tobago
23 Rejoinder: "There is no justification in the eastern
24 sector for treating the two coastlines as opposite, and
25 thus producing a manifestly inequitable result." Forgive
26 me, but this is so important that I will read it again.
27 "There is no justification in the eastern sector for
28 treating the two coastlines as opposite, and thus
29 producing a manifestly inequitable result."

30 The emphasis on "thus" is mine, but the word "thus"
31 is crucial to Trinidad and Tobago's argument. Its
32 contention is that treating the two coastlines as opposite
33 somehow automatically produces a manifestly inequitable
34 result. That is a naked assertion. A few words should
35 suffice to expose it as wishful thinking.

36 The law and the jurisprudence on the delimitation of
37 opposite coasts is settled. The median line is the
38 starting point and the presumptive final point because it

1 divides equally the area under delimitation. To treat two
2 sovereign states equally is to treat them equitably as
3 both customary law and UNCLOS Articles 74 and 83 require.
4 [North Sea Continental Shelf, para. 57; Gulf of Maine,
5 para. 193; Eritrea/Yemen, para. 131] It is this
6 commonplace of maritime delimitation that Trinidad and
7 Tobago now seeks to rebut. The median line in the eastern
8 sector, Trinidad and Tobago says, would lead to this
9 manifestly inequitable result. But the law of maritime
10 delimitation is not satisfied by bald assertions that the
11 result achieved by a median line is inequitable; it must
12 be shown that a special circumstance exists which makes
13 the normally applicable median line so.

14 Trinidad and Tobago is unable to point to any such
15 special circumstance other than to say that if one were to
16 treat its coast and that of Barbados as opposite, which of
17 course they are, then that would of itself lead to
18 inequity.

19 2.45 You will have noted in this connection, in the
20 written pleadings, Trinidad and Tobago's frequent use of
21 the expression "Atlantic sector". One surmises that
22 Trinidad and Tobago has optimistically lifted this
23 expression from the UK/French Continental Shelf decision
24 of 1977. [54 ILR 6] That decision established a
25 Continental Shelf boundary in what France insisted on
26 describing as two sectors, the Channel sector and the
27 Atlantic sector. France defined the Channel sector as the
28 one "where the coasts of the two states are opposite" and
29 the Atlantic sector as one "where the coasts of the two
30 states are no longer opposite each other". In its
31 decision the Court of Arbitration avoided France's terms
32 and instead spoke neutrally of the area under
33 consideration which was (I quote the Court this time)
34 "immediately to the westward of the Channel". Trinidad
35 and Tobago has opted for France's expression "Atlantic
36 sector" perhaps in the hope of sharing France's good
37 fortune in pushing its boundary northward. France
38 persuaded the Court to state that although the

1 equidistance principle was convenient, it was more
2 appropriate to make an equitable adjustment when one is
3 faced with what France called a lateral boundary between
4 two adjustment states. And the Court did adjust the
5 equidistance line in favour of France.

6 Trinidad and Tobago would have you leap to the
7 conclusion that international law therefore accepts that
8 two states may in various places be either adjacent or
9 opposite. Allow me to say "not so fast!"

10 First of all, the Court's operative expression was
11 "lateral boundary". It never said that the UK and France
12 were in any region "adjacent states". Indeed, the Court
13 was at pains to counter any such notion, and I tell you it
14 did so explicitly.

15 I wish to take you to one or two specific passages
16 from the decision but they will be easier to understand if
17 we first consider the concrete geographic problem facing
18 that Arbitration Court.

19 Consider the area to the west. Out in the Atlantic,
20 as the Court said in paragraph 233, the areas to be
21 delimited "lie off rather than between the coasts of the
22 two countries". Who could disagree? But France was quite
23 unhappy about the prospect of the lateral line to be drawn
24 into this area off the coasts, if this was to be done on
25 the basis of a pure median line. The reason for France's
26 unhappiness was very simple: the small English Scilly
27 Isles project more than twice as far westward into the
28 Atlantic than their French counterpart, the small island
29 of Ushant: 31 nautical miles to 14 nautical miles. As a
30 result, if you imagine the line between the Scillys and
31 Ushant as the base of a triangle pointing downward to the
32 south west, the mere fact that there is more water between
33 the Scillys and Cornwall has the result of causing the
34 triangle to pivot. The downward vector of the triangle
35 automatically shifts in the UK's favour.

36 Now it gets really bad from France's point of view,
37 because the agreed arbitration areas extended to a point,
38 the 1,000 metre isobath, located 180 or 160 nautical miles

1 from the islands, depending on which one you chose as your
2 starting point. The effect of pivoting the triangle was
3 greatly magnified as the vector was drawn out - leading to
4 the French loss, if we should call it that, of a very
5 considerable area due to the happenstance that the Scillys
6 are 15 nautical miles further out to sea than Ushant.

7 And so the Court agreed with France that it was
8 appropriate to make an equitable adjustment in its favour
9 on the footing that "the Scilly effect", if I may call it
10 that, produced an inequitable distortion.

11 Now, by this decision did the Court do anything or
12 say anything which assists Trinidad and Tobago in its
13 present ambitious claim? Before I answer the question let
14 me say that having reviewed the geography we can more
15 easily digest the explicit language of the decision.
16 Trinidad and Tobago would have you believe that France won
17 this particular argument because it convinced the Court to
18 treat the two states as adjacent, once you get into the
19 Atlantic area. But the decision itself is in flat
20 contradiction with this assertion. On the screen you will
21 now see paragraph 242. Further extracts from the case are
22 in your Judges' folder at 122, if you prefer that, but
23 here you see an extract from paragraph 242. I ask you
24 first just to concentrate on the first sentence. Here the
25 Court is saying that, if the distinction were legally
26 important, the Court would be inclined to treat this
27 Atlantic region as one where the two states had a
28 relationship of opposition rather than one of adjacency.
29 That is the undisputable meaning of the references to the
30 corresponding paragraphs, one and two, of article 6 of the
31 1958 Convention. That destroys Trinidad and Tobago's
32 thesis.

33 The Arbitration Court went on to say in this very
34 paragraph (242), "to fix the precise legal classification
35 of the Atlantic region appears to this Court to be of
36 little importance ... What is important is that ... the
37 Court must have regard both to the lateral relation of the
38 two coasts as they abut upon the continental shelf region

1 and to the great distances seaward that the shelf extends
2 from those coasts".

3 Mr President, this is not difficult to understand and
4 I submit it greatly illuminates an interesting earlier
5 passage in the judgment, in paragraph 239, where the Court
6 compares opposite and adjacent coasts and the relative
7 danger of distortion by geometrical effects of the
8 equidistance principle. Kindly look at the last two
9 sentences of this paragraph 239 where you read: "In the
10 case of adjacent states it is the lateral geographical
11 relation of the two coasts, when combined with a large
12 extension of the Continental Shelf seawards from those
13 coasts, which makes individual geographical features on
14 either coast more prone to render the geometrical effects
15 of applying the equidistance principle inequitable than in
16 the case of opposite states. The greater risk in these
17 cases that the equidistance method may produce an
18 inequitable delimitation thus also results not from the
19 legal designation of the situation as one of adjacent
20 states but from its actual geographical character as one
21 involving laterally related coasts".

22 I do not believe I have to say very much. All that
23 seems necessary to point out is the obvious. If Trinidad
24 and Tobago thinks it can convince anyone that France won
25 an adjustment on the basis that the Court found the two
26 states to shift from being opposite to being adjacent,
27 Trinidad and Tobago seems to be in fairly serious trouble.

28 Without intending to sound rude I would suggest that
29 Trinidad and Tobago has invented a series of abstractions
30 and tried to use them to make buckets, but buckets made of
31 abstractions tend not to hold water and this one surely
32 does not.

33 Let me illustrate. Since we are in the realm of
34 abstractions let us imagine the relationship of two states
35 which are conveniently (something you never see in our
36 world) identical in mass and geometry. These two states
37 are opposite. Even Trinidad and Tobago would surely not
38 deny it. But now we alter the abstraction and double the

1 size of these two identical states so as to give them a
2 greater sideways frontage. These, Trinidad and Tobago
3 would say, are adjacent. Let us double them again, and we
4 are opposite once more, given the greater vertical
5 frontage. Double again and Trinidad and Tobago would tell
6 you that they are adjacent. This, we submit, is getting
7 Trinidad and Tobago absolutely nowhere. The objection is
8 evident. All of these figures depict an unvarying
9 relationship of opposite coasts.

10 Mr President, either two houses are across the street
11 from each other or they are next door to each other; it
12 does not matter if you look at them from the manhole cover
13 in the middle of the street or from the post box down by
14 the corner. Of course the house across the street could
15 be dismantled and rebuilt next door, but the islands we
16 are talking about do not surreptitiously prowl about at
17 night. When the sun rises on the Windwards I think we can
18 confidently expect every morning that Trinidad and Tobago
19 and Barbados remain exactly where we left them last night.

20 These are our two states. (Judges' folder, tab 124)

21 The first thing we can observe is that there is
22 nothing like the Scilly Islands, there is nothing like the
23 island of Ushant, no special relevant circumstances of a
24 geographic nature. That is enough, I submit, to cause us
25 to put aside the UK/French decision of 1977 which has no
26 bearing on our case.

27 As to the two other decisions from which Trinidad and
28 Tobago borrows, and this time it borrows mere dicta rather
29 than any actual holdings, these are equally unavailing in
30 its attempt to re-arrange geography. Let me deal with
31 these two cases in rather shorter order if I may.

32 First Trinidad and Tobago relies on the Gulf of Maine
33 decision, in its Counter Memorial in paragraph 178. In
34 that case a Chamber of the ICJ drew a perpendicular to the
35 closing line of the Gulf of Maine to delimit the area
36 "outside and over against the Gulf". [Gulf of Maine,
37 para. 224] Barbados does not take exception to the
38 Chamber's decision. Drawing a closing line along the

1 mouth of the Gulf formed by territories belonging to two
2 states is the only way to delimit areas off the Gulf. But
3 Barbados and Trinidad and Tobago do not form a gulf, and
4 so nothing in the Gulf of Maine decision has any direct
5 pertinence to the present geographical realities. Rather,
6 Gulf of Maine and Trinidad and Tobago's reliance on Gulf
7 of Maine, is interesting in two other respects.

8 First, to demonstrate its thesis of adjacency
9 Trinidad and Tobago posits "that the westerly coasts of
10 Tobago and Barbados constitute a continuous coastline
11 joining up somewhere in the Caribbean, a tropical version
12 of the Gulf of Maine". On this basis Trinidad and Tobago
13 draws a closing line across their easterly coasts,
14 Rejoinder paragraph 184. But this hypothesis does not
15 advance Trinidad and Tobago's position. As you will have
16 seen, Barbados for the exercise of it, has drawn an
17 imaginary closing line connecting the islands of Barbados
18 and Tobago so as to form an imaginary single island.
19 (Judges' folder, tab 126) If you draw an equidistance line
20 across the imaginary closing line, you will see that it
21 runs to the south, not the north, of the actual medial
22 line between the two states.

23 Second, perhaps even more interesting, is something
24 which is not to be found in the text of the decision. In
25 Gulf of Maine, Canada's primary case was as follows. Here
26 is a quotation from the Canadian pleading which appear in
27 the commentary by Jan Schneider, one of the counsel to
28 Canada in that case, and her note on the Gulf of Maine
29 which appeared in the American Journal of International
30 Law, Volume 79, page 539. This is from page 555. "Where
31 a maritime zone is defined by distance, in Canada's view
32 the seaward extension of the zone must be thought of in
33 terms of a radial extension from the coast with equal
34 treatment for all states and their various coasts". The
35 Tribunal will recall that this is precisely the position
36 advanced by Trinidad and Tobago in its Rejoinder,
37 paragraph 185: coasts "radiate" (paragraph 185). This
38 argument is not even mentioned in the Gulf of Maine

1 judgment.

2 3.00

3 Secondly, reliance is placed by Trinidad and Tobago
4 on the Qatar/Bahrain case. It is true that the Court
5 there referred, on the one hand, to the southern part of
6 the delimitation area where "the coasts of the parties are
7 opposite to each other" and, on the other hand, to the
8 northern part "where the coasts of the two states are
9 rather comparable to adjacent coasts". Paragraph 169 and
10 170 of the judgment. This indeed is sketch map 2 from the
11 judgment. (Judges' folder, tab 128)

12 Trinidad quotes the ICJ and announces the quotation
13 by the words "the Court distinguished between the southern
14 area and the area further north in the Gulf". But then
15 Trinidad and Tobago utterly fails to show how the Court
16 distinguished between these two areas in its judgment. In
17 truth it did not. In both areas an equidistance line
18 obtained and in both cases it was incidentally adjusted to
19 take account of specific traditional special features,
20 such as low-tide elevations and islands. (Paras. 244 et
21 seq.)

22 Before leaving this topic, Barbados wishes to make it
23 clear that its position is not that the "relevant coasts"
24 involved in a delimitation - we turn to this concept in a
25 moment as I have announced - cannot be opposite in part
26 and adjacent in part. Of course they can be - if their
27 configuration varies vis-a-vis each other and vis-a-vis
28 the area to be delimited. For example, in paragraph 216
29 of the Gulf of Maine judgment the ICJ Chamber noted that
30 the adjacency of the coasts of Maine and Nova Scotia, the
31 first segment of the delimitation nearest to the back of
32 the Gulf of Maine, gave way to a "quasi-parallelism" of
33 coasts in the second segment of the delimitation further
34 in the body of the Gulf. But Trinidad and Tobago's
35 position today is something radically different. It does
36 not involve changing geographical relationships. Trinidad
37 and Tobago contends that the very same coasts may be
38 viewed as opposite from one vantage point, the Caribbean

1 sector, and as contiguous from another vantage point, the
2 Atlantic sector. There is no precedent for dual treatment
3 of this kind of the same coasts. Nor can there be when,
4 as in our case, the coastal configuration does not change.

5 To conclude, the inequity asserted by Trinidad and
6 Tobago is in no way borne out by the special relationship
7 of the parties' relevant coasts. These coasts are always
8 opposite to each other.

9 I now move with your permission to the concept of
10 relevant coasts.

11 If we consider the archipelagic baseline of Trinidad
12 and Tobago, we can perceive no projection whatsoever into
13 the relevant area, because that line results in a frontage
14 which faces obliquely away from the area. (Judges'
15 folder, tab 129) You see in the light blue section the
16 EEZs that could overlap and the area which is created by
17 the projection of the archipelagic baseline. How can this
18 projection be relevant?

19 Trinidad and Tobago itself in its Counter Memorial
20 paragraph 197 is careful to describe this frontage as
21 "coasts which face more or less to the east". Well, Mr
22 President, make that "less." Barbados' map 9 illustrated
23 the fallacy of Trinidad and Tobago's position. The
24 Tribunal may recall that Barbados' map 10, perhaps
25 somewhat cheekily, showed that the only way for Trinidad
26 and Tobago to make this argument good would be to ask for
27 permission to swing Trinidad and Tobago into a new
28 position. And when the Trinidadian pendulum starts to
29 swing, there is apparently no stopping it. What you see
30 before you now (Judges' folder, tab 131) is only the
31 migration of Trinidad and Tobago's land mass necessary to
32 claim that Trinidad and Tobago fronts - i.e. faces on to -
33 the median line. To support the radical further
34 adjustment which Trinidad and Tobago proposes, Trinidad
35 and Tobago would have to be moved much further out to sea,
36 as depicted by Barbados' map 11, which you have in the
37 Judges' Folder, tab 132.

38 The answer to this observation in Trinidad and

1 Tobago's Rejoinder was to steer off and adopt a radically
2 different approach. Now you are told that one must focus
3 on physical coasts, because the land must dominate the sea
4 - and Barbados has violated this principle by giving
5 prominence to the archipelagic baseline. This is rather
6 the pot calling the kettle black. After all, Trinidad and
7 Tobago and no one else argued that its coastal front
8 should be taken as represented by its eastern archipelagic
9 baseline. I refer you to Trinidad and Tobago's Counter
10 Memorial, for example at paragraph 200. But let us not
11 quibble. Everyone is entitled to see a new light and to
12 adopt a new position. Trinidad and Tobago's newly-found
13 faith in actual coasts rather than abstract lines
14 manifests itself in a concept of radiating coasts. I will
15 resist Mr Volterra's invitation to transform myself into
16 the judge of dancing contests, but I will agree with him
17 that Sir Elihu's fan dance was elegant indeed and you
18 surely will remember it. I will not now repeat what I
19 mentioned a few minutes ago on Canada's reliance on this
20 faux ami in the Gulf of Maine case and the fact that the
21 ICJ Chamber did not even dignify it with a reference in
22 its judgment.

23 Let me simply highlight Trinidad and Tobago's purpose
24 in advancing the concept of radiating coasts. This can be
25 simply stated. Above all, Trinidad and Tobago wants you
26 to focus away from the coasts that are relevant: that
27 front, abut, face onto the area to be delimited. It wants
28 you to focus on what Trinidad and Tobago calls (its their
29 word, Rejoinder paragraph 150(5)) generally eastern facing
30 coastline consisting primarily of the coast of the island
31 of Trinidad. Trinidad and Tobago's reasons are, of
32 course, transparent. But Barbados submits that they find
33 no expression in the law and they cannot find any
34 expression in the law because they are unprincipled.
35 Trinidad and Tobago's submission is summed up as follows,
36 and I am quoting, "There is a distinction in the
37 jurisprudence between the base points which are used in
38 the construction of a line and the coastal frontage which

1 is relevant to the delimitation as a whole". (Counter
2 Memorial paragraph 186)

3 The falsehood of this proposition is clearly shown by
4 both the Jan Mayen and Libya-Malta cases. (Reply, paras.
5 298-299) A boundary delimits competing seaward
6 projections of territorial sovereignty titles: these
7 titles must find expression in a base point. In addition
8 it is difficult to reconcile Trinidad and Tobago's
9 proposition with its professed desire to adhere to the
10 rule that "one starts from coasts, not lines unsupported
11 by coasts". (Rejoinder, para. 203)

12 By contrast Barbados' position is the orthodox
13 position, simple and uncontroversial. A coast that does
14 not produce base points is irrelevant to delimitation. As
15 the International Court of Justice said in Qatar/Bahrain,
16 paragraph 178, a "relevant coast" is one that produces a
17 base point. The Court was of course only following its
18 own established case law, and notably the judgment in Jan
19 Mayen where the relevant coasts were identified as those
20 on which base lines were located, paragraphs 65 and 67 of
21 that decision.

22 This does not mean that a coast which is not a
23 relevant coast, and therefore produces no base points, has
24 no entitlement to maritime zones. Of course it does. But
25 such maritime zones will not be opposable to the other
26 state participating in that delimitation because they do
27 not "look on to the area to be delimited", and for this
28 reason do not "generate entitlements overlapping" with
29 those of the other state participating in that
30 delimitation. This is language used in the Rejoinder,
31 paragraph 186. These coasts are therefore irrelevant to
32 the delimitation, although they may well be relevant to a
33 delimitation with other states. Which states? Those
34 whose coasts they do face.

35 Simply put, Trinidad and Tobago confuses entitlement
36 with delimitation. Practically, its so-called eastern
37 facing coastline faces, if anyone, Venezuela, Guyana and
38 Surinam. This coastline is not Barbados' or the

1 Tribunal's concern in these proceedings; and Trinidad and
2 Tobago's radiating entitlement thesis cannot alter this.

3 The discussion on relevant coasts places in context
4 Trinidad and Tobago's ultimate argument in these
5 proceedings. That is that the median line must be shifted
6 eastwards with point A as a pivot to account for Trinidad
7 and Tobago's superior coastal length as a matter of
8 proportionality. So we get to that subject.

9 Proportionality and disproportionality.

10 The first point to mention here is that both Parties
11 agree on the two rules. One, the purpose of maritime
12 delimitation is not "to divide up an undivided whole or to
13 share out resources on ex aequo ad bono basis". (Counter
14 Memorial para. 150) Two, proportionality is not a
15 positive method of delimitation - indeed it is not a
16 method at all, and does not produce lines. (Counter
17 Memorial paras. 170-171)

18 It follows from these two cardinal rules that
19 proportionality is subordinate to entitlement. It is not
20 a rule of international law, but only a potential
21 instrument of equitable adjustment as one of several
22 possible auxiliary factors. As the President has had the
23 occasion to remark in the Libya-Malta case, the equitable
24 adjustment that may be called for on account of
25 proportionality cannot be a direct mathematical function
26 of the relevant coastal lengths. (ICJ Reports 1985 at 182-
27 184)

28 The Tribunal will recall that in its Counter Memorial
29 Trinidad and Tobago's fig 7.3 relied on a north/south
30 vector - strictly north/south - to demonstrate a disparity
31 of coastal lengths and a need for adjustment of the median
32 line. (Counter Memorial paragraph 239). In its Reply
33 Barbados simply noted (a) that a vector is not a coast and
34 (b) that the direction of the vector constructed by
35 Trinidad and Tobago distinctly deviated from the actual
36 direction of its coastline. This you will find in the
37 Reply, paragraphs 304-307. In one sentence: the vector
38 was the coastline and Trinidad and Tobago's case required,

1 but that Trinidad and Tobago plainly does not have.

2 Trinidad and Tobago's Fig 7.3 seems to be, how shall
3 I put it, a bit bashful about showing the impact that its
4 author intended to have. We have faithfully adopted
5 Trinidad and Tobago's vector in this illustration (Judges'
6 Folder tab 135) which is more forthright in showing that
7 impact. As you can see, what is being compared is on the
8 one hand a true coast and on the other hand something
9 which is neither a physical coast nor even an archipelagic
10 baseline. It is but the figment of a creative imagination
11 bereft of any articulated or even conceivable principle.

12 3.15

13 The Tribunal will also recall that Trinidad and
14 Tobago appears in its Rejoinder to have resiled from
15 reliance on the vector, so I do not propose to take your
16 time with this abandoned suggestion. But I must note that
17 Trinidad and Tobago maintains its claim, even though the
18 vector that underlies it appears to have drifted out to
19 sea, and out of this case.

20 If we are to focus on the physical coasts, as
21 Trinidad and Tobago professes to invite us to do, so be
22 it, but if the land dominates the sea, (North Sea
23 Continental Shelf paragraph 96) we should be consistent,
24 and if this is our approach we should not engage in the
25 absurdity of drawing lines on the heaving surface of the
26 sea. There are three significant physical costs:
27 obviously Trinidad, Tobago, Barbados. And there is one
28 relevant issue. Is there a disproportion, to follow the
29 Trinidad and Tobago thesis, in their eastward frontages
30 such as to merit some form of equitable adjustment? Then
31 the question becomes: what is the north to south reach,
32 counting only the physical reality of these three islands
33 as lands? You have seen this (Judges' Folder, tab 136)
34 before, as I commenced my remarks, and I remind you the
35 ratio is about one to three and a half, precisely 3.6.

36 If we compare this ratio to the coastal length
37 disparities that jurisprudence has considered as relevant
38 for the purposes of adjustments, we find in the Libya-

1 Malta case that Libya's relevant coast was eight times
2 longer than Malta's. (That disproportion was relevant not
3 of itself, but because Malta appeared as a relatively
4 small feature in a semi enclosed sea, particular
5 circumstances to that particular case. (paragraph 73))

6 In the Jan Mayen case the Greenland coast was more
7 than nine times longer than Jan Mayen, (Reply, paras. 292-
8 294) And out of an abundance of caution, I must reiterate
9 that in each of these two cases the relevant coasts where
10 respective lengths were compared did produce base points
11 for purposes of delimitation.

12 A median line produces equal division of overlapping
13 entitlements, and equality is equity. A ratio of three
14 and a half to one does not come remotely close to qualify
15 as a disproportion, even if one accepted, which Barbados
16 of course does not, that one should begin to consider this
17 kind of fanciful re-engineering. But the re-engineering
18 is inherent in Trinidad and Tobago's case. Let me briefly
19 outline the two main reasons that make it inadmissible.

20 First, the radical adjustment of the median line that
21 Trinidad and Tobago proposes under the cloak of
22 proportionality comes perilously close to asking for a
23 "just and equitable share" of maritime space. Trinidad
24 and Tobago proposes to use proportionality as a sword
25 rather than as a shield. I need not remind this Tribunal
26 how that argument fared in the North Sea Continental Shelf
27 cases (paragraph 20; and Reply, paragraph 282, note 381).

28 But remember Germany's contention that what is fair and
29 just is a direct function or proportion of a state's
30 "coastal front" or "facade". (Germany's Memorial, ICJ
31 Pleadings volume I at 77) The ICJ dismissed that
32 contention in no uncertain terms and relegated "the
33 element of a reasonable degree of proportionality" to the
34 level of a "final factor" in assessing the equitable
35 character of a delimitation arrived at by other means.

36 Secondly, and this again follows directly from the
37 North Sea cases, the relevant final factor is not
38 proportionality as such but disproportionality or, as the

1 ICJ Chamber said in the Gulf of Maine case, a "substantial
2 disproportion of lengths". (paragraph 185)

3 I have already explained and do not propose to repeat
4 why the Parties' coasts bear out no such manifest
5 disproportion. The conclusion is the same as we have seen
6 whether one counts the lengths of relevant or irrelevant
7 coasts (and Trinidad and Tobago accepts that only properly
8 relevant coasts should enter into consideration.

9 Rejoinder, paragraph 181; of course, there is a
10 difference of view as to what is relevant).

11 The only way, therefore, for Trinidad and Tobago's
12 argument to succeed is to persuade you to treat coastal
13 lengths as a trump card. I want a larger share of the
14 sea, Trinidad and Tobago says, because Trinidad's coast is
15 longer than Barbados'. But, again, proportionality is not
16 a positive delimitation method, nor is it a source of
17 entitlement to maritime zones. Although Trinidad and
18 Tobago professes to accept these elementary principles, it
19 has retreated to a claim for the "establish[ment of]
20 approximate proportionality". Therefore, its proposed
21 delimitation line is at variance with the very principles
22 that it professes to adhere to.

23 That is what I have to say about Trinidad and
24 Tobago's proportionality thesis.

25 But allow me now to say a few words about something
26 which actually does not seem to be a proper topic at all,
27 namely Trinidad and Tobago's amazing Point A. We may
28 just have to admit that we lack a conceptual framework to
29 discuss this ipse dixit. It seems to be an unexplained,
30 unjustified mechanism, which just happens to achieve the
31 effect Trinidad and Tobago has decided to ask for. Since
32 this effect is said to be warranted by a concern for
33 proportionality, perhaps this is as good a place as any to
34 deal with it. The members of the Tribunal, I am sure, Mr
35 President, will have pondered the mysteries of Trinidad
36 and Tobago's Point A. We first had Trinidad and Tobago
37 explaining that it and Barbados are opposite in waters
38 which Trinidad and Tobago chooses to designate as

1 Caribbean and adjacent in the Atlantic waters. These two
2 geographical abstractions are likely to come as news to
3 mariners who see only waves stretching to the horizon.
4 After all, there are no Straits of Gibraltar there as we
5 pass from one sea to the other. But Trinidad and Tobago
6 has told us that we should imagine a line in the water
7 conveniently drawn from Barbados to Trinidad and Tobago,
8 to the west the Caribbean, to the east the Atlantic.
9 (Judges' folder tab 136)

10 And now the plot thickens. Since the Atlantic
11 ambience is apparently one of adjacency where equidistance
12 apparently must be corrected to suit Trinidad and Tobago,
13 we would expect to perceive the burgeoning effect of this
14 correction as soon as we cross into the Atlantic, but that
15 is not Trinidad and Tobago's claim line. Trinidad and
16 Tobago's line does not begin to veer until we get to this
17 curious Point A.

18 In its attempt to understand what Trinidad and
19 Tobago was saying, Barbados naturally expressed its
20 bewilderment. Trinidad and Tobago then answered that,
21 when you actually stand on the north-south line, which
22 supposedly separates the Atlantic and the Caribbean, you
23 cannot yet become properly aware of the change of
24 relationship. Apparently, the feeling of adjacency must
25 grow on you. You must get out to sea a bit before it
26 really hits you and you realise that what you thought was
27 opposite is really side by side and it is at that point
28 suddenly the boundary must be given a sharp kick in the
29 flank. If that is Trinidad and Tobago's answer, so be it,
30 but, even if we humour Trinidad and Tobago, the obvious
31 question remains. How do we go on to alight on Point A in
32 particular? Is it justified by some rule of law or by
33 some convention universally accepted by hydrographers? Is
34 Point A in truth not wholly arbitrary?

35 Incidentally, or not so incidentally, what would
36 happen if we conducted what the Americans call a reality
37 check? The objective of this check would be to verify
38 whether there is some intuitively compelling reason why

1 the two states must be viewed as adjacent from the
2 perspective of this Point A. You now see Barbados' map 24
3 (Judges' folder tab 137) which shows that at Point A the
4 angle is over 90 degrees. That is to say beyond the right
5 angle which intuitively should be the ultimate separation
6 between the categories of "adjacent" and "opposite". If
7 you wish to see something that could more plausibly be
8 termed adjacent, look to the upper left corner and the St
9 Lucia/Martinique/Barbados tri-point. From here, St Lucia
10 and Martinique appear in a tight 18.2 degree angle, what
11 one supposes should be an overwhelmingly more
12 verisimilitudinous manifestation of adjacency. (I
13 apologise for the eight-syllable word). I need only ask
14 you to observe that there is no peculiar adjustment to the
15 agreed St Lucia/Martinique border on account of adjacency.

16 Before our friends on the other side rush off to check
17 their Charney and Alexander, may I save them the trouble
18 and prepare them for some bad news. Charney and
19 Alexander, you see, consider the case of St Lucia and
20 Martinique - and explicitly describe them as an opposite
21 coast delimitation. The reference is International
22 Maritime Boundaries, Volume 1, page 594. Barbados has no
23 idea what justification for Point A Trinidad and Tobago
24 will finally seek to give later this week. Trinidad and
25 Tobago certainly did not come up with a theory to fit its
26 desires in its written pleadings. Perhaps by now it will
27 have contrived something, we shall see. All I can say is
28 that I am very happy that it is not my job to do so.

29 Finally, cut-off and non-encroachment. Faced with
30 the problems that I have just outlined, Trinidad and
31 Tobago's claim to a proportional share of maritime
32 expanses is advanced in yet another way. In the Rejoinder
33 we are told that the "principle" of non-encroachment
34 "qualifies equidistance" (para. 189) and that this
35 principle "enjoins ... as far as possible ... zone
36 lock[ing]" (para. 188). Here is how Trinidad and Tobago
37 understands non-encroachment. I quote from paragraph 189
38 and I tell you right away that the emphasis is in the

1 original. "What the principle reflects is a concern that
2 coastlines of roughly equal or greater length not be shut
3 out from access to maritime areas". Barbados asks to
4 which maritime area? Trinidad and Tobago responds at
5 paragraph 191 of its Rejoinder, and by figure 5.3, which
6 you see in Judges' Folder item 138. Trinidad and Tobago's
7 response, "the maritime areas to which Trinidad and Tobago
8 could lay claim if Barbados were not in the way". But
9 this, Mr President, is to turn the question on its head.
10 In Libya-Malta the ICJ described non-encroachment in a
11 continental shelf context as "no more than the negative
12 expression of the positive rule that the coastal state
13 enjoys sovereignty rights over the continental shelf off
14 its coasts to the full extent authorised by international
15 law in the relevant circumstances". (Paragraph 46 of that
16 decision.)

17 I will quote the greatest advocate in American
18 history, Daniel Webster, not his most famous case, which
19 is not reported in the ordinary way, because his debate
20 with the devil is reported in more poetic collections, but
21 in the case of Dartmouth College, where he said, "It is a
22 small college, but there are those that love it". Is
23 Barbados' very existence and its competing entitlement to
24 maritime zones not a relevant circumstance?

25 The ICJ continued in Libya-Malta to say this, "Equity
26 does not seek to make equal what nature has made unequal
27 and ... there can be no question of distributive justice".

28 (Paragraph 46). Yet this is precisely what Trinidad and
29 Tobago asks you to do here. It asserts that "questions of
30 non-encroachment are to some extent matters of impression"
31 and appeals to your "impressions" to persuade you to award
32 it zones that lie no more than 200 nautical miles from the
33 island of Trinidad and, moreover, are not fronted by that
34 island. (Judges' Folder, tabs 139 and 140).

35 3.30

36 Summing up on this point, Trinidad and Tobago
37 proceeds on the premise that it has a potential but
38 absolute extended continental shelf entitlement, and this

1 is the basis of its cut-off theory today. In our Reply,
2 paragraphs 233 to 241, we discussed in some detail why
3 this is logically absurd. Barbados' entitlement to
4 maritime zones and continental shelf is competing and
5 overlapping with that of Trinidad and Tobago. The only
6 way that Barbados' entitlement can be ignored, and the
7 only way that Trinidad and Tobago's thesis of unobstructed
8 access to the ocean could be vindicated, is by altogether
9 ignoring Barbados' existence. But this cannot be and
10 Trinidad and Tobago itself professes to acknowledge this
11 in the Counter Memorial, referring to the "as much as
12 possible" proviso in the North Sea cases. That is the
13 profession, but what is the claim?

14 In truth, as Barbados' map 23 showed (Judges' Folder,
15 tab 141) there is a welter of potential claims which would
16 turn the Trinidadian vision into a nightmare.

17 Members of the Tribunal, the question of entitlement
18 to maritime zones is wholly distinct from the role of
19 equitable principles such as the principle of non-
20 encroachment. Trinidad and Tobago proposes to use non-
21 encroachment as a circumstance creating title to maritime
22 zones. It is simply the subordinate principle to abate
23 inequality. It cannot support or displace competing
24 entitlements to maritime zones.

25 In the same way could Barbados - or Trinidad and
26 Tobago - simply ignore the presence of Venezuela, Guyana
27 and Surinam to the south east? Certainly not. The
28 presence of those third states naturally constrains the
29 claims of Barbados, and of Trinidad and Tobago, in that
30 area. Barbados illustrated the constraints placed by
31 third parties potential entitlements to the west and to
32 the east in its map 8, which you will see before you and
33 also under item 142 of the Judges' Folder.

34 This picture would require a thousand words, so I
35 move on. Returning to jurisprudence for a moment, the
36 Tribunal in the Guinea-Guinea Bissau case chose its words
37 carefully when it stated that non-encroachment aimed to
38 "ensure that, as far as possible" (here we have it again)

1 each State controls the maritime territories opposite its
2 coasts and in their vicinity (paragraph 92). In other
3 words, a potentially corrective consideration cannot be
4 elevated to an entitlement to maritime zones, as Trinidad
5 and Tobago's claim implies.

6 In our submission, Mr President, members of the
7 Tribunal: to dismiss Trinidad and Tobago's imaginative
8 utilisation of non-encroachment it is sufficient to
9 describe it as I have just done. Neither the principle of
10 natural prolongation nor the principle of distance afford
11 to Trinidad and Tobago any maritime areas precluded by
12 Barbados' claim line, as seen in Barbados map 22. (Judges'
13 Folder, tab 193).

14 You can see that Barbados' line gives Trinidad and
15 Tobago a continental shelf extending to 192 nautical miles
16 from its baseline, or indeed 220 miles from the southern
17 part of Trinidad. Thus, Trinidad and Tobago cannot say in
18 any meaningful way that it is "zone locked" by Barbados'
19 claim - except if one accepts the premise that Barbados
20 should not have existed in the first place, or that the
21 coast of the island of Trinidad radiates a maritime
22 entitlement at a convenient angle of 40 degree - or
23 perhaps you are asked to imagine both of these things.

24 These remarks, Mr President, bring me to the end of
25 my presentation today. I have attempted to show that
26 geography and law sap the foundations of Trinidad and
27 Tobago's attempt to shift the median line in what it calls
28 the "eastern sector" of the delimitation. No such shift
29 is possible, no such shift is justified. As I have
30 endeavoured to show (1) there is no justifiable or legally
31 relevant distinction between the geography of the
32 "Caribbean" and the "eastern" or "Atlantic" sectors; (2)
33 the coastal length of the island of Trinidad, or of the
34 Trinidad and Tobago archipelagic line, does not control
35 the delimitation line in the way suggested by Trinidad and
36 Tobago; (3) given the actual direction of Trinidad and
37 Tobago's coastal frontage, no coastal lengths in this case
38 call for any correction to the median line; and (4)

1 Barbados surely cannot be left out of the map in order to
2 give to Trinidad and Tobago what it calls an "unobstructed
3 access to the ocean."

4 Mr President, my time has expired and before I do I
5 will leave you with Barbados' submission: the adjustment
6 of the median line propounded by Trinidad and Tobago is
7 wholly inappropriate in light of the geographical
8 realities of this case.

9 With your permission I will inform you that the
10 speaker to follow me is Professor Reisman. We are
11 comfortable in terms of the scheduling and if you were to
12 desire that this point would be convenient for a break we
13 could arrange the infrastructure in a way as to suit him.

14 THE PRESIDENT: Thank you so much, Mr Paulsson. We will take
15 a break for 15 minutes and resume at five minutes to four.

16 **(Short Adjournment)**

17 THE PRESIDENT: Professor Reisman.

18 PROFESSOR REISMAN: Thank you very much, Mr President.

19 Mr President, if it pleases the Tribunal, Barbados
20 turns now to Trinidad and Tobago's regional implications
21 theory. As Mr Volterra observed this morning, by means of
22 the 1990 maritime boundary agreement with Venezuela,
23 Trinidad and Tobago yielded altruistically, if you were to
24 take it at its word, significant parts of the maritime
25 space to which it was entitled under international law to
26 its large and powerful continental neighbour. Mr Volterra
27 has shown why that treaty can have no effect on the
28 maritime delimitation task before you. The 1990 treaty,
29 as a matter of general law, can have no effect on third
30 parties and, indeed, it is not subject to the jurisdiction
31 of the Tribunal. In this arbitration it may be helpful in
32 understanding why Trinidad and Tobago is making the claim
33 that it is making, but otherwise it is irrelevant.

34 Trinidad and Tobago concedes that the 1990 treaty is
35 not binding on third states and is not part of this case,
36 but that treaty is, in fact, the source of its dilemma and
37 the predicate of much of Trinidad and Tobago's argument.
38 For Trinidad and Tobago now seeks to compensate itself for

1 the maritime space it surrendered and to trump the pacta
2 tertiis rule by a ruse. It is trying to use the 1990
3 treaty as if it were not the bilateral agreement which it
4 is and, as such, without legal effect on third states, but
5 as if it were a geographical fact which must be given
6 effect in the delimitation of Barbados. Before we proceed
7 to disentangle the threads of Trinidad and Tobago's
8 argument let me state the obvious.

9 4.00

10 The 1990 treaty is not a fact of geography, it is a
11 bilateral legal relationship whose problematic legitimacy
12 was expressly recognised by Trinidad and Tobago's current
13 Prime Minister. The treaty has no part in this case for
14 manifest jurisdictional reasons and it cannot be applied
15 prejudicially against Barbados because of equally manifest
16 and fundamental international legal principles. But, Mr
17 President, what may be confusing in this aspect of the
18 case is that at the front door Trinidad and Tobago
19 acknowledges that the treaty with Venezuela can have no
20 effect on third states, while it tries to sneak that
21 treaty in the back door. My colleagues have drawn
22 attention to many examples of this effort of legal
23 resurrection, but I will concentrate on the legal theory
24 by which Trinidad and Tobago tries to accomplish the
25 resurrection.

26 The device for circumventing the jurisdictional and
27 substantive law problems invalidating the 1990 treaty and
28 opposing it to Barbados is what Trinidad and Tobago calls
29 the regional implication, which it purports to derive from
30 the Guinea-Guinea Bissau award. Early in its Counter
31 Memorial, Trinidad and Tobago explained its view of the
32 relevance of Guinea-Guinea Bissau. Giving with one hand
33 and taking with the other, Trinidad and Tobago said that
34 "the present Tribunal's jurisdiction is of course limited
35 to the two states which are parties to the present
36 proceedings". But it immediately added that this "does
37 not mean the Tribunal may not take account of the
38 existence and potential maritime spaces appertaining to

1 other states in the region".

2 What this apparently innocent reference to "taking
3 account" means only becomes clear considerably later in
4 the Counter Memorial, where Trinidad and Tobago introduces
5 a subsection entitled "Regional implications the Guinea-
6 Guinea Bissau test". This section is comprised of a
7 single paragraph, number 231, which you will find in your
8 folders, and which is also set out on your screens. The
9 critical passage which is highlighted is as follows. "By
10 contrast, the two maritime boundary agreements actually
11 concluded to the south and north of Barbados, to the south
12 between Trinidad and Tobago and Venezuela, to the north
13 between France and Dominica have departed from the
14 equidistance line precisely in order to take into account
15 the general configuration of east facing coastlines in the
16 region and to give at least some expression to the
17 projection of these coastlines to an uninterrupted if
18 still conscripted EEZ and continental shelf".

19 With that, Mr President, the cat is out of the bag.
20 The portentous heading "Regional Implications" boils down
21 to nothing more than a circuitous proposal to this
22 Tribunal to reject the maritime boundary to which Barbados
23 is entitled under well-established international law by
24 ignoring the now rich body of accepted international law
25 on this subject and instead giving effect to the maritime
26 boundary treaty between France and Dominica and, mirabile
27 dictu, the very treaty between Venezuela and Trinidad and
28 Tobago which according to its own terms, according to the
29 repeated assurance of Trinidad and Tobago and according to
30 international law, is not supposed to affect third
31 parties. Regional implication is a code word to ignore
32 customary international law and general state practice,
33 the term in article 38 of the statute, which clearly
34 sustains Barbados' claim and rejects Trinidad and Tobago's
35 and to look only at two treaties as if they constituted
36 international law.

37 We submit, first, that the alleged basis for the
38 regional implication argument - the Guinea-Guinea Bissau

1 award - a decision with serious problems - is not
2 authority for this argument. Second, as my colleagues
3 have already shown, the 1990 agreement cannot be applied
4 against Barbados or any third state and, third, that
5 neither the France-Dominica nor any other regional
6 maritime boundary agreement provides support for Trinidad
7 and Tobago's effort to justify its own boundary proposals.

8 Let me begin, Mr President, if I may, with the
9 arbitral award between Guinea and Guinea Bissau, its
10 jurisdictional problems, its actual holdings and the
11 additional propositions which Trinidad and Tobago tries to
12 load on to it as part of its regional implication
13 argument.

14 The Guinea-Guinea Bissau award was rendered in 1985
15 by Judges Mohammed Bedjaoui, Keba M'baye and Manfred Lachs
16 presiding. It is in many ways a problematic award, a
17 jurisprudential outlier, but, even if one were to ignore
18 its problems and to take it at face value, it could not be
19 applied to the entirely different geographical
20 configuration in the case before you. Nor does its
21 holdings support the regional implication proposition
22 which Trinidad and Tobago ascribes to it.

23 Mr President, Guinea and Guinea Bissau are coastally
24 adjacent states on the west coast of Africa, whose
25 coastlines are approximately equal. As the two states
26 were unable to agree upon the boundary for their
27 respective territorial waters, EEZ and continental shelf,
28 they submitted their difference to arbitration by special
29 agreement. The agreement laid down that, if the Tribunal
30 were to decide the Franco-Portuguese Convention of 1886
31 concluded by the then colonial powers to which Guinea and
32 Guinea Bissau had succeeded did not establish the maritime
33 boundary, the Tribunal was to determine "according to the
34 relevant rules of international law" the course of the
35 boundary between the territories of the respective states.

36 The Tribunal found that the 1886 Convention and the
37 protocols and documents annexed to the treaty did not
38 establish the boundaries for the EEZ and the continental

1 shelf, so the Tribunal turned to the task of identifying
2 the principles of law for delimitation. Although the
3 Tribunal insisted it was not acting in a discretionary
4 manner, nor deciding *ex aequo et bono*, it opened its
5 discussion by announcing that there were only a few basic
6 legal principles, the factors and methods the Tribunal
7 could consider were unrestricted, none of them was
8 obligatory on the Tribunal, but they included the
9 circumstances of each particular case and characteristics
10 peculiar to the region and these factors included self-
11 authorisation to consider "the coastlines of one or more
12 neighbouring countries" and "the other delimitations
13 already made or still to be made in the region". The
14 Tribunal's methodology extended explicitly to making and
15 applying assumptions about the maritime boundaries of
16 other states which had not submitted to its jurisdiction.

17 Consider the Tribunal's words "in order to for the
18 delimitation between the two Guineas to be suitable for
19 equitable integration into the existing delimitations of
20 the West African region as well as into future
21 delimitations which would be reasonable to imagine from a
22 consideration of equitable principles and the most likely
23 assumptions, it is necessary to consider how all these
24 delimitations fit in with the general configuration of the
25 West African coastline".

26 Mr President, it is of course entirely proper for an
27 international Tribunal to consider general state practice,
28 which includes agreed boundary delimitations, but it is
29 entirely improper to ignore general state practice and to
30 look at only one or two selected delimitation agreements
31 as if they alone constituted state practice. That highly-
32 selected course of action can be particularly misleading
33 because individual treaties may have been concluded on the
34 basis of many factors extraneous to maritime boundary law,
35 which is why our discipline insists on general practice,
36 general trends to determine customary international law
37 and will not accept a single agreement as making law for
38 all.

1 Guinea-Guinea Bissau is also a perilous methodology
2 because it contains its own poison pill, the supposed
3 equitability of the Tribunal's decision. The essence of
4 its validity according to the Tribunal depends forever on
5 all the other non-consenting states, whose maritime
6 boundaries the Tribunal had assumed, agreeing to or doing
7 exactly what the Tribunal was assuming. If any state did
8 not accept the boundaries which the Tribunal was making
9 for it and no other state was under any legal obligation
10 to do so, the Guinea-Guinea Bissau award would become
11 retroactively inequitable. Yet the promise of what one
12 might call consequential equitability served as the very
13 legitimation of the Tribunal's decision. Thus the
14 continuing validity of that decision was hostage to the
15 ways that other states who could not be bound by that
16 decision would make their own agreements. This is a
17 problematic methodology which we submit should be
18 distinguished on its facts and not applied in any other
19 case for it poses real peril.

20 But even if one ignores the jurisdictional
21 methodological problems in Guinea-Guinea Bissau and takes
22 the case on its own terms, the award provides no support
23 for the theory which Trinidad and Tobago is trying to
24 propound. If prior cases are to have precedential value,
25 they must be accepted as decisions about particular types
26 of factual situations. Guinea-Guinea Bissau dealt with
27 states in coastal adjacency, not the innovative and very
28 strange concept of adjacency which Trinidad and Tobago has
29 tried to develop and which Mr Paulsson has just dissected.

30 The real adjacency: the plain and natural meaning of
31 adjacency. Each successor state sitting next to the other
32 cheek by jowl, as it were, on the coast of West Africa.
33 Moreover, all the other states with which the Tribunal
34 purported to concern itself are also coastally adjacent to
35 either Guinea or Guinea Bissau. All of these states face
36 frontally the open sea. No island state is located
37 offshore. When the Guinea-Guinea Bissau Tribunal said "it
38 is necessary to ensure that as far as possible each state

1 controls the maritime territories opposite its coasts and
2 in their vicinity" it meant, as did the ICJ in the North
3 Sea Continental Shelf, which Guinea-Guinea Bissau cited as
4 part of its authority, that as far as possible none of
5 these coastal adjacent states was to be cut off from the
6 high seas by a State that was coastally adjacent to it -
7 "as far as possible".

8 Neither the Tribunal nor the ICJ said it meant or
9 could have been understood to mean that a coastally
10 opposite state was not to cut off the state opposite to
11 it. It would have been absurd for that is the very nature
12 of coastal opposition. The other state, the coastally
13 opposite state, would be denied its own maritime
14 entitlement and, indeed, the very segment of Guinea-Guinea
15 Bissau, its paragraph 93, which is quoted at length in the
16 Counter Memorial at its paragraph 251, makes the
17 assumption of true adjacency perfectly clear. Consider
18 the critical sentence. The Tribunal says, "When in fact,
19 as is the case here, if Sierra Leone is taken into
20 consideration, there are three adjacent states along a
21 concave coastline, the equidistant method has the other
22 drawback of resulting in the middle country being enclaved
23 by the other two and, thus, prevented from extending its
24 maritime territory as far seaward as international law
25 permits".

26 Mr President, it is difficult to understand how
27 Trinidad and Tobago can follow this quotation with the
28 words "similar considerations apply here", that is in the
29 case before you. The considerations here are entirely
30 different. West Africa is a case of adjacency, coastal
31 adjacency. Our case is one of coastal opposition. When
32 Guinea and Guinea-Bissau and North Sea Continental Shelf
33 speak of avoiding as much as possible a cut-off effect,
34 they are speaking of a cut-off by the maritime boundary of
35 an adjacent state not an opposite state for which the term
36 "cut-off" is an oxymoron. My colleague, Mr Paulsson, has
37 already demonstrated the meretriciousness of this part of
38 Trinidad and Tobago's claim.

1 The central holding in Guinea-Guinea Bissau is that
2 it is necessary to ensure that as far as possible each
3 state controls the maritime territories opposite its
4 coasts and in their vicinity. This is a far cry from
5 Trinidad and Tobago's claim that as an opposite state "in
6 respect of coasts with unobstructed access out to the open
7 ocean, the no cut-off principle applies". I am of course
8 quoting Trinidad and Tobago. Indeed, Mr President,
9 members of the Tribunal, it is incongruous for a state in
10 coastal opposition with another which nonetheless receives
11 a EEZ and continental shelf of some 193 nautical miles to
12 characterise itself as "shelf locked and zone locked" as
13 Trinidad and Tobago does in its Rejoinder at paragraph
14 155. Nor does Trinidad and Tobago, in citing Guinea-
15 Guinea Bissau mention that, even in the application of its
16 very expansive notion of its function, the Tribunal
17 excluded precisely the type of treaty which the 1990
18 Trinidad and Tobago-Venezuela agreement constituted.

19 4.15

20 The Tribunal said "In its assessment the Tribunal
21 could not take into consideration a delimitation which did
22 not result from an equivalent act in accordance with
23 international law." Mr President, members of the
24 Tribunal, would even the Tribunal in Guinea Bissau, with
25 its rather expanded notion of its function have taken
26 account of the 1990 Trinidad and Tobago Venezuela
27 agreement?

28 Trinidad and Tobago tries to bolster support for its
29 regional theory by invoking the maritime boundary treaty
30 between France and Dominica as purported evidence of a
31 common regional practice, but it ignores the agreement
32 between Martinique and St Lucia, which is similar to the
33 relative coastal configuration of Barbados and Trinidad
34 and Tobago. France/Dominica is indeed a good example of
35 the danger of allowing the self-interested selection and
36 generalisation which the regional implication theory
37 invites. Charney and Alexander in their study call it "a
38 very special case", "where the boundary between political

1 considerations and economic considerations becomes
2 difficult to detect".

3 Mr President, we now know that the regional
4 implication is a device to validate the Trinidad and
5 Tobago/Venezuela treaty, which has no force with respect
6 to Barbados, by tying it to one other maritime boundary
7 agreement in the region and proposing that these two
8 agreements constitute law for the region. Please consider
9 the sleight of hand with respect to the choice of law here
10 that is hidden in the so called regional implication.
11 UNCLOS Article 293 prescribes the applicable law. With
12 respect to other rules of international law, the Tribunal
13 turns to Article 38 of the Statute. It is appropriate, as
14 I have said, indeed mandatory for the Tribunal to examine
15 general state practice, but that means all relevant state
16 practice. Under the theory of regional implication,
17 however, the vast body of state practice which confirms
18 the median line special circumstance method is ignored and
19 a new sub heading is slipped into Article 38.1, regional
20 implication derived from the Trinidad and Tobago Venezuela
21 treaty and one other selected treaty.

22 The theory of regional implication permits the party
23 arguing it to pick and choose from regional practice,
24 relying on agreements which it believes support its claim
25 and ignoring those which do not. It ignores international
26 law and produces a caricature of regional practice. Mr
27 President, members of the Tribunal, there is no basis in
28 international law for this.

29 Mr President, new theories on maritime boundary
30 delimitation are invariably proposed by a litigant because
31 the lex lata does not give it what it wants, while the new
32 theory crafted for this purpose will. For the party
33 proposing the new treaty of course it produces an
34 "equitable result" for it, but will Trinidad and Tobago's
35 regional implication actually accomplish equity for the
36 other states of the region? If one were to take Trinidad
37 and Tobago's regional implications seriously and replicate
38 the lines of Dominica/France and Venezuela/Trinidad and

1 Tobago systematically Barbados would receive virtually no
2 EEZ and continental shelf, as we show in chart 14 from our
3 Reply. No continental shelf. Equitable for one party but
4 inequitable for others.

5 The regional implication theory opens a Pandora's box
6 of problems, some jurisdictional, some substantive. It
7 departs from the discipline of Article 38(1)(b) of the
8 Statute. It takes tribunals beyond their consensual
9 jurisdiction and it makes the acceptability of their
10 decisions hostage to the concurrence of non-parties who
11 have no obligation to accept the decisions.

12 It would be mischievous in another sense as well, for
13 it will encourage disputes about subjective conceptions of
14 equity, just as international maritime boundary law had
15 evolved to comparatively clear geographic considerations.

16 Barbados submits that the regional implications theory
17 should be rejected in both theory and in the practical
18 consequences for which Trinidad and Tobago has produced it
19 in this case.

20 Mr President, members of the Tribunal, I turn from
21 the question of Trinidad and Tobago's theory of regional
22 implication to the question of Trinidad and Tobago's claim
23 to the extended continental shelf or ECS which is
24 appurtenant to Barbados' EEZ and continental shelf but not
25 to Trinidad and Tobago's. We have indicated earlier our
26 view that the Tribunal may not treat a claim under UNCLOS
27 for two reasons. First, Article 76 assigns this matter to
28 other organs, as held in *St Pierre and Miquelon*, and
29 second this Tribunal lacks jurisdiction because the matter
30 was not raised as a legal claim in the negotiations. Nor
31 could Barbados have anticipated the problem as Trinidad
32 and Tobago never even raised the issue as far as we know
33 by beginning the requisite investigation for submission of
34 a request to the Commission on the Extended Continental
35 Shelf. But wholly aside from issues of competence and
36 jurisdiction, Trinidad and Tobago's claim here fails on
37 its substance.

38 To appreciate how extraordinary Trinidad and Tobago's

1 claim is you have to see it. If you will observe map 1
2 from Barbados' Reply you will see a shaded area indicating
3 the continental shelf out to its statutory limit under
4 UNCLOS Article 76, a 200 mile arc from Barbados'
5 baselines, 200 miles being of course the limit of an
6 unobstructed EEZ, a 200 mile arc from Trinidad and
7 Tobago's baselines, the median line between Barbados and
8 Trinidad and Tobago, and in red Trinidad and Tobago's
9 claim line, which departs from the median line at the
10 arbitrarily selected point A and veers off into Barbados'
11 EEZ instead of remaining faithful to the median line.
12 This is in itself exorbitant and unprecedented, but to
13 borrow from Dr Seuss' Cat in the Hat there is more, there
14 is more. Trinidad and Tobago's claim continues through
15 Barbados' EEZ and beyond it into the extended continental
16 shelf through the EEZ of another state and into the
17 extended continental shelf.

18 This is a claim that is unprecedented and on its very
19 face preposterous, as Mr Volterra detailed this morning.
20 It is a claim moreover with a great potential for mischief
21 elsewhere were it to be accepted. Trinidad and Tobago
22 tries to justify it by a rather mechanical though
23 nonetheless intricate argument which we believe has a
24 fatal flaw. To simplify matters let me summarise the
25 argument in four steps, paraphrasing or quoting Trinidad
26 and Tobago. First, the instituting of the continental
27 shelf as a natural prolongation that automatically
28 pertains to the coastal state developed and vested before
29 the institution of EEZ, which came later and is now found
30 in UNCLOS. (2) There is "no expression of any intention
31 in the 1982 Convention to repeal or eliminate existing
32 rights to the continental shelf." (3), and quoting again,
33 "It is evident that the continental shelf measured to the
34 outer edge of the continental margin and without reference
35 to any 200 nautical mile limit is not absorbed by the EEZ
36 measured out to the 200 nautical mile line. The two legal
37 institutions, older and newer, co-exist". And finally,
38 "Under the 1982 Convention the continental shelf remains a

1 distinct institution and EEZ rights are exercisable
2 subject to valid claims to the outer continental shelf".

3 Many of the premises of this intricate theory are
4 doubtful, as Sir Elihu observed yesterday, but the theory
5 fails at the very outset because of a simple fact. The
6 automatic entitlement of a state to its natural
7 prolongation is not and cannot extend without regard to
8 the claims of other states. The entitlement stops when it
9 encounters the automatic ipso facto competing entitlement
10 of an opposite state. So even if one accepts the first
11 premise of Trinidad and Tobago's argument, its entitlement
12 to shelf space stopped at the median line between it and
13 Barbados the moment the institution of continental shelf
14 crystallised, for it could not have crystallised for
15 Trinidad and Tobago before it crystallised for Barbados.
16 It pertains to each state *lo ipso* and *ipso facto*. Because
17 it stopped at the median line Trinidad and Tobago *ab*
18 *initio* could never extend to the ECS areas it covets. In
19 fact Mr President, Trinidad and Tobago's argument really
20 rests on two premises. First, that every coastal state
21 *qua* coastal state has an automatic right to a share of the
22 ECS whether it is contiguous with it or not, and whether
23 or not another state is inconveniently opposite to it.
24 Second, that the automatic right leaps over, slides under
25 or somehow or other trumps the EEZ of another state that
26 happens to be in the way.

27 Mr Volterra reviewed the maze of zones these premises
28 lead us into. Nor are there precedents for this
29 proposition; although Trinidad and Tobago refers to three
30 treaties, none relates to the proposition it wishes to
31 establish. Nor does Libya-Malta, which Trinidad and
32 Tobago cites only to acknowledge immediately that "the
33 Court was not concerned in Libya-Malta with the co-
34 existence of continental shelf rights based on natural
35 prolongation beyond 200 nautical miles from the coast of
36 state A and the EEZ rights of state B". Nor do Jan Mayen
37 or Qatar/Bahrain, the other cases which Trinidad and
38 Tobago cites again only to acknowledge that they are not

1 in point, because they do not deal with anything remotely
2 similar to its propositions.

3 Mr President, members of the Tribunal, there are no
4 precedents for Trinidad and Tobago's proposition, and I
5 will hazard to tell you why. This is the coast of West
6 Africa and this is it with Trinidad and Tobago's theory.
7 This is another stretch of West Africa's coast with
8 Trinidad and Tobago's theory. If we could look at those
9 again. Mr President, those are the consequences of
10 Trinidad and Tobago's argument, a chaotic Balkanisation of
11 the extended continental shelf with enclaved areas that
12 have no contiguity to shelf or EEZ areas of the states to
13 which they would pertain. The legal theory on which
14 Trinidad and Tobago's ECS claim is based is a prescription
15 for conflict, for environmental havoc and inefficient
16 development.

17 Mr President, members of the Tribunal, at the dawn of
18 the modern era of maritime boundary delimitation, Lord
19 Asquith of Bishopstone, sitting as the sole arbitrator of
20 the Abu Dhabi arbitration, perhaps not very far from the
21 chambers in which we sit, concluded that as of the
22 critical date in that case the doctrine of continental
23 shelf had not yet entered into the codex of international
24 law. But in an obiter dictum Lord Asquith observed that
25 it should become international law because it was in the
26 common interest that someone should control the shelf and
27 "the contiguous coastal power seems the most appropriate
28 and convenient agency for this purpose. It is in the best
29 position to exercise effective control and the
30 alternatives teem with disadvantages".

31 To our knowledge no one before Trinidad and Tobago in
32 the case before you has proposed that international law
33 should depart from that wise advice; nor we respectfully
34 suggest should this distinguished Tribunal.

35 Mr President, members of the Tribunal, this concludes
36 Barbados' initial presentation of its case. On behalf of
37 my colleagues I would like to thank the Tribunal for its
38 courtesy and attention.

1 THE PRESIDENT: Thank you so much, Professor Reisman. I wish
2 to thank you and all of Barbados' team for the lucidity
3 and cogency of your presentations which have been of
4 extreme interest; and we look forward to hearing the
5 presentations of Trinidad and Tobago, which we confidently
6 believe will be no less lucid and cogent, and therefore
7 present the Tribunal with the difficulty of making a
8 decision.

9 I take it then that we should adjourn today. Clearly
10 our colleagues from Trinidad and Tobago will not wish to
11 launch themselves in the hour and a half that remain. We
12 meet then on Thursday morning at 10 o'clock.

13 The Tribunal stands adjourned.

14 **(Adjourned till 20th October 2005 at 10 a.m.)**