

International Dispute Resolution Centre
Fleet Street
London, England

Thursday, 20th 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 THREE

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ATTENDANCES

Barbados was represented by:

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

The Republic of Trinidad and Tobago was represented by:

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

Mr David Gray (Tribunal appointed Expert Hydrographer)

The Permanent Court of Arbitration was represented by:

Ms Anne Joyce
Mr Dane Ratliff

Court Reporter

June Martin, Harry Counsell
Ivan Trussler, Harry Counsell

1 THE PRESIDENT: Good morning to you. May I note that tomorrow
2 at the end of the day it is possible that the Tribunal may
3 have some questions to put to the parties and it would be
4 good therefore if you could plan to stay on a bit after 6
5 o'clock to hear those questions if in fact we decide to
6 put them. Today we begin with the argument of the
7 Republic of Trinidad and Tobago and I believe that the
8 agent will speak first. Please, sir ----

9 MR JEREMIE: Thank you, Mr President, distinguished members
10 of the Tribunal. I propose to stand, with your leave, but
11 to make no further comments on standing or sitting.

12 Mr President, distinguished members of the Tribunal,
13 it is an honour to open the first round presentation in
14 these proceedings on behalf of the Republic of Trinidad
15 and Tobago.

16 The Republic of Trinidad and Tobago is an
17 archipelagic state, consisting of some 1,980 square miles
18 of land territory. It is populated by 1.3 million persons
19 and is located off the north-eastern shoulder of the South
20 American Continent.

21 Tobago itself has a population of approximately
22 55,000 persons, which is larger than the population of
23 some members of CARICOM and is slightly smaller than that
24 of the Commonwealth of Dominica, an independent member
25 state of CARICOM.

26 Geological history reveals that not too long ago in
27 geological terms both islands were part of the South
28 American land mass. At its closest point, Trinidad and
29 Tobago is no more than seven miles from Venezuela across
30 the Gulf of Paria.

31 The fact is that the area in which Barbados fishermen
32 wish to fish is located in the Trinidad and Tobago
33 Exclusive Economic Zone off the northern, north western
34 and north eastern coast of Tobago.

35 Mr President, members of the Tribunal, there is
36 little fishing off the east coast of Tobago due to sea
37 conditions and other reasons. You have been told that
38 there are no economic interests of Tobago fishing or

1 otherwise beyond 12 nautical miles. That is untrue, as
2 counsel for Trinidad and Tobago will demonstrate. As you
3 are aware, there is the issue between Barbados and us of
4 whether the fisheries and boundary delimitation
5 negotiations were, in fact, separate. This issue was
6 important then as it is of fundamental importance now.
7 One of the many reasons why the negotiations were kept
8 separate was because there was a need to consult and
9 involve the stakeholders in the fishing communities as
10 well as the political administration of our sister island
11 of Tobago. The island of Tobago, Mr President, enjoys a
12 substantial measure of internal self-government and has
13 its own House of Assembly by virtue of the Tobago House of
14 Assembly Act of 1986. That Assembly is comprised of
15 elected and nominated representatives of the people of
16 Tobago.

17 10.15

18 Mr President, members of the Tribunal, the 1942 Gulf
19 of Paria Treaty between the United Kingdom, on behalf of
20 Trinidad and of Venezuela, was inspired by the realisation
21 that there existed in the shallow waters of the Gulf of
22 Paria, exploitable reserves of hydrocarbon, which was
23 vitally needed energy that could be used to fuel the war
24 effort at that time. Since that time, Mr President and
25 members of the Tribunal, Trinidad and Tobago has had an
26 interest in the development of resources of its
27 continental shelf. Our reserves are not huge by world
28 standards. The geology of the shelf of which we are
29 located is complex, and finding and developing reserves is
30 a very challenging task. The importance of the
31 development of our marine resources has grown over the
32 years to the point where today most of our production of
33 oil and gas takes place offshore on our continental shelf.

34 It is a matter of record that we have a long history of
35 involvement in the exploration and exploitation of the
36 resources of the continental shelf. Barbados argues that
37 this history should be ignored, but, as Professor
38 Greenwood will show, it is of real legal significance.

1 The institution of the continental shelf can be said to
2 have begun in the Gulf of Paria and it remains a distinct
3 institution under modern international law. Much has been
4 said of our reserves of oil and natural gas and of the
5 wealth they bring. In fact, Mr President and members of
6 the Tribunal, the per capita income of Barbados is almost
7 twice that of Trinidad and Tobago and, if my learned
8 friend and colleague, The Attorney General of Barbados,
9 gets her way in seizing virtually the whole Exclusive
10 Economic Zone and continental shelf off Tobago, it will be
11 higher still. Tobago will be reduced to a penniless
12 enclave and, given the tension which exists between the
13 islands of Trinidad and Tobago, separated as they are in
14 cultural diversity, political interests, the integrity of
15 the very State of Trinidad and Tobago might well be
16 compromised. Tobago, which is even more dependent on
17 tourism than Barbados, might well find itself in a
18 position not simply of being economically dependent wholly
19 on tourism but having to buy fish from Barbadian boats
20 just off its horizon, a reality which I need hardly
21 emphasise is likely to engender some considerable
22 hostility in Tobago, as it has already done.

23 Mr President, members of the Tribunal, if the island
24 of Trinidad had claimed the exclusive rights to Tobagonian
25 resources in the way Barbados has done, that would have
26 spelt the end of the union or, at the very least, there
27 would have been a virtual revolution in the House of
28 Assembly of that island.

29 My colleague, Dr Potts, who is a Tobagonian, a member
30 of this delegation and a senior official of the Tobago
31 House of Assembly, as well as an authority on the fishing
32 industry of Tobago - one of his articles is included in
33 our evidence - will tell you in no uncertain terms what
34 would have happened as a stalwart defender of the rights
35 of the people of Tobago.

36 Mr President, members of the Tribunal, even as these
37 proceedings went forward, the Prime Minister of Barbados,
38 no less a person than he, suggested that Tobago might be

1 better off in a union with Barbados. This remark was
2 justifiably greeted with a howl of indignation in Tobago
3 and was quite properly rejected by the political head of
4 Tobago, the Chief Secretary of the Tobago House of
5 Assembly, Mr Orville London.

6 Mr President, members of the Tribunal, Trinidad's
7 marriage to Tobago has had very difficult moments, but for
8 the Tobago House of Assembly Act of 1986, we might no
9 longer be talking of a unitary state, but today we are
10 indeed a family. As in a marriage, constant discussion
11 and negotiation is required. We love each other and are
12 committed to each other.

13 The Tribunal has heard a lot about the negotiations.

14 You may feel you have heard too much already, but there
15 is an issue of principle here. Initially, the tone and
16 tenor of the negotiations was set back in 2000. They were
17 reflective of the good will and neighbourliness that has
18 usually characterised relations between Trinidad and
19 Tobago and Barbados.

20 The top two items on our bilateral agenda were the
21 negotiation of a maritime boundary delimitation treaty and
22 the negotiation of a new fishing agreement to replace the
23 1990 Fishing Agreement, which expired in 1991.

24 Trinidad and Tobago had offered to renew that
25 agreement, but Barbados had rejected that proposal, so
26 that a new agreement had to be negotiated.

27 Two distinct negotiating teams were set up by the
28 Government of Trinidad and Tobago. Both the maritime
29 delimitation and the fisheries negotiating teams were led
30 by an individual with the experience of having represented
31 Trinidad and Tobago during the third United Nations
32 Conference of the Law of the Sea, possessing considerable
33 expertise in international law, proven competence in the
34 international Law of the Sea and possessing experience in
35 the negotiation of maritime delimitation and fisheries
36 agreements.

37 This was Ambassador Philip Sealy. Mr Sealy is a part
38 of our delegation who was born in Barbados and you will

1 hear from him later this morning.

2 The fisheries negotiations with Barbados were at all
3 times about continuing the earlier permission given by
4 Trinidad and Tobago to Barbados to fish in an area they
5 now claim as theirs. That, Mr President, is a fact of
6 history: it cannot be glossed over; it cannot be
7 ignored; and it cannot be finessed by nice legal
8 language.

9 The negotiations were about access, which is
10 different from maritime boundaries and which all those
11 participating understood to be different. It is true that
12 Barbados tried to establish a linkage between the two. It
13 did so not in order to make the fisheries negotiations
14 disappear but so that any concession Barbados might agree
15 to make in the boundary negotiations might be returned in
16 the fisheries negotiations. That was a political linkage,
17 not a legal one.

18 At no stage was there any suggestion that Trinidad
19 and Tobago would require the permission of Barbados to
20 fish off the west coast of Tobago, but that is what
21 counsel for Barbados now solemnly argues. That, Mr
22 President, members of the Tribunal, is not consistent with
23 the record.

24 Let me turn to the boundary negotiations, which is
25 what ultimately concerns this Tribunal. After exchanges
26 on the location of the median line and on the applicable
27 principles, Trinidad and Tobago put forward an initial
28 proposal. Sir Elihu showed it to you the other day.
29 Barbados objected on the grounds that it meant that they
30 would have to ask our permission to fish 40 miles from
31 their coast, though they seem to have no problem making
32 exclusive claims to fisheries 12 miles from the coast of
33 Tobago today. But Barbados never put forward a concrete
34 counter proposal. We were prepared, as one must be in the
35 course of negotiations, to modify our proposal to meet
36 reasonable objections, but we never got to that point.
37 Instead London lawyers rushed in and no counter proposals
38 by Barbados were ever made. Instead we saw a PowerPoint

1 presentation which was never given to us and which Ms
2 Marshall made clear was not an official position, some
3 vague indications of a wider claim, a sudden ratcheting up
4 of hostilities, punctuated by a licensing regime on
5 Trinidad and Tobago in ports of Barbados, which was
6 contrary both to the letter and to the spirit of the
7 Caribbean single market economy and which was properly
8 pronounced as such by the Council of Trade in CARICOM and
9 then these proceedings, Mr President.

10 Mr President, members of the Tribunal, Trinidad and
11 Tobago comes to the Tribunal with a firmly grounded faith
12 in the mechanism and institutions created by UNCLOS. We
13 made no declaration under article 298 and that was by
14 choice. The suggestion made by Barbados that we have been
15 on the verge of withdrawing our acceptance of delimitation
16 jurisdiction is without foundation and has no basis
17 whatsoever in the record.

18 We heard about the letter and spirit of article 74(1)
19 and 83(1) of UNCLOS, which, of course, referred to
20 negotiations, with a view to reaching an equitable
21 solution and not to equidistance as a rule or even
22 presumption. We were and are prepared to negotiate with
23 our neighbours in settling maritime issues. We maintain
24 that Barbados has dragged us here in peremptory fashion.
25 More will be said on this matter in a short time.

26 Mr President, distinguished members of the Tribunal,
27 Trinidad and Tobago negotiated with Venezuela for some 17
28 years before concluding a treaty, the much discussed
29 Venezuela Treaty, delimiting the marine and submarine
30 areas between the two states in 1990. Much has been made
31 of the position adopted by the then leader of the
32 Opposition, the Honourable Mr Patrick Manning, and of the
33 mysterious, as it was described, leaked map. I say two
34 things on that. While I have never been in Opposition
35 myself, I am told that Opposition allows one both a
36 freedom to explore and a duty to oppose, statements for no
37 reason other than opposition itself. As to the leaked
38 map, I say only that it is not, Mr President, a spy movie.

1 This is not a spy movie. Whatever the paternity of that
2 map, whether fuelled by Opposition interests or not, it
3 formed no part of the very difficult negotiations which we
4 had with Venezuela.

5 Mr President, distinguished members of the Tribunal,
6 the salient point is that negotiations are intended to be
7 difficult because they are designed to result in a
8 position in which both states have participated and
9 agreed, however difficult that process might be.

10 We began delimitation negotiations with Grenada,
11 another member of CARICOM, in 1992 and these are ongoing.

12 Yet we have excellent relations with that country. We
13 have not yet initiated discussions with St Vincent and the
14 Grenadines, but we are quite prepared to do so when it is
15 mutually convenient for the two Governments involved. I
16 give this background merely to indicate that the
17 government of Trinidad and Tobago has always been willing
18 to engage in negotiations with its neighbours to settle
19 maritime boundary delimitation questions, as the letter
20 and spirit of articles 74(1) and 83(1) require of us. It
21 is not true to say, therefore, that the Treaty with
22 Venezuela was or is a cause of discord between Trinidad
23 and Tobago and our CARICOM partners. It is true that the
24 treaty was the subject of an exchange between the two
25 parties in these proceedings but not in any formal meeting
26 of CARICOM states, as suggested by my friends. But at a
27 meeting of Commonwealth Heads of Government in Abuja,
28 Nigeria.

29 Mr President, the less said on that exchange the
30 better. Suffice is to say that that exchange quite
31 fortunately does in no way characterise the nature of
32 Trinidad and Tobago's excellent relations with its CARICOM
33 partners.

34 But, in addition, to the distinct substantive
35 requirements of article 74(1) and 83(1), there is the
36 additional requirement of article 283 and an exchange of
37 views. Our position is that at a late stage just before
38 these proceedings were commenced, Barbados completely

1 changed its approach from one in which there would be two
2 separate Treaties, one on fisheries access, one on
3 maritime boundaries, they decided to seek the whole lot in
4 one go in seeking an award from this Tribunal which gave
5 them everything, everywhere, all the sea and all the fish,
6 not just the median line but all the fish and a lot of the
7 oil and gas on our side of the median line.

8 10.30

9 Mr President, members of the Tribunal, you will have
10 noticed the curious fact that since these proceedings
11 started Barbados' claim has got larger and ours has got
12 smaller. Yet it is Barbados which cries poor and
13 vulnerable and which accuses of excessive claims. The
14 principle underlying our initial claim, which Sir Elihu
15 showed you on Monday, was explained to Barbados during the
16 fourth round and there was an initial attempt at an
17 exchange of views on it. By contrast, we never received a
18 proposal from Barbados. How could there be an exchange of
19 views on a proposal which one side is unwilling even to
20 hand over. Mr President, members of the Tribunal, a
21 PowerPoint presentation with a Canadian accent is not
22 whatever else it might be, an exchange of views. When I
23 say that we adhere to the 1982 Convention and to Part XV,
24 I mean the whole of it, including article 283, but in
25 order to avoid the innuendo that we are waiting only to
26 withdraw our acceptance under article 298, I am authorised
27 to say that we will not do so vis-a-vis Barbados while our
28 maritime boundary remains unresolved. Of course,
29 Barbados, through counsel, Professor Reisman, on Monday
30 says that any further negotiations will be futile, but the
31 Honourable Attorney General of Barbados knows perfectly
32 well that that is not true and that reasonable solutions
33 to the two distinct problems that are at the top of our
34 bilateral agenda, maritime boundaries and fisheries
35 access, are as available as they always have been. That
36 is the way forward. Not the presentation of a claim which
37 is untenable in almost every respect and which was never
38 put forward in the negotiations. In relations between

1 states, Mr President, members of the Tribunal - and I say
2 this with great deference to your collective wisdom - it
3 is a wise thing to allow the parties which have to abide
4 with the solution to work one out in accordance not simply
5 with the nuances which are not apparent - and here there
6 are many - the Tobagonians psyche, the effect of an award
7 on Tobago in the face of provocative imperial comments by
8 not the leader of the opposition but by the sitting Prime
9 Minister, the sensitivities of the marriage between
10 Trinidad and Tobago, which is a sensitivity of I am aware
11 people are keenly aware of, being married myself to a
12 Tobagonian.

13 Mr President, distinguished members of the Tribunal,
14 our small nation has always maintained great respect for
15 the principles of the rule of law. We are a leader
16 throughout the CARICOM region. We ask only that justice
17 be done in respect of this matter.

18 Mr President, with your leave, I will now ask you to
19 call upon Professor Crawford to outline the case of
20 Trinidad and Tobago and I think you for your attention.

21 THE PRESIDENT: I thank the distinguished agent of Trinidad
22 and Tobago and call on Professor Crawford.

23 PROFESSOR CRAWFORD: Mr President, members of the
24 Tribunal, we can see on the screen the claims of the
25 parties. Sir Elihu, whose presence today I salute, showed
26 you this map on Monday. He said it was prejudicial. We
27 do not think it is prejudicial, we think it is revealing.

28 He said the boundaries were not firm. We have had to
29 listen to a good deal more of Mr Volterra. They sound
30 pretty firm to us. You will note that Mr Volterra
31 repeatedly showed tri-points along those lines, including
32 tri-points to which we are not a party.

33 This is the map of the state which, one, says there
34 is no difference between the two sectors: there is no
35 difference between the two sectors - not apparent. It is
36 a state which adheres rigorously to equidistance - not
37 apparent to us. It is a state which says there has been
38 an exchange of views on this map. If there was one, we

1 must have missed it. It is a state that says that point
2 E, which we do not even claim, down at the end of their
3 claim line, lies between the opposite coasts of the two
4 states. When we last we looked for point E between the
5 opposite coasts of the two states, we could not find it.

6 In all of these four respects, this is a pretty
7 surprising map and it surprised us when we first saw it in
8 the Barbados Memorial. Actually, it looks to me like a
9 predatory sea bird about to eat the island of Tobago,
10 which makes Barbados' recent overtures to Tobago part of
11 the picture, you might say. After all, they might as well
12 finish the job: having eaten the surrounding environment,
13 there is nothing left but the egg.

14 Now I would like to take you to tab 2 in your
15 folders. This is Barbados' transcript - another thing
16 that we had not seen - actually this time until the Reply.

17 Can we have the tape, please? It is the first time I
18 have made a speech with a cast of thousands. You will see
19 the transcript at tab 2. This is Ms Marshall:

20 "Thank you very much, co-chair. As you are aware,
21 Barbados too is giving the utmost priority to the
22 conclusion of these delimitation negotiations and to a
23 positive result for both of us in the spirit of co-
24 operation that has characterised our relationship, and
25 that certainly now characterises the new relationship that
26 is evolving within the context of the Caribbean single
27 market and economy.

28 "We regret very much that there has been such a lapse
29 of time between the fourth round which took place at the
30 end of January 2002 and this fifth round, but, as you
31 would well recall, there were certain political events
32 that intervened on your side and on ours in terms of
33 general elections, in terms of ministerial portfolios and
34 generally in terms of a number of developments that
35 prohibited an earlier meeting. This, of course, does not
36 mean that in the interim we were doing nothing. We have
37 had time to study the proposal that you put on the table
38 towards the end of the last round, and we would like, with

1 your permission, to respond to that proposal now by way of
2 a presentation of our own, which is purely for purposes of
3 illustration. And so if you have no objections at this
4 point, I would ask Mr Volterra and Mr Gent to proceed with
5 that presentation.

6 "We would like to do so in as open and frank a manner
7 as possible, and therefore if at any stage of the
8 presentation there are any queries or questions which you
9 are saying you wish to raise please stop us and raise
10 those and we will attempt to respond to them or to clarify
11 as necessary. So if that is acceptable to you, Mr
12 Chairman, I suggest we proceed in that manner.

13 "Mr Volterra: Thank you, Permanent Secretary
14 Marshall and Ambassador Sealy. I will open the
15 presentation by a few preliminary remarks, the first of
16 which is to apologise to everybody who is here for the
17 fisheries discussion. I am sorry, this will be very
18 boring for you and likely irrelevant, but thank you for
19 your patience in any event.

20 "We are going to go through a number of slides.
21 These are images that we have put together for
22 illustrative purposes to assist us in our presentation.
23 They are by no means meant to be definitive and accurate
24 lines on our chart in any respect but do feel ----" And
25 you can read the rest of it for yourselves.

26 That was Ms Marshall starting and Mr Volterra
27 finishing. This is the fifth, as Ms Marshall said, and it
28 turned out the final round of the negotiations on the
29 maritime boundary. Ms Marshall refers to it as the fifth
30 round, not the ninth round or the conjoined round of an
31 uncertain denomination.

32 Three points to note about that little passage.
33 First of all, in the transcript with which we were
34 provided the word "irrelevant" was missing. It does not
35 take much training to hear the word "irrelevant". It
36 seems clear to me.

37 Secondly, both the speakers said that the
38 presentation they were making was "for illustrative

1 purposes", Mr Volterra; "purely for the purposes of
2 illustration", Ms Marshall.

3 Thirdly, it may have been for the purposes of
4 illustration, but we did not get the illustration; we did
5 not get the Powerpoint presentation. Perhaps Mr
6 Volterra's computer has crashed: you have not got it
7 either.

8 This was not an exchange of views, this was a change
9 of views.

10 Let us go back to graphic one. Sir Elihu said this
11 was prejudicial and we should ignore the bit at the top
12 which is not pertinent because it is not within the area
13 of any EEZ we could claim and, with customary fairness,
14 Sir Elihu has a point. So let us change it and have only
15 the area of overlapping claims.

16 As between the two states' EEZ potential claims to
17 the north of the 1990 line, that is the situation. About
18 70% - just under 70% Barbados, something of the order of
19 30% or a bit more Trinidad and Tobago. It still looks
20 like a bird about to eat Tobago, except possibly a
21 slightly hungrier bird.

22 You will recall that, taking the line C-D on that
23 map, which is the wholly unexplained line to the south-
24 east of Barbados' claim line, I really did admire Sir
25 Elihu the other day when he was talking about that line:
26 he managed to come out with all the numbers in the right
27 order with a straight face and not give a single reason:
28 a forensic tour de force.

29 Of the area to the west of the line C-D and beyond
30 the territorial sea, Barbados claims 86%, and it is an
31 adherent to the principle of equidistance.

32 You will remember Sir Elihu's fandango. Actually,
33 again he is right: coasts do radiate, they are fan-like.

34 Looked at from a very long way away, a coastline may seem
35 straight. For example the straight, more or less
36 precisely north-south coastline of Trinidad before the
37 bump. That looks pretty straight, but if you go and see
38 it, it is not straight at all, it is full of indentations.

1 Coastlines radiate, because that is the nature of the
2 thing: they do not point in a single direction.

3 Let us look at them on this - and I hope Sir Elihu
4 finds the green slightly less prejudicial than the red -
5 let us look at what happens if you do treat them uni-
6 directionally on this map. Let us start with Barbados.
7 First, the north-east facing coast of Barbados. I do not
8 think anyone suggests that that is relevant and Sir Elihu
9 certainly did not. The south-east facing coast of
10 Barbados. That is relevant. That coast is relevant even
11 though a coast which has basically the same relationship
12 to the median line as that coast is proclaimed by Barbados
13 to be irrelevant. We will come back to that. The south-
14 west facing coast of Barbados. That is where the two
15 islands are in frontal opposition: quite obviously
16 relevant. The west-facing coast of Barbados: that is
17 irrelevant.

18 You will notice that there are gaps between the
19 beams, these sort of fixed lighthouses, as it were. Are
20 they the sort of maritime terra nullius that Mr Volterra
21 conjured up, quite without any basis, on the record the
22 other day? Of course not.

23 Barbados claims in Sir Elihu fan-like manner
24 everything around it, and so it ought to - and so ought we
25 to. Coasts fan out, they radiate.

26 10.45 a.m.

27 Let us do the same for Trinidad and Tobago, still
28 applying Barbados' model of linear uni-directional
29 projection. The north-east facing coast of Tobago, that
30 is relevant and, of course, it is opposite to a similar
31 south-west facing coast of Barbados of approximately the
32 same length, and so we stopped them both at the
33 equidistance line.

34 The east-facing coast of Tobago. Actually, it seems
35 more relevant than its Barbadian equivalent. The east-
36 facing coast of Trinidad, leaving out the bump. We seem
37 to be prejudiced by the bump actually: things get worse
38 because we have more. Rather curious.

1 We could have done others. For example, the north-
2 west coast of Tobago, the north-west coast of Trinidad,
3 but you get the point.

4 Incidentally, Mr Paulsson, in what I must say was in
5 most respects a superb presentation, said we were double-
6 counting coasts: we are not double-counting coasts and
7 that map shows that we are not double-counting coasts.

8 I will discuss the definition of relevant coasts this
9 afternoon and their application to our geographical
10 situation tomorrow.

11 Let us go back to the overlapping potential
12 entitlements, but this time let us include the continental
13 shelf and the exclusive economic zone, because this is a
14 case about both, with both claim lines written in. You
15 can see in yellow the Trinidad and Tobago claim line and
16 in blue the beak of the bird which now looks much less
17 threatening, it has to be admitted.

18 Trinidad and Tobago's case is that we have a lengthy,
19 predominantly east-facing coastline in a separate sector,
20 that that coastline is not opposite and is certainly not
21 cancelled out by the south-west facing coastline of
22 Barbados; that it is, to choose a neutral term, lateral
23 to the area between the two states.

24 We do not have to worry any more about the
25 distinction between "adjacent" and "opposite" which was
26 drawn in 1958 and dropped in 1982. So let us use the
27 neutral word "lateral". On any view, it is lateral.

28 We say that our coastline facing east, in the order
29 of somewhere between Mr Paulsson's 3.6 to 1 and our
30 maximum, something like 9 to 1 - I will go through the
31 ratios tomorrow, is entitled to a projection to the outer
32 edge of the exclusive economic zone for starters. Then we
33 debate what happens next.

34 That is a perfectly simple case. I have to pay
35 tribute to our opposition, who have produced a series of
36 graphics, the complexity of which staggers me. I did not
37 realise that I was as clever as that: to produce a claim
38 which would call for such a display of histrionics. I

1 have just stated the claim for you in my own words without
2 a text in less than a minute, but Mr Gent seems to be
3 capable of any level of graphical elaboration, shall we
4 say?

5 Three preliminary points, Mr President, members of
6 the Tribunal. Before I outline how we propose to present
7 it, I will just make three preliminary points. The first
8 is to do with the subject of advocacy and accuracy. I
9 admit that when one talks about advocacy there is a
10 distinct risk of the pot calling the kettle black, but I
11 am going to do it.

12 It is not the function of counsel to score points off
13 each other or, indeed, of the Tribunal to keep score. Our
14 function is to talk to you and hopefully to persuade you.

15 So I am going to make a mild complaint, and it will stand
16 as representing a general problem. I promise on behalf of
17 my colleagues that they will not make any more complaints.

18 We can put this as a series of cases. First, we have
19 the case of the unexplained explanation. Mr Paulsson
20 could not think how we had come to point A: "Totally
21 without explanation", he said. I am sorry, we explained
22 it in the Counter Memorial; we explained it again in the
23 Rejoinder. Mr Paulsson, I know from personal experience,
24 is a highly literate man and yet he seems to ignore the
25 reason we gave: the case of the unexplained explanation.

26 The case of the unargued argument. This time Mr
27 Volterra. Mr Volterra took it in his mind to think that
28 we were trying to exclude Barbados from an area of
29 exclusive economic zone, which is within 200 miles of
30 their coast and beyond 200 miles of our coast, by our -
31 what he called - single maritime boundary. They are the
32 one who brought the single maritime boundary. We have
33 always been clear from the beginning what we claim: we
34 claim a continental shelf beyond our 200 miles. That puts
35 us in a situation which I will explore tomorrow. But it
36 is clear what we are doing. He attributes to us an
37 argument we have not made and then has great fun saying,
38 "Oh, there's a vacuum." I will not tell you where the

1 vacuum is, but it is certainly not in our pleadings.

2 Then we have the case of the withdrawal that is not a
3 withdrawal. This is going to take a little longer. Mr
4 Volterra spent quite a bit of time talking about these two
5 maps, and he drew from them a concession. Mr Volterra's
6 speeches before this Tribunal have been full of estoppels
7 and withdrawals and concessions and all sorts of things.
8 This is supposed to be a withdrawal from us of a position
9 we took in the Counter Memorial. You see the little bit
10 that is in the red square in the Counter Memorial figure
11 7.4. "Huh", he says, "you changed it surreptitiously
12 without informing the Tribunal", presumably in triplicate,
13 "in figure 3.5.1 of your Rejoinder. That is a
14 concession." I am not sure they have yet had time to rely
15 on it, but give them time and it will be an estoppel.

16 Mr President, they are actually representing two
17 different things. One is concerned with economic zone
18 claims and therefore includes the arc. One is concerned
19 with our view of the continental shelf situation because,
20 frankly, we do not believe that Barbados has an EEZ below
21 the Trinidad and Tobago/Venezuela agreement line. You do
22 not have to decide that - in fact, you cannot decide it -
23 but it is a perfectly consistent position and we have
24 taken it all along: it is not a withdrawal.

25 To give you evidence of that, I refer to our Counter
26 Memorial, figure 7.5, and the next document in the Counter
27 Memorial, which shows exactly the same graphic.

28 I do accept that in certain circumstances states can
29 change their mind, and they can even do so with legal
30 effect. All I can say is that we did not.

31 We had another example of the change of mind,
32 although it was perhaps more subtly presented by Professor
33 Reisman, who said we accepted the basic methodology of
34 equidistance in the Counter Memorial, but then backed off
35 it in the Rejoinder. If we backed off it, we were not
36 aware of it. As I will demonstrate later on, we do accept
37 it.

38 Above all, we have the case of the comic cartographer

1 in Professor Reisman's maps of resurrected continental
2 shelves in the Gulf of Guinea: things popping up all over
3 like flowers in spring. We made it totally clear in our
4 pleadings that we do not claim a doctrine of resurrection.

5 If our maritime zones come to the end within 200 miles of
6 our coast, then that is it, we are dead. We do not
7 somehow go underground. Where would we go underground?
8 And emerge somehow in some mysterious process hundreds of
9 miles further east and still, I suppose, in an area
10 claimed by others.

11 It is true that the Tribunal in St Pierre & Miquelon
12 left that damaging possibility open and I will have some
13 things to say about that later on. We do not claim it,
14 and we have made it clear that we do not claim it. So all
15 these bits and pieces of states which are shelf-locked,
16 popping up in the middle of the ocean - well, Mr Gent has
17 had fun, but it has got nothing to do with the
18 proceedings.

19 The issue for the Tribunal is this. If you say - and
20 I will explore this in more detail tomorrow - that the
21 mere fact that another state has a few miles of exclusive
22 economic zone beyond our exclusive economic zone and that
23 that puts an end to all of our maritime claims, you will
24 have reinstated equidistance for the outer continental
25 shelf when the International Court of Justice in a
26 decision never repudiated or rejected equidistance and the
27 core of its doctrine of the continental shelf. For the
28 continental shelf between 200 miles - even a mile of EEZ
29 will put a permanent end to the maritime claims of the
30 other state.

31 Any state in a slightly recessed situation relative
32 to the outer states, that is, the North Sea continental
33 shelf situation, will lose all its rights because of that
34 mild recession. We do not believe that that is
35 international law. We accept that it has never been
36 decided, the Tribunal in St Pierre & Miquelon having
37 ducked the issue in a quite unaccountable way. That is
38 the issue for you. But comic cartographic does not

1 illuminate the issue: it only confuses it.

2 We say it is possible for zones to overlap. In fact,
3 overlapping zones and the accommodation of sovereignties
4 is very much what international law is about and not about
5 rigid rules that exclude the entitlements of states which
6 would otherwise appear to exist and be plausible.

7 In short, Mr President, members of the Tribunal, take
8 us as making the arguments we actually make and not some
9 parodistic version of them.

10 That said, I have to say the region is complex, as
11 you can see now on the graphic. This is the overall
12 region. You can see that there are a lot of states, that
13 they are arrayed in series of arcs, there are extra
14 difficulties because of individual territorial claims,
15 like Aves Island, which may give rise to joint zones and
16 so on. This is not a straightforward situation.

17 Actually, Mr Gent and his colleagues did not have to
18 make it more complex than it is, although they made it
19 orders of magnitude more complex than it is. It is
20 already difficult. But the thing that is clear from that
21 - the thing that is clear from that - is the effect of
22 equidistance on the Barbadian claim. It is to block out a
23 very, very substantial fraction, something of the order of
24 60%, of the east coast or the eastern projections of all
25 of those states.

26 That is the effect of their prima facie equidistance
27 rule, the rule that you do not just start with
28 equidistance - you start with equidistance, you wander
29 around looking for special circumstance which, unless they
30 concern flying fish, are not there and then you come back
31 to equidistance.

32 My second point concerns the role of the claimant in
33 maritime delimitation under the 1982 Convention, another
34 matter on which Sir Elihu had some sensible words. He
35 said - and one can see the point - even though you start a
36 case by unilateral application, nonetheless each party
37 still has to make out the claim that it brings. A state
38 does not get awarded maritime zones on the basis of that

1 the other side has failed to meet some burden of proof,
2 except in a situation where the other side relies on a
3 fact which is proved not to be true. That turns out to be
4 the case here. But except in that special situation, each
5 state has to make out its claim. We accept that.

6 Onus probandi actori incumbit. That principle
7 applies. Of course, as to what the law is no side has the
8 burden of proof: we merely remind the Tribunal of what it
9 knows already. As I will show later on by reference to
10 Professor Reisman's tour de force, there are some things
11 that you know now that you did not know before.

12 There are four points where it matters a lot that
13 this case is brought by Barbados as applicant under Part
14 XV and not, for example, by a special agreement before a
15 chamber of the International Court of Justice.

16 There are actually two distinct points here with two
17 sub-points under them, so for a moment I can be
18 Francophone and completely symmetrical. Point number one.

19 This case is brought by unilateral application. Point
20 number two. It is brought under Part XV of the 1982
21 Convention. Each of those two points has two
22 consequences.

23 Point number one. The case is brought by unilateral
24 application. The first consequence of that is that it is
25 for the applicant to define its case and that it is bound
26 by its definition of the case in accordance with the ultra
27 petita principle. If Barbados had wanted to bring a case
28 about access to our fisheries zones, they could have done
29 so. They would have then raised very serious questions of
30 jurisdiction under the Convention, but the first thing
31 that they had to do was to say that. If this had been a
32 case brought, for example, under the optional clause,
33 there would have been very interesting questions about the
34 relationship of the jurisdictional set up in Part XV to
35 optional clause jurisdiction. That is not the case. If
36 you go back to their application, you will see not a word
37 about fisheries access.

38 Professor Reisman tried to bring it in by recounting

1 infra petita several times. It does not work. The petita
2 is in the application. The application is about maritime
3 boundaries and from their point of view about a single
4 maritime boundary. It is not about anything else. They
5 were clear on that in their application. They were clear
6 in it in their Memorial. They were clear on it in the
7 Reply. All of a sudden confusion has been introduced.
8 That is the first point.

9 The second point is that, because they are the
10 applicant in a case brought by unilateral application,
11 there is no requirement for a single maritime boundary.
12 The jurisprudence on this is absolutely clear. The
13 parties can agree that it is the mandate of the Tribunal
14 to determine a single maritime boundary and courts and
15 tribunals will accept that mandate. These parties have
16 not so agreed and no matter how much Mr Volterra recites
17 the phrase "single maritime boundary", this is a case in
18 which we claim what we claim and they claim what they
19 claim. If the result is a single maritime boundary, that
20 will be because of the coincidence of the application of
21 delimitation principles to the two distinct institutions
22 and not because there has been any stipulation.

23 Those are the two consequences of the fact that they
24 are applicants.

25 There are two consequences of the fact that this is
26 brought under Part XV of UNCLOS and not, for example,
27 under the optional clause. That this makes a legal
28 difference was established - I have to say it against me -
29 by the International Court in the Cameroon-Nigeria case
30 preliminary objections, a point which I argued, and the
31 court pointed out, in paragraphs 108 and 109 - it is in
32 the Judges' folder, tab 8 - that it makes a difference.
33 If you bring a case under the optional clause, well, there
34 has to be a dispute, but article 283 does not apply,
35 because article 283 is about bringing applications under
36 Part XV.

37 The consequences of the fact that this pleading is
38 brought under Part XV and not under a separate

1 jurisdictional head which would give this court access to
2 the whole range of legal relations between the parties are
3 two. First, the requirement of an exchange of views
4 applies to the claimant. In order to start this case off,
5 in order to kick the wheels and get the thing going, the
6 claimant has to have established that there was an
7 exchange of views: Article 286 and (c) of article 283 -
8 the two are clearly related. Once the case is commenced,
9 the parties are in a position of equality from the onus
10 probanti actori incumbit rule, as Sir Elihu said, but the
11 Tribunal has jurisdiction over the whole dispute. Article
12 287. Article 283 does not come back in at some
13 intermediate state and impose further constraints to tie
14 the hands of the respondent behind its back in relation to
15 an issue where the respondent has been dragged to the
16 court. The respondent is entitled to respond in relation
17 to the dispute. Provided that its response falls within
18 the scope of the application and concerns the dispute
19 between the parties it is admissible and that is that.

20 The second consequence of the fact that this is
21 brought under Part XV is that you have no jurisdiction to
22 determine what share of fish they should get. The
23 Convention is crystal clear about that. Article 297,
24 paragraph 3.

25 Sir Elihu is right on questions of where boundaries
26 are to be, but there are four important consequences of
27 the procedural relations between the parties.

28 My third point. And this relates to two new
29 positions by Barbados. I hope that they will forgive me.

30 I have already said that one should not attribute new
31 positions to parties when those are actually existing
32 positions in their pleadings, but, as far as we were
33 concerned, these were new positions. The first I have
34 already mentioned. Barbados has claimed that you can give
35 it non-exclusive fisheries rights, hinted at by Sir Elihu,
36 expanded by Professor Reisman.

37 11.00

38 That claim is wrong on two distinct grounds. First,

1 it falls outside the petita which the claimant itself
2 drafted that busy afternoon and, secondly, it is outside
3 this Tribunal's jurisdiction under Part XV.

4 Professor Reisman says that the greater includes the
5 lesser, and so it does if you are comparing like with
6 like. A bag of five oranges includes three oranges, but a
7 bag of five oranges does not include three apples. As
8 between maritime boundaries and access to fisheries, we
9 are apples and oranges.

10 The second and most remarkable feature of the first
11 round was Professor Reisman's theory of the alchemical
12 transformation of non-exclusive private rights into
13 exclusive public rights.

14 Here we do have a new argument and we do not begrudge
15 him it. It is wonderful to watch an artist at work. To
16 use Isaac Newton's term, he seemed "delighted with
17 transmutation". I am fond of the 17th century as well.
18 Converting the base metal of high seas fisheries into the
19 black gold of exclusive continental shelf rights. Newton
20 never managed it. Reisman did as best as could humanly be
21 done.

22 Here is Professor Reisman's alchemy. You can see the
23 location of the event is the high seas which is res
24 communis. No particular right against us. A res communis
25 right. If it exists. Actually, it seems to me, if you
26 are fishing on the high seas, you are not claiming
27 anything that could be described as a private right. You
28 are simply enjoying a right which everyone has. You may
29 be able to complain about the conversion of a res communis
30 into the control or jurisdiction of a particular state,
31 but you do not have an automatic right that what you were
32 doing before is simply transferred into a right against
33 the new holder. If the new holder of titles holds
34 legitimate title, then that is bad luck. Your common has
35 gone. Anyway, that is one of the many legal difficulties
36 with the Reisman theory. I am here to admire its
37 symmetry.

38 The beneficiaries, of course, are individuals and the

1 character of the rights is non-exclusive. That is the
2 status quo ante. That is the original condition.

3 Now what happens? The access rights are bridged.
4 And now what happens? In the EEZ and continental shelf
5 which was at least apparently Trinidad and Tobago's the
6 beneficiary becomes the state of Barbados and the
7 character of the rights is the exclusive rights to fish
8 and oil. That is the theory of transmutation.

9 It is very curious, because for there to have been a
10 breach of access rights, we had to have jurisdiction,
11 otherwise we could not have breached the rights. We had
12 to have jurisdiction. So there is actually a missing
13 level there. It is a missing level where this is really
14 our EEZ and we did not give them what they asked. So it
15 transfers. It transfers. It becomes theirs. I have
16 never seen this before. This is wonderful. You know in
17 the law of self-determination - Professor Brownlie will
18 know for certain - there is a doctrine called remedial
19 secession. Sir Arthur Watts has also written on such
20 determination. Remedial secession is the idea that self-
21 determination normally enables you to do something as, as
22 it were, a community with others, but then, if you are
23 denied that right, you can break away. It is a somewhat
24 dubious proposition but the Canadian Supreme Court in the
25 secession case said it might be all right. OK. Well, now
26 we have remedial delimitation. But there is a bit of a
27 difference, because remedial delimitation concedes that it
28 is not your territory, that you are not part of the
29 community in the first place. Sir Henry Maine once said
30 that the movement of modern law had been from status to
31 contract. What Professor Reisman has managed to do is to
32 go from obligation back to status, a reversal of history.

33
34 What would happen if two different fishing
35 communities shared the particular area, which in a res
36 communis situation they may well might, the closest state,
37 as it were, gets the exclusive economic zone but it denies
38 the rights of the foreigners. The foreigners take it over

1 and deny the rights. You can get into a very good game of
2 what is called EEZ ping pong, which may be a more
3 salubrious game than anything that Mr Paulsson does or not
4 do with fans. This would be subverting the law of the
5 sea. This is a total confusion between the obligation
6 such as it is in relation to foreign fishermen in the EEZ
7 and title to the EEZ.

8 Mr President, members of the Tribunal, in what
9 remains of today, we will present two witnesses, Mr
10 Laveau, and, presumably, after the coffee break, Mr
11 Charles. Ambassador Sealy will then discuss the separate
12 negotiations on fisheries and on maritime delimitation.
13 Mr Wordsworth either before or after the break will deal
14 with the issues of jurisdiction and admissibility based on
15 Ambassador Sealy's presentation. Professor Greenwood will
16 then restate the obvious two sectors in this case against
17 the depredations of Mr Paulsson. I will return to discuss
18 the applicable law, a matter only incidentally and
19 illusively mentioned by counsel for Barbados. Finally, Mr
20 Wordsworth will demonstrated the factual situation with
21 respect to the fisheries. We might call it the "Tall
22 Story of the Artisanal Fishery that Got Away". Tomorrow
23 Professor Greenwood will deal with the law concerning the
24 western or Caribbean sector claim: why as a matter of law
25 Barbados' fishy story does not strike oil. I will deal
26 with the Atlantic side of the claim in two stages. In the
27 first state I will deal with delimitation within 200
28 nautical miles of our own coast. The simplest of all
29 possible situations, although Mr Gent will manage to
30 confuse it. Then Professor Greenwood will discuss in
31 principle the relationship between the EEZ and the
32 continental shelf which confronts this Tribunal in this
33 case. What is the relationship between the EEZ and the
34 continental shelf? I will then return to deal with
35 Trinidad and Tobago's claim beyond 200 nautical miles from
36 our coast in a situation in which initially there are
37 overlapping claims and then both states are simply in the
38 continental shelf with res communis above them.

1 Mr President, you have Judges' folders. We will be
2 installing through the PCA additional inserts as we go
3 along. We hope that that process works smoothly. We look
4 forward to the questions tomorrow afternoon. We do not
5 anticipate going up to six o'clock, but who knows?

6 Thank you.

7 THE PRESIDENT: Thank you so much. Mr Laveau.

8 **MR ANDRE LAVEAU**

9 **(Affirmed)**

10 **Examination in Chief by MR WORDSWORTH**

11 MR WORDSWORTH: Mr Laveau, for the Tribunal could you possibly
12 state your full name and position, please?

13 A. My name is Jerome Andre Laveau. I am at present
14 communications manager at the Ministry of Sport and Youth
15 Affairs of Trinidad and Tobago. I am substantively a
16 foreign service officer. I am on vacation leave in order
17 to take up a two-year contract at the Ministry of Sport
18 and Youth Affairs.

19 Q. Before you, you have a copy of volume 2 of Trinidad and
20 Tobago's Rejoinder. Could I ask you to turn to tab 4 and
21 confirm that that is your statement there and also that it
22 is your signature at page 5?

23 A. Yes, it is my statement and it is my signature.

24 Q. Thank you. I would like just to ask you some very general
25 questions about that statement. First, were you present
26 at the meeting of Prime Ministers of 16 February 2004?

27 A. Yes, I was.

28 Q. What was the immediate background to that meeting?

29 A. Prime Minister Manning decided to visit Barbados because
30 there was some public reporting about the possibility of
31 the imposition of monitoring licences on certain
32 categories of Trinidad and Tobago's goods in retaliation
33 for the arrest of two Barbadian fishermen.

34 Q. How was the licensing issue dealt with at the meeting?

35 A. Both Prime Ministers had some discussion on it. Prime
36 Minister Arthur stated that the monitoring licences were
37 to be applied to all CARICOM countries. Prime Minister
38 Manning stated that he was very concerned by this decision

1 of the Barbadian Government. He felt that the eyes of the
2 Caribbean were on both countries and he, in fact, was in
3 Barbados to encourage Prime Minister Arthur to re-consider
4 the position of monitoring licences. Prime Minister
5 Manning questioned the timing of the imposition of the
6 licences. Prime Minister Arthur insisted that the
7 imposition of the monitoring licences was in no way a
8 retaliation for the arrest of the two Barbadian fishermen.

9 Prime Minister Manning said something to the effect that
10 the timing of them suggests that it is a retaliation.
11 Prime Minister Arthur basically said, "What timing? What
12 about the timing? The timing has nothing to do with it.
13 In general, they are going to be applied to CARICOM
14 countries across the board and it is with the purpose of
15 data collection".

16 Q. What was Prime Minister Manning's position on the
17 continuation of fisheries negotiations?

18 A. Prime Minister Manning expressed the commitment of the
19 Government of Trinidad and Tobago to a mutually-
20 satisfactory conclusion of the negotiations. He stated
21 that it could be the way to go for an interim arrangement
22 to be sought to allow Barbadian vessels to fish in
23 Trinidad and Tobago waters.

24 Q. What about seeking a permanent agreement?

25 A. Yes, he did state that he is committed to a lasting
26 agreement.

27 Q. What was Prime Minister Manning's position on the
28 continuation of maritime delimitation negotiations?

29 A. Well, I should say that he did not go to Barbados to
30 discuss maritime delimitation. It was something that was
31 raised by Prime Minister Arthur. Prime Minister Arthur
32 stated that Barbados' position had been long to link both
33 negotiations; that is maritime delimitation and fisheries.

34 Prime Minister Manning was surprised at that assertion.
35 I think that the Trinidad and Tobago delegation was
36 somewhat surprised also. He stated that to his
37 understanding the negotiations should remain separate.
38 The maritime negotiations should not be married to the

1 fisheries negotiations. He felt that the maritime
2 negotiations can take somewhat longer. Fisheries possibly
3 a shorter time.

4 Q. Did the Prime Minister suggest that the maritime
5 delimitation negotiations were intractable or use some
6 similar wording to that effect?

7 A. No, he did not state that the maritime negotiations were
8 intractable. In fact, I do not remember him using any
9 word or series of words to connote a similar meaning.

10 Q. Did he in any way invite Barbados to commence arbitral
11 proceedings?

12 A. No. In fact, the question of arbitral proceedings to
13 determine the matter of marine delimitation was never
14 raised in that meeting.

15 MR WORDSWORTH: Mr President, I am sure that Barbados is
16 keen to ask Mr Laveau some questions in cross-examination.

17 I notice that it is 11.15, so, if the Tribunal wishes to
18 pause, then Mr Laveau can bite his finger nails and remain
19 in purdah for the duration of the coffee break.

20 THE PRESIDENT: Mr Wordsworth. We will adjourn for 15 minutes.

21 **(Short Adjournment)**

22 THE PRESIDENT: Mr Volterra, will you be questioning Mr
23 Laveau?

24 MR VOLTERRA: Please.

25 **Cross-examined by MR VOLTERRA**

26 Q. Thank you, Mr President. Good morning, Mr Laveau. My
27 name is Robert Volterra. I am a lawyer acting for the
28 Government of Barbados in this arbitration and I will be
29 asking you a few questions today. I wonder before I start
30 if I could ask you, please, to make sure that you speak
31 clearly into the microphone. Our review of the transcript
32 of the first two days of the arbitration show that, just
33 as the Barbadian transcribers appeared to have had one or
34 two difficulties with my Canadian accent, so too our
35 English transcribers, who are, of course, doing a fabulous
36 job, have been having even more difficulties with both my
37 Canadian accent and Caribbean accents.

38 Mr Laveau, could you tell us when you joined the

1 Ministry of Foreign Affairs?

2 A. April 13th 1993.

3 Q. What was your official title at the time of the meeting of

4 the Prime Ministers in February 2004?

5 A. I was a Foreign Service Officer assigned to the office of

6 the Prime Minister. I had chief responsibility for

7 protocol.

8 Q. So you were the Chief of Protocol for the Prime Minister,

9 rather than for the whole of the Foreign Ministry?

10 A. No, I simply was assigned to the Prime Minister's office

11 and my chief responsibility was protocol.

12 Q. Did you have other responsibilities?

13 A. Yes, I did.

14 Q. Could you tell us what those were?

15 A. What I should say is that protocol can be widely defined

16 or it can be narrowly defined. When you are working with

17 the Prime Minister, you define it in a more wide sense and

18 it included - let us say - some event management, maybe

19 one can say attending meetings, advising on substance and

20 not simply protocol, sometimes. It took in things like

21 providing records of meetings, collecting data - many

22 other duties.

23 Q. Is it fair to say - I am just trying to take from your

24 comments, so please correct me if I am wrong - that your

25 principal responsibility there was protocol and that

26 involved the administration of the Prime Minister's

27 activities; is that a fair thing to say?

28 A. No, no, I do not think so. Protocol deals mainly with the

29 preservation of the place of precedence of the Prime

30 Minister in showing that his office always is accorded the

31 respect and the place of precedence that it merits. I was

32 often asked by the Prime Minister to sit in on his

33 meetings, which I appreciated because sometimes - well,

34 many times if not most times the record is of great

35 importance and it could even have implications for his

36 place of precedence in the future. So I often sat in on

37 his meetings.

38 Q. In relation to the particular trip to Barbados that we are

1 concerned to discuss - in February 2004 - when did you
2 first become aware that there was the idea of a trip to
3 Barbados?

4 A. I think - if you just give me a moment to try and
5 recollect.

6 Q. If we think in terms of a Saturday/Sunday and then the
7 meeting was on Monday, I am happy just to go with the days
8 of the week rather than dates, if that is easier.

9 A. I am not sure. I think I found out on the Monday morning,
10 but I am really not sure.

11 Q. On the Monday morning of the meeting itself?

12 A. Yes.

13 Q. Would you have been the person who would arrange the
14 flight to Barbados and return or to make sure the Prime
15 Minister was on the flight, for example? Is that one of
16 your duties?

17 A. Yes, that is in fact one of my duties. There were the odd
18 times when it would have been made by someone else, but I
19 would have been the person to be contacted with respect to
20 flight schedules, let us say, when the Prime Minister will
21 arrive at the airport for departure and often when he
22 would wish to return.

23 Q. So in this particular case on the Monday you had that
24 function you have just described.

25 A. I must have, yes. I must have. Yes.

26 Q. So you would have looked after that. Would you have
27 looked after the reception in Barbados at all?

28 A. No, once we got to Barbados, of course, you know, both
29 countries have very good relations, so once we got to
30 Barbados we know that we are in the hands of the protocol
31 of the Ministry of Foreign Affairs at Barbados and they
32 took us to the venue for the meeting. We were totally
33 confident that all was well there.

34 Q. So you would have been speaking with your counterpart when
35 you arrived in Barbados.

36 A. Yes, I think it was Hugh Yeoman, who was probably acting
37 Chief of Protocol at the time.

38 Q. So you would have been the opposite numbers, if you will.

1 A. Yes.

2 Q. And he would have taken care of things like automobiles
3 and transportation to the venue which was Villa Nova and
4 that sort of thing.

5 A. Yes.

6 Q. You would have been co-ordinating with him all of this,
7 presumably letting him know that everyone had arrived and
8 that sort of thing?

9 A. Well, it was pretty simple. We were all on one very small
10 aircraft and we were met on the tarmac by the Chief of
11 Protocol, Acting Chief of Protocol or an officer of the
12 Protocol Division and we were taken to the VIP lounge and
13 from there, probably after maybe fifteen minutes we were
14 driven to Villa Nova resort.

15 Q. And you would have been responsible for the Trinidadian
16 delegation to make sure that everything ran smoothly.

17 A. Yes, I would ensure that their landing cards were done
18 properly and that they had their passports. I remember
19 one minister not having his passport.

20 Q. That must have been a lot of fun. When you arrived at
21 Villa Nova, did the delegation immediately go into the
22 meeting room or was there a break-out room provided?

23 A. No, we went into a - I am just trying to look for the
24 right word - one of the - what do you say?

25 Q. Suite maybe?

26 A. Yes, it was a suite. Thank you very much.

27 Q. In the Villa Nova Hotel. So, first the delegation went
28 there and then eventually went into the meeting room.

29 A. Yes.

30 Q. You went into the meeting room, I take it.

31 A. Yes.

32 Q. And your opposite number went into the meeting room as
33 well.

34 A. No, I do not think Yeoman - I do not even think that he
35 journeyed to Villa Nova resort. I am not certain. I do
36 not think he was there, no.

37 Q. So you had no contact with him or any other protocol
38 officer after you left the airport?

1 A. No.

2 Q. So there was no protocol officer from Barbados looking
3 after you?

4 A. I do not know. There could have been someone downstairs.
5 I do not know.

6 Q. Do you have any recollection of having spoken to any
7 Barbadian protocol officer at Villa Nova?

8 A. No. I may have, but I do not remember.

9 Q. And you have no recollection of having talked to the
10 acting chief protocol officer of Barbados at Villa Nova?

11 A. No, no, but what I can tell you is that I know that
12 whatever arrangements were made I was pretty sanguine,
13 very calm about them.

14 11.45

15 Q. At the meeting itself, you did not speak with any Barbados
16 protocol officer; is that your testimony ...

17 A. I am not sure if counsel is asking if I spoke with any
18 Barbadian protocol officer in the meeting room or ...

19 Q. No, I am not suggesting. You interrupted me. I am just
20 trying to determine what communications you had and when
21 with any Barbados protocol officer once the delegation
22 arrived at Villa Nova. I am not trying to put words in
23 your mouth. Presumably the Trinidad and Tobago delegation
24 left at some point and presumably there was some
25 communication with a protocol officer or was there not?

26 A. I do not remember. I do not remember.

27 Q. Can you remember if you stayed in the meeting room once
28 the meeting started for the duration of the meeting?

29 A. Yes. I stayed in the meeting room. I remember getting
30 up just once. I passed a list to my colleague who is in
31 the room - well, a friend - on the Barbados side. I asked
32 her for a list of the names of the persons on the Barbados
33 side, but I do not think that she ever filled the sheet
34 out. It was just for my recording. I do not remember
35 leaving the room at all.

36 Q. I put it you directly. Do you recall leaving the room two
37 times to speak with the acting chief protocol officer of
38 Barbados when that person left the room?

1 A. No, I do not recall. I am not saying that it did not
2 happen, I just do not recall.

3 Q. If you had left the room, Mr Laveau, presumably, there
4 would have been gaps in your ability to give an opinion on
5 what happened during the meeting. Is that true?

6 A. Yes.

7 Q. Did you take notes of that meeting yourself, Mr Laveau?

8 A. Yes, I did.

9 Q. Have you looked at those notes in the preparation of your
10 witness affidavit and otherwise?

11 A. Yes, I did.

12 Q. Do your notes record at any point that you left the room
13 and spoke with your counterpart, the acting chief protocol
14 officer of Barbados, when he left the room?

15 A. No, I do not. No, my notes do not.

16 Q. Mr Laveau, did you read any briefing paper for the meeting
17 between the Prime Ministers before the meeting?

18 A. No, I did not.

19 Q. You said that you and the Trinidad delegation were
20 surprised during that meeting to hear the issue of the
21 boundary delimitation raised by the Prime Minister of
22 Barbados. Is that your recollection?

23 A. Yes, I remember the Prime Minister looking to his left at
24 his Minister for Foreign Affairs and his Director of Legal
25 Affairs and saying something like, "Is that so?" and he
26 seemed somewhat surprised, yes, when the matter was
27 raised.

28 Q. Had you read before that meeting any diplomatic note from
29 Barbados in response to the diplomatic note from Trinidad
30 and Tobago requesting that meeting?

31 A. No, I did not read any such diplomatic note.

32 Q. Did you prepare a briefing note for the Prime Minister and
33 anyone else in anticipation of that meeting?

34 A. No, I did not.

35 Q. Would you say that you were prepared for a discussion of
36 the boundary delimitation and everything related to it?

37 A. I was not prepared for any discussion. I knew that I was
38 not going to be called upon to discuss - certainly not

1 fisheries or the imposition of the licences. So I was
2 much less prepared for any discussion on delimitation
3 which of course was only raised - it was raised at the
4 meeting but it was not something that even our delegation
5 spoke about on the way to Barbados.

6 Q. It was not raised at all on the way to Barbados?

7 A. Not to my knowledge.

8 Q. If it had been raised by Barbados with Trinidad prior to
9 that meeting, would you have expected it to have been
10 discussed by the Trinidad delegation on the way to
11 Barbados?

12 A. No, I do not think so. As far as I know, there were two
13 very weighty issues, one was the Barbados reaction, the
14 Barbados view of the arrest of two fishermen, which I was
15 well aware was a thorny issue, the fishing matter. The
16 other was Trinidad and Tobago's concern with the threat of
17 the imposition of monitoring licences. I think that it
18 was serious enough that not one but two Cabinet Ministers
19 accompanied our Prime Minister. That includes the
20 Minister of Trade and Industry.

21 Q. So it is fair to say that the delimitation issues were not
22 in your mind at all until they were raised by the Prime
23 Minister of Barbados?

24 A. No, not in my mind.

25 Q. Did you attend any of the bilateral negotiating sessions
26 between Barbados and Trinidad and Tobago in relation to
27 boundaries and fishing?

28 A. No. That was not my remit, no.

29 Q. Had you ever read any briefing note about those
30 negotiating sessions prior to the meeting of the Prime
31 Ministers?

32 A. No, I do not think so. If I did, I do not think I
33 retained anything from it.

34 Q. Did you ever read the joint reports that were produced
35 from those sessions before the meeting of the Prime
36 Ministers in February 2004?

37 A. No.

38 Q. Had you ever read the United Nations Law of the Sea

1 Convention prior to the meeting with the Prime Ministers?

2 A. Yes, I studied international relations and I did a thesis

3 on the International Seabed ...

4 Q. Seabed Authority?

5 A. Seabed Authority.

6 Q. Very interesting. Mr Laveau, do you attend Cabinet

7 meetings?

8 A. No.

9 Q. Were you aware that in December 2003 Prime Minister

10 Manning agreed to resubmit the 1990 agreement between

11 Trinidad and Tobago and Venezuela to his Cabinet for re-

12 consideration?

13 A. Yes, I was aware that he had so agreed. Yes.

14 Q. Were you aware of the result of that resubmission or re-

15 evaluation?

16 A. Yes.

17 Q. Were you aware of that prior to the meeting with Barbados

18 in February 2004?

19 A. No, I was not.

20 Q. So were you surprised when the Prime Minister of Trinidad

21 and Tobago told the Prime Minister of Barbados the result

22 of that Cabinet review?

23 A. No, I do not think I was surprised. I may have heard some

24 mention of the outcome.

25 Q. Mr Laveau, are you responsible for policy formation for

26 the Prime Minister?

27 A. No.

28 Q. Was there anybody else from Trinidad and Tobago from the

29 delegation who attended the February 2004 meeting who is

30 in this room on the Trinidad and Tobago side of the

31 delegations?

32 A. I am sorry, can you repeat that question?

33 Q. Is there anybody else from Trinidad and Tobago who was at

34 the meeting in February 2004 who is here today?

35 A. Yes. There is.

36 Q. Who is that?

37 A. That is Mr Gerald Thompson.

38 Q. Do you know if he attended any of the bilateral

1 negotiating sessions between Barbados and Trinidad, the
2 fisheries and delimitation sessions?

3 A. I would say that he must have.

4 Q. Are you aware of why Trinidad and Tobago has not sought a
5 witness affidavit from him?

6 A. No, but I would guess that it is because he is so
7 intimately involved in the negotiations.

8 MR VOLTERRA: Yes, he certainly does know a lot about them,
9 does he not? Thank you very much, Mr Laveau. I have no
10 further questions, subject to any re-examination.

11 THE PRESIDENT: Thank you, Mr Volterra.

12 MR WORDSWORTH: I have no questions in re-examination.

13 THE PRESIDENT: Thank you, Mr Laveau.

14 **(Witness withdrew)**

15 MR VOLTERRA: Mr President, on a point of order, before we
16 proceed to the next witness, I understood from the opening
17 address by Professor Crawford that Ambassador Sealy will
18 be making a presentation to the Tribunal. I wonder if it
19 could be clarified. Is he going to be talking about the
20 negotiating sessions as a witness and, therefore, we need
21 to address that or will he be addressing this as an
22 advocate.

23 PROFESSOR GREENWOOD: Mr President, would you like me to respond
24 to that?

25 THE PRESIDENT: Could you, please.

26 PROFESSOR GREENWOOD: Ambassador Sealy will be addressing the
27 Tribunal as an advocate and not giving evidence. His
28 position is very similar in that respect to that of Sir
29 Henry Forde, who was also making a presentation that was
30 largely factual, but, as I understand it, it was done
31 entirely as counsel rather than as a witness.

32 THE PRESIDENT: Thank you, Mr Greenwood. Then do we now call Mr
33 Eden Charles?

34 MR WORDSWORTH: Yes, please, Mr President.

35 **EDEN CHARLES**

36 **(Affirmed)**

37 **Examination in Chief by MR WORDSWORTH**

38 MR WORDSWORTH: Mr Charles, could you confirm to the Tribunal

1 you name and position?

2 A. My name is Eden Charles. I am First Secretary of the
3 Permanent Mission of the Republic of Trinidad and Tobago
4 to the United Nations.

5 Q. Can you open the volume of Trinidad and Tobago's
6 additional evidence that is on the table, tab 1, and
7 confirm that that is your statement of 3rd October 2005
8 and that it is your signature on the second page?

9 A. Yes, this is my statement and this is also my signature.

10 Q. Could you tell the Tribunal what your position was during
11 the maritime delimitation negotiations of July 2000 to
12 November 2003 and also the fisheries negotiations?

13 A. Mr President and other distinguished members of the
14 Tribunal, during the period July 2000 to November 2003, I
15 was a member of separate negotiating teams to conclude,
16 firstly, a maritime boundary delimitation treaty with
17 Barbados as well as a new fisheries agreement.

18 Q. Were you aware of any agreement or understanding with
19 Barbados regarding the taping of the negotiating sessions?

20 A. I am not aware of any agreement between Trinidad and
21 Tobago and Barbados as regards the taping of the
22 negotiating sessions, be they maritime boundary or
23 fisheries. What I am aware of, Mr President, is that at
24 the first round of negotiation for a maritime boundary
25 treaty in July 2000 the two sides agreed to the
26 preparation of a joint report in an effort to correctly
27 reflect and adequately reflect the positions advanced by
28 either side during the negotiations.

29 Q. Did Trinidad and Tobago make any tape recordings of
30 sessions held in Trinidad?

31 A. No, we in Trinidad and Tobago were not making any taping
32 of the negotiations. It did not arise simply because
33 there was no agreement between the sides as far as the
34 taping of the negotiations are concerned.

35 Q. Were you aware that Barbados was making tapes of sessions
36 in Barbados?

37 A. I am not aware of any taping done by Barbados during any
38 of the negotiating sessions, either fisheries or the

1 separate negotiation for a maritime boundary delimitation
2 treaty.

3 Q. Did tapes or transcripts feature in any way in the making
4 of the joint reports?

5 A. Speaking from the Trinidad and Tobago point of view, what
6 I recall is that the members of the Trinidad and Tobago
7 delegation took verbatim notes of what was said during the
8 negotiating sessions. When we prepared our part of the
9 joint report, we referred to our verbatim notes. That is
10 what I am able to recall.

11 12.00 noon

12 Q. Did Barbados ever ask for copies of tapes or of
13 transcripts?

14 A. Mr President, I cannot recall or I am not aware of any
15 request by Barbados either during the negotiating sessions
16 themselves for tapes or even subsequently. I would have
17 been surprised at such a request because there was no
18 agreement on that. When we went back to Port-of-Spain,
19 whatever correspondence had to be prepared between the
20 parties, I was largely responsible for the preparation of
21 diplomatic notes and other pieces of correspondence, draft
22 letters and so on, which were despatched to Barbados.

23 Q. In those diplomatic notes or correspondence, was there
24 anything that you ever saw relating to the making of tapes
25 or transcripts?

26 A. No, and when we did receive diplomatic notes or other
27 pieces of correspondence from Barbados I did not see - I
28 am not aware of any request for tapes from the Barbadian
29 side.

30 Q. Or transcripts.

31 A. Or transcripts - neither. As a matter of fact, being a
32 member of the team, the first time I saw any reference to
33 tapes or transcripts was in Barbados' Reply to Trinidad
34 and Tobago's Counter Memorial.

35 THE PRESIDENT: Thank you very much. Mr Charles, counsel for
36 Barbados may now have some questions.

37 **Cross-examined by MR VOLTERRA**

38 Q. Thank you, Mr President. Mr Charles, it is nice to see

1 you well.

2 A. That is fine.

3 Q. Nice to see you. I am not going to introduce myself. We

4 are sitting even closer than we were during the rounds of

5 negotiations.

6 A. I would say so.

7 Q. Mr Charles, you were a member of the Trinidad and Tobago

8 delegation at the bilateral negotiating sessions on

9 delimitation and fisheries between the two countries.

10 A. That is correct.

11 Q. Your affidavit points out that you were a member of the

12 delegation during the period July 2000 to November 2003.

13 A. That is also correct.

14 Q. After 2003, you did not have that role any more?

15 A. After 2003, I continued to be a member of the Trinidad and

16 Tobago delegation, but in a different capacity, because

17 that negotiating team, as you recall, Mr Volterra, being a

18 part of the Barbados team yourself, said the negotiations

19 were suspended and the negotiating team was transformed

20 into a local advisory team, so I continued to be involved

21 in the process until I was transferred in August 2005 to

22 the Permanent Mission of the Public Affairs of Trinidad

23 and Tobago to the United Nations.

24 Q. Thank you for that clarification. You have just given

25 testimony in relation to what happened at the first round

26 of negotiating sessions where the two sides agreed to

27 prepare joint reports.

28 A. That is correct.

29 Q. You have testified and it is your evidence that at no time

30 did Trinidad and Tobago make any tapes of the negotiation

31 sessions in Trinidad and Tobago.

32 A. That is also correct. As I indicated previously, the

33 issue of taping did not arise. There was no agreement

34 between the parties as far as any tape recordings or

35 transcripts were concerned.

36 Q. Mr Charles, I would like to give you a copy of the second

37 affidavit of Teresa Marshall, if I may. This is a clean

38 photocopy, no mark-ups on it, if counsel for Trinidad

1 would like to check, but otherwise it is just a blank
2 copy. It was the affidavit submitted by Teresa Marshall
3 on 17th September 2005. Have you seen this affidavit
4 before?

5 A. Mr President, members of the Tribunal, before I proceed, I
6 would request that my counsel ensures that this is what Mr
7 Volterra says it is. (Same handed) Thank you very much.

8 Q. Thank you, Mr Charles. Could you turn to paragraph 5 of
9 the witness statement of Teresa Marshall? You might just
10 want to refresh your memory by reading it. In that
11 paragraph, Ms Marshall refers to the tape recordings that
12 were taken in July 2000 at the first set of negotiations.
13 You can just read it through.

14 A. Read it aloud?

15 Q. No, you can just read it to yourself and let me know when
16 you have finished the paragraph.

17 A. (After a pause for reading): I have read it.

18 Q. Thank you. In that paragraph and in her evidence, Ms
19 Marshall refers to having seen tape recording equipment in
20 the room and that it had been running whilst the session
21 was underway. That is not your recollection, I take it.

22 A. I cannot recall or I cannot say what Ms Marshall would
23 have seen, but, as far as I am aware, there was no tape
24 recording equipment at the Crown Plaza.

25 Q. Thank you. You can put that to one side now, Mr Charles.
26 Mr Charles, could I take you to volume 2.2 of the
27 Trinidad and Tobago Counter Memorial and ask for the
28 assistance of the Permanent Court of Arbitration to
29 provide you with a copy of that or perhaps your own
30 counsel. (Same handed) Mr Charles, could I ask you to
31 turn to the first tab that is numbered 1? You have it
32 now. Could you, please, read the underlined title of that
33 document at the top? Sorry, read it aloud.

34 A. Mr President. "Joint report of the first round of
35 negotiations for a maritime boundary delimitation treaty
36 between Trinidad and Tobago and Barbados, Port-of-Spain,
37 Trinidad and Tobago, 19-20th July 2000."

38 Q. Could you read the first paragraph out loud as well,

1 please?

2 A. "The first round of negotiations for the conclusion of the
3 maritime boundary delimitation treaty between Trinidad and
4 Tobago and Barbados took place in Port-of-Spain, Trinidad
5 and Tobago, during the period 19th to 20th July 2000."

6 Q. Could you read the next sentence, please, out loud?

7 A. "The Trinidad and Tobago delegation was comprised as
8 follows ..."

9 Q. Could you read the first name on there and the description
10 of the role?

11 A. "His Excellency Philip Sealy, Leader."

12 Q. Could you please locate your name and your description as
13 part of that delegation on that record?

14 A. My name is not listed here.

15 Q. I am sorry? Your name is not listed?

16 A. No, my name is not listed here.

17 Q. Were you at this first negotiating session?

18 A. Yes, I was at the first negotiating session.

19 Q. So the record of the joint report is incorrect, in your
20 testimony.

21 A. Well, there is an absence of the name here, that is
22 correct, yes. There is an absence of the name, but I
23 would not say the record is incorrect as far as the
24 substantive areas are concerned.

25 Q. This session was held at the Crown Plaza Hotel, was it
26 not?

27 A. That is correct.

28 Q. And you have very clear recollections of being there, are
29 you telling us?

30 A. I have said before, I was there at the Crown Plaza during
31 these negotiations, that is correct.

32 Q. And you were present at this particular negotiating
33 session.

34 A. I was present at this negotiating session, just as I was
35 present at the other sessions, fisheries negotiations and
36 for maritime boundary delimitation negotiations.

37 Q. In fact, you told us that you were in charge of preparing
38 the joint reports, as far as Trinidad was concerned.

1 A. Mr President, that is not correct. I never said that. I
2 never said that. The joint reports were prepared by the
3 Trinidad and Tobago team. I was only one member who had
4 an input in the preparation of the joint reports.

5 Q. Could I read to you paragraph 5 of your witness statement?
6 "I was assigned by the leader of the Trinidad and Tobago
7 delegation to work with an appointed officer from the
8 Barbados delegation to verify the accuracy of the draft
9 joint reports." Is that statement correct?

10 A. That statement is correct, yes.

11 Q. So you would have been responsible for the accuracy of
12 this draft joint report that does not contain your name on
13 it.

14 A. Not the preparation, the accuracy of the joint report, but
15 I was not responsible for the preparation.

16 Q. So you were responsible for the accuracy of this record,
17 the joint report of the first session found at tab 1 that
18 I just took you to. You were responsible for the accuracy
19 of it.

20 A. I was not solely responsible for the accuracy of the joint
21 report; I never said that. I was appointed by the
22 Trinidad and Tobago leader to liaise with an opposite
23 number on the Barbadian side. After that was done, the
24 joint report was referred back to the respective leaders
25 and there and then the reports were adopted and signed.

26 Q. Am I correct in presuming that you verified the accuracy
27 of the draft report at the point at which you were
28 liaising with your opposite number from the Barbados
29 delegation or did you not complete the task you were
30 assigned?

31 A. As I said, my task was a limited one. If you read my
32 witness statement, I said after that situation ended,
33 after I liaised with my opposite number, the joint reports
34 were taken back to the respective leaders. The final
35 vetting would have been done by the respective leaders.

36 Q. I will ask you again, Mr Charles, was this report accurate
37 when you completed the task that you were assigned, which
38 was to verify - I am quoting your words - "... to verify

1 the accuracy" - was it accurate and had you verified it
2 when it left your remit?

3 A. I did what I was supposed to do and then it went back to
4 my leader and the rest of the delegation before it was
5 signed and adopted.

6 Q. Are you suggesting that your leader took your name off the
7 delegate list?

8 A. I am not suggesting that.

9 Q. Mr Charles, I will ask you to re-visit your memory one
10 more time. Were you at this first meeting of the
11 negotiating sessions of the parties?

12 A. I was at the first meeting, just as I was at every other
13 meeting between the parties for the fisheries
14 negotiations, which came later on, and also the maritime
15 delimitation negotiations which started in 2000.

16 12.15 p.m.

17 Q. Thank you, Mr Charles. I would like you to turn now in
18 the same big volume, to - I am sorry, it is a bit
19 confusing but the first tab number 5. It should be a
20 report the heading of which in brackets refers to a
21 meeting in Bridgetown, Barbados, November 19-21 2003. Do
22 you have that before you?

23 A. Yes, it is before me.

24 Q. I will just wait for the Tribunal to follow me if they are
25 inclined to. Could I also ask you, Mr Charles, whilst you
26 keep perhaps a hand to this page, so that you keep this to
27 hand, to turn to the second tab 6 of the same volume. It
28 is not the first tab 6, but the second one. There is a
29 confusion with the tabs.

30 A. Yes.

31 Q. This should be once again the date of which refers to
32 Bridgetown November 19-21, 2003. Do you have that in
33 front of you?

34 A. Yes.

35 Q. Could you read out the two dates from those joint reports?
36 Do the first tab 5 one first, this is the one that is
37 described as the fifth round of negotiations for maritime
38 boundary delimitation. What is the date on that?

1 A. November 19 to 21, 2003.

2 Q. Would you now turn to the document at the second tab 6,
3 which is entitled, "Joint Report of Fourth Round of
4 Negotiations for the Conclusion of a New Fisheries
5 Agreement" and read the date from that?

6 A. November 19, 2003.

7 Q. Thank you. You testified, and indeed His Excellency the
8 Agent in his opening statement referred, to two distinct
9 negotiating teams as between Trinidad and Tobago's
10 delegation for the delimitation parts of the negotiations
11 and the fisheries parts. Is that correct? Do you stand
12 by that testimony?

13 A. I stand by that testimony.

14 Q. Could you please turn to the second page of the document
15 that is the first tab 5? At the top of that second page
16 it starts with the words "Ms Sandra Phillips".

17 A. Yes.

18 Q. This is the distinct delegation for Trinidad and Tobago
19 for the maritime boundary delimitation exercise that took
20 place on the simultaneous days that you have just
21 identified in November 2003 - yes?

22 A. Yes.

23 Q. You hold that page. I for my part am going to turn to the
24 second of the tab sixes, which is entitled "Joint Report
25 for the Fourth Round of Negotiations for the New Fisheries
26 Agreement". I am going to turn to the third page. I
27 would like you, please to read out the list of the
28 separate delegation of the Trinidad and Tobago
29 delimitation delegation. Just read out the names and
30 titles of the individuals, for example, the first one is
31 His Excellency Mr Philip Sealy.

32 A. Mr President, could you request counsel to repeat the
33 question?

34 Q. I am sorry. You are on the right page that I want you to
35 be at. That is the second page of the document at the
36 first of the tab fives of volume 2.2 of Trinidad and
37 Tobago's Counter Memorial. This document is entitled
38 "Joint Report of Fifth Round of the Negotiations for

1 Maritime Boundary Delimitation Treaty" and the date of it
2 is November 19-21, 2003. I am asking you to read out not
3 the full titles and identification of working
4 relationships, but just the names of the people one by
5 one. For example, the first one is Mr Philip Sealy, the
6 second one is Mr Gerald Thompson. Could you read them out
7 slowly?

8 A. His Excellency Mr Philip Sealy

9 Q. I am sorry, could you wait there? I am going to be a
10 counter-point to you. I am going to read out the list of
11 the distinct and separate delegation of Trinidad and
12 Tobago for the fisheries negotiations that is found in the
13 second tab 6. You do not need to go there Mr Charles. I
14 would ask you to stay at the first tab. Mr Charles is
15 going to read the list of the distinct delegation of
16 Trinidad and Tobago for maritime boundary delimitation. I
17 am going to read the list of the distinct team of Trinidad
18 and Tobago for the fisheries agreement. We are going to
19 do it counter-point. Mr Charles is going to read one name
20 and I am going to read the other.

21 Mr Charles, could you start again with Mr Sealy?

22 A. Sure. His Excellency Mr Philip Sealy.

23 Q. His Excellency Mr Philip Sealy.

24 A. Mr Gerald Thompson.

25 Q. Mr Gerald Thompson.

26 A. Mr Francis Charles.

27 Q. Mr Francis Charles.

28 A. Captain Garnet Best.

29 Q. Captain Garnet Best.

30 A. Mr Tyrone Leong.

31 Q. Mr Tyrone Leong.

32 A. Mr Selwyn Lashley.

33 Q. Mr Selwyn Lashley.

34 A. Dr Arthur Potts.

35 Q. Dr Arthur Potts.

36 A. Mr Eden Charles.

37 Q. Mr Eden Charles.

38 A. Ms Delissa Noel.

1 Q. Ms Delissa Noel.

2 A. Mr Errol Caesar.

3 Q. Mr Errol Caesar.

4 A. Mrs Christine Chan A Shing

5 Q. Mrs Christine Chan A Shing

6 A. Commodore Anthony Franklyn.

7 Q. Commodore Anthony Franklyn.

8 A. Mr Emile Louis.

9 Q. Mr Emile Louis.

10 A. Mr Danny Melville.

11 Q. Mr Danny Melville. Is that the end of the delegation list

12 of the distinct and separate delegation of Trinidad and

13 Tobago's for the maritime boundary delimitation?

14 A. That is the delegation.

15 Q. Thank you. It is certainly the end of the delegation for

16 the distinct and separate Trinidad and Tobago delegation

17 to the fisheries part of the negotiation. Could I ask you

18 please to turn now to the list that I was reading out,

19 which is at tab 6, the last tab 6? Please go to the third

20 page. This is the list of the delegation - you and I have

21 just gone through it. Could I ask you to read out the

22 full description of the member of this delegation who is

23 sixth from the top, Mr Lashley.

24 A. Chief Technical Officer of the Ministry of Energy and

25 Energy Industries.

26 Q. The chief technical officer of the Ministry of Energy and

27 Energy Industries. You know him well?

28 A. Yes.

29 Q. He is from the Ministry of Energy?

30 A. That is correct.

31 Q. Is this the delegation of Trinidad and Tobago for the

32 fisheries part of the negotiations?

33 A. Mr President, could I use this opportunity to explain

34 something?

35 THE PRESIDENT: Please.

36 MR VOLTERRA: I would prefer you to answer my question and then

37 explain something.

38 A. Yes, what you said is correct.

1 Q. Thank you.

2 THE PRESIDENT: Please.

3 A. The fourth round of the negotiations for the maritime
4 boundary delimitation treaty would have been towards the
5 end of January 2002. There was a lapse in the
6 negotiations. Recognising that there was a lapse when we
7 went to Barbados in November 2003 ... Let me back track.
8 Before that, the two sides agreed that maritime boundary
9 negotiations and the fisheries negotiations would be
10 conducted during the same period but they would not be
11 held simultaneously. I recall that the first morning of
12 the maritime delegation was chaired by the PS, Ms
13 Marshall, in the absence of the late Sir Harold St John
14 who was ill and who came in later. By mid afternoon or
15 maybe a little bit before that, the maritime negotiations
16 were concluded. That is the fifth round. And we got into
17 the fourth round of fisheries negotiations. The intention
18 was always clear, that they be separated. Since the
19 negotiations were conducted during the same period,
20 although separately, the two teams left Trinidad and
21 Tobago and, for the purposes of travelling, we travelled
22 as one team. That is why they are listed as members of
23 each delegation, but those members, like Mr Lashley and
24 other members who were traditionally part of the maritime
25 boundary delimitation and were not part of the fisheries
26 negotiations did not participate in the fisheries
27 negotiations. However, some members, like Mr Thompson,
28 Ambassador Sealy and myself, we were members of the two
29 negotiating teams. When we see that the list here
30 reflects a mixture of what we consider members of the
31 maritime boundary delegation and the fisheries delegation,
32 that does not indicate that the negotiations were joined.
33 One has to look at the titles. They are separate titles
34 and they are separate reports.

35 Q. Thank you, Mr Charles, I was directing you to the
36 identical nature of those two apparently distinct and
37 separate negotiating teams and you have agreed with me
38 that they were, in fact, identical. I wonder if you would

1 take my word for it that you are listed as being part of
2 the Trinidad and Tobago delegation in all of the joint
3 reports other than the first joint report, or would you
4 like to go through them one by one?

5 A. What you have said is correct. I am not listed in the
6 first joint report, but I was present at the Crowne Plaza.
7 That is a fact. I did participate as indicated in my
8 statement.

9 Q. I take it that you did a better job in ensuring the
10 accuracy of the joint reports, at least in that respect,
11 in relation to the other joint reports than the first?

12 A. I would say that on each occasion I attempted to the best
13 of my ability, having regard to the mandate given to me by
14 my lead negotiator.

15 Q. Just two last questions. One is just to refer you to the
16 list at the last of the tab sixes to which you gave a
17 prolonged response to the Tribunal. I just wanted to make
18 sure that you were not - and if you were to investigate it
19 - questioning the accuracy of the list of the delegation
20 as described there?

21 A. Mr President, could counsel repeat the question, please?

22 Q. Are you questioning the accuracy of the list that is
23 described here as being part of the Trinidad and Tobago
24 delegation? Is this list incorrect?

25 A. This list is the correct list.

26 Q. Could I ask you whether you are aware if there was a
27 Trinidad and Tobago fisheries officer at all of the
28 negotiating sessions that Trinidad and Tobago describes as
29 delimitation negotiations?

30 A. There would have been fisheries officers at every round of
31 the delimitation negotiations, that is correct.

32 Q. Is there anybody in this room other than yourself who was
33 part of the Trinidad and Tobago delegations at these
34 negotiating seasons?

35 A. Mr President, counsel has to identify which negotiations
36 that he wants me to refer to.

37 Q. Is there anybody in this room who was on the Trinidad and
38 Tobago delegation that is listed on the page in front of

1 Ministers of 16th February 2004. But I want first to step
2 back to consider what is the importance of the negotiating
3 history and the build-up to the commencement of
4 proceedings, given that this is a maritime delimitation
5 dispute which, after all, is to be decided on principles
6 of law and would not normally require a tribunal to delve
7 back into the failure to effect an agreement under
8 Articles 74 and 83 of the United Nations Convention of the
9 Law of the Sea.

10 The issue is important for at least three reasons.
11 First, the issue of the Tribunal's jurisdiction and, in
12 particular, the issue of whether Barbados has satisfied
13 the requirement of Article 283 of the United Nations
14 Convention on the Law of the Sea cannot be decided without
15 an inquiry as to whether, as of 16th February 2004, there
16 was a "dispute" and whether there had been "an exchange of
17 views" on that dispute. This of itself necessitates the
18 close review of the negotiating history.

19 Second, when it comes to the merits, the negotiations
20 are important not so much for what was said but, rather,
21 in terms of the basis on which the negotiations proceeded.

22 To take an example, the negotiations for a new fisheries
23 agreement in 2002/2003 at all times proceeded on the basis
24 that Barbadian vessels were being granted access to
25 Trinidad and Tobago's exclusive economic zone, although
26 Barbados now claims that the waters in question in fact
27 fall within its exclusive economic sphere. Such
28 inconsistencies do have a legal significance.

29 Third, when it comes to issues of fact, the positions
30 adopted in the negotiations are useful in terms of
31 assisting the Tribunal to assess the current allegations
32 of the parties. For example, in the first two rounds of
33 maritime delimitation negotiations Barbados said that
34 there were no special circumstances at all. Now, its
35 position has radically changed and it invokes alleged
36 traditional artisanal fishing as a special circumstance.

37 We are not saying that Barbados is bound by any
38 admissions. The point is just that if Barbados says X in

1 negotiations in respect of a fact that is within its
2 knowledge but now says Y, which is to its legal advantage
3 before this Tribunal, the Tribunal is assisted in its
4 determination of facts by knowing of the change of
5 position.

6 Mr President, members of the Tribunal, turning to the
7 detail, I want to focus first on the five rounds of
8 negotiations on maritime delimitation. If the Tribunal
9 would please turn to Trinidad and Tobago's Counter
10 Memorial volume 2, which contains the joint reports of
11 these negotiations, together with the joint reports of the
12 fisheries negotiations. I do not propose to go into the
13 joint reports in any detail, but merely to highlight some
14 relevant facets.

15 At part 1, tab 1, you will see the first joint report
16 on the maritime delimitation negotiations which took place
17 in Port-of-Spain in July 2000. At page 11, in the first
18 two paragraphs, you have the basic position of Trinidad
19 and Tobago and I respectfully ask you to review that
20 later.

21 Then under "From the perspective of Barbados" you can
22 see the point I have just made, that Barbados' position
23 was that there were no - and I stress no - special
24 circumstances. I quote from page 11 of this joint report:
25 "Barbados did not recognise any special circumstances as
26 put forward by Trinidad and Tobago which would justify a
27 deviation from the median line position."

28 Barbados also took the view that the starting point
29 for the median line should be a tri-point between
30 Barbados, Trinidad and Tobago and St Vincent and the
31 Grenadines. This is quite inconsistent with Barbados'
32 current claimed line as set out in map 3 of its Memorial.

33 Of course, Barbados' current claim is justified by
34 reference to the alleged traditional artesian fishing by
35 Barbadians south of the median line, but I respectfully
36 refer you to what Barbados was saying on page 12 of that
37 joint report before these proceedings commenced. I quote:
38 "The practice since the 1970s has been an observance of

1 the median line between the two countries by fishermen and
2 Coast Guard officials on patrol and search and rescue
3 missions."

4 This could not be more inconsistent with Barbados'
5 current claim, especially when one takes account of the
6 fact that there was no - and I stress no - fishing for
7 flying fish by Barbadians to the south of the median line
8 prior to the 1970s, as we shall be showing you later
9 today.

10 While we are still on page 12 of this joint report,
11 please also note the final paragraph on the preparation of
12 joint reports. I quote: "So as to avoid having to rely
13 upon memory". If the joint reports were there to be
14 relied upon, there was clearly no need for tapes and
15 transcripts. Why did this passage not simply record that
16 tapes were being made "so as to avoid having to rely upon
17 memory"?

18 At tab 2, Mr President, members of the Tribunal, you
19 will find the second rung of maritime delimitation
20 negotiations which took place in Bridgetown in October
21 2000. Trinidad and Tobago's position is set out at pages
22 7 to 11, but I just want to highlight two points that were
23 being made by Barbados.

24 At page 11 under "Submission by Barbados", it was
25 Barbados' position that "It was necessary to elicit from
26 Trinidad and Tobago an indication of where they envisaged
27 the potential demarcation line between the two countries.

28 It was only in this way that both sides could have a full
29 appreciation of any difference between them."

30 I emphasise this because, as events transpired,
31 Trinidad and Tobago did subsequently submit a claim line
32 and Barbados did not. Thus, to use Barbados' language, it
33 was never possible to have a full appreciation of the
34 differences between the two states. This is important
35 when it comes to our jurisdictional objection.

36 At page 12, paragraph D, I draw your attention - you
37 see, again, Barbados' position on the tri-point with St
38 Vincent and the Grenadines. At tab 3, there is the report

1 of the third round of maritime delimitation negotiations
2 in Port-of-Spain in July 2001 and I bring this to your
3 attention as there was a change in personnel and a change
4 in position, presumably not unrelated.

5 At page 3 of tab 3, you can see that Barbados now has
6 two advisers in the form of Mr Volterra and Mr Carlton.
7 At page 7, under item (v), Barbados' position is now
8 suddenly that there is - and I quote - "... a significant
9 number of geographical, geomorphological, historical and
10 socio-economic factors, including relevant coastal ratios,
11 exploration, fisheries, surveillance and search and rescue
12 which would cause a shifting of the line in Barbados'
13 favour to the south of the provisional median line." But
14 this is all in terms of generalities: still no actual
15 claim is put forward.

16 At tab 4 is the fourth round held in Barbados, late
17 January 2002. At page 5 of tab 4 is the parties'
18 agreement to exchange lines that describe their opening
19 positions. Over the page at page 6, the joint report
20 records that all Barbados did was to submit a median line.

21 That chart is at tab 6 of this volume. By contrast,
22 Trinidad and Tobago submitted - and I quote - "A working
23 copy of a detailed chart" showing its proposed boundary
24 line.

25 At tab 5, Mr President, is a record of the fifth and
26 final round of maritime delimitation negotiations which
27 took place in November 2003 in Barbados. There, at page 5
28 of the joint report before us, Barbados - and I quote -
29 this is page 5 of that joint report - "Barbados proceeded
30 to respond to Trinidad and Tobago's proposals by way of a
31 presentation which it was understood was purely for the
32 purposes of illustration." But there was no claim line
33 submitted by Barbados and when Trinidad and Tobago asked
34 for a copy of the slides Barbados declined, stressing that
35 the slides were merely illustrative.

36 So, despite what Barbados now says, it never
37 submitted any claim line in the negotiations. Indeed, it
38 never submitted a claim line until it lodged its Memorial.

1 The other thing to note here, Mr President, members
2 of the Tribunal, is that there is no suggestion that the
3 negotiations have broken down. The joint report recorded
4 - and I quote - "The two delegations agreed to resume
5 negotiations at the sixth round early in 2004 on dates to
6 be agreed through diplomatic channels." Indeed, such a
7 suggestion would have been very strange. Barbados has
8 still not presented its official position. Thus, at the
9 end of the last round of negotiations, one, no claim had
10 been submitted by Barbados and, two, it was agreed that
11 further negotiations were needed.

12 Mr President, members of the Tribunal. Before I turn
13 to the history of events from this agreement to resume
14 negotiations to Barbados' unilateral submission of a claim
15 to arbitration, I want to look briefly at the joint
16 reports on the negotiations on a new fishing agreement
17 which are part 2 of this volume.

18 At part 2, tab one, as I have already noted, the
19 first round of fisheries negotiations took place in March
20 2002, around six weeks after the fourth round of maritime
21 delimitation negotiations. Then Barbados had made clear
22 its wish to link the two sets of negotiations. Trinidad
23 and Tobago had declined. The issue was raised again by
24 Barbados at this first round of the fisheries
25 negotiations. Although this appears to have been a matter
26 of some importance, the parties evidently accepted that
27 the fishing negotiations were separate.

28 I can make this point simply by turning to the
29 subsequent negotiations and the fact that the third and
30 fourth rounds of fisheries negotiations were expressly
31 stated as being "third" and "fourth" rounds in the joint
32 reports. This is how the negotiations were characterised
33 at the time, even by Barbados' own Prime Minister. In
34 this connection, see his letter of 9th June 2003 in
35 respect of what he called "the third round of fisheries
36 negotiations". I.e. not the seventh round of interrelated
37 negotiations. The reference to that letter is to be found
38 in Barbados Reply volume 3, appendix 32.

1 Turning back briefly to tab one, that is the first
2 round of fishing negotiations, I should stress that even
3 though at this stage Barbados was now pushing for its new
4 "special circumstance" in the maritime delimitation
5 negotiations, it did appear to accept that there was some
6 part of the area to the south of the median line that was
7 unquestionably within Trinidad and Tobago's exclusive
8 economic zone. In this connection please see paragraph 21
9 on page 9. "In response to Trinidad and Tobago's
10 rejection of the use of a common fisheries zone approach
11 and its assertion that Barbados' fishing boats were
12 habitually fishing in areas close to the territorial sea,
13 which were unquestionably within the jurisdiction of
14 Trinidad and Tobago, the Barbados delegation propose that
15 as a way forward the Trinidad and Tobago side might wish
16 to indicate an area unquestionably within its national
17 jurisdiction and in which consideration could be given to
18 granting access to Barbadian boats and the specifics of
19 access could then be negotiated. Barbados suggested that
20 this area should be just outside Trinidad and Tobago's
21 territorial sea. Consideration of these issues could form
22 the basis of resumed discussions which Barbados would see
23 take place at the earliest opportunity following receipt
24 of the review of the technical working papers". That is
25 of course no longer Barbados' position.

26 Mr President, members of the Tribunal, I have already
27 made the point that the fishing negotiation did indeed
28 proceed on the basis that Barbadian vessels were being
29 given access to Trinidad and Tobago's exclusive economic
30 zone. If it had been otherwise, what would have been the
31 purpose of the negotiations? There would have been no
32 purpose. Indeed, Barbados would have been negotiating in
33 bad faith if all along it was taking the view that the
34 whole of Trinidad and Tobago's exclusive economic zone, in
35 fact, belonged to Barbados. And of course it was not.

36 I can make this point by referring, for example, to
37 the draft fishing agreement that was being negotiated. I
38 draw your attention to tab 6, page 5. "This agreement

1 lays down the principles, rules and procedures for co-
2 operation between the Government of the Republic of
3 Trinidad and Tobago and the Government of Barbados with
4 regards to the use by authorised fishing vessels of
5 Barbados in a sustainable manner of the flying fish and
6 associated pelagic species within the exclusive economic
7 zone over which the Republic of Trinidad and Tobago
8 exercises sovereign rights for the purpose of exploring
9 and exploiting, conserving and managing said marine living
10 resources".

11 This was an agreed position. We are not of course
12 saying that Barbados is bound by one article of an
13 agreement that was never concluded.

14 We refer to this simply to show what was the
15 underlying purpose of the negotiations. That purpose was
16 evidently not that Barbados should be able to have access
17 to its own - and I stress "own" - waters.

18 Mr President, members of the Tribunal, I turn now to
19 the immediate build up to Barbados' unilateral
20 commencement of this arbitration and, in looking at these
21 events, I hope also to be able to explain Barbados'
22 current interest in depicting the two sets of negotiations
23 as joined together as a single entity.

24 There can be no doubt that the tension increased
25 between the parties in early February 2004. Teresa
26 Marshall made much of the fact that "Trinidad and Tobago's
27 Prime Minister was speaking of referring the "dispute" to
28 CARICOM. But this was only a dispute regarding the
29 failure to agree a new fishing agreement, as is clear from
30 Barbados' own evidence.

31 Firstly, I refer you to the press report of 31
32 January 2004 which can be found at Barbados Reply, volume
33 3, appendix 39, which records the following. "Prime
34 Minister Patrick Manning has announced that the fishing
35 dispute between his country and Barbados will be referred
36 to the Caribbean community". This, Mr President, refers
37 solely - and I stress "solely" - to the fishing agreement.

38 Secondly, Professor Greenwood took Ms Marshall to

1 appendix 40 of Barbados' Reply. Barbados' own statement
2 on 2nd February 2004, where you may recall it was stated,
3 "The Government of Barbados has noted with concern recent
4 statements attributed to the Prime Minister of Trinidad
5 and Tobago, the Honourable Patrick Manning, and appearing
6 in Saturday's press, which suggests that following
7 informal discussions in Nigeria our two Governments have
8 reached an agreement to refer the ongoing fisheries
9 negotiations to the CARICOM Secretariat".

10 Not only was Barbados quite clear that Prime Minister
11 Manning's remarks concern only the fishing agreement, not
12 only was his statement quite inconsistent with the claim
13 that the negotiations were joined with maritime
14 delimitation negotiations, but also there is an express
15 denial of any breakdown in the negotiations at page 2 of
16 that statement.

17 But, Mr President, what happens? Professor Greenwood
18 also took Ms Marshall to appendix 43 of Barbados' Reply.
19 That is a press report of 6 February 2004 which shows how
20 Trinidad and Tobago in fact sought to mollify the
21 situation as opposed to acting aggressively. This press
22 report shows that Prime Minister Manning was trying to
23 avoid this court and that the purpose of referring the
24 fisheries issue to CARICOM was not to involve CARICOM
25 directly but rather just to keep the Secretariat of
26 CARICOM "abreast of what was taking place". Barbados
27 chooses to depict this as if Prime Minister Manning was
28 declaring war on Barbados, but he was saying quite the
29 opposite. There were no aggressive public statements by
30 Prime Minister Manning and nothing he said concerned the
31 ongoing maritime delimitation negotiations.

32 Mr President, members of the Tribunal, when on 6th
33 February 2004 Trinidad and Tobago arrested two Barbadian
34 vessels for fishing illegally in its waters, as it had
35 done on many occasions before, Barbados reacted by
36 threatening retaliatory action against Trinidad and Tobago
37 exports to Barbados by way of a new licensing regime. I
38 should stress that there was no high level understanding

1 that there would be no arrests of Barbadian vessels
2 fishing illegally, despite what Professor Reisman stated
3 on Monday. The threat of a licensing regime certainly did
4 raise the temperature as far as Trinidad and Tobago was
5 concerned. It explains Prime Minister Manning's visit to
6 Barbados on 16th February to meet with Prime Minister
7 Arthur, the aim of which was to improve relations not to
8 declare war.

9 Mr President, members of the Tribunal, this brings me
10 to the hotly disputed issue as to what happened at 16th
11 February meeting. Firstly, Barbados has submitted witness
12 evidence only. It was going to deploy "contemporaneous
13 manuscript notes of members of the Barbados delegation at
14 the meeting". That is a quote, Mr President, from
15 Barbados' letter to the Permanent Court of Arbitration of
16 9 September 2004. But it has pulled back from this.
17 Presumably the notes do not say what Barbados wants them
18 to say. Presumably there is, and I stress, no record of
19 the use of the by now famous word "intractable" or perhaps
20 the notes go on to undermine Barbados' account of the
21 meeting in other ways. We will never know, but the
22 inference to be drawn is obvious.

23 Trinidad and Tobago, by contrast, has put in its
24 contemporaneous record of the meeting of 16 February 2003.

25 This is at Counter Memorial volume 5, exhibit 29. There
26 is nothing here at all to signal that Trinidad and Tobago
27 considered the maritime negotiations to have broken down -
28 and I quote. "The proposal by Prime Minister Manning for
29 an interim agreement on fisheries was made in the context
30 of a recognition of the Trinidad and Tobago position that
31 the issue could be solved, that Trinidad and Tobago had
32 never agreed to link fisheries and maritime boundary
33 delimitation negotiations and that Trinidad and Tobago was
34 now agreeable to linking the two negotiations on the
35 understanding that the delimitation negotiations were
36 likely to be more protracted than the fisheries
37 negotiations. At this point Prime Minister Arthur turned
38 to Deputy Prime Minister Mottley and asked that it be

1 recorded that Trinidad and Tobago was of the view that the
2 fisheries issue could be solved before a final resolution
3 is achieved of the maritime boundary delimitation".

4 To the contrary, what does appear strongly from this
5 Cabinet note is Trinidad and Tobago's astonishment at what
6 happened next - i.e. Barbados' commencement of
7 proceedings. I respectfully ask the Tribunal to read, in
8 particular, paragraphs 15 and 16 of the Cabinet note in
9 their own time.

10 The Cabinet note is supported by the evidence of
11 Trinidad and Tobago witness, Mr Laveau, from whom the
12 Tribunal has just heard.

13 So, Mr President, let me sum up by making three main
14 points. Firstly, it was Barbados not Trinidad and Tobago
15 which broke off negotiations and both unannounced and
16 quite to our surprise initiated arbitration.

17 Secondly, at no point in the negotiations did
18 Barbados produce a map setting out the boundary line which
19 it claimed. The first time that Trinidad and Tobago saw
20 Barbados' claim line was with its Memorial.

21 Thirdly, the fisheries negotiations were based
22 throughout on the understanding of both parties that they
23 were discussing Barbadian access to Trinidad and Tobago
24 waters. There was never any suggestion by Barbados that
25 the area in question was part of the exclusive economic
26 zone of Barbados. I should add that the question of
27 sovereign rights over the continental shelf in that area
28 was never raised.

29
30 Mr President, I just have a few more minutes.

31 THE PRESIDENT: Please.

32 AMBASSADOR SEALY: Thank you. As to the fourth issue on whether
33 there was an agreement to tape the negotiations or some
34 understanding to that effect, Trinidad and Tobago denies
35 this vigorously. Quite simply, the first thing we knew of
36 any tapes or any transcript was when we received Barbados'
37 Reply. There is nothing in any of the joint reports or
38 the transcripts themselves that suggests that Trinidad and

1 Tobago knew that sessions in Barbados were being taped or
2 that there was any agreement or understanding to this
3 effect. So far as concerned the witness evidence, we
4 respectfully ask the Tribunal to have regard to what Mr
5 Eden Charles has just told you. So far as concerns the
6 transcripts themselves, they add very little, they are
7 flawed and they are certainly not to be regarded as the
8 definitive record of the negotiations. That definitive
9 record is, of course, the joint reports made
10 contemporaneously and signed by both parties.

11 1pm

12 Mr President, members of the Tribunal, thank you for
13 your attention. My notes say that I should now call on
14 counsel, but it is now one o'clock so I shall leave the
15 proceedings in your hands. Thank you, Mr President.

16 THE PRESIDENT: Thank you, Ambassador Sealy. Before we adjourn
17 Sir Arthur Watts would like to put a question to you.

18 SIR ARTHUR WATTS: Thank you. Ambassador Sealy, there is one
19 little point of clarification that you might be able to
20 help on. I want to refer to the volume 2.2 of Trinidad
21 and Tobago's documents. It is the records of the
22 negotiations to which you have referred. If you look at
23 tab one of section 2, the first page you will see is
24 headed "Joint Report of the Negotiations for a Fishing
25 Agreement". At the end of the first paragraph it says
26 that a full list of participants appears at annex one. If
27 you turn then to annex one, which appears after page 10 of
28 the report, you will see the heading of annex one is
29 "[First Round of] Negotiations for a New Trinidad and
30 Tobago and Barbados Fishing Agreement". I wonder,
31 therefore, whether in the light of what we have heard so
32 far those words "First round of" in square brackets have
33 been added at some stage or whether the annex as we have
34 it is, indeed, the annex which was annexed to the joint
35 report which is at tab one. If it is convenient for your
36 team to think about that over lunch and answer at some
37 later stage, that will be perfectly acceptable to me, but
38 I think that an answer at some stage would be helpful.

1 AMBASSADOR SEALY: Yes.

2 THE PRESIDENT: Thank you, Sir Arthur. Ambassador Sealy, do you
3 wish to respond now or does your delegation wish to
4 respond later?

5 AMBASSADOR SEALY: I will respond after lunch.

6 THE PRESIDENT: Thank you. Then we will adjourn until 3.05.

7 MR VOLTERRA: Mr President, before the Tribunal rises and we
8 leave the record, I wonder if I could make a point of
9 procedure. It is as follows. Barbados has no intention,
10 as Trinidad and Tobago apparently has, to make comments
11 about counsel who appear for the other side in a personal
12 capacity. I just wish to clarify, I am sure Professor
13 Greenwood intended no slight, that Sir Henry Forde is
14 appearing before this Tribunal as a counsel advocate for
15 Barbados. He is a distinguished Queen's Counsel in
16 Barbados and he has been engaged for the purpose of acting
17 as an advocate and he has not participated, for example,
18 in any of the joint negotiating sessions and his
19 presentation during the first round and possible
20 presentation in the second round must be viewed in that
21 light.

22 PROFESSOR GREENWOOD: Mr President, might I respond to that?

23 THE PRESIDENT: Yes.

24 PROFESSOR GREENWOOD: Mr President, I meant no slight whatever
25 to Sir Henry Forde. I would make that quite clear. But I
26 was responding to a point of a somewhat strange character
27 made by Mr Volterra about the capacity in which Ambassador
28 Sealy was to address you, which I would have thought was
29 perfectly evident from the way in which Professor Crawford
30 had introduced matters at the beginning of the day. As
31 you have seen, what Ambassador Sealy has done is to take
32 you through a series of documents which are on the record
33 anyway in these proceedings. I merely compared his
34 remarks of Sir Henry Forde in the sense that both of them
35 were dealing with essentially factual material. Both of
36 them, I quite accept, appeared as counsel and did so
37 perfectly properly.

38 THE PRESIDENT: Thank you so much. We stand adjourned until

1 3.07.

2 (Adjourned for a Short Time)

3 3.07 p.m.

4 THE PRESIDENT: Ambassador Sealy --?

5 AMBASSADOR SEALY: Thank you, Mr President. Mr President,
6 I would like to respond briefly to the question raised by
7 Sir Arthur Watts at the end of this morning's session.
8 The words in square brackets "first round of" that appear
9 at annex one to the first round of fishery negotiations
10 were not added at a later date. These words reflect the
11 disagreement that the parties then had as to whether this
12 round of negotiations should be characterised as the first
13 round of fisheries negotiations or the fifth round of
14 bilateral discussions between the parties. For that, I
15 respectfully refer the Tribunal to paragraph 3 of the
16 joint report at tab 1 of part 2 of volume 2.2 of our
17 Counter Memorial. I should add that the words in square
18 brackets also appear in the version of this joint report
19 that is at appendix 25 of Barbados' report.

20 As I have already said, by the time of the third and
21 fourth round of negotiations - if you wish to look, it is
22 at tabs 5 and 6 of part 2 of volume 2.2 of our Counter
23 Memorial - it was agreed that the fisheries negotiations
24 could be characterised as such.

25 Of course, the Tribunal will have heard of this
26 separation in the very tapes made by Teresa Marshall,
27 which were played this morning.

28 So the short answer, Mr President, to Sir Arthur's
29 short question is that the square brackets were put in by
30 the parties at the time of the meeting: they were not
31 added later by Trinidad and Tobago.

32 Thank you, Mr President, and I would now ask you to
33 call on Mr Wordsworth.

34 THE PRESIDENT: Thank you so much, Ambassador Sealy. Mr
35 Wordsworth, please.

36 MR WORDSWORTH: Mr President, members of the Tribunal, it is
37 a very great privilege to appear in front of such a
38 distinguish tribunal and, of course, all the members of

1 the Tribunal will be more than familiar with the
2 jurisdictional objections that invoke pre-conditions
3 requiring the existence of a dispute for the conduct of
4 negotiations.

5 This Tribunal is aware that such objections, though
6 frequently run, generally fail and the treaty obligations
7 to negotiate are generally given a broad interpretation by
8 international tribunals.

9 So what is different about this case? Professor
10 Reisman put Barbados' case with extreme eloquence and with
11 elegant simplicity. He said, in essence, there have been
12 five years of negotiations between the parties on maritime
13 delimitation and there is self-evidently a dispute, there
14 was self-evidently an exchange of views for the purposes
15 of Article 283 of UNCLOS. It follows that it must have
16 been open to Barbados to seize this Tribunal by virtue of
17 Article 286 of the 1982 Convention.

18 So why is that not enough? The simple answer is that
19 this submission ignores the wording of the relevant
20 provisions of UNCLOS, i.e. Articles 283, 286, 298 and
21 also, of course, Articles 74 and 83.

22 I want to point to two very important factors that
23 this Tribunal should have in mind whilst considering the
24 objection.

25 First, this jurisdictional objection is in fact
26 unique. The Tribunal is not looking at the dispute
27 resolution provisions, say, of BIT and deciding that it
28 matters little if an investor has not complied with a
29 given notice or negotiation provision. Here, the Tribunal
30 is deciding for the first time on the interplay between
31 Articles 74 and 83 on the one hand and Part XV on the
32 other. This is an interplay that requires all the more
33 attention, given the right of withdrawal in Section 2,
34 Part XV, that is put in place by Article 298 of the 1982
35 Convention.

36 Second, it follows from this that the general
37 international law precedents, which do not deal with the
38 peculiarities of the UNCLOS scheme, are of limited

1 relevance. Even the three ITLOS cases, Southern Blue Fin
2 Tuna, MOX and the Straits of Johor, are readily
3 distinguished, because they are not dealing with parties
4 seeking and eventually failing to effect an agreement
5 under Articles 74 and 83.

6 These three cases are relevant when it comes to the
7 meaning of Article 283, but they say nothing about how a
8 state, acting in unison with another state under Articles
9 74 and 83, acquires the right to act unilaterally under
10 Section 2 of Part XV.

11 I turn first to Articles 74 and 83. If you need to
12 refer to them, they are at tab 13 of the judges' folder
13 and also now on the screen.

14 These provisions are particularly important because
15 Barbados' case on Article 283 is, in essence, predicated
16 on a dispute having crystallized and an exchange of views
17 having taken place under Articles 74 and 83. Articles
18 74(1) and 83(1) both provide that the relevant
19 delimitation shall be effected by agreement on the basis
20 of international law in order to achieve an equitable
21 solution.

22 Articles 74(2) and 83(2) both provide: "If no
23 agreement can be reached within a reasonable period of
24 time, the states concerned shall resort to the procedures
25 provided for in Part XV."

26 There is a series of points to make with respect to
27 these provisions. First, states seeking to effect an
28 agreement under Articles 74(1) and 83(1) are obviously
29 engaged in negotiations and, by definition, until they
30 actually effect an agreement they will be in a state of
31 disagreement on a potentially very wide range of topics.
32 This does not mean that they are to be regarded as being
33 in a state of dispute for the purposes of Part XV of
34 UNCLOS.

35 Second, to the contrary, as appears from the wording
36 of Articles 74(2) and 83(2), the process under Articles
37 74(1) and 83(1) is discrete from the procedures of Part
38 XV. Articles 74(2) and 83(2) in fact envisage a potential

1 shift to the procedures of Part XV, a shift away from the
2 process of effecting an agreement under Articles 74(1) and
3 83(1) to the procedures of Part XV, but only, of course,
4 after a reasonable period of time.

5 3.15 p.m.

6 Third, so far as concerns this potential shift of
7 Part XV, the obligation under Articles 74(2) and 83(2)
8 falls on both states that are concerned in the
9 negotiations. "The states" (plural) concerned shall
10 resort. It is not envisaged that one state acting alone
11 will immediately and without notice resort to the
12 procedures of Part XV. Fourth, and consistent with this,
13 Part XV, of course, includes section 1 as well as sections
14 2 and 3. The language of article 74(2) and 83(2) does not
15 suggest that section 1 can be by passed. To the contrary,
16 the procedures under section 1, including article 283,
17 envisage parties acting together to reach the settlement
18 of a dispute, whereas section 2 envisages a party acting
19 unilaterally; for example in commencing an arbitration
20 under article 286. Thus the reference to states in the
21 plural in article 74(2) and 83(2) confirms that the next
22 stage in the process is settlement by recourse to section
23 1 of Part XV. Thus, articles 74 and 83 do not authorise
24 resort to binding dispute resolution, although this was
25 Professor Reisman's submission.

26 I turn to Article 283. 283(1) provides that when a
27 dispute arises between state parties concerning the
28 interpretation or application of this Convention, the
29 parties to the dispute shall proceed expeditiously to an
30 exchange of views regarding its settlement by negotiation
31 or other peaceful means.

32 The key point to note is that the obligation to
33 proceed to an exchange of views - and it is of course an
34 obligation - arises only after the dispute has arisen.
35 The order of events is, one, the dispute arises and,
36 following on from the crystallisation of the dispute, two,
37 the parties proceed expeditiously to an exchange of views
38 in respect of that dispute with a view, of course, to its

1 settlement.

2 Of course, this is the expected order of events. By
3 contrast, it would have been very unusual if article
4 283(1) had provided that the exchange of views could
5 somehow precede crystallisation of the dispute. It
6 follows that it is not open to a party to say, as Barbados
7 does, that we have already been involved in amicably
8 trying to effect an agreement under articles 74 and 83, so
9 there is no need for us to exchange views now that we
10 consider that no agreement can be reached.

11 This goes against the ordinary meaning of the wording
12 of article 283. It would also go against the wording of
13 articles 74(2) and 83(2) which refer the states [plural]
14 to Part XV as a whole and not just to section 2 thereof.
15 It would also be counter to the wording of article 298.1
16 of UNCLOS which expressly preserves the obligations of a
17 party under section 1 of Part XV even when that party has
18 made a declaration in respect of section 2. There is a
19 copy of article 298 at tab 13 of the Judges' folder, page
20 10. It might magically appear up on the screen.

21 When signing, ratifying or acceding to the Convention
22 or at any time thereafter, a state may without prejudice
23 to the obligations arising under section 1 declare in
24 writing that it does not accept any one or more of the
25 procedures provided for in section 2 with respect to one
26 or more of the following categories of disputes. Of
27 course one of the categories of disputes is those that
28 concern the interpretation or application of articles 74
29 and 83. This would make no sense if a party that had been
30 seeking to effect an agreement under articles 74 and 83
31 could be deemed already to have conducted an exchange of
32 views for the purposes of article 283.

33 Trinidad and Tobago also relies on the three ITLOS
34 cases to support its interpretation of article 283 so far
35 as concerns the existence of a jurisdictional requirement
36 to exchange views. These are of course Southern Blue Fin
37 Tuna, the MOX plant and Straits of Johor.

38 Certainly, these cases show that there is no

1 obligation on a party to continue with an exchange of
2 views under article 283 when it considers that the
3 possibilities of reaching agreement have been exhausted.
4 For example, the MOX plant case, and this is in
5 authorities bundle tab 24 - there is no need to turn it up
6 - says at paragraph 60, "Considering that in view of the
7 Tribunal a state party is not obliged to continue with an
8 exchange of views when it concludes that the possibilities
9 of reaching agreement have been exhausted".

10 The Trinidad and Tobago's objection is not based on a
11 need for exhaustion. Trinidad and Tobago's point was that
12 the requirement of an exchange of views under article 283
13 cannot simply be bypassed and the ITLOS cases confirm
14 this.

15 It should be added that this appears to be common
16 ground. This is one of the two bases of Barbados'
17 jurisdictional objection concerning Trinidad and Tobago's
18 claim beyond the 200 nautical miles line which, in fact,
19 Professor Crawford will come back to in due course. And,
20 of course, this is not a case where, because a state
21 declines to exchange views or to engage in any discussion,
22 the requirements of article 283 will be taken as having
23 been met. Quite the reverse. Once the dispute in
24 Barbados' eyes had come into existence, Trinidad and
25 Tobago was never given the faintest opportunity to engage
26 in any exchange of views.

27 I move on to article 283(2). 283(2) provides that
28 the parties shall also proceed expeditiously to an
29 exchange of views where a procedure for the settlement of
30 such a dispute has been terminated without a settlement.

31 This means what it says. If the Tribunal has the
32 judges' folder, if you could possibly turn to tab 14, I
33 think that it is worth looking at what the Virginia
34 Commentary says on 283(2). This is to be found at tab 14,
35 the second page in of the tab. You will see two thirds of
36 the way down the page a paragraph numbered 283.3. "The
37 obligation specified in this article is not limited to an
38 initial exchange of views at the commencement of a

1 dispute. It is a continuing obligation applicable at
2 every stage of the dispute. In particular, as is made
3 clear in paragraph 2, the obligation to exchange views and
4 further means of settling a dispute revives whenever a
5 procedure accepted by the parties for the settlement of a
6 particular dispute has been terminated without a
7 satisfactory result and no settlement of the dispute has
8 been reached. In such a case the parties would have to
9 exchange views again with regard to the next procedure to
10 be used to settle the dispute. There might be further
11 resort to negotiations in good faith or the parties might
12 agree to use another procedure. This provision ensures
13 that a party may transfer a dispute from one mode of
14 settlement to another especially when entailing a binding
15 decision only after appropriate consultations between all
16 parties concerned". Well, precisely. No hijack, we might
17 say.

18 In so far as we are in the realms of ambiguity, it is
19 necessary for the Tribunal to look at a travaux. We have
20 referred to a passage from a memorandum by the President
21 of the Conference of 31st March 1976. This is at the
22 index tab in the judges' folder. As to this, as I
23 understood it, Professor Reisman said somewhat defensively
24 that what international conference does not include some
25 absurd statements? He also suggested that we had taken
26 this excerpt from the travaux out of context. I will take
27 you to it in a little bit more detail. On the first
28 page, bottom right corner, you will see "general
29 obligation to settle disputes by peaceful means". In
30 fact, they are looking at what essentially became the
31 first four articles of section 1 of Part XV. The first
32 four articles which incorporate the fundamental principle
33 of modern international law as contained in articles 2 and
34 33 of the Charter of the UN and in paragraph 15 of the
35 Declaration of Principles governing the seabed and the
36 ocean, including the subsoil thereof should I hope have
37 very wide support. While imposing a general obligation to
38 exchange views and to settle disputes by peaceful means,

1 these articles give complete freedom to the parties to
2 utilise the method of their choosing, including direct
3 negotiations, good offices, mediation, conciliation,
4 arbitration and judicial settlement. We can skip over
5 paragraph 11. It adds nothing.

6 Then in paragraph 12, the President effectively is
7 discussing what became article 283. There is provision
8 for general regional or special agreements or some other
9 instrument or instruments under which contracting parties
10 which are parties to a dispute would assume the obligation
11 to settle any dispute by resorting to arbitration or
12 judicial settlement in accordance with the relevant
13 agreement or instrument under which they assume an
14 obligation, but the parties are free to agree otherwise.

15 He then gives his interpretation of what the phrase
16 "unless the parties agree otherwise" in paragraph 13.
17 Then in paragraph 14 he moves on to what has now become
18 article 283. An exchange of views is also prescribed
19 whenever any procedure for settlement has failed to bring
20 about a settlement. The text, therefore, whilst imposing
21 the general obligation, does not limit in any way the
22 method for dispute settlement that the parties may wish to
23 utilise. It is hoped that there would be a consensus on
24 these provisions.

25 I think that there is no suggestion really that
26 Trinidad and Tobago has taken paragraph 14 out of context
27 and, if it is being submitted by Barbados that this is an
28 absurd statement, it appears to have been a statement that
29 actually commanded very wide support, not just because of
30 the President's words at the time, but also because this
31 effectively is the scheme that became section 1, Part XV.

32 Thus, even if Barbados were right to characterise the
33 disputes between the parties as having developed in the
34 course of articles 74 and 83 negotiations and that he
35 relevant exchange of views therefore took place in the
36 course of those negotiations, this simply brings us back
37 to article 283(2) and the need for a further exchange of
38 views.

1 I turn to article 286. Article 286 is important, of
2 course, because it has been used to attempt to found the
3 jurisdiction of this Tribunal and Barbados claims that we
4 are seeking to deprive it of a right to commence
5 arbitration unilaterally.

6 Article 286 does, of course, create a unilateral
7 right to submit a dispute to, amongst other things,
8 arbitration, but this right is subject to the provisions
9 of section 1. This again is confirmed by the Virginia
10 Commentary. If I can ask you to turn back to tab 14 and
11 look at page 38 in this tab, that is the pagination at the
12 top left-hand corner, then to find the paragraph under
13 286.3, "Nevertheless in application of the basic principle
14 of autonomy of the parties, provisions of Part XV, section
15 2 are subject to the provisions of Article 280 to 282",
16 and then it explains in brackets what 280 to 282 are all
17 about.

18 3.30 p.m.

19 Then six lines down, Article 283: "... requiring the
20 parties to a dispute first to exchange views regarding the
21 means of settlement of the dispute, thus discouraging
22 immediate resort to Section 2 of Part XV." Again,
23 precisely. No ambush.

24 So far as concerns the jurisdiction of this Tribunal
25 specifically, I would refer you to Article 1 of Annex VII.

26 This is in the judges' folder back at tab 13. It may not
27 be necessary for you to turn it up now, but this provides,
28 subject to the provisions of Part XV, "Any party to a
29 dispute may submit the dispute to the arbitral procedure
30 provided for in this annex by written notification."

31 The exercise of jurisdiction by this Tribunal is thus
32 made expressly subject to the provisions of Part XV, which
33 of course comprise the provisions of Section 1 of Part XV
34 as well as Section 2 and, as applicable, of course, of
35 Section 3.

36 Move now to Article 298. Article 298 - again you
37 will find this in the judges' folder and perhaps it would
38 be useful to turn this up - no, it has come back on the

1 screen - Article 298 undoubtedly places states involved in
2 a dispute concerning Articles 74 and 83 into a special
3 category so far as concerns the application of Section 2
4 of Part XV.

5 So is Barbados correct that, if it is obliged to
6 signal in some way a movement from negotiation under
7 Articles 74 and 83 to negotiations under Part XV, Article
8 298 will then enable a so-called recalcitrant state to
9 defeat Article 286 altogether, i.e. render nugatory the
10 right to commence arbitration under Article 286?

11 On one level, the answer to this is simple: the
12 issue simply does not arise. Trinidad and Tobago had no
13 intention of invoking Article 298.1 and, despite what
14 Professor Reisman said on Monday, there was never any
15 reason for Barbados to believe that Trinidad and Tobago
16 intended to make an Article 298.1 declaration. It has no
17 intention of doing so now, so far as concerns this
18 dispute; indeed, the Attorney-General has already spoken
19 on this matter this morning.

20 So Barbados may have seen the interaction between
21 Sections 1 and 2 of Part XV on the one hand and Article
22 298 on the other as giving rise to a test as to who will
23 blink first or to who will draw a gun fastest, even if
24 that does require a little bit of subterfuge. But that is
25 not how Trinidad and Tobago sees matters. It sees
26 Articles 74 and 83 and Part XV as providing for an orderly
27 progression where parties first seek to effect an
28 agreement pursuant to Articles 74(1) and 83(1); second,
29 after a reasonable period of time, resort to the
30 procedures under Part XV, not just Section 2 of Part XV;
31 third, they comply with the requirements of Section 1 of
32 Part XV such that, fourth, one party then has the right,
33 unilaterally, to invoke Article 286.

34 The very particular facts of this case in no way
35 undermine the need to follow that orderly progression and,
36 it should be added, there is anyway a limit to how
37 recalcitrant a state could be when it came to Article 298,
38 because the rights under Article 298 are subject to

1 Article 300 of UNCLOS, i.e. they can only be exercised in
2 good faith and not so as to constitute an abuse of rights.

3 So there is always an important safeguard.

4 How then do the facts fit into this legal framework?

5 First and most importantly, Barbados moved directly and
6 entirely without warning from negotiation under Articles
7 74 and 83 to arbitration under Section 2 of Part XV. In
8 fact, negotiations under Articles 74 and 83 were not
9 suspended until after Barbados commenced arbitration:
10 there is no dispute about that.

11 It follows that Section 1 of Part XV was bypassed
12 completely and there was no exchange of views of any kind
13 as required by Article 283.

14 Insofar as it is necessary to look further at the
15 events, there are two related fields of inquiry. First,
16 had a reasonable period of time elapsed for the purposes
17 of Articles 74(1) and 83(1) such that the parties could
18 have resorted to the procedures of Part XV? Second, was
19 there ever a dispute, as required by Article 283?

20 I think it is worth just briefly my referring you to
21 one of authorities we refer to in the Counter Memorial,
22 which is the South-West Africa case. This is at volume 1
23 of our authorities, tab 3. There is no need to turn it up
24 now. "It is not sufficient for one party to a contentious
25 case to assert that a dispute exists with the other party.

26 Mere assertion is not sufficient to prove the existence
27 of a dispute any more than a mere denial of the existence
28 of the dispute proves its non-existence." It is all very
29 familiar stuff.

30 The court continues: "Nor is it adequate to show
31 that the interests of the two parties to such a case are
32 in conflict." Of course, the interests of parties in
33 negotiations under Articles 74 and 83 are going to be in
34 conflict. "It must be shown that the claim of one party
35 is positively opposed by the other."

36 So had a reasonable period of time elapsed? Was
37 there a dispute? The Tribunal has already heard the
38 answers from Ambassador Sealy: as of 16th February 2004,

1 the parties were still engaged in the initial stages of
2 effecting an agreement under Articles 74(1) and 83(1);
3 there had been no expiry of a reasonable period of time;
4 and there was no dispute. Barbados had not yet submitted
5 claim and Trinidad and Tobago was in no position, to use
6 the words from South-West Africa, to oppose formally a
7 claim, given that the claim had not yet been formulated by
8 Barbados.

9 With the words from South-West Africa still in mind,
10 I think it is worth turning briefly to what Barbados'
11 position was at the time of the second round of maritime
12 delimitation negotiations on the need for there to be a
13 claim.

14 This is at tab 2 of part 1 of volume 2.2 of
15 Trinidad's Counter Memorial, page 11, "Submission by
16 Barbados". This is something that Ambassador Sealy took
17 you to this morning. "Barbados was generally satisfied
18 with the progress made in the first round. In order for
19 this progress to be sustained in this round, it was
20 necessary to elicit from Trinidad and Tobago an indication
21 of where they envisaged the potential demarcation line
22 between the two countries. It was only in this way that
23 both sides could have a full appreciation of any
24 differences between them." Otherwise, "Until you show us
25 your claim line, we simply do not know where you are
26 coming from." That makes all the sense in the world.

27 Professor Reisman submits that Trinidad and Tobago
28 was under no doubt whatsoever as to where Barbados' line
29 ran. This submission can be judged by reference to
30 Barbados' own transcript and perhaps the Tribunal has now
31 heard enough of Barbados' transcript both in terms of
32 hearing it on the tape and being taken to it this morning
33 or had it referred to this morning by, I think, every
34 single speaker. This is, of course, the fact that
35 Barbados, at the fifth and final round, was only putting
36 forward illustrations and did not, in any sense, put
37 forward what its claim line was.

38 If I can refer you to the judges' folder at tab 16,

1 we have put in excerpts of the transcript there. I think
2 it is worth just flicking the pages of these just to get
3 the impression of the emphasis that was being placed by
4 Barbados on the fact that it was only putting forward
5 illustrations.

6 At page 575, Ms Marshall, half-way down: "We have
7 had time to study the proposal that you put on the table
8 towards the end of the last round and we would like, with
9 your permission, to respond to that proposal now by way of
10 a presentation of our own which is purely for the purposes
11 of illustration."

12 At the top of the next page - this is now Mr Volterra
13 speaking at 576 - "We are going to go through a number of
14 slides. These are images that we put together for
15 illustrative purposes to assist us in our presentation.
16 These are by no means meant to be definitive and accurate
17 lines on a chart in any respect."

18 Then, two-thirds of the way down: "As you know, this
19 slide shows - of course it is for illustrative purposes -
20 the median line between Trinidad and Tobago and Barbados."

21 Over the next page, 577 in the middle: "Now this
22 slide - we are not trying to put any words into Trinidad
23 and Tobago's mouth and this is merely an illustrative
24 slide of what we have interpreted to be the position
25 presented by Trinidad and Tobago today ..."

26 Then flicking on a few pages to 580 - and I think
27 this is the most important excerpt of the transcript on
28 this point - four lines up from the bottom - again this is
29 Mr Volterra speaking: "This is just a chart for
30 illustrative purposes. But one of the bases that Barbados
31 has repeatedly mentioned to Trinidad in these discussions
32 is Barbados' historic fishing rights, both in and around
33 the area of Tobago and over towards Grenada and that whole
34 area over here. And if one takes those historic fishing
35 rights into account, then" - over the page - "it is
36 possible to contemplate for illustration purposes the
37 maritime boundary between the two countries that follows
38 this red line here."

1 Of course, we are not in a position of being able to
2 show the Tribunal where the red line was, because Barbados
3 would not give Trinidad and Tobago a copy of the slides,
4 so that it has not got a copy of those slides before you
5 now.

6 The point is, it is possible to contemplate, for
7 illustration purposes, any line anywhere, but that is not
8 a claim line. So how could the parties be able to oppose
9 formally one another so as to be able to be in a situation
10 of dispute?

11 I move onto the meeting of Prime Ministers of 16th
12 February 2004. There is, of course, a host of disputed
13 issues as to what was said there. We say our evidence is
14 to be preferred, in particular as it comprises
15 contemporaneous evidence that is conspicuously lacking on
16 Barbados' side.

17 I am actually going to take the Tribunal to one more
18 contemporaneous document, which is at tab 17 of the
19 judges' folder. This is a very important document,
20 because this is what Prime Minister Arthur said at the
21 time. It is again strange that Barbados has not taken you
22 to this document. The Prime Minister of Barbados.

23 When you review this document, it is striking how
24 consistent it is with Trinidad and Tobago's contemporary
25 cabinet note. If I can ask you to start reading after the
26 introductions, you will see that the ministerial teams at
27 a meeting at Villa Nova - you have heard about that. Then
28 the description starts, in the words of Prime Minister
29 Arthur: "At that meeting, Prime Minister Manning
30 confirmed that he had fulfilled his undertaking to his
31 colleague heads to submit the 1990 maritime delimitation
32 treaty between Trinidad and Tobago and Venezuela to review
33 by his cabinet. The review had concluded that in Trinidad
34 and Tobago's opinion the treaty was law and that, as a
35 consequence, Trinidad and Tobago could not act in
36 contravention of the law.

37 "As Barbados has made clear in the past, moving
38 through the chief negotiator for Barbados, Sir Harold St

1 John, during five rounds of negotiations" - I ask you to
2 just to note it is five rounds of negotiations - "the
3 Venezuela, Trinidad and Tobago treaty of 1990 is not
4 binding or relevant to Barbados or any other third state.

5 It purports unilaterally to appropriate to Venezuela and
6 Trinidad and Tobago an enormous part of Barbados' and
7 Guyana's maritime territory as well as one-third of Guyana
8 land territory.

9 "As Prime Minister of Barbados, I cannot be complicit
10 in any agreement which threatens to usurp territory,
11 maritime or land, that is contrary to international law,
12 let alone the national interests of any CARICOM state,
13 including Barbados."

14 3.45 p.m.

15 This is very important, because this is giving you
16 the background to the decision made by the Prime Minister
17 of Barbados and his Cabinet. The background to the
18 decision is very much made or given by reference to
19 Barbados' position so far as concerns the 1990 treaty
20 between Trinidad and Tobago and Venezuela". I continue.
21 "In fact, all members of the conference of Heads of
22 Government of CARICOM annually re-affirm their commitment
23 to support the territorial integrity of Guyana with
24 respect to the Venezuelan claim. I believe that Prime
25 Minister Manning shares my assessment that there is no
26 possibility of a negotiated settlement of the maritime
27 boundary. Why is this just a belief? Why is he talking
28 about "my assessment"? "Between Barbados and Trinidad and
29 Tobago it does not compromise the interests of Barbados
30 and Guyana. Those interests are confirmed and we have
31 their legal justification in the United Nations Convention
32 on the Law of the Sea of which Barbados and Guyana and
33 Trinidad are all parties. In the circumstances, the
34 Cabinet of Barbados, after careful review of the current
35 status of its negotiations with Trinidad and Tobago on
36 maritime boundaries as well as the related area of
37 fisheries and after extensive consultation with its team
38 of international law experts, has this afternoon concluded

1 that there is no option but to proceed to commence binding
2 dispute resolution procedures under UNCLOS".

3 Why has such an enormously sensitive moment in
4 interstate relations and I am sure a sentiment moment so
5 far as concerned the Barbadian population, why does not
6 Prime Minister Arthur say, "Well, we have no option
7 because Prime Minister Manning has made it clear that
8 further maritime boundary negotiations are fruitless. He
9 has said that the issues that divides us is intractable"?

10 There is not a mention of that. Why does he not say,
11 "Oh, Prime Minister Manning has invited us to go to
12 arbitration and, in those circumstances, we consider that
13 we have no choice but to accept that invitation"? There
14 is not a hint of any of that. It is clear that Prime
15 Minister Arthur has made his own assessment of the
16 situation. He may believe that Prime Minister Manning
17 shared that assessment, but Prime Minister Manning clearly
18 did not.

19 In conclusion, so far as concerns this agreement, at
20 the time Prime Minister Arthur simply did not see things
21 in the way that the Barbados team now portrays them. If
22 Prime Minister Manning had called for maritime
23 delimitation issues intractable - he did not, but suppose
24 he had - all this could mean was that the articles 74 and
25 83 phase in the negotiation had come to an end and that it
26 was time for the parties to move on to Part XV. It did
27 not mean that Barbados could jump to section 2 of Part XV
28 and commence arbitration.

29 I turn now to Trinidad and Tobago's submissions on
30 abuse of process. These submissions, of course, only
31 concern Barbados' claim in the western sector. This is
32 not a jurisdictional objection to the whole of Barbados'
33 claim. It is an objection essentially to admissibility of
34 the western sector claim of Barbados. Our point is a
35 simple one which is that Barbados cannot advance just any
36 claim under article 286. Its rights are confined by
37 article 300 - i.e., those rights under article 286 can
38 only be exercised in a manner that would not constitute an

1 abuse of rights.

2 Professor Reisman suggested on Monday that the
3 doctrine of abuse of rights could not apply in the case of
4 a legal claim as no injury results from the making of the
5 claim of itself. But there is nothing in article 300 or
6 Part XV which suggests that article 300 should not apply
7 to article 286. As a matter of general principle, the
8 idea of bringing a claim that should not be brought causes
9 no injury is a strange one. If there were no injury, why
10 does international law trouble to protect states from
11 inadmissible claims? Also in our Counter Memorial at
12 pages 40 to 41 we have referred to various authorities,
13 including Zoller, confirming that the concept of good
14 faith applies in the performance of any international
15 jurisdictional agreement.

16 So far as concerns the content of the abuse, Trinidad
17 and Tobago relies on approaching 20 years of recognition
18 by Barbados that the area that it now claims is within
19 Trinidad and Tobago's EEZ. This recognition is epitomised
20 by the 1990 Fishing Agreement which is to be found at tab
21 18 of the judges' folder. You will see tab. 18, the
22 heading, "Fishing Agreement between the Government of
23 Trinidad and Tobago and the Government of Barbados". You
24 will see what it does not say there is "provisional modus
25 vivendi" which is how this agreement was described time
26 and again on Monday.

27 I will refer you to the preamble at the bottom of the
28 page. The parties acknowledging the desire of the
29 Barbados fishermen to engage in harvesting flying fish and
30 associated pelagic species in a fishing area within the
31 EEZ of Trinidad and Tobago and the desire of the Republic
32 of Trinidad and Tobago to formalise access to Barbados as
33 a market for fish. Then over the page, the key provision,
34 article 2.1, access to the exclusive economic zone of
35 Trinidad and Tobago. "The Government of the Republic of
36 Trinidad and Tobago in the exercise of its sovereign
37 rights and jurisdiction shall for the purpose of
38 harvesting flying fish and associated pelagic species

1 afford access to its EEZ" and so on.

2 Trinidad and Tobago's point is simple. In the light
3 of such language, which is to be found in a treaty, it is
4 abusive now to lay claim to those same areas that were
5 recognised by Barbados as forming part of Trinidad and
6 Tobago's EEZ.

7 Barbados' big answer in response is to refer to
8 article 11 of the Fishing Agreement. Article 11, in fact,
9 is to be found on page 11, the pagination in the bottom
10 right hand corner. This is article 11, preservation of
11 rights. In fact, this provision divides into two parts.
12 Nothing in this Agreement is to be considered as a
13 diminution or limitation of the rights which either
14 contracting party enjoys in respect of its internal
15 waters, archipelagic waters, territorial sea, continental
16 shelf or exclusive economic zone. This part of the
17 provision is not at all problematic for Trinidad and
18 Tobago's argument, because Barbados has no relevant rights
19 to be preserved. The whole 1990 fishing Agreement is
20 predicated on Barbados not having rights to Trinidad and
21 Tobago's EEZ. The second part of the provision "Nor shall
22 anything contained in this Agreement in respect of fishing
23 in marine areas of either contractual party be invoked or
24 claimed as a precedent". Also not problematic for
25 Trinidad and Tobago's argument, because it merely
26 establishes the fact that the fact that fishing is being
27 allowed in a marine area should not constitute a precedent
28 with a view to establishing a future right to fishing
29 rights. So we say that article 11 does not operate as the
30 sort of bar that Barbados contends for and there is
31 nothing in Article 11 that prevents reliance on the
32 straightforward fact that Barbados was being granted
33 access for Trinidad and Tobago's EEZ. This recognition of
34 Trinidad and Tobago's EEZ did not lapse with the expiry of
35 the 1990 fishing Agreement. To the contrary, all future
36 attempts to agree a new Fishing Agreement are approached
37 on this same basis, that Barbadian vessels were being
38 granted access to Trinidad and Tobago's EEZ.

1 There are plenty of other powerful examples of
2 recognition. In particular, in Barbados' reaction to
3 Trinidad and Tobago's arrest of Barbadian vessels that
4 crossed into Trinidad and Tobago's EEZ. I am just going
5 to give you one example for now. This is at tab 19 of the
6 Judges' folder. This is a press release of the Barbadian
7 Government. This is 1992 and it follows on from certain
8 arrests by Trinidad and Tobago of Barbadian vessels. "No
9 fishing agreement with Trinidad and Tobago. The Ministry
10 of Agriculture Food and Fisheries today reminded fishing
11 boat owners and fishermen that at the present there is no
12 fishing agreement between the Governments of Trinidad and
13 Tobago and Barbados. Consequently, the Ministry advises
14 that boats should remain within the waters of Barbados.
15 The Ministry said that this zone extends to points midway
16 between Barbados and Trinidad and Tobago. Yet, of course,
17 we see what Barbados now claims in the raven-like head
18 that Professor Crawford showed you this morning.

19 Finally, we have taken the point that Barbados'
20 current claim is completely inconsistent with Barbados'
21 1978 Marine Boundaries and Jurisdiction Act. This is to
22 be found at tab 20 of the Judges' folder. I would address
23 your attention to section 3.3 of the 1978 Act.
24 "Notwithstanding subsection 1 where the median line is
25 defined by section 4 between Barbados and any adjacent or
26 opposite state is less than 200 miles from the baseline of
27 the territorial waters, the outer boundary limit of this
28 zone shall be fixed by agreement between Barbados and that
29 other state, but where there is no such agreement the
30 outer boundary limit shall be the median line".

31 Of course, Barbados has completely ignored that
32 legislation in making its claim before the Tribunal. We
33 submit that it is acting arbitrarily and capriciously in
34 doing so.

35 The submission on Monday was that it was not for
36 Trinidad and Tobago to interpret Barbados' municipal
37 legislation which does seem very defensive and, of course,
38 it is certainly within the Tribunal's jurisdiction to

1 interpret a municipal statute that arises in the course of
2 these proceedings. Of course, Barbados is more than ready
3 to deploy section 3.3 of its 1978 Act when it comes to its
4 contentions on acquiescence and estoppel. According to Mr
5 Volterra, this section of the 1978 Act evidences a clear
6 and consistent claim to sovereignty to the north of the
7 median. So Barbados can rely on this action, but Trinidad
8 and Tobago cannot. That is a novel approach that rather
9 tends to underline the contention that Barbados is acting
10 capriciously.

11 In conclusion, we say that it is abusive for Barbados
12 now to claim that the EEZ of Barbados, in fact, abuts the
13 territorial waters of Trinidad and Tobago.

14 Mr President, I move on very briefly to the issue of
15 scope, scope of course being raised by Professor Crawford
16 in his overview this morning. We had all thought that the
17 issue of scope was a dead issue, because in its Reply
18 Barbados said that it did not claim any remedy relating to
19 fishing rights in the EEZ of Trinidad and Tobago. We have
20 put some excerpts in at tab 21 of the judges' folder. In
21 paragraph 121 Barbados told you that Barbados requests
22 that the Tribunal adjust the median line to enclose these
23 waters in Barbados' EEZ as the appropriate method of
24 protection of the rights of its fisherfolk. This is
25 manifestly within the jurisdiction of the Tribunal. Then
26 again half way down in paragraph 122, Barbados does not
27 request the award of non-exclusive fishing rights.

28 4.00

29 Of course, now we see that Barbados is trying to
30 introduce this claim through the back door. It says that
31 we are not claiming an award of non-exclusive fishing
32 rights, but you, Tribunal, are not bound by what we claim.

33 As Professor Reisman said on Monday, with the
34 heaviest of heavy hints, "When this species of special
35 circumstances has been established, an international
36 tribunal has two options: either to adjust the boundary,
37 as occurred in Jan Mayen or to instal a regime protecting
38 the artisanal fishing, the predicate of the special

1 circumstance as occurred in Eritrea-Yemen."

2 This has to be compared with what Barbados said in
3 its statement of claim. I will just read you the relevant
4 passage from that, which is to be found at volume 3 of
5 Trinidad and Tobago's Counter Memorial, Exhibit 85.
6 Barbados sets out under a heading "The Relief Sought":
7 "Barbados claims a single unified maritime boundary line
8 delimiting the exclusive economic zone and continental
9 shelf between it and the Republic of Trinidad and Tobago
10 as provided under Articles 74 and 83 of UNCLOS. Details
11 of this claim will be particularised at the appropriate
12 stage in this arbitration as determined by the Tribunal."

13 To follow up on Professor Crawford's analogy this
14 morning, it is of course details of this claim that will
15 be supplied in due course, not details of a completely
16 different claim, as it were, the apples and not the
17 oranges.

18 It is not open to a state to seek to broaden the
19 remedy that it claims by heavy hint or otherwise after the
20 written pleadings once the oral proceedings have
21 commenced. States are entitled to know the case they have
22 to meet and, indeed, this Tribunal is entitled to know the
23 case on which it has to decide. This unspoken claim is
24 not before you.

25 Second, the Tribunal does not have the jurisdiction
26 for which Barbados contends. Professor Crawford this
27 morning referred to Article 297.3(n) of the 1982
28 Convention. That is to be found at tab 13 of the judges'
29 folder, also it has come up on the screen. "Disputes
30 concerning the interpretation or application of the
31 provisions of this Convention with regard to fisheries
32 should be settled in accordance with Section 2, except
33 that the coastal states shall not be obliged to accept the
34 submission to such settlement of any dispute relating to
35 its sovereign rights with respect to the living resources
36 in the exclusive economic zone for their exercise,
37 including its discretionary powers for determining the
38 allowable catch, its harvesting capacity, the allocation

1 of surpluses to other states and the terms and conditions
2 established in its conservation and management laws and
3 regulations." So we say clear as day exception to Section
4 2 of Part XV that constrains your jurisdiction.

5 We have actually referred to that Article in both our
6 Counter Memorial and our Rejoinder and, on all occasions
7 thus far, Barbados has simply blanked it.

8 Mr President, members of the Tribunal, that concludes
9 my submissions on objections to jurisdiction and
10 admissibility by Trinidad and Tobago and, Mr President, I
11 believe that Professor Greenwood is ready to follow,

12 THE PRESIDENT: Thank you so much, Mr Wordsworth. Professor
13 Greenwood?

14 PROFESSOR GREENWOOD: I am going to follow the example of
15 the other members of the Trinidad and Tobago team by
16 making my submissions from the standing rather than the
17 sitting or the kneeling position that has been urged upon
18 us in the course of these proceedings.

19 Mr President, members of the Tribunal, you have heard
20 my learned friend Mr Wordsworth address you on our
21 submissions with regard to jurisdiction and admissibility.

22 Trinidad and Tobago made clear in its written pleadings
23 and its first notification to the Tribunal regarding those
24 preliminary objections that it was content for them to be
25 joined to the merits. Accordingly, the submission which I
26 am about to make and which Professor Crawford and Mr
27 Wordsworth will follow me on, which concern the merits of
28 this case, are made, of course, without prejudice to our
29 earlier submission that the Tribunal lacks jurisdiction.

30 Mr President, what I wish to deal with is the
31 proposition that the area in which this delimitation is to
32 be effected divides naturally into two sectors: the
33 western or Caribbean sector and the eastern or Atlantic
34 sector.

35 The basic premise of Trinidad and Tobago's argument
36 on this point is very simple: the relationship between
37 the coasts of the two states and the maritime spaces to be
38 delimited is not uniform throughout the area in which

1 delimitation is to be effected. That simple fact leads to
2 certain important legal consequences.

3 Perhaps we could go first to a map which appears at
4 tab 22 of the judges' folder but will now, I hope, with
5 the miracle of modern technology, appear on your screen,
6 except that unfortunately it has not appeared on mine.
7 Every screen bar my own working.

8 That map shows the region, the eastern Caribbean
9 states and the open Atlantic sea. We can, in fact, narrow
10 it down a little bit: the red box and then expanding from
11 there covers the area primarily in dispute.

12 What this map demonstrates is that the Caribbean and
13 the Atlantic are two very different seas. The distinction
14 between them has been recognised by bodies like the
15 International Hydrographic Organisation and by mariners
16 for many, many years indeed. This map, which appears at
17 tab 23, demonstrates the IHO's dividing line between the
18 Caribbean and the Atlantic. The red line there represents
19 the IHO's depiction of the division between the two seas.

20 Mr President, we say it is patently obvious that the
21 conditions in the two sectors are vastly different: in
22 the Caribbean both Trinidad and Tobago on the one hand and
23 Barbados on the other face a range of islands, Grenada, St
24 Vincent & The Grenadines and the others further north,
25 whereas in the Atlantic they face out into the open sea
26 and there is, in fact, no landfall for approximately 2,000
27 nautical miles until one reaches the coast of West Africa.

28 That distinction between the Caribbean and the
29 Atlantic is, in our submission, obvious even to Mr
30 Paulsson's imaginary mariner who appears briefly at tab 24
31 in an extract from the transcript. Mr Paulsson said that
32 the mariner, of course, sees only waves stretching to the
33 horizon. Well, Mr President, all I can say is, "Don't go
34 sailing with Mr Paulsson, certainly in the waters of the
35 Caribbean, if that is what he sees, or your chances of
36 becoming an ancient mariner are rather restricted."

37 The difference between sailing in the Atlantic and
38 sailing in the Caribbean is something which has been

1 perfectly obvious to mariners ever since anyone started to
2 sail in those waters at all.

3 The second point that I would make, the second basic
4 premise, is that the distances between the furthest point
5 of the line that might be drawn by this Tribunal in the
6 west, the Caribbean, and the furthest point in the east is
7 vastly greater than the area in which the two coasts
8 actually face each other directly.

9 The yellow band on this diagram illustrates the area
10 between the two directly facing coasts and it is
11 approximately 5 nautical miles across at the putative
12 median line.

13 Contrast that with the length of that median line
14 down to the furthest point in the east that could be
15 claimed by Trinidad and Tobago: 185 nautical miles in
16 total. Out of that 185, the two coasts directly face one
17 another for only some five nautical miles, 1/38th of the
18 entire boundary.

19 Barbados maintains that that short stretch of 5
20 nautical miles where the two coasts directly face on
21 another has to control the delimitation exercise for the
22 entirety of the two sectors. We say that that makes no
23 sense and is contrary to precedent.

24 Mr President, these are simple geographical realities
25 which not even the clever geographical alchemy that you
26 have heard from the other side can conceal. It does not
27 matter how much you rotate states on their axes or talk
28 about the Balkanization of the sea bed, the simple fact
29 remains: the Atlantic is open sea; the Caribbean is not.

30 The distance across which these two coasts face each
31 other directly is a very small part of the whole.

32 What legal consequences can follow from those
33 geographical realities? We say that three points are
34 significant in this respect. The first and most obvious
35 point is the one made at paragraph 240 of the Anglo-French
36 Channel Continental Shelf case and you might like to have
37 that case open in front of you. It is at tab 9 of volume
38 1 of the Trinidad and Tobago volume of authorities. We

1 have not followed learned colleagues from Barbados'
2 example in throwing up short extracts from these
3 authorities on the screen, because, in our submission,
4 that is not the proper way to use authorities. It may be
5 very convenient technically, but it is necessary to look
6 at these passages in context, rather than seeing just a
7 short gobbet taken as an extract.

8 At paragraph 240 of the Anglo-French Channel case,
9 the Court of Arbitration said this: "The appreciation of
10 the effect of individual geographical features on the
11 course of an equidistance line has necessarily to be made
12 by reference to the actual geographical conditions of the
13 particular area of continental shelf to be delimited and
14 the relation of the two coasts to that particular area."

15 That is something of a truism, but it leads onto the
16 second point that we want to make, which is that, as the
17 Court of Arbitration made clear, even in a case governed
18 by the 1958 Continental Shelf Convention, which of course
19 is not the governing instrument here, what matters is not
20 the legal classification of two coasts as opposite or
21 adjacent for the purposes of Article 6, paragraph 1, or
22 Article 6, paragraph 2, of the Convention. What matters
23 is the actual geographical relationship between the
24 relevant coasts and the maritime areas to be delimited.

25 The Court of Arbitration put it this way in paragraph
26 239, just before the passage that I have just quoted to
27 you: "The appropriateness of the equidistance or any
28 other method for the purpose of effecting an equitable
29 delimitation in any given case is always a function or
30 reflection of the geographical and other relevant
31 circumstances of the particular case. In a situation
32 where the coasts of the two states are opposite each
33 other, the median line will normally effect a broadly
34 equal and equitable delimitation. But this is simply
35 because of the geometrical effects of applying the
36 equidistance principle to an area of continental shelf
37 which in fact lies between coasts that in fact face each
38 other across that continental shelf. In short, the

1 equitable character of the delimitation", the Court of
2 Arbitration went on to say, "results not from the legal
3 designation of the situation as one of opposite states but
4 from its actual geographical character as such.

5 Similarly, in the case of adjacent states, it is the
6 lateral geographical relation of the two coasts when
7 combined with a large extension of the continental shelf
8 seawards from those coasts which makes individual
9 geographical features on either coast more prone to render
10 the geometrical effects of applying the equidistance
11 principle inequitable than in the case of opposite states.

12 The greater risk in these cases that the equidistance
13 method may produce an inequitable delimitation, thus also
14 results not from the legal designation of the situation as
15 one of adjacent states but from its actual geographical
16 character as one involving laterally related coasts."

17 That is the way in which it is put by the Court of
18 Arbitration in paragraph 239 of its award.

19 4.15 p.m.

20 It was that consideration, Mr President, which was
21 decisive in the view of the Court of Arbitration. It
22 found at paragraph 232 of the award that the Atlantic
23 region had "characteristics which distinguish it
24 geographically and legally from the region within the
25 English Channel". What were those distinguishing
26 characteristics? The chief one, according to the court of
27 arbitration, consists in the fact that the continental
28 shelf of the Atlantic region is not one confined within
29 the arms of a comparatively narrow channel - and I will
30 have more to say about that in a moment, but one extending
31 seawards from the coasts of the two countries into the
32 open spaces of the Atlantic ocean. In consequence the
33 areas of continental shelf to be delimited lie off rather
34 than between the coasts of the two countries.

35 I would invite the members of the Tribunal to mark
36 that phrase in particular, "lie off rather than between
37 the coasts of the two countries". The miracle has thrown
38 up on your screens the map of the Atlantic approaches.

1 The red line joining the two furthest points on the
2 mainland coast, the green line the alternative one joining
3 the isles of Scilly to the Isle of Ushant. As we know,
4 the Tribunal effectively split the difference between
5 those two approaches, but that is of no significance for
6 present purposes. What matters is that it is plain that,
7 if you go to where the words "UK and France" appear in the
8 bottom left hand side of the screen, no one would describe
9 that position, no hypothetical mariner treading water
10 there, as his boat sinks under him, is going to describe
11 himself as lying between the coasts of Britain and France.

12 The court of arbitration also noted in this case two
13 other factors which are relevant. First, that the
14 continental shelf across which the court has to decide the
15 course of the boundary extends to seawards of the coasts
16 of the two countries for great distances. Secondly, that,
17 although separated by some 100 miles of sea, their
18 geographical relation to each other vis-a-vis the
19 continental shelf to be delimited is one of lateral rather
20 than opposite coasts.

21 Mr President, we say
22 exactly the same considerations are applicable here. The
23 continental shelf and EEZ in the Atlantic sector lie off
24 rather than between the two coasts as any mariner could
25 tell you. The continental shelf and EEZ across which the
26 Tribunal has to decide the boundary in the Atlantic sector
27 extends to seawards for great distances, well over 130
28 nautical miles beyond the point at which the two coasts
29 cease to stand directly opposite each other. Thirdly,
30 although they are separated by 116 miles of sea, a little
31 bit more than in the case of the Channel, the geographical
32 relation of Trinidad and Tobago, on the one hand, to
33 Barbados, on the other, vis-a-vis the continental shelf to
34 be delimited is one of lateral rather than opposite coasts
35 in the Atlantic. Trinidad and Tobago considers, Mr
36 President, that in determining the course of the
37 boundaries, the Tribunal necessarily has to take account
38 of these fundamental geographical realities. Can I have
tab 25 again please? We say that the difference between

1 the two parties is really very straightforward. In that
2 long area, that long limb out into the Atlantic, 168
3 nautical miles, of course it would be slightly more or
4 slightly less depending on how one moves the line up and
5 down, that is a vast extension seawards into the open
6 ocean. Just as one had in the Channel. To say that
7 somebody standing at the far end of that line was standing
8 between the Barbados and Trinidad and Tobago coasts is
9 quite simply a nonsense. If you are standing at Barbados'
10 Point E, you are standing between Trinidad and Tobago and
11 Barbados there, then Odysseus was standing between Scylla
12 and Charybdis before he had ever left Troy, long before he
13 got into a ship and long before he had to cope with the
14 illustration of how the relationship of the coasts changes
15 as the line through the gulf of Maine is drawn. It is
16 true also in respect of Qatar/Bahrain, a map from which
17 appears at tab 28. The position in the channel between
18 Bahrain and Qatar is obviously different from the position
19 further out beyond the red line out into the Gulf.

20 The distinction between the two sectors is well
21 grounded in fact and in law. Barbados' attack on that
22 distinction which was so eloquently made by Mr Paulsson we
23 say is based on a distortion of the argument being put by
24 Trinidad and Tobago. Two elements of that distortion were
25 very evident in Mr Paulsson's presentation on Tuesday.
26 First of all, and this appears at tab 29 of the judges'
27 folder, a short extract from the transcript, contrary to
28 what Mr Paulsson says there, Trinidad and Tobago is not
29 suggesting that the same stretches of coastline are both
30 opposite and adjacent, opposite if you are standing in one
31 place, adjacent if you are standing somewhere else. In
32 the Channel case it was not suggested that the
33 relationship between the Isle of Wight and the Continental
34 Peninsula is opposite at one point but adjacent somewhere
35 else. Those two coastlines are opposite each other and
36 the waters in between them lie between them. But, when
37 you get out into the Atlantic, the relationship of the
38 maritime space to the two coastlines is quite different.

1 Why? Because the coasts change direction. The same is
2 true here. Once one reaches the south point at the
3 extreme south east tip of Barbados, the Barbados coastline
4 turns north and thereafter faces eastwards out into the
5 Atlantic. Similarly the coastline at Tobago, once one
6 gets to St Giles Island, turns to the south east and,
7 again, faces southwards into the Atlantic. It is a simple
8 geographic fact, Mr President. It has nothing to do with
9 perception or distance or some idea that adjacency is
10 better to see when you are further away.

11 In one part of his presentation, my learned friend Mr
12 Paulsson gave you some rather glorious little drawings of
13 bubbles, states made up of bubbles, that looked a little
14 bit like those children's television characters, the
15 Tellytubbies. If you stood one Tellytubby on top of
16 another, then suddenly the Tellytubbies became opposite.
17 Stand one on its end and they are adjacent. That is not
18 what we are saying at all. It is a product instead of
19 whether in the words of the court of arbitration the
20 relevant maritime space can plausibly be described as
21 lying between the two coasts or as lying off the two
22 coasts. That is the difference between oppositeness as a
23 geographic fact and a lateral relationship.

24 The second misrepresentation of our argument concerns
25 the significance of Point A. Point A in the Trinidad and
26 Tobago claim is not the dividing line between the two
27 sectors. The dividing line between the Caribbean and the
28 Atlantic, as we made perfectly clear in our Counter
29 Memorial and then in our Rejoinder, is as laid down in the
30 IHO map. It is the point at which the relationship
31 becomes lateral rather than opposite. Point A is the
32 turning point for the claim line. That is an entirely
33 different matter. In the Channel case, for example, the
34 court of arbitration considered that, although the
35 relationship between the coasts changed at the point of
36 the Scilly Isles and Ushant, the boundary line between the
37 two could nevertheless continue out to a further point
38 before account needed to be taken of that change from

1 opposite to lateral. There are all kinds of reasons why
2 that might be the case. Mr Paulsson, of course, said that
3 Point A was wholly arbitrary, unexplained and he made
4 great play of the fact that he simply could not understand
5 as a conceptual matter how a state could rely on some
6 arbitrary unexplained point like that. We can help. We
7 can offer him help at two levels in this respect. The
8 first is that there is, in fact, nothing arbitrary or
9 unexplained about Point A. At paragraphs 238 to 239 of
10 our Counter Memorial, we explain with great care how Point
11 A has been selected, not just in its geographical sense of
12 how it is calculated, but in terms of its rationale.

13 Point A "is the last point on the equidistance line which
14 is controlled by points on the southwest coast of
15 Barbados". In other words, it is the last point on the
16 line which can be determined by reference to a base point
17 on any part of the coast of Barbados which faces directly
18 across from Tobago. That is the rationale for Point A.

19 Since Barbados did not get it in writing, we made it
20 again at paragraphs 227 to 228 of the Rejoinder. Since it
21 would appear that they still have difficulty with it, I
22 have repeated it now for the Tribunal.

23 The second level at which we can help my learned
24 friend Mr Paulsson is that, if he has trouble
25 understanding how an arbitrary and unexplained point can
26 be a prominent feature of a state's claim to a maritime
27 boundary, he could ask the colleagues that he has on the
28 Barbadian team and ask them if they could explain how they
29 arrived at Point D on their own claim line. Point D is
30 described in very careful geographical terms but it is
31 never explained. There is not a jot of argument or
32 evidence to justify that turning point in their line. So
33 when the rest of his team have explained the rationale to
34 him, I hope that in the second round he will share that
35 explanation with the Tribunal and with those of us on this
36 side of the room, because at the moment after 286 pages of
37 pleadings, 160 annexes and nearly 200 pages of transcript
38 of Barbados' argument, we have none of us been offered a

1 single word of justification for Point D. The silence, Mr
2 President, is eloquent.

3 Perhaps because of the weakness of its own case,
4 Barbados prefers to devote its attentions to attacking
5 Trinidad and Tobago's approach. In its enormous Reply,
6 the longest pleading by far in this case, three times the
7 length of Barbados' Memorial and nearly twice the length
8 of our own Counter Memorial, Barbados attacks the reliance
9 by Trinidad and Tobago on the geography of the two sectors
10 on several grounds. Two of those, as we have seen, have
11 already been weighed and found wanting. Very briefly,
12 what about the others? The first is an argument developed
13 in the Reply and then by Mr Paulsson on Tuesday to the
14 effect that the direction of the coasts of Trinidad and
15 Tobago points southeast away from the area of
16 delimitation. But international tribunals have never been
17 impressed with arguments based on the supposed shape,
18 direction or thrust of a coastline. The court of
19 arbitration in the Channel case had no difficulty in
20 rejecting a French argument - it does so at paragraph 234
21 - that the contours of the UK coastline were such that the
22 United Kingdom had no relevant coastal frontage facing on
23 to the western approaches. The court described that as an
24 argument that mistook form for substance. Similarly in
25 the Tunisia-Libya case, arguments to this effect met with
26 a very dismissive response. Quite apart from its legal
27 deficiencies, this argument is based on a fundamental
28 misreading or perhaps a fundamental misrepresentation of
29 the geographical facts. The notional south eastern
30 direction of the Trinidad and Tobago coast is, in fact,
31 based upon the archipelagic baseline, but it is the actual
32 coastline which matters not the archipelagical baseline.
33 As Barbados' counsel said on numerous occasions on Monday
34 and Tuesday, the land dominates the sea. Most of the
35 actual coastline of Trinidad faces due east and as for
36 what Barbados regards as the relevant coastline of Tobago,
37 well, let us have a look at it. One sees in the corner
38 there in the box the north eastern coast of Tobago. What

1 direction does it face in? An extension will make the
2 point clear. Now, if that was the basis of Trinidad and
3 Tobago's claim, I do not think that we would have heard
4 Professor Reisman telling you that cut-off was an oxymoron
5 between two opposite states. If you want to play games
6 with the direction of the coastline, it is easy to do so.

7 Then, Mr President, there is the argument that the
8 distance between Tobago and Barbados is too great to
9 permit the kind of reasoning used in cases like the
10 Channel. But at 160 miles the distance is only slightly
11 greater than the Channel where it was 100 or I think to be
12 precise 97.5, but far less than in the Gulf of Maine,
13 where the distance was some 219 miles. Lastly, it is said
14 that the geographical relationship between large land
15 masses, such as the UK and France or the USA and Canada,
16 cannot be compared with that between two small island
17 states. Or, as Mr Paulsson put it, there is no gulf or
18 channel behind Tobago and Barbados. Mr President, no two
19 coastlines are ever quite alike. That is the beauty of
20 geography. But there is no logical reason whatever why
21 the size of the two states should be a controlling factor
22 or the absence of a gulf behind the eastern frontage of
23 the two countries. Nothing in the reasoning of any of the
24 cases referred to warrants such an arbitrary conclusion.

25 Of course, to say that the relationship in the
26 Atlantic sector is lateral rather than opposite is not the
27 end of the matter. It still remains to establish what
28 legal consequences for the achievement of an equitable
29 delimitation follows from that fact and on that Professor
30 Crawford will address you tomorrow. But just allow me, if
31 you will, one comment in conclusion. Mr Paulsson - and
32 the relevant extract is at tab 30 in the Judges' folder -
33 repeatedly stated that it made no difference to the
34 drawing of the boundary line whether the two coasts were a
35 lateral or an opposite relationship vis-a-vis the maritime
36 spaces. In doing so, he quoted a passage from paragraph 6
37 of our Rejoinder, but he quoted it out of context. I will
38 not read it to you, but I would invite you to read (at tab

1 31|) the whole of paragraph 6. Moreover, the suggestion
2 that it made no difference whether or not the two
3 coastlines were treated as opposite is in fact completely
4 incompatible with Barbados' own submissions. Mr Paulsson
5 himself - at page 53 of the Tuesday transcript - at tab 30
6 - immediately after he sought to pour scorn on the
7 suggestion that a failure to recognise the different
8 nature of the two coasts would lead to an inequitable
9 result, went on to say this, "The law and the
10 jurisprudence on the delimitation of opposite coasts is
11 settled, the median line is the starting point and the
12 presumptive final point". In other words, he draws an
13 immediate conclusion from his characterisation of the two
14 coasts as opposite. Or Professor Reisman - at page 79 of
15 the same transcript - "West Africa is a case of adjacency,
16 coastal adjacency. Our case is one of coastal opposition.

17 When Guinea and Guinea Bissau and North Sea Continental
18 Shelf speak of avoiding as much as possible the cut-off
19 effect, they are speaking of a cut-off by the maritime
20 boundary of an adjacent state not an opposite state for
21 which the term 'cut-off' is an oxymoron". In other words,
22 Barbados attaches great legal significance to its own
23 characterisation of the relation between the two coasts.
24 Once it is realised that that characterisation is false,
25 those arguments for a start simply fall away.

26 Mr President, I apologise for the fact that I delayed
27 the Tribunal somewhat in taking its coffee break, but that
28 concludes my submissions and after the break I would be
29 grateful if you would call upon my learned friend
30 Professor Crawford.

31 THE PRESIDENT: Thank you so much, Professor Greenwood. We will
32 adjourn for 15 minutes. That is until 10 to 5.

33 **(Short Adjournment)**

34 THE PRESIDENT: Professor Crawford --?

35 PROFESSOR CRAWFORD: Mr President, members of the Tribunal,
36 it will be helpful for the purposes of this speech if you
37 have available the two volumes of authorities prepared by
38 Trinidad and Tobago, authorities bundle, volumes 1 and 2.

1 The tab numbers run consecutively through the two
2 volumes. I will take you to some passages there, and it
3 is easier than having to segregate passages in
4 miscellaneous volumes and folders.

5 Mr President, members of the Tribunal, you will
6 recall that in her opening speech the Barbados agent, the
7 Hon The Attorney-General Ms Mottley talked about the rule
8 of law and Barbados' adherence to it. She said much less
9 about the applicable law. In this respect, she gave the
10 lead to her colleagues. There was no presentation on the
11 applicable law as such in their first round, just
12 occasional remarks on particular points.

13 Trinidad and Tobago dealt with the applicable law in
14 some detail in chapter 4 of its Counter Memorial, to which
15 I would respectfully refer the court, but I do want to
16 make some points in amplification of those issues and in
17 preparation for our treatment of the issues of application
18 of the law of maritime delimitation in the two sectors
19 that Professor Greenwood has established for you.

20 Of course, we start with the North Sea Continental
21 Shelf case, the fons et origo of the judicial law of
22 maritime delimitation. You can see on the screen the
23 equidistance lines as between the Netherlands, Germany and
24 Denmark. The equidistance line was the line B-E-D. You
25 can see that, in the context of that concave coastline it
26 had the effect of completely shelf-locking Germany.

27 You can see also the lines that were eventually
28 agreed, which are the shaded lines, the rather curious
29 figure for which Mr Gent undoubtedly has a technical term,
30 which is the agreed line between the three states. The
31 eventual agreement, which is published, actually consisted
32 of two separate bilateral agreements that were tied
33 together by a head agreement, so it was a very adroit
34 solution to the problem which faced those three states.

35 Of course, the court was not asked to draw that line
36 and we do not know what line they would have drawn. I
37 think it would be fair to say they would not have drawn
38 that line. But it is equally clear that they would not

1 have adopted - and of course they said expressly that they
2 would not adopt the equidistance line or anything like.
3 The general thrust of the decision is that Germany was
4 entitled, as a coastal state with a coastline of
5 approximately the same size as its two neighbours to a
6 substantial projection out to the centre of the North Sea,
7 the median line boundary between the United Kingdom and
8 its opposite coast neighbours having been effectively
9 established.

10 You will also see that Germany did in fact get up to
11 the median line. It went as far as any of the coastal
12 states on that side of the North Sea were able to go.

13 If Venezuela had a salida al Atlantico, I think
14 Germany had what might be described as an ausfahrt: the
15 principle was the same, whatever the language.

16 I draw your attention to the crucial paragraphs of
17 the judgment in the North Sea case. This is tab 5 in
18 volume 1 of the authorities. Paragraph 85 on page 47 of
19 tab 5, which is repeated in the dispositive in somewhat
20 different terms in paragraph 101 on page 54: one of the
21 rare examples where the dispositive of a judgment of the
22 court is really a set of general propositions about the
23 state of international law, as distinct from merely motif
24 or the background for particular findings.

25 It will be seen, looking at paragraph 85, the stress
26 that the court placed on negotiations. The emphasis of
27 the principle of equidistance is a principle of automatic
28 application and the court, of course, rejected
29 equidistance as a matter of automatic application.

30 The strong emphasis upon the principle of natural
31 prolongation, in particular subparagraph (c) of paragraph
32 86, from which I will read an extract: "The continental
33 shelf of any state must be the natural prolongation of its
34 land territory and must not encroach upon what is the
35 natural prolongation of the territory of another state", a
36 fundamental principle.

37 The court went on in the dispositive paragraph 101 to
38 lay down relevant factors which were to be taken into

1 account and were indeed taken into account in the
2 negotiations: "The general configurations of the coasts,
3 the presence of special or unusual features, the physical
4 and geological structure and natural resources of the
5 continental shelf area so far as known or readily
6 ascertainable.

7 "The element of a reasonable degree of
8 proportionality which a delimitation carried out in
9 accordance with equitable principles ought to bring about
10 between the extent of the continental shelf areas
11 appertaining to the coastal state and the length of its
12 coast measured in the general direction of the coastline,
13 account being taken for this purpose of the effects,
14 actual or prospective, of any other continental shelf
15 delimitations between adjacent states in the same region."

16 There is a tendency to treat - and Professor Reisman
17 has in fact treated - other cases as outlier and as not in
18 the main line of development, but in fact all of the main
19 line of development of the customary law of the
20 continental shelf to which the relevant provisions of the
21 1982 Convention, as relates to delimitation, refer can be
22 found here, including the regional dimension, including
23 the element of proportionality, including the no cut-off
24 principle, including the principle of ab initio pertinence
25 of the continental shelf and so on.

26 Moreover, the decision of the court in the North Sea
27 Continental Shelf cases has been taken into the later
28 authorities in an almost axiomatic way. No doubt we have
29 had much more experience of the process of delimitation
30 since. The core principles which the court enunciated
31 here as principles for application by the parties through
32 agreement and secondarily by the court if the parties
33 failed to agree are very much part of the fabric of the
34 law of delimitation.

35 Against that background - I realise that I am
36 preaching very much to the converted in the sense that
37 talking to the Tribunal about maritime delimitation is
38 rather a process of reminding than expounding - I do want

1 to say some things about the approach of Barbados, so far
2 as one can infer it to issues of applicable law.

3 The first concerns the role of equidistance. As
4 Professor Greenwood has said, partly because Barbados
5 pretends that the whole of the boundary is a boundary
6 between opposite coasts, there has been enormous emphasis
7 upon equidistance and, indeed, Barbados might be described
8 as the equidistant state par excellence in the region. Of
9 course, one can see why it is: because equidistance gives
10 it such an enormous share of a space which is having to be
11 allocated or distributed amongst a large number of states,
12 many of which are thereby affected. But the decisions are
13 clear: equidistance is a means of achieving an equitable
14 solution; it is not an end in itself. It is, we fully
15 accept, the starting point of a delimitation, unless, in
16 very special circumstances, some completely different
17 method might need to be adopted which is not excluded.
18 But, in normal circumstances, it is the starting point of
19 the delimitation and we accept that it is the starting
20 point of this delimitation: you start with the median
21 line and then ask, "To what extent do the circumstances
22 justify a departure from it?"

23 There is no presumption that the median line is not
24 to be departed from. It is not the case in these
25 geographical circumstances that the median line is not
26 merely the presumptive beginning but the presumptive
27 ending. In a situation between two parallel opposite
28 coasts which cover the entire area and between which the
29 boundary is to be drawn, it will only be islands or very
30 special features that will warrant a departure, because
31 the natural prolongations of the opposite coast will, by
32 definition, cancel each other out. But that is not the
33 situation here.

34 We are rather in the situation that discrepancies -
35 in this case in particular the somewhat more easterly
36 orientation or location of Barbados relative to the other
37 line of islands has a wholly disproportionate effect.

38 Barbados is trying to present this picture as if it

1 was a case about trying to swing Trinidad and Tobago. It
2 is rather a case of an appropriate adjustment being made
3 for a circumstance which has a wholly disproportionate
4 effect, something which the Tribunal did in the Anglo-
5 French case and something which Tribunals have generally
6 done.

7 Of particular importance is that, in accordance with
8 the principles of the North Sea case and of general
9 international law applied by Renvoi in Articles 74 and 83
10 of the Convention, there is no vesting of jurisdictional
11 rights or territory - maritime territory - by reason
12 solely of the principle of equidistance.

13 It is not the case, notwithstanding presentations to
14 the contrary effect, that equidistance gives you a
15 presumptive right which you then have to concede or
16 bargain away or otherwise grant.

17 Thus the talk of dispossession - I quote a word used
18 by Mr Volterra - is wholly inappropriate. Well, at least
19 we thought it was inappropriate: it has become
20 appropriate through Professor Reisman's alchemy, because
21 his doctrine of what happens to the exclusive economic
22 zone is dispossession: "You had it, you failed to
23 exercise your jurisdiction in accordance with it and,
24 therefore, it is taken away from you." This is a new
25 theory of dispossession, not one known to the law.

26 I turn to the second general question, which is the
27 relationship between particular bilateral delimitations
28 and other delimitations in the region. This goes partly
29 to the question of the regional effect, but it is of
30 importance also as it concerns, for example, the position
31 of this court faced with the 1990 agreement. For this
32 purpose, we will go to the line of the 1990 treaty, which
33 you can see depicted here as the red line. The whole of
34 the 1990 treaty is in your folder.

35 It is fundamental that delimitation, unless it is
36 achieved by way of a multilateral agreement (a very rare
37 phenomenon), is bilateral. Even the resolution to the
38 trilateral problem in the North Sea Continental Shelf case

1 was achieved by linked bilateral treaties, rather than by
2 a treaty properly multilateral. This, of course, is a
3 bilateral agreement.

4 I should say that Barbados has made a great deal of
5 the draft map which fell off the back of a truck or other
6 conveyance at some stage unspecified during the very
7 lengthy negotiations. What matters, of course, is the
8 final line drawn by the agreement and the terms of the
9 agreement. The final line you can see there. It is
10 obvious and was obvious at the time when the treaty was
11 concluded in 1990, when it was registered with the United
12 Nations in 1991 and correspondingly published that the
13 line drawn in that agreement went well beyond the 200 mile
14 exclusive economic zone. It is expressed to be a maritime
15 boundary. It is, of course, a maritime boundary which is
16 an EEZ boundary between the two states out to 200 miles
17 and the continental shelf boundary thereafter. It does
18 not go - and at the time it was concluded it was unclear
19 where one would go to get to the outer edge of the
20 continental shelf. One might say that is still unclear,
21 but it goes a considerable distance.

22 Barbados has made a considerable issue and Mr
23 Volterra's presentation of the back of the truck map made
24 a considerable thing about the 1990 agreement as an
25 endorsement of the Venezuela position with respect to the
26 land boundary dispute between Venezuela and Guyana. But I
27 draw your attention to the note annexed to the 1990 treaty
28 which was exchanged between the parties at the time the
29 treaty was ratified and is therefore co-equal in temporal
30 terms with the treaty itself.

31 The second paragraph: "I wish to draw to your
32 Excellency's attention" - the Trinidad and Tobago minister
33 - "the words 'zona en reclamacion' which appear on the map
34 attached to the treated are not to be interpreted as
35 applying endorsement" - this is tab 36, I am sorry - "by
36 the Government of the Republic of Trinidad and Tobago of
37 the claim by the Government of the Republic of Venezuela
38 to the area indicated", and there was a corresponding note

1 produced by the Government of Venezuela.

2 This was obviously a Venezuelan map which, as maps of
3 claimants states are apt to do, represented a claim which
4 Venezuela has to Guyana. Trinidad and Tobago was
5 perfectly entitled to enter into a bilateral agreement
6 with its neighbour to the south, Venezuela, but in doing
7 so it made it absolutely clear that this did not imply
8 endorsement.

9 I am authorised to say, although it is public
10 knowledge, that the diplomatic position of Trinidad and
11 Tobago favours the position of Guyana in that bilateral
12 territory dispute.

13 I would also refer you to Article 2, paragraph 2, of
14 the 1990 treaty, the text of which you will see on the
15 screen. The whole of the treaty is in your folders. It
16 says - and is significant from this point of view as well
17 - "Both parties reserve the right in case of determining
18 the outer edge of the continental margin is located closer
19 to 350 miles from the respective base lines to establish
20 and negotiate their respective rights up to this outer
21 edge in conformity with the provisions of international
22 law."

23 Then it goes on to say, after a semi-colon: "... no
24 provision of the present treaty shall in any way prejudice
25 or limit these rights or the rights of third parties." So
26 the treaty purported to be bilateral; of course it was
27 bilateral, but it made no claims in relation to third
28 parties. The position of each state in relation to any
29 other state having maritime claims requiring to be
30 delimited to be resolved on a bilateral basis.

31 You might like to compare the language of the last
32 part of Article 2, paragraph 2, of the 1990 treaty with
33 Article 2, paragraph 2, of the 1991 fisheries agreement,
34 with its rather curious language "constitute a precedent".

35 This is much clearer language: "No provision of the
36 present treaty shall in any way prejudice or limit these
37 rights, the rights of the parties or the rights of third
38 parties."

1 Mr Wordsworth has already taken you to that rather
2 curious provision. It certainly, in our submission, does
3 not have the all-embracing exonerative meaning which
4 Barbados gives it.

5 Although there was some internal criticism, of which
6 Barbados has made much, of the 1990 treaty, there were no
7 formal protests for a decade. Indeed, it seems the formal
8 protests were a sort of celebration of the decade of the
9 treaty being in force.

10 5.15 p.m.

11 There are images of CARICOM members ganging up on
12 Trinidad and Tobago, for example, at a meeting in Abuja.
13 The Attorney General has dealt with this. The treaty
14 itself has worked well and I am assured that Trinidad and
15 Tobago's relations with other CARICOM members are
16 generally excellent.

17 Barbados through Professor Reisman, says that the
18 1990 Treaty is irrelevant, that it is "no part of this
19 case". Of course, he is half right. You are not asked to
20 validate or invalidate the 1990 treaty. It is not a
21 matter for this Tribunal. It is not a matter for this
22 dispute. You were certainly not asked to render it
23 opposable to Barbados, still less of course Guyana. It is
24 not in its terms opposable to them. All it constituted
25 was an acknowledgement by Trinidad and Tobago after
26 extensive negotiations which lasted more than a decade of
27 Venezuela 's entitlement as a coastal state with a
28 significant coastal frontage on to the region to a modest
29 Salida, just like the ausgang in the Federal Republic of
30 Germany got following the North Sea Continental Shelf
31 decisions or the corridor - I am afraid the French word
32 for that corridor is unpronounceable, which the Islands of
33 St Pierre and Miquelon got in that decision.

34 You can take that solution, the solution of the 1990
35 treaty, into account as a relevant regional circumstance,
36 just as the court in 1969 said was permissible. Similarly
37 you can take into account as practice in the region, the
38 practice between France and Dominica. Professor Reisman

1 said that you could not do that because this practice did
2 not amount to a general practice accepted as law within
3 the meaning of article 38 of the statute of the
4 International Court to which, of course, articles 74 and
5 83 refer. But the renvoi comes not through article 38 as
6 such, it comes through the decision of the North Sea
7 Continental Shelf case and of later cases specifically
8 allowing these regional circumstances to be taken into
9 account. It is general international law that that may be
10 done. The particular regional agreements of course are
11 not general international law and their particular
12 circumstances will have to be taken into account and may
13 have to be discounted. But there is a clear distinction
14 between your jurisdiction, which is, as with all
15 delimitation, bilateral, and your capacity to take into
16 account other circumstances, those circumstances including
17 agreements reached which relate to the area in question.

18 The 1990 treaty is, however, relevant in another
19 important way, in that it marks the limit of your
20 jurisdiction. Any claim Barbados may wish to make to
21 areas south of this line is a matter for discussion
22 between Barbados and Venezuela or between Barbados and
23 Guyana. Perhaps they could get together in the zone of
24 co-operation. It is not for this Tribunal. But you may
25 well wonder why Barbados would have a claim so far south
26 in a situation so closely reminiscent, in general terms,
27 to the concave collection of states in the North Sea
28 Continental Shelf case. Barbados evidently claims, as you
29 can see by its so-called zone of co-operation, to go
30 around the corner of the Trinidad and Tobago exclusive
31 economic zone which stops short of 200 miles, to go around
32 the corner and to go further south, to claims areas to the
33 south east. That is now why it seems so annoyed that
34 Trinidad and Tobago, retrospectively annoyed, made what it
35 sees as if not a cession at least a concession to
36 Venezuela. But any suggestion that the south east facing
37 maritime boundary of Trinidad and Tobago, which is along
38 the line of the 1990 agreement, abuts on to Barbadian

1 maritime territory is, I have to say, implausible. Like
2 it or not, the south to north rank order of states in this
3 generally concave region of continent and islands is
4 Guyana, Venezuela, Trinidad and Tobago, Barbados. Yet the
5 maritime pecking order, according to Barbados, in a north
6 to south area is Guyana, a little bit of Venezuela, a
7 little bit of Guyana and Barbados mysteriously relating to
8 each other in hypothetical co-operation, giving you might
9 think a new meaning to the idea of condominium living,
10 then Barbados, then Trinidad and Tobago in a diminished
11 and shelf-locked triangle around which Barbados circles
12 or, with reference to Sir Elihu, silkily dances carrying
13 its fan and then lots and lots of Barbados. That is the
14 impression. That is the equidistance state for you.

15 This may help to explain why the term equitable
16 solution, a term which is an integral part of the
17 applicable law, did not readily pass Bajan counsel's lips.

18 What that scenario cannot explain is Barbados' apparent
19 distaste for complex solutions, since nothing could be
20 more complex than the Barbados scenario I have outlined.

21 The fact is that in an area where numbers of states
22 have competing claims overlapping potential entitlements
23 the situation is inevitably somewhat complex. And this is
24 equally true whether particular boundaries are
25 equidistance ones or not. The fact is that any maritime
26 boundary between Trinidad and Tobago and Venezuela would
27 have affected areas which were within 200 nautical miles
28 of Barbados - any maritime boundary, whether it had been a
29 concession or a Salida or not. Yet that fact could not be
30 expected to prevent Trinidad and Tobago from concluding an
31 agreement with its neighbour immediately to the south on
32 the very reasonable assumption that they do share a
33 boundary. What protects interested third states in
34 regions such as this is the principle that all maritime
35 delimitations between two states, whether carried out by
36 them or by another pursuant to Part XV, are of their
37 nature and inherently bilateral.

38 The Honourable Attorney General for Barbados passed

1 over this when she said that the Guyana-Barbados
2 agreement, the co-operation agreement, does not purport to
3 claim areas claimed by other states. That is true for
4 Trinidad and Tobago. The area of co-operation is south of
5 the 1990 treaty line. We make no claim to it. It is
6 certainly not true of Venezuela which claims a continental
7 shelf in that region. But I stress that that is not a
8 criticism. It is impossible in an area in which there are
9 numbers of states within 400 nautical miles of each other
10 which sit on the same geomorphological continental shelf
11 to reach agreements which do not concern areas within the
12 area of overlapping potential entitlement. You cannot do
13 it. That is the nature of things. Yet such agreements
14 are reached and are binding inter se.

15 Barbados' problem as I have said before is that it
16 considers that equidistance creates at least a prima facie
17 entitlement to sovereign rights. The equidistance
18 delimits boundaries unless the parties otherwise agree.
19 In which case their agreement is a divestiture. That is
20 not international law and never has been. It is not even
21 international law for overlapping territorial sea
22 entitlements, though article 15 contains a gesture in that
23 direction. There is no equivalent to article 15 of the
24 1982 Convention as you know in either article 74 or
25 article 83. Pending a binding or agreed delimitation, all
26 that a coastal state with a relevant coastline has is an
27 entitlement to maritime jurisdiction. Disputes with other
28 similarly situated states to be resolved under and in
29 accordance with Part XV. Pending agreement between the
30 states or a delimitation there is no boundary, but an area
31 of overlapping claims to be resolved in accordance with
32 the Convention.

33 I turn to the method now of how those disputes are to
34 be resolved, the question of relevant and irrelevant
35 circumstances. We analyzed relevant and irrelevant
36 circumstances in our Counter Memorial at paragraphs 150 to
37 168. I will not repeat what is said there, but I will
38 just make one or two points and then analyze the relevant

1 circumstances here when I speak tomorrow in relation to
2 the Atlantic zone claim.

3 Both the agent and counsel for Barbados spent time
4 dealing with circumstances which are irrelevant in
5 maritime delimitation. Those I will deal with now so as
6 to dispose of them. It is true that it is relevant that a
7 territory is inhabited, that it has a community. I think
8 that it was relevant in Jan Mayen, but Jan Mayen was only
9 inhabited by meteorologists. But once you have a
10 community on a territory of any size the population, the
11 economic status of that population, the state of
12 social/cultural development, their culinary traditions,
13 their per capital income, designs of their stamps and bank
14 notes - I say parenthetically, I do approve of a state
15 that has Frank Worrell on its bank notes - whether they
16 are oil importers or gas importers or gold exporters or
17 whatever, all of this is completely irrelevant, and it has
18 been repeatedly held to be. You have heard a lot about
19 it. You should put it from your minds, with respect.

20 I move to relevancy. The first of these is
21 proportionality of coastal lengths. Barbados says that
22 this is entirely subsidiary an ex post matter, but this
23 confuses the role of coastal lengths in making the case
24 with other factors for an adjustment of the initially
25 drawn median line, on the one hand, and the use of coastal
26 ratios as a criterion for adjustment on the other. The
27 latter is excluded, the former is not. I refer you very
28 briefly to subparagraph D(3) of paragraph 101 of the North
29 Sea Continental Shelf case dispositive in which that point
30 is made. It has been much developed since. For example,
31 in paragraph 58 of Libya-Malta, in paragraph 68 of Jan
32 Mayen.

33 Mr Paulsson said that proportionality was a shield
34 rather than a sword, but that is not true.
35 Proportionality in appropriate circumstances is part of
36 the case for an adjustment. We would hope that between
37 neighbours like this there is no need for either shields
38 or swords and the analogy does not exactly fit. What he

1 seemed to say that proportionality is something that only
2 comes in at the end, but that is not true.
3 Proportionality of course can be used as a checking
4 device, but it is also and has been in many cases part of
5 the initial case for an adjustment as in Jan Mayen.

6 A second area which is of considerable importance and
7 of frontal disagreement between the parties is the
8 identification of relevant coasts. For Barbados relevant
9 coasts are those coasts - well, it has been expressed I
10 think in different ways and I hope that I am not doing
11 what I criticise them for doing - those coasts which lie
12 between base points for the equidistance line or,
13 alternatively, those coasts on which are located based
14 points for the equidistance line. If a coastline does not
15 have a base point on it, it is not a relevant coast,
16 according to Barbados.

17 Yet again, of course, the assumption is that the
18 equidistance line is performing a vesting operation which
19 is identifying the points in respect of which the exercise
20 will be carried out. But the identification of the
21 relevant coasts is something that you do early on. It is
22 an initial stage in the process. It is not something that
23 happens later on. Although the drawing of the provisional
24 median line is normally the first thing you do, there may
25 be circumstances, as the chamber held in the Gulf of Maine
26 case, where some other method will be adopted. Simply to
27 take the baselines that draw a particular line is begging
28 of the question.

29 The question of relevant coasts has been discussed in
30 a number of cases by the court, for example, in the
31 Cameroon-Nigeria case, but I particularly draw your
32 attention - and I hope I may do so - to a domestic
33 decision in the Newfoundland-Nova Scotia decision, where
34 there was considerable debate between skilled counsel in
35 international law on the question of what were relevant
36 coasts. I refer you in particular to paragraph 420 of the
37 Newfoundland-Nova Scotia case, which is tab 25 in your
38 authorities bundle. The relevant passage is at page 74 of

1 the transcript of the second-phase award, where the
2 tribunal said, "What the Tribunal for its part seeks in
3 the definition of the relevant coasts is guidance as to
4 those coasts which may affect the actual delimitation,
5 i.e. that contribute to the delimitation in some general
6 sense. In this respect it treats as relevant any coast of
7 either party which affects or might potentially affect
8 delimitation. Other expressions of the same idea are
9 coasts that look upon the area to be delimited or coasts
10 which help to generate the area of overlapping potential
11 entitlement. Because the ratio between coastal lengths is
12 not used in an arithmetical way to generate a particular
13 solution, some imprecision in the identification of
14 relevant coasts can be allowed." A further difficulty
15 with the idea of base points as defining the relevant
16 coasts is that the base points themselves may change.
17 There are many situations in which only two base points
18 determine a particular boundary and may determine it over
19 very long areas. The southern base point of the Faroe
20 Islands is located on a small island well to the south.
21 If you move that point back, you get a completely
22 different coastal configuration. On that view, the
23 relevant coasts actually change during the course of
24 working out what the boundary is, which is an unstable
25 situation.

26 We say that relevant coasts are the coasts which look
27 on to the area to be delimited and help to generate the
28 area of overlapping potential entitlement. That being so,
29 I will take you tomorrow to the actual geographical
30 situation in defining relevant coasts.

31 The next factor to be considered is that of natural
32 prolongation. The almost leitmotif of the North Sea
33 Continental Shelf case which in more recent decisions has
34 been treated as the entitlement to be represented as far
35 as possible throughout the extension of the maritime zone
36 in question. The corollary of that idea is that you
37 should not be cut off from maritime zones to which your
38 coasts would otherwise entitle you and, of course, it is a

1 mutual process. Just as you are not to be cut off, nor is
2 the other party, which is why in situations of direct
3 coastal opposition, as Professor Reisman said, cut-off
4 happens in the nature of things. It does not happen in
5 this situation in the nature of things.

6 5.30 p.m.

7 Of course, it may be - and we can see this from the
8 situation in the Gulf of Guinea - that some coasts simply
9 for geographical physical reasons do not look upon the
10 area to be delimited. The west-facing coastline of
11 Cameroon was behind the Island of Biyoka of Equatorial
12 Guinea. The result was that the court said that it simply
13 did not look upon the area to be delimited and was an
14 irrelevant coast. The only relevant coasts were the
15 coasts that were in and unobtruded relationship to the
16 area of delimitation.

17 Although the total coastline of Cameroon in that case
18 was longer than the relevant coastline of Cameroon(sic),
19 part of it turned out to be irrelevant to the delimitation
20 because there was an other island in front of it. So you
21 do not re-configure geography but you do take the
22 coastlines as they look unobstructed onto the area to be
23 delimited and you take those coastlines as the relevant
24 coastlines.

25 I will say some more tomorrow about the conduct of
26 the parties, but Cameroon and Nigeria are as equally
27 important there. Cameroon v. Nigeria was a case where
28 there was intense long-standing conduct of the parties
29 which the court nonetheless rejected as a relevant factor,
30 and I will show you tomorrow the same conclusion has to be
31 reached here in respect of the sporadic conduct of the
32 parties in the Atlantic sector.

33 According to the court in Cameroon v. Nigeria, the
34 only conduct which is to be taken into account is that
35 which implies an agreement as to the attribution of
36 particular zones. Here we have an express agreement as to
37 the attribution of particular zones in the Caribbean
38 sector; no agreement at all in the Atlantic sector.

1 The final thing to which I want to take you briefly
2 is the so-called single maritime boundary. Again, we will
3 return to this tomorrow more particularly in looking at
4 the course of the boundary in the Atlantic sector, but the
5 authorities on this over time are clear, in particular Jan
6 Mayen and Qatar-Bahrain.

7 The single maritime boundary is an institution of
8 state practice, it is not an institution of general
9 international law. In many cases, the boundaries drawn as
10 between the continental shelf and the exclusive economic
11 zone will coincide. Generally, it is desirable that they
12 do, but there is no rule of international law that they
13 must coincide and tomorrow I will take you to examples
14 both in the context of third party settlement and in the
15 context of state practice where they do not coincide.

16 There is no rule that they coincide, because there is
17 no attempt in the 1982 Convention to make one set of
18 boundary considerations prevail over the other. The two
19 co-exist and the function of tribunals is to reconcile
20 that co-existence where possible, while accepting the
21 independent and continued existence of the continental
22 shelf as a separate institution. Professor Greenwood will
23 come back to this issue in one of his presentations
24 tomorrow.

25 Mr President, members of the Tribunal, Professor
26 Greenwood has distinguished between the two sectors. I
27 have set out some general considerations relating to the
28 applicable law. We will now start - and we will finish
29 tomorrow - our treatment of the Caribbean or western
30 sector and Mr Wordsworth, as falls to the lot of able
31 junior counsel, will now deal with the facts.

32 THE PRESIDENT: Mr Wordsworth, please.

33 MR WORDSWORTH: Mr President, members of the Tribunal,
34 Barbados has chosen to make its claim in the western
35 sector by reference to three so-called core facts. The
36 first of these is the key to Barbados' case in the western
37 sector. This is the alleged traditional artisanal fishing
38 by Barbadian fishermen in flying fish grounds off Tobago.

1 If Barbados is wrong about this, the whole of its
2 case in the western sector falls away. There is actually
3 no need at all to examine the other so-called facts which
4 are on catastrophic consequences to Barbadian fishermen
5 and also on non-exploitation of EEZ by Tobago's fishermen.

6 So I turn to Barbados' central claim on the facts,
7 which is that Barbadians have "fished off the islands of
8 Tobago for centuries". That is a quote from section 7.1
9 of Barbados' Reply.

10 I am now going to put onto the screen a map. What
11 this map shows is the area of alleged traditional
12 artisanal fishing. It shows the closest distance of that
13 area to Barbados, which is 58 nautical miles. We then
14 show the furthest point in that area away from Barbados,
15 and that is 147 nautical miles, so the simple point.
16 Across the centuries, Barbadian fisherfolk have had a very
17 long way to come to fish for flying fish. This leads to
18 two obvious questions. First, how did the Barbadian
19 fisherfolk get to these fishing grounds and, second, how
20 did they store the flying fish so that it would still be
21 edible in the time that it took to complete fishing and
22 get back to Barbados?

23 Barbados never addresses these questions in any
24 detail, albeit that there is abundant evidence on the
25 history of the Barbadian fishery, mainly, of course,
26 written by Barbadians. I will return to these two
27 questions I have highlighted and the abundant evidence
28 shortly.

29 First, I want to focus on Barbados' evidence, the
30 very limited evidence that it has put in but which is
31 intended to show that Barbadians have fished off the
32 island of Tobago for centuries. First, I would like you
33 to turn, please, to tab 41 of our judges' folder. This is
34 "Tropical Reminiscences" by John Bezsins Tyne, completed in
35 1909, so it gives us maybe a snapshot of how things were
36 at the beginning of the 20th Century.

37 If you turn over the page, you will see highlighted
38 the passage to which Sir Henry Forde took you on Monday in

1 yellow. This is the passage to which he took you: "The
2 catch of this delicate flavoured fish is an industry
3 peculiar to Barbados. The industry gives employment to
4 hundreds of boats, built and equipped for the purpose,
5 each of which is manned with 2 to 5 men according to its
6 size."

7 Rather bizarrely, you were not taken to the next
8 passage: "Quite a fleet of these fishing sloops and
9 schooner rigs may be seen any morning of the earlier
10 months of the year, sailing away from the land in various
11 directions towards 'the flying fish ground'." Obviously,
12 members of the Tribunal, you would like to know where the
13 flying fish ground is.

14 "An indefinite term that might mean five or fifteen
15 miles at sea as the boats cruise around, always keeping in
16 sight of the island until a shoal of fish is discovered."

17 So, five to fifteen miles away from Barbados, not at
18 least 58 nautical miles from Barbados.

19 I turn over to tab 42. Tab 42 is a newspaper report
20 of 1894, so evidence of how things were in the late 19th
21 Century. Again, you can see the passage in yellow to
22 which Barbados took you on Monday. "It certainly has been
23 for many years the mainstay of a large part of the
24 population and the source whence the most popular food
25 known on the island is derived. There are about 200 boats
26 engaged in the fishery."

27 If I could ask you to turn to the passage immediately
28 preceding that: "Barbados, situated in the heart of the
29 north-east Trades is one of the favourite haunts of the
30 flying fish. Its steep shorelines afford the blue depths
31 which the flying fish loves and permit it to range very
32 near to land. Thus, the fisherman rarely go more than 10
33 or 12 miles from home." Again, you can see this up on the
34 screen.

35 If I can ask you to turn over the page to tab 43, we
36 have "Notes on the West Indies" by Dr George Pincard.
37 This is published in London in 1806. This is another of
38 Barbados' appendices, I should say. It has done what

1 homework it could. The situation in 1806 we see
2 highlighted on page 215: "The fish is about the size of a
3 herring. They are caught in great numbers near Barbados,
4 where they are pickled and salted and used as a very
5 common food." So, again, nothing much of assistance to
6 Barbados there.

7 I turn over to tab 44 of the judges' folder. This is
8 a collection edited by Nathaniel Hawthorne. The date of
9 publication is 1926, but I suspect it is rather earlier.
10 Then the highlighted passage, if I can ask you to look at
11 on page 114: "I saw very few fish with the exception of
12 flying fish and one could hardly escape the sight of them
13 anywhere. They were caught in abundance all around the
14 island", and so it goes on to describe how they were
15 caught at that period of time.

16 Of course, this is all entirely what one would
17 expect. How could artisanal fishermen in Barbados be
18 expected to sail massive distances to fish off Tobago and
19 why would the trouble to do so, given the abundance of
20 flying fish all around the island of Tobago?

21 The Tribunal may recall that in its Memorial,
22 paragraph 7, Barbados made the brave assertion, "There can
23 be no doubt that fishermen from Barbados have fished off
24 Tobago for centuries", but then it is stated: "There is a
25 dearth of direct evidence to this effect for the period
26 from the early 19th Century to the mid-20th Century."

27 Well, not quite so. There is evidence over that
28 period. The trouble for Barbados is that it shows the
29 Barbadians were fishing for flying fish off Barbados, not
30 Tobago.

31 Barbados also took you at the beginning of the week
32 to five documents from the 18th Century. These are to be
33 found at tabs 61 through to 65 of Barbados' bundle. I
34 have not copied them again for you today. I just tell you
35 what they deal with.

36 Two of these concern a Mr Charnock and Mr Charnock
37 went over to Tobago to catch 21 turtles. The Tribunal may
38 have noticed how, at the beginning of the week, Barbados'

1 flying fish case was expanding to cover dolphin fish and
2 various other species, but as of yet traditional artisanal
3 turtling has not been added to the list, so really we do
4 not think this assists the Tribunal at all.

5 The other three documents to which Barbados took you
6 from the 18th Century concern a 1749 agreement between
7 England and France to appoint commissaries to decide on
8 the regulation of Tobago. In the interim of the
9 commissaries' decision both nations were allowed to go to
10 Tobago to water, food and fish. This is of no relevance
11 at all. This was a temporary arrangement. Barbados has
12 put in no evidence at all as to what happened next.

13 5.45 p.m.

14 There is no suggestion that a right to a high seas
15 fishery 12 miles off Tobago was somehow being created.
16 That is an idea that would, of course, have been totally
17 incomprehensible to either the English or the French at
18 the time.

19 I would like to turn now to more recent documentary
20 evidence which is by any standards ample. It includes
21 reports dating from 1942 to 2001, i.e. a few years prior
22 to the commencement of this arbitration. I would like to
23 make two introductory points. First, almost all of these
24 reports have been put in evidence by Trinidad and Tobago,
25 although they are almost all by Barbadians or officials
26 within the relevant Ministries of Barbados or they are
27 reports commissioned by the relevant Ministries in
28 Barbados. Secondly, none of the reports have been
29 challenged by Barbados. Barbados has not said that such
30 and such an author is not a reliable source. The reports
31 stand wholly unchallenged and almost completely ignored by
32 Barbados, both in its written and oral pleadings.

33 I am not going to take the tribunal to each and every
34 report. There is a list of ten reports that is to be
35 found at paragraph 79 of our Rejoinder. There is no need
36 to go to that now. But I am going to take the Tribunal,
37 bearing in mind of course the time, to some of these
38 reports and also tomorrow to a 1982 FAO report that has

1 been commented on subsequently in our Rejoinder.

2 If I can ask you to turn to report number one of
3 Trinidad and Tobago's list in its Rejoinder, that is to be
4 found at tab 45 of the judges' folder. Mr President, with
5 your leave, what I would like to do is to continue up
6 until six o'clock and then pause where I am and continue
7 tomorrow morning.

8 THE PRESIDENT: Certainly.

9 MR WORDSWORTH: At tab 45 there is a report by Mr Brown in 1942
10 on the sea fisheries of Barbados, it is a report to the
11 controller for development and welfare in the West Indies
12 by the director of fisheries investigation, an important
13 and interesting sounding document. Over the page, on page
14 2 in the judges' folder, general findings. I would like
15 to draw your attention to general finding number three.
16 The dominant fishery is for flying fish conducted by small
17 locally built sail boats of an excellent sea-going model.

18 These boats also trawl. They average 23 feet in length
19 and six feet in draught and operate in deep water within
20 five miles of the land. No motors, live wells or ice
21 boxes are used.

22 The position as of 1942 is that it is a traditional
23 fishery operated within five miles of Barbados.

24 Judges' folder tab 46. This is report number three
25 in our list in our Rejoinder. This is by a gentleman
26 called Rose who was Barbados' deputy director for
27 agriculture. It is a memorandum on the Barbados fishing
28 industry for consideration by the marketing committee.

29 I would just like to draw your attention to the
30 second page of this document where Mr Rose describes - and
31 I should have given you the date of this, I believe it is
32 1954 - the fishermen's day. Under B at the bottom of the
33 page, "during the fishing season, November to June, boats
34 leave the shore at about 4 am in order to reach the
35 fishing grounds by 6.30 to 7 am. Drifting and actual
36 fishing may proceed until 11 am or until 3 pm depending on
37 the season and the availability of fish".

38 What we glean from that is that the sailing distance

1 to the fishing ground in a sail boat was about three
2 hours' worth of sailing. The suggestion that in three
3 hours of sailing one can get 58 nautical miles would be a
4 strange one. There is overleaf a reference to what
5 happens when powered boats are used. Mr Rose says that,
6 when using power boats, travelling time can be reduced to
7 four to five hours and the time spent in fishing is
8 correspondingly increased. That time distance of four to
9 five hours is the journey there and back. He is not
10 suggesting that the powered boats are going any further
11 and he is certainly not suggesting that they are going in
12 material distances from Barbados.

13 I turn to report number five on our list, which is to
14 be found at tab 47. Perhaps the oddity of this report is
15 that it was actually put in evidence by Barbados in its
16 Reply. Barbados, however, put in three pages of the
17 report and those three pages are wholly irrelevant to this
18 case, as I will shortly show. What Ms Bair did was to
19 write several chapters, including one chapter on the
20 traditional fishery of Barbados. She also wrote a chapter
21 on extraordinary activities. This is at tab 47. If you
22 look on to the pagination at the top right-hand corner,
23 page 31, extraordinary activities, it is only from this
24 chapter that Barbados has quoted and annexed in its Reply.

25 The extraordinary activities in question are whaling and
26 fishing for red snapper. Both of these activities were
27 discontinued by the time Annette Bair was writing this.

28 You heard a lot about red snapper fishing on Monday,
29 which is rather bizarre considering this is a flying fish
30 case, but the point that was being made was that, well, if
31 we could fish for red snapper hundreds of miles away, over
32 by Brazil, then of course we could fish for flying fish
33 also. Well, that is a complete non sequitur. I would
34 like you to turn to page 34 in this bundle - again,
35 pagination in the top right-hand corner - just to find out
36 what was happening with the red snapper fishery at the
37 time that it was in existence. Half way down the page,
38 "Also neglected up to now is the red snapper fishing

1 carried out off the banks off the coast of British Guyana.

2 Like whaling this was a temporary activity and
3 furthermore it was carried out in alien waters." I will
4 take you back to this I think tomorrow morning, but there
5 is not a hint in Bair's work about traditional flying fish
6 fishery work being carried out in alien waters. She
7 continued, "In 1942 there were three Barbadian owned
8 vessels engaged in this fishery. The catch of these,
9 however, was marketed in Port-of-Spain, Trinidad and the
10 boats only returned to Barbados intermittently to be
11 refitted". This is nothing whatsoever like the
12 traditional flying fish fishery that Barbados relies on.
13 This is an activity that took place at some time where
14 Barbadian vessels were leaving to fish in fishing grounds
15 off the coast of British Guyana and the like. And then
16 marketing the fish in Port-of-Spain. This is nothing to
17 do at all with the traditional artisanal fishery.

18 It is worth just turning over the page to see how
19 Annette Bair concludes this chapter. "The Barbadians
20 affected by this fishery were few and its life span short.

21 One sea captain who took part said that he fished between
22 Tobago and British Guyana from 1933 to 1942 and again from
23 1946 to 1948. The practice was discontinued because the
24 high cost necessary to equip the outfit, heavy losses of
25 gear, especially when the vessels drifted over rocky
26 bottoms and because the prices obtained did not adequately
27 cover expenses. However, this fishery in alien waters is
28 important since it may have represented one of those
29 farsighted ventures introduced prematurely but worthy of
30 second try at a later date". This is the one instance of
31 fishing in alien waters that Bair in a long and impressive
32 thesis - 88 pages or more - has been able to find. It has
33 nothing whatsoever to do with the traditional flying fish
34 fishery.

35 If I can ask you to turn back to the first page that
36 we have extracted of this report which is still in tab 47,
37 but it is paginated 10, there we see Bair describing the
38 story of fishing in the island. She says, "The story of

1 fishing in the island can be divided into periods. The
2 first one of relative stagnation endured for most of the
3 island's history, approximately up to 1940, and the
4 activities of this period we refer to as the 'traditional
5 fishery'. In striking contrast the second period is one
6 distinguished by greatly accelerated progress, the work of
7 the past 20 years." So strange indeed, just focusing on
8 that, the traditional fishery, strange indeed that
9 Barbados should not have taken you to this extract of Bair
10 which they have only annexed the three pages relating to
11 extraordinary activities.

12 Turning over the page, to page 19 in the top right-
13 hand corner, the highlighted passage, "During the flying
14 fish season the capture of flying fish was the fishermen's
15 most important business. The fish were found in local
16 waters from November to July but the main catches were
17 made in the period stretching from January to June when
18 the flying fish was most abundant. When in pursuit of
19 flying fish boats carrying three fishermen left the shore
20 at about four, so that by 6.30 or 7 am a school of fish
21 was probably have been encountered" and so on. She
22 describes the fishing day in essentially the same way as
23 Rose and then she concludes that paragraph, "Once he was
24 sure that his boat was in the current, generally at a
25 distance of 3 to 4 miles offshore, the sails were lowered,
26 the masts unset and the boat allowed to drift with the
27 current". That is the traditional fishery as it was up to
28 the 1940s, taking place at a distance of three to four
29 miles off shore.

30 With your leave, Mr President, perhaps that is a
31 convenient point to leave off and I will pick up with the
32 development since 1940 or so tomorrow morning.

33 THE PRESIDENT: Thank you so much, Mr Wordsworth. We will now
34 adjourn and resume tomorrow at 10 am.

35 **(Adjourned until tomorrow morning at 10 o'clock)**