

International Dispute Resolution Centre
Fleet Street
London, England

Thursday, 27th 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 SEVEN

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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 afternoon. We come now to the second round
2 in which the Tribunal will be addressed by the
3 representatives of the Republic of Trinidad and Tobago.
4 Do I gather from the seating arrangement that it is Mr
5 Wordsworth who we will have the pleasure of hearing first?
6 No. I gather it is Professor Greenwood.

7 PROFESSOR GREENWOOD: I am sorry, Mr President, the pleasure is
8 to be postponed until later in the afternoon. But it is
9 my pleasure to address the Tribunal today on behalf of
10 Trinidad and Tobago on a day that can only be described as
11 Tobagonian sunshine.

12 The statutory housekeeping, to start with, Mr
13 President. I fear that you have another Judges' folder
14 before you into which we will be putting more inserts
15 tomorrow. This, however, will be the last Judges' folder
16 and though not today it will tomorrow include the Virginia
17 Commentary on Article 56 of the Law of the Sea Convention
18 which Sir Arthur asked about on Tuesday.

19 Mr President, at this stage when, as one commentator
20 said, everything that could be said has been said, but not
21 everybody has yet said it, it is appropriate to take a
22 step back and just ask what exactly this case is about.
23 It is of course about achieving an equitable solution.
24 The goal stated like that is simple. Its achievement
25 however is still not an easy task for any Tribunal. It is
26 worth keeping in mind, in my submission, that this is the
27 task that the Tribunal is seeking to perform.

28 Barbados has made much of the fact that it has

1 offered you a simple case, a simple solution. Sir Elihu
2 put it very succinctly in his closing speech at the end of
3 their second round. "This is really a simple case", he
4 said, "that has been made difficult by the complexities
5 introduced on behalf of Trinidad and Tobago". We heard
6 the same from the learned Attorney General of Barbados in
7 her closing speech. Mr President, the Tribunal is
8 entitled to ask just how simple is the case that Barbados,
9 as the claimant in these proceedings, has put before you.

10 It is at its simplest, we would suggest, with Mr
11 Paulsson's map which is just coming up on the screen (Tab
12 1 of the Judges' folder). This is what I call the
13 commendable honesty map. It shows a simple equidistance
14 line, nothing else. This is the way that Mr Paulsson
15 introduced the map at the end of his speech. "My subject
16 is geography. Everything I say is subject to fishing, but
17 that is not my subject. Radiation is a part of geography.

18 There is a place in international jurisprudence for
19 radiation. It has, incidentally, had effects in maritime
20 delimitation, but its effect has been orthodox. Its
21 effect should be foreseeable. Its effect should be, as
22 you see on the map now, neither predatory nor
23 mischievous".

24 Well, three comments in that regard, if I may, Mr
25 President. First of all, this map shows no difference at
26 all between the closed in Caribbean and the open Atlantic
27 and point B, which although it is not marked, the tip of
28 the lozenge in the bottom right-hand corner, is still said
29 by Mr Paulsson to be lying between to coasts. Let us just

1 have a look at what it really all involves. There, the
2 yellow band is where the two coasts are opposite, there is
3 the line 182 nautical miles of it down to B and 191
4 nautical miles from point B to the nearest point on the
5 coast of either Tobago or Barbados. Mr President, who on
6 earth can say that point B lay between those two coasts?
7 If one takes the formula in the Channel Continental Shelf
8 case, it would seem to us to be self-evident, that point B
9 lies off rather than between the two coast lines. Of
10 course, the map tells a lot less than the whole story.
11 There is no attempt here to show why the solution which Mr
12 Paulsson posits gives nearly 60 per cent of the maritime
13 space in the eastern sector to Barbados, a fact that
14 Barbados has never contested. We raised it in the first
15 round. Why is it that an equitable solution? The answer
16 came there "none" from Counsel to Barbados. Not a
17 suggestion, not a hint as to what was equitable about
18 that, except that you are asked to take it on trust, Mr
19 President, that the median line is always going to produce
20 an equitable result between opposite coasts - between
21 opposite coasts. The third point, Mr President, is this.

22 With commendable candour, Mr Paulsson abandoned the claim
23 in the western sector altogether. His case, he said, was
24 subject to fishing but he was only dealing with geography.

25 We cannot help wondering whether Mr Paulsson believes in
26 the western sector part of Barbados' claim or even whether
27 he would be willing to advocate the western sector part of
28 the claim. It does not feature in her map. But it is, of
29 course, as this map shows, a critical part of the claim

1 that Barbados is putting forward. We have to consider
2 whether it is indeed a simple case as they say or not.

3 It is simple enough to see what is wanted. But, Mr
4 President, the juridical basis of that claim is very far
5 from simple. Barbados claims a single maritime boundary
6 as valid for the shelf as for the exclusive economic zone.

7 Mr Volterra made that clear in his speech in the first
8 round. Ms Mottley made it clear in her closing
9 submissions on behalf of Barbados on Tuesday afternoon.
10 But the basis for the claim in the western sector, for the
11 beak that comes down here, around Tobago, the basis for
12 that claim has been said to be non-exclusive rights of
13 access to fish. Professor Reisman put it in these terms
14 in his second round speech, "When some 60 Barbadian ice
15 boats, each with a crew of three to five people net fish
16 in waters south of the median line, they do not interfere
17 with any other uses of the water column or seabed". They
18 do not interfere with anything on the seabed at all, it
19 seemed. Well, in one sense, Mr President, they do not.
20 There will not be any activities by anybody else on the
21 seabed. Rather than interfering with them, Barbados is
22 proposing to take them unto itself. Nor are the facts on
23 which this Barbadian claim is founded at all simple.
24 Indeed, quite the contrary. There has been a constant
25 shifting of ground by Barbados. Not only from one written
26 pleading to another, but between the different speeches in
27 the same round of this hearing. We started off, Mr
28 President, with a centuries old traditional artisanal
29 fishing ground and we have finished up with Sir Eli

1 telling you solemnly on Wednesday afternoon that even if
2 the practice only stretched back 30 years that was still
3 good enough, and by the way, surely an adjustment could be
4 made on social and economic grounds.

5 Nor is there anything simple about the manner in
6 which this claimed adjustment has been worked out.
7 Professor Lowe asked Barbados the question that we had
8 earlier asked without any success; how exactly are these
9 different points calculated? how was the zone drawn
10 around the north east of Tobago? It took until last night
11 for an answer to appear to one would have thought was so
12 fundamental a part of Barbados' claim that counsel would
13 have been able to answer that question while he was on his
14 feet. And the answer as we will see is as confused as the
15 original claim was.

16 Nor is there anything simple about the two halves of
17 Barbados' claim in their relationship with one another.
18 The claim in the western sector and the claim in the
19 eastern sector. In the eastern sector we are told by Mr
20 Paulsson that as between two opposite states the median
21 line is not only the starting point, it is the putative
22 finishing point. The normal means of achieving
23 equidistance. But as soon as we get to the point, if we
24 could just go back one slide, where the two coasts
25 actually are opposite in that yellow band equidistance is
26 abandoned completely. Barbados instead claims 84 per cent
27 of the Continental Shelf and the exclusive economic zone
28 right the way down to the territorial waters of Tobago.

29 Lastly, the law on which the Tribunal is said to be

1 proceeding by Barbados is not at all straightforward.
2 Reflect if you would on this comment by Sir Elihu in his
3 closing speech. Sir Eli said "It has become a common
4 place of the discussion of relevant factors in
5 delimitation that economic and social considerations
6 should be disregarded. Barbados suggests that this common
7 place is ripe for reconsideration. There is no good
8 reason why an approach to an equitable solution should
9 exclude consideration of economic and social factors,
10 particularly in the case of a small island state that is
11 already inherently vulnerable." Professor Reisman
12 describes Sir Eli as a legend and I would certainly go
13 along with that. He resembles in some respect the great
14 Lord Denning. Whenever Lord Denning referred to something
15 being of commonplace, he meant that it was a well-
16 established principle resting firmly on authority which he
17 proposed to disregard in the decision that he was about to
18 give. That is what you are being asked to do, to
19 disregard one of the few really clearly -established
20 principles. It is more than just commonplace. It has
21 been a bedrock of jurisprudence on this subject from the
22 very start. You are to disregard it on the basis of what,
23 Mr President? Detailed argument of analysis of the case
24 in which it has been laid down? No. On the basis of a
25 couple of sentences in closing submissions at the end of
26 the second round.

27 When Barbados says that this is a simple case which
28 Trinidad and Tobago has complicated, we say that that is a
29 little bit far from the truth. The reality is that

1 Barbados has confronted this Tribunal with a claim that is
2 anything but simple. A complex wolf clothed as a simple
3 sheep. And that is enough of the animal analogies. We
4 have already got the bird, now we have the wolf in sheep's
5 clothing as well. If I could contrive a diagram that
6 moved between the bird and the wolf, I would do so, but it
7 is beyond my artistic skill.

8 Mr President, at the end of the second round, it is
9 customary for the state that goes last to show how the
10 issues in the proceedings have narrowed, to see what has
11 become common ground and what is still in dispute between
12 the parties. But the reality in this case is that the
13 differences have seemed to grow wider during the three
14 sets of oral argument we have so far heard. That we say
15 owes a lot to the fact that Barbados has simply refused to
16 answer a whole series of questions about matters of
17 fundamental importance to its case which Trinidad and
18 Tobago has posed during the written pleadings and, again,
19 in the first round of the oral argument. It has even
20 declined so far to answer some of the difficult questions
21 put to it by the Tribunal.

22 3.15

23 Let us have a look at ten core questions Barbados has
24 not answered. First of all, what is the rationale for
25 Barbados' point D or its point C, for that matter?
26 Silence on this subject when we raised it in the first
27 round. Mr Paulsson did not deal with it at all when he
28 came to reply. It was only when the matter was raised by
29 Professor Lowe at the end of day five. He said this,

1 "Thank you. There are two questions that arise out of
2 what we have heard this afternoon and I apologise if you
3 are planning to deal with it tomorrow, but I will put them
4 now anyway." In fact, I am reading the wrong question,
5 forgive me. Never mind, the point will do just as well.
6 "The first is as a matter of international law what in
7 Barbados' submission is the period of time during which a
8 traditional fishing right of the kind for which it
9 contends must be established". The second part of that
10 question. "What, if any, is the difference in this
11 respect between traditional, historical and habitual
12 fishing? The second question is what is the significance,
13 if any, of UNCLOS Article 297, paragraph 3(a) for the
14 jurisdiction of this Tribunal in respect of Barbados'
15 claim to a non-exclusive right to fish?" Well, it was
16 characteristic of Professor Lowe that he apologised for
17 raising the matter then in case Barbados was planning to
18 deal with it on Tuesday. Of course, Mr President, the
19 Tribunal now knows that Barbados was not planning to deal
20 with it on Tuesday. In fact, it has not dealt with it on
21 Wednesday or so far on Thursday either. Indeed, we think
22 that the answer is quite simple. Barbados was hoping not
23 to have to deal with those two questions at all. It was
24 also hoping not to have to deal with the rationale for
25 points C and D and only rather reluctantly, last night,
26 did it come up with a very thin answer indeed which more
27 or less amounts to saying, "We don't really have much of a
28 rationale for that part of the claimed sector. The area
29 we are really interested in is over on the north west and

1 western side of the island of Tobago".

2 Secondly, how do non-exclusive fisheries rights
3 operate to deprive Trinidad and Tobago of its continental
4 shelf in perpetuity? We raised that question expressly in
5 the first round. Silence. The most that can be said is
6 there was a degree of confusion. As Professor Reisman
7 said, "They do not operate to do that". Mr Volterra said,
8 "They do". But neither of them vouchsafed an answer to
9 the question, how does this happen?

10 Thirdly, Mr President, how can Barbados' point E be
11 said to lie between two coasts? We ask that question as
12 well. No answer.

13 Fourthly, how can the Tribunal have jurisdiction
14 regarding point E when Trinidad and Tobago does not claim
15 that point but Venezuela, which is not a party, does do
16 so? Silence.

17 Fifthly, why did Sir Harold St John tell the first
18 maritime boundary negotiations that "the practice since
19 the 1970s has been an observance of the median line
20 between the two countries by fishermen". A vitally
21 important point. How did he come to make that statement?

22 Barbados says nothing about it in its pleadings at all.
23 Although Ms Marshall said something. She was very candid
24 when the point was put to her in cross-examination. What
25 she said was, "We were concerned to get our comments
26 correct". "We were concerned to get our comments
27 correct", including that one, Mr President.

28 Sixthly, what evidence is there of Barbadian licences
29 south of the median line? I ask that question because the

1 Attorney General of Barbados said in her opening speech
2 that "Barbados has licensed the whole area of its EEZ".
3 Really. Have we been given any evidence of practice south
4 of the median line in granting licences by Barbados?
5 Nothing.

6 Seventhly, Mr President, why did Barbados not put
7 before the Tribunal and at least seek to explain reports
8 by its own officials, members of its own Government, which
9 completely contradict its story about traditional
10 artisanal fishing rights? We heard about people sitting
11 there with a look of injured guilt. A rather nice phrase
12 of Mr Paulsson's or it might have been Mr Churchill's, I
13 cannot remember. Well, if there is ever injured guilt, it
14 lies on the part of the Counsel for a state who has put
15 forward evidence of one particular story while not
16 disclosing that their own officials - their own officials
17 - have flatly contradicted that in reports prepared before
18 this litigation and before the witness statements. Not a
19 word. Raised by Mr Wordsworth in the first round. No
20 answer.

21 Eighthly, Mr President, what was unreasonable about
22 the terms offered by Trinidad and Tobago for access to the
23 EEZ around Tobago by Barbadian fishing vessels? A very
24 important point in Barbados' case. The centrepiece of
25 Professor Reisman's argument. "You denied our fishermen
26 access. That is why we have a case", he said. I will
27 come back to that in a few minutes. But, amazingly, apart
28 from the suggestion that Trinidad and Tobago would only
29 have granted access on its own terms, not a murmur about

1 what was wrong with those terms. Not a word at all. Yet
2 it must be fundamental to the case that Barbados puts.

3 Lastly, what is the significance of article 297,
4 paragraph 3(a)? The question that Professor Lowe put,
5 that we flagged up, that Professor Crawford reminded the
6 other side of. The question that I have missed out,
7 number nine, I am sorry. What exchange of views was there
8 on Barbados' claim? Not a word on that either in
9 relation to jurisdiction.

10 Then, tenthly, what about the significance of article
11 297, paragraph 3, of Barbados' position regarding the
12 powers of the Tribunal to grant access? A fundamental
13 issue which goes to the very heart of the claim that dare
14 not speak its name. The claim disavowed in the Reply and
15 then resurrected, brought back from the dead, first, by
16 Sir Elihu and then by Professor Reisman. No answer. They
17 did not answer it when we asked it. They have not
18 answered Professor Lowe. I am sure that something will
19 come in tonight now I have reminded Barbados. But this is
20 surely the sort of question that could have been answered
21 immediately. It should have been if Barbados was serious
22 about this point.

23 Mr President, these are not peripheral questions.
24 They are questions that go to the very heart of the
25 fundamental elements of Barbados' claim on jurisdiction,
26 on the adjustment of the median line, on the single
27 maritime boundary that it claims, on the relationship
28 between the eastern and western sector. Not one of these
29 questions can have been unexpected and Barbados has had

1 ample time in which to answer them. Yet is has not done
2 so. We say, Mr President, that the Tribunal has to draw
3 some very hard inferences about Barbados' argument from
4 that failure.

5 Mr President, let me take the main elements of the
6 case and just briefly review where the parties' pleadings
7 stand.

8 First of all, jurisdiction. Barbados has dismissed
9 Trinidad and Tobago's objections to jurisdiction as
10 unreal. But Part XV of the Convention on the Law of the
11 Sea requires not just that there be a dispute but that
12 there be an exchange of views. As Mr Wordsworth has shown
13 and as he will develop in argument later today, that must
14 be an exchange of views about the opposing claims which
15 are the very essence of a dispute as defined in
16 international law.

17 But Barbados' claim to the area south of the median
18 line was never formally presented as an official position.

19 It was only ever put forward on an illustrative basis.
20 So what constituted the exchange of views? No answer, Mr
21 President. And compare the absence of an answer on that
22 with the stance now taken by Barbados towards Trinidad and
23 Tobago's claim to an extended continental shelf beyond 200
24 nautical miles which had been notified to Barbados years
25 before these proceedings were started and had been
26 discussed in the negotiations from the very first round in
27 the year 2000.

28 Lastly on the question of jurisdiction there is the
29 failure to answer the point about Article 297 paragraph 3

1 to which Mr Wordsworth will return in due course.

2 PROFESSOR LOWE: Could I just ask a question at this point?

3 On the question of exchange of views in paragraph 11 of
4 the Counter Memorial it is said that in relation to the
5 extended Continental Shelf Trinidad and Tobago had put
6 forward a claim but that in the absence of any defined
7 claim line put forward by Barbados, Trinidad and Tobago
8 was never placed in a position where a further counter
9 proposal might have been called for. I wonder if you
10 could say something about where the line is drawn in
11 relation to an exchange of views in that context.

12 PROFESSOR GREENWOOD: Paragraph 11?

13 PROFESSOR LOWE: Yes.

14 PROFESSOR GREENWOOD: Forgive me while I read the relevant
15 passage. Mr President, first of all there was more of an
16 exchange of views on that than there could ever have been
17 in relation to the Barbadian proposal, because the
18 Barbadian position was never put forward as an official
19 stance in the first place. Trinidad and Tobago's was, and
20 it was notified as you heard in the previous round,
21 formally and in the boundary negotiations. Secondly of
22 course there is the point that Barbados has chosen to be
23 the claimant in these proceedings. It is for Barbados to
24 show that there has been the necessary exchange of views,
25 which is a prerequisite to their seizing this Tribunal in
26 respect of their own claim. Having done so it is not then
27 necessary, in our submission, for Trinidad and Tobago to
28 show a further exchange of views in relation to the
29 elements of Trinidad and Tobago's claim. It is Barbados

1 who have brought this dispute and not us. But
2 nevertheless, even taking account of the fact that
3 Barbados did not come forward with counter proposals until
4 this illustrative proposal at the end of the final round
5 of maritime boundary negotiations, there is still we say a
6 stark contrast between the approach taken by Barbados to
7 establishing that there was an exchange of views on its
8 own proposals but forward for illustrative purposes only
9 at the end of the final round of maritime boundary
10 negotiations and a copy of which was never handed over to
11 the delegation from Trinidad and Tobago, and the approach
12 they take in respect of jurisdiction over their own claim
13 is to say there was a dispute, we knew all about it, talks
14 had been fruitless for years. So a quantitative and a
15 qualitative difference in the attitude between the two.

16 THE PRESIDENT: Sir Arthur has a question.

17 SIR ARTHUR WATTS: To pursue just a little bit this question
18 of exchange of views and relationship to negotiation, I
19 think you were suggesting that the exchange of views
20 would be about issues of substance, because you said
21 without a detailed map identifying Barbados' claim-line
22 there could not be an exchange of views on the claim, but
23 I wonder whether Article 283 is actually envisaging an
24 exchange of views on the substance of the dispute or
25 rather an exchange of views on the procedure to be
26 followed, which might include negotiation or might not for
27 resolving it. If the exchange of views is, as you seem to
28 be suggesting, to concern the substance of the dispute,
29 then where do exchanges of views stop and negotiations

1 begin?

2 PROFESSOR GREENWOOD: Mr President, my function in this
3 speech is to give a tour de raison. Mr Wordsworth is
4 going to deal with the details of jurisdiction immediately
5 following me. I will therefore do what leading counsel
6 always do with a difficult question and gratefully say my
7 learned junior will deal with that after the coffee break!

8 I see Mr Wordsworth losing a certain amount of colour
9 at that remark but that cannot be helped!

10 Mr President, can we go on to the question of the two
11 sectors, the next point in dispute between the parties. I
12 was very struck by the fact that in her closing
13 submissions the learned Attorney General for Barbados
14 referred to the eastern sector, whereas of course Mr
15 Paulsson had denied that there was any difference between
16 the two sectors at all. Yet in fact the distinction
17 between the two is central to both states' claims. The
18 geographical distinction we say is perfectly obvious, but
19 in addition to that the fact that there is a juridical
20 distinction between the two is clear in both claims. The
21 turning point for the line is different. Barbados' point
22 D on the median line in their case, our point A on the
23 median lines on ours, but nevertheless the notion that
24 there are two separate sectors to be delimited and that
25 there are differences in the arguments to be deployed in
26 respect of both of them, that it would seem is common
27 ground.

28 What is not common ground we say rather
29 extraordinarily is whether there is a geographical

1 difference, because Mr Paulsson argued that it is a
2 relationship of opposite coasts throughout. Yet we would
3 say that the fact that the maritime spaces in the Atlantic
4 lie off rather than between the two coasts, that the
5 relationship of the two coasts to the maritime space there
6 is a lateral one, is perfectly obvious.

7 Mr Paulson said that his subject was geography and he
8 did complain, very mildly and very courteously, about what
9 he said was the unfair report given on his term card by
10 the two Professors. I am happy to say, Mr President,
11 that having consulted Professor Crawford we will be able
12 to say in respect of the term card for the second term
13 that Mr Paulsson has been at this particular school that
14 he has made considerable progress in his chosen subject of
15 geography! Although of course given the interpretation
16 put on the phrase "considerable progress" by Barbados in
17 its press releases that probably means he is going to be
18 expelled from school tomorrow! But he has made
19 considerable progress in geography. We regret, however,
20 that at the end of term exam he allowed himself to be
21 sidetracked into answering questions on English
22 literature. That this was a mistake was evidence in the
23 fact that he chose to answer the question on 18th century
24 poets by writing about John Donne who died in 1631. Not
25 only did this mistake clearly cost him marks in itself,
26 but it also meant that he lacked enough time to answer all
27 the questions on the geography section of the paper.

28 3.30

29 In particular his foray into English literature

1 distracted him from answering the question on what exactly
2 is the rationale for turning point D? The best he could
3 manage on that was to say his subject was geography,
4 fishing was different and then to show us a map that
5 ignored point D completely.

6 Not until last night, Mr President, did we get from
7 Barbados even a feeble attempt at an answer about the
8 rationale for point D, or to be more precise for the line
9 that joins points C and D. In that answer, Mr President,
10 what Barbados does is to refer fleetingly to two items in
11 the evidence. My learned friend Mr Wordsworth will say
12 more about that tomorrow. And then to tell us how it
13 determined the locations of points C and D. But what it
14 did not do was to answer the question why those points are
15 there, what is the rationale for them. The fact that the
16 reference to the evidence is so fleeting and that Barbados
17 now says but of course the evidence shows that most of the
18 fishing is out there in the west, suggests that in
19 relation to that whole area, that part of the beak to the
20 north and north-east, is effectively just throwing in its
21 hand.

22 But to return to Mr Paulsson, I said he had made
23 considerable progress in geography, and he had. On point
24 A he has first of all dropped the notion which was plainly
25 wrong that Trinidad and Tobago were trying to treat the
26 same stretches of coast as both opposite and adjacent, and
27 that is an important point. And secondly, and perhaps
28 even more important, he acknowledged that there is indeed
29 a rational justification for point A. It is true that he

1 would have put point A somewhere else. His argument was
2 if the shape of Barbados was different point A would be
3 further down the median line. Mr President, that is the
4 trouble with equidistance lines. They do tend to change
5 if the coastline is different. If Barbados lost a quarter
6 of a city block then the turning point might indeed be
7 somewhere else. If it lost a whole city block or two or
8 three city blocks, or if it was ten miles further west,
9 yes, the line would be different. That is the nature of
10 maritime boundaries. They reflect geography as it is, not
11 geography as it might have been or geography as somebody
12 would like it to be. That is an important distinction.
13 In fact it maybe that this is where the problem over 18th
14 century poets actually surfaced, because Dr Johnson who
15 was of course writing in the 18th century described the
16 metaphysical poets as those who engaged in nice
17 speculations in unusual contexts. That is in our
18 submission exactly what Mr Paulsson was doing with
19 geography; nice speculations in unusual contexts, where
20 islands change their shape, their size, bits drop off,
21 bits are added on. Multicoloured boundaries appear to the
22 right, to the left, in front of, behind them, but Mr
23 President, your Tribunal has to deal with the real world,
24 with real geography, not virtual geography however
25 cleverly presented to you.

26 The next point is estoppel. Mr Volterra made a great
27 deal about estoppel in his argument. Trinidad and Tobago
28 is estopped in the east. Barbados is not estopped in the
29 west. That is the essence of his argument. It might of

1 course raise the eyebrow that he puts it quite so bluntly,
2 because the amount of conduct on which Barbados relies in
3 the east is a fraction of the conduct it dismisses as not
4 amounting to an estoppel in the west.

5 But the eyebrows would have gone a lot higher over
6 one other aspect of Mr Volterra's speech. For all the
7 length of time that he took on estoppel there is not a
8 word about what the criteria for estoppel are, and I would
9 like to pause for a minute to look at those criteria.
10 Perhaps I could invite you to turn to tab 5 in your
11 judges' folder first of all. This is the article by
12 Professor Bowett on estoppel before international
13 Tribunals and its relation to acquiescence, an article as
14 seminal in its own area as Sir Gerald Fitzmaurice's word
15 on nonexclusive rights was in that area. If I could
16 invite you to turn to the conclusions. The whole article
17 is worthy of reading but I have not time to go through it
18 all. The conclusion is on the penultimate page at 201.

19 "First of all the rule of estoppel operates so as to
20 preclude a party from denying the truth of a statement of
21 fact made previously by that party to another, whereby
22 that other has acted to his detriment or the party making
23 the statement has secured some benefit. As such the rule
24 has been accepted by international Tribunals."

25 We can pass over paragraph 2, and then paragraph 3
26 notes the various forms in which estoppel can arise, by
27 treaty, exchange of notes or other undertakings in
28 writing, and by conduct. Then over the page at paragraph
29 4.

1 "The essentials of estoppel are (a) the statement of
2 fact must be clear and unambiguous, (a) the statement of
3 fact must be made voluntarily, unconditionally and must be
4 authorised, (c) there must be reliance in good faith upon
5 the statement, either to the detriment of the party so
6 relying on the statement or to the advantage of the party
7 making the statement".

8 Now it is true that that article was written nearly
9 50 years ago, but if one turns to the case law in the
10 international court on this subject, just to give two
11 brief illustrations, we will see that the test formulated
12 by Professor Bowett has stood the test of time. If one
13 goes to volume 1 of Trinidad and Tobago's authorities, the
14 North Sea Continental Shelf case at tab 5, the critical
15 passage appears at paragraph 30. "Having regard to these
16 considerations of principle, it appears to the court that
17 only the existence of a situation of estoppel could
18 suffice to lend substance to this contention. That is to
19 say, if the Federal Republic were now precluded from
20 denying the applicability of the conventional regime by
21 reason of past conduct, declarations etc, which not only
22 clearly and consistently evinced acceptance of that
23 regime, but also caused Denmark or the Netherlands in
24 reliance on such conducted detrimentally to change
25 position or suffer some prejudice. Of this there is no
26 evidence whatever in the present case".

27 That is in 1969, an application of the test
28 formulated by Professor Bowett. Then in tab 6 of your
29 Judges' folder, and I hope that I will be forgiven for a

1 short extract here from what was a long case, the
2 chamber's decision in the Land, Island and Maritime
3 Frontier Dispute, at page 239 - third page in the inset -
4 towards the bottom underneath the quotation, "So far as
5 Nicaragua relies on estoppel, the chamber will only say
6 that it sees no evidence of some essential elements
7 required by estoppel. A statement or representation made
8 by one party to another and reliance on it by that other
9 party to its detriment or the advantage of the party
10 making it".

11 Mr President, those are the criteria for an estoppel
12 in international law. Tried and tested over the decades.

13 There is no evidence in this case that those criteria are
14 present in relation to the eastern sector. And Barbados,
15 astonishingly, has made no effort either to outline what
16 the criteria are, let alone show how it might prove
17 compliance with them in this particular case.

18 Mr President, one could equally well say that the
19 criteria for estoppel are not satisfied in the west
20 either, but that does not matter because Trinidad and
21 Tobago has not advanced a case of estoppel in relation to
22 the western sector. What we do say, though, is that
23 Barbados cannot simply re-write history. The facts of the
24 matter are that until 2002 Barbados never advanced any
25 sort of claim to the continental shelf or the exclusive
26 economic zone south of the median line. On the contrary,
27 it continuously treated the waters in question as Trinidad
28 and Tobago's exclusive economic zone and negotiated for
29 access to them on that basis. Those are facts which are

1 important in establishing the question of who has title to
2 the shelf and zone south of the median line and around the
3 island of Tobago. We do not say that they create an
4 estoppel. What we do say is that the criteria for
5 estoppel advanced by Barbados have nowhere near been made
6 out.

7 Then there is the Trinidad and Tobago and Venezuela
8 treaty of 1990. This, Mr President, produced some of the
9 most overheated rhetoric we have heard in the whole of
10 these proceedings. There is time now, we say, to take
11 what Mr Paulsson referred to as a reality check in
12 relation to it.

13 It seems to us that four principles are absolutely
14 plain as day. The first is that the treaty does not bind
15 Barbados. It even says so. The second principle is that
16 there is no question of Trinidad and Tobago seeking in
17 these proceedings to compensate itself as Barbados has
18 suggested at Barbados' expense for the effects of that
19 1990 treaty. Thirdly, the treaty is, however, in force
20 between Trinidad and Tobago and Venezuela and Trinidad and
21 Tobago is, therefore, precluded from advancing any claim
22 to the area south of the 1990 treaty line. And it
23 advances no such claim. That leads us on to the fourth
24 principle. It follows as a matter of the most elementary
25 principles of international law that to the extent that
26 Barbados claims anything to the south of the 1990 line,
27 there is a dispute between Barbados and Venezuela not
28 between Barbados and Trinidad and Tobago. Since Venezuela
29 is not a party to these proceedings, this Tribunal cannot

1 have jurisdiction to determine a boundary line between the
2 point where the claimed line put forward by Barbados
3 intersects with the 1990 treaty line and Barbados' point
4 B, because that would be to rule upon a dispute between
5 Barbados and a state that is not a party to these
6 proceedings and, one might add, to give credence to
7 Barbadian claims against Venezuela even to the south of
8 point B. That is another matter. Barbados and Venezuela
9 can fight that out if they wish.

10 All of that, Mr President, is elementary
11 international law, but Barbados has tried to obscure these
12 simple issues with a cloud of rhetoric and hot air. We
13 had this tale of the map that fell off the back of a
14 lorry. No idea where it came from. No idea how it got
15 into the hands of the then leader of the Opposition in
16 Trinidad and Tobago or, for that matter, of the newspaper
17 from which it would appear that Barbados has gleaned it.
18 But it was not part of their official record and, in any
19 case, what matters, Mr President, is not what may have
20 been banded around in negotiations for the 1990 treaty,
21 but what was actually agreed in that treaty. Of course,
22 it is an elementary proposition, that it is what the
23 Government of a state does not what the leader of its
24 Opposition might say which is conduct imputable to the
25 state.

26 Mr President, you raised with my learned friends
27 counsel for Barbados a question about the official map
28 attached to the 1990 treaty. That is not in the
29 pleadings, as they pointed out in a written response to

1 you either this morning or late last night. We will
2 endeavour to get hold of a copy of that map tomorrow and
3 will put it before the Tribunal. If it cannot be done for
4 tomorrow, then we will send it in by post to the PCA after
5 the hearing is completed.

6 The second bit of hot air and rhetoric on this. The
7 land boundary between Guyana and Venezuela. First of all,
8 Mr President, that could not possibly have any bearing on
9 the dispute before this Tribunal. It simply could not do
10 it. Secondly, commonsense, Mr President, dictates that,
11 if a state is negotiating with a neighbour, which has a
12 boundary dispute with another neighbour, it has got to
13 proceed on a basis whereby it acts, as it were, without
14 prejudice. The exchange of notes filed by Trinidad and
15 Tobago described as "the apology with a smirk" by counsel
16 from Barbados is, in fact, an absolutely straightforward
17 and honest piece of diplomacy. It says that Trinidad and
18 Tobago's acceptance of the map is not to be taken as an
19 acceptance of Venezuela's claim to the land area in
20 question. It could not be clearer. It could not be more
21 straightforward and the issue could not be less relevant
22 to the proceedings here.

23 Lastly, Mr President, Aves Island and the much
24 discussed map which shows Aves Island (tab 7 in your
25 Judges' folder). Mr President, one of the problems of
26 advancing years is that I have had to start fiddling
27 around with reading glasses, but I would need much more
28 than reading glasses to see Aves Island on this map. I
29 would need a magnifying glass of very considerable

1 strength. It is, in fact, highlighted now roughly
2 opposite the island of Guadeloupe. For some considerable
3 period of time the learned co-agent for Barbados said
4 "This shows what the Trinidadians are up to. They called
5 it Aves Island when it is really Bird Rock". Oh dear!
6 This is serious stuff, Mr President. Calling it Aves
7 Island does not make any difference whatsoever to the
8 question that does matter which is what legal effect does
9 it have in generating exclusive economic zone or
10 continental shelf? That would be exactly the same whether
11 it was an island or a rock. The description of it as an
12 island is by no means unusual as the next slide, which is
13 an excerpt from Charney and Alexander, will show. It is
14 referred to as Aves Island (Venezuela) in that as well.
15 We will take the following slide which appears at tab 9,
16 an excerpt from the UN Division of Ocean Affairs' note on
17 the protest by four CARICOM Governments about claims to a
18 maritime boundary generated by Aves Island. That refers
19 to it as Aves Island or the Island of Aves as well. It is
20 the legal space that it may or may not generate, not its
21 name, which is important. And, of course, in terms of its
22 effect on these proceedings it could not possibly have any
23 effect at all and neither state is suggesting that it
24 does.

25 Let us turn then to the two sectors, the western and
26 the eastern, the western sector first. In respect of the
27 western sector, we say that Barbados' claim has quite
28 simply fallen apart. Mr Wordsworth has shown that the
29 claim to a traditional fishery is radically inconsistent

1 with Barbados' own reports. That is a very serious
2 matter. It cannot be brushed aside, as counsel for
3 Barbados sought to do by saying, "Well, our Ministry does
4 not employ historians" or "This was written by the
5 Ministry of Agriculture and not by the Foreign Ministry"
6 or "You, Trinidad" - this is the most extraordinary of all
7 - "you, Trinidad, did not call these Barbadian officials
8 as witnesses so that we could cross-examine them". What
9 Mr President I hope this Tribunal is asking is, what about
10 Barbados' duty of candour to the Tribunal? Why did
11 Barbados not say that its own claim was contradicted by
12 reports from its own authorities?

13 Then you have the three core facts, traditional
14 artisanal fishery, catastrophic consequences, Tobagonians
15 do not fish these waters anyway. They do not stand up in
16 practice, but, in the second round, after all the
17 performance in two rounds of written pleadings and the
18 first round of oral argument about how solid the evidence
19 was, how does counsel or Barbados plead his case? "Two
20 out of three ain't bad, Mr President. We do not have to
21 get home on the first one. There does not have to have
22 been a traditional artisanal fishery. We do not have to
23 show 30 years. Thirty years will do", according to Sir
24 Elihu. In fact, it need only be 25. And for 20 of those
25 the Trinidad and Tobago EEZ had already been proclaimed
26 in respect of this area and anything that happened within
27 the context of the various fisheries agreements, actual
28 and draft, of the negotiations in question.

29 It just collapses, Mr President. Mr Wordsworth will

1 say more about that. It has also collapsed on the law. I
2 will deal with that issue tomorrow. But let me just
3 summarise what our position is. First of all, the
4 argument that non-exclusive rights of access to fisheries
5 can generate sovereign rights to an EEZ and a continental
6 shelf is simply unsustainable. Secondly, Barbados' case
7 may rely entirely on fish, but more accurately on access
8 to fish, but that is not the only resource in this area.
9 It is an area which has already been the subject of
10 licensing which may well be extremely rich in hydrocarbon
11 resources. An unmentioned unspecified windfall, possibly
12 of enormous proportions which Barbados is hoping to scoop
13 with the claim that it is making.

14 3.45

15 Thirdly, Barbados has made it clear that what is at
16 issue is access for its fishing vessels. But, Mr
17 President, it has been offered access. It was offered
18 access on terms better than those in the 1990 treaty,
19 which its own Foreign Ministry thought could form the
20 basis of an agreement, as their press release of February
21 2004 made clear. Considerable progress. Just like Mr
22 Paulsson's geography. And its own evidence - its own
23 evidence, Mr President - shows that the negotiations on a
24 fisheries agreement were far from being deadlocked. Leave
25 aside the difference of view about the position on the
26 maritime boundary. Ms Marshall in answer to questions in
27 cross-examination was quite clear that the Prime Minister
28 of Trinidad and Tobago was offering to keep the fisheries
29 negotiations open. So the upshot of all this is that at

1 the end of its argument, Mr President, Barbados is unsure
2 what kind of fishing activity it is relying on, it has not
3 answered Professor Lowe's question about how long habitual
4 traditional historic fisheries require. It has failed to
5 prove that the fishery even existed until the very eve of
6 the declaration of the EEZ. It has failed to show that
7 its fishing industry has been denied access on reasonable
8 terms. It has ignored all of the resources of the area
9 except for fish. It is in total confusion as to the legal
10 rationale for its claim. But it still asks the Tribunal
11 to cut off Tobago from any EEZ or shelf to its west, north
12 and north east, on the basis of a boundary the location of
13 for which it has been unable to offer any coherent
14 explanation.

15 Mr President, we will deal with the western sector,
16 but the case against us is in such a mess that we are
17 going to leave that until the end of the second round and
18 concentrate on what this case is really about. What this
19 case is really about, we say, the real heart of it, is the
20 eastern sector.

21 Professor Crawford will deal with the eastern sector.

22 I just want to give you a taste of what our submissions
23 will be in this respect. Throughout these proceedings,
24 both in writing and in the oral states, Trinidad and
25 Tobago has put forward a case designed to achieve an
26 equitable solution in relation to maritime spaces which
27 plainly lie off rather than between the coasts of the two
28 states. We made it clear throughout the negotiations that
29 Trinidad and Tobago regarded the equidistance approach as

1 leading to inequity, because it cut off Trinidad and
2 Tobago from its natural prolongation, denies any extended
3 continental shelf and boxed it into a corner, very similar
4 to the corner Germany would have been boxed into had the
5 International Court not decided the North Sea Continental
6 Shelf cases as it did.

7 THE PRESIDENT: May I ask you a question?

8 PROFESSOR GREENWOOD: Yes, Mr President.

9 THE PRESIDENT: When you say that it cut it off from its
10 natural prolongation, when you say "natural prolongation",
11 are you saying its physical shelf, its physical
12 continental shelf would be cut-off? Not its continental
13 shelf as it may be endowed with it by a reason that it is
14 under the EEZ, but the continental shelf of a physical
15 kind, is that cut-off? Does it have actually a physical
16 continental shelf that goes out to the extent that the ...

17 PROFESSOR GREENWOOD: Mr President, I see that Professor
18 Crawford is scribbling a post-it which I suspect says that
19 I am going to deal with this in my speech, please leave it
20 to me. If I may, I will do so.

21 Of course, Mr President, the North Sea Continental
22 Shelf case would have involved boxing in Germany to a
23 greater extent into a smaller area, but that does not
24 alter the fact that the same adherence to rigid
25 equidistance which was rejected by the international court
26 in that case would also operate to cut off Trinidad and
27 Tobago here. What response do we get? These are opposite
28 coasts, not a convincing argument geographically or
29 juridically. And the notion that vast spaces in the

1 Atlantic lie between the two states simply does not work.

2 Mr Paulsson's argument that there is no Scilly effect
3 here, there is no equivalent of the Isle of Scilly, that
4 is true, but the issue is whether as the line projects
5 seaward for a great distance, in this case 168 nautical
6 miles on our reasoning, and 182 on Barbados', whether
7 there is any justification for a result that gives the
8 smaller state with the shorter relevant coastline nearly
9 60 per cent of the maritime space, and which denies the
10 larger state with the longer relevant coastline any
11 extended Continental Shelf at all. We say that that
12 argument is just as inequitable as the effect of a Scilly
13 Isles. There is not a word about a shelf lock in
14 Barbados' submissions and no serious argument about the
15 cut-off other than to say that cut-off is an impossible
16 notion between opposite states.

17 Moreover, Barbados' case rests on the thesis that at
18 least in relation to Trinidad and Tobago's claim to an
19 extended Continental Shelf, the EEZ regime must trump the
20 regime of the Continental Shelf. Whatever Article 56
21 paragraph 3 of the Law of the Sea Convention means, it is
22 very difficult to see that it means that, that the EEZ
23 takes priority over the Continental Shelf. It is very
24 hard indeed.

25 Mr Volterra's answer to this was to say "nothing
26 could possibly compensate Barbados if this Tribunal was
27 somehow to accept that Trinidad and Tobago was entitled to
28 any maritime territory at all to the north of the median
29 line". But that presupposes that everything to the north

1 is Barbados' already. The very point that is in dispute
2 in these proceedings. In any case look at the actual
3 areas involved.

4 THE PRESIDENT: Professor Lowe would like to ask another
5 question at this juncture.

6 PROFESSOR LOWE: It may be convenient because you may be able
7 to answer the questions as you go through this diagram.
8 There are two. One is simply to get clear what it is 60
9 per cent of, if you can define the area of which you have
10 spoken, of Barbados getting 60 per cent. And the second
11 is a slightly different point on Article 56 paragraph 3.
12 You are addressing it in terms of the overlap between an
13 area of claimed Continental Shelf and an area of claimed
14 EEZ. But of course it might also be said that the
15 definition of the Continental Shelf under Article 76 also
16 refers to the 200 mile criterion, so it might equally be
17 treated as an area of overlap between two areas of
18 Continental Shelf, in which case what is said about the
19 conflict if any between the EEZ claims and the seabed
20 claims does not arise in quite the same way. It would be
21 a straight contest between two seabed claims.

22 PROFESSOR GREENWOOD: Mr President, as far as the first
23 question is concerned I can answer it but whether I can
24 illustrate the answer is another matter. It is 58 to 42
25 per cent of the area of overlapping entitlements,
26 overlapping 200 mile entitlements, in the Atlantic sector.
27 We have a slide on that which I think Professor Crawford
28 was proposing to show you, but that is what is referred
29 to. If one looks at the dark striped area in yellow you

1 see Barbados' 58 per cent and in the lighter blue the 42
2 per cent that would go to Trinidad and Tobago. In
3 relation to the western Caribbean sector Barbados would
4 get 84 per cent, up to 16 per cent for Trinidad and
5 Tobago, but I do not think our slide breaks it down in
6 that way.

7 PROFESSOR LOWE: So it is based on an assumption about the
8 boundary between Barbados and St Lucia and Martinique.

9 4.00

10 PROFESSOR GREENWOOD: No, not this slide it is not. This is
11 based simply on the overlap between the 200 miles arc from
12 Trinidad and Tobago and 200 mile arc from Barbados.

13 In relation to your second question, the relationship
14 between conflicting Continental Shelf and conflicting
15 exclusive economic zone claims, I take the point entirely,
16 but first of all that is not the way in which Barbados has
17 put its case. Barbados' case is that Trinidad and Tobago
18 could not have an exclusive Continental Shelf because of
19 Barbados' exclusive economic zone in that area, and that
20 is why we fell to the argument about Article 56 paragraph
21 3 of UNCLOS. If it is in relation to the Continental
22 Shelf, the two competing Continental Shelf claims alone,
23 then that is a straightforward dispute, assuming there was
24 no EEZ and the Continental Shelf regime had evolved as it
25 has done but without the complication of an additional
26 EEZ, one would then have the argument about whether
27 equidistance was determinative here, which is what
28 Barbados says, in which case of course in an area which
29 was within 200 miles of Barbados but more than 200 miles

1 of Trinidad and Tobago, an equidistance rule would
2 automatically mean that that area was part of the
3 Continental Shelf of Barbados.

4 But Barbados' argument is wherever one might have
5 drawn the Continental Shelf boundary you cannot have an
6 EEZ out beyond 200 miles. Therefore there is an area, and
7 we accept this, where we have a Continental Shelf claim
8 and Barbados has a claim to the EEZ. That is a situation
9 which we say was envisaged by the draftsman of the Treaty
10 in Article 56 paragraph 3 and Article 56 paragraph 3 gives
11 priority to the Continental Shelf over the exclusive
12 economic zone.

13 PROFESSOR LOWE: Mr President, I do apologise for this,
14 but could we go back to the map, and the second answer,
15 but the map that illustrated the 60 per cent overlap,
16 because I am not sure that I have understood it.

17 I can see that the hatched area represents an area of
18 overlapping Barbadian and Trinidadian 200 mile claim.
19 What I am not clear on is the basis of the assumption that
20 Barbados would be entitled to maintain its 200 mile claim
21 north of Barbados in the face of whatever claims there
22 might be from St Lucia and Martinique, and is it not
23 possible that one or other of those states might argue
24 that they have an entitlement to go eastward and out to
25 the outer Continental Shelf or whatever which would cut
26 off Barbados in the north?

27 PROFESSOR GREENWOOD: Mr President, it is possible. Two things
28 about that. First of all the arc, the shaded area,
29 represents the limit of 200 miles from Trinidad and

1 Tobago. The arc which shows 200 miles from Barbados is
2 the further arc. This is not my illustration and I am
3 trespassing on Professor Crawford's territory. So if one
4 took account of the whole of what Barbados would be
5 entitled to it would of course be very considerably more
6 than 58-48. Secondly, to the best of our knowledge,
7 neither St Lucia nor Martinique has put forward a claim of
8 that kind, and therefore in the dispute between these two
9 states looking at where the claim of Trinidad and Tobago
10 overlaps the claim of Barbados, the effect would be in
11 this sector that Barbados would have 58 per cent and
12 Trinidad and Tobago would have 42 per cent. I grant you
13 that does make the assumption about St Lucia and
14 Martinique to the north, but it equally makes an
15 assumption about St Vincent and the Grenadines and Grenada
16 not cutting into the Trinidad and Tobago share of the
17 pudding.

18 Mr President, I have answered those questions as best
19 I can off the cuff. It is probably best if Professor
20 Crawford develops our answer to them further, as that is
21 very much his part of the case. Mr President, before I
22 sit down there is one last issue I need to deal with and
23 that concerns allegations that were made earlier this week
24 by counsel for Barbados of improper conduct on the part of
25 Trinidad and Tobago. Mr President, we say that this is a
26 matter that has been blown out of all proportion by our
27 learned friends. I am sorry to have to distract the
28 Tribunal from its real task by taking up any more time
29 with it but the fact of the matter is that it has been

1 suggested that Trinidad and Tobago has behaved improperly,
2 and an allegation of that kind cannot be left unanswered,
3 especially since it was framed in such a way as to include
4 a personal accusation of improper conduct against my
5 learned friend Professor Crawford.

6 Mr President, the statement that gave rise to this is
7 Professor Crawford's statement on day 4, page 89 which you
8 will find in tab 11 of today's judges' folder. The
9 context of this statement here is that what Professor
10 Crawford did was to make a statement on instructions
11 regarding Trinidad and Tobago's proposed submission to the
12 Commission on the limits of the Continental Shelf. The
13 context was a statement made by Mr Volterra on the opening
14 day of these proceedings, day 1 page 95. What Mr Volterra
15 said was the following: "Barbados has extended", and it
16 must have been "expended", "significant time and resources
17 on this programme. In contrast Trinidad and Tobago has
18 not even claimed to have begun a CLCS submissions
19 programme or to have undertaken any such activities. The
20 Tribunal is entitled to conclude that if Trinidad and
21 Tobago had such a programme it would have said so. This
22 must lead to the inescapable conclusion that Trinidad and
23 Tobago has engaged in no such activities to date. As the
24 Tribunal is no doubt well aware the deadline for CLCS
25 submissions is but a few years away. Trinidad and
26 Tobago's failure even belatedly to have started a CLCS
27 submission programme is inconsistent with the new claims
28 that it is making in this arbitration. The Tribunal is
29 entitled to conclude from this evidence or lack of

1 evidence that Trinidad and Tobago recognises that in truth
2 it has no plausible claim to appropriate Barbados' EEZ and
3 extended Continental Shelf."

4 Leaving aside the language in which that was couched,
5 in response to that comment, Professor Crawford told the
6 Tribunal that Trinidad and Tobago was taking steps to
7 prepare its case, though the deadline for submission was
8 still some years away, and he outlined what steps were
9 being taken. That was said by Mr Volterra to be an
10 improper statement because it was in effect counsel giving
11 evidence.

12 Mr President, I would make three points about that.
13 The first is that a state appearing in proceedings such as
14 these is entitled to inform the Tribunal through its
15 counsel what its intentions are and what steps it is
16 taking to implement them. There is nothing whatever
17 improper in this. It is done all the time in the
18 international court of justice and in other inter-state
19 proceedings; and indeed in my experience a statement of
20 that kind is also quite common in public law proceedings
21 in this country.

22 Secondly that is particularly the case where the
23 other party invites the Tribunal to draw inferences about
24 those intentions. Inferences which are unfounded.

25 Thirdly, Mr President, Mr Volterra's own statement
26 was based on no evidence before the Tribunal. It was
27 based instead on an assertion made by Barbados, not in
28 fact in its Memorial but in its Reply, at paragraph 56.

29 Mr President, a statement made by a state in its

1 written pleadings is not evidence, it is an assertion. It
2 is just as much of an assertion coming in writing in the
3 Reply as it is coming orally from counsel at the oral
4 stage of the hearings. Mr President, there was nothing
5 improper in what Professor Crawford did, and we say that
6 Barbados is making a huge fuss about nothing in respect of
7 this.

8 Likewise with its second complaint about a statement
9 on activities in the western sector, which Mr Volterra has
10 had to withdraw in large part, and about which I will say
11 nothing more.

12 Moreover, Mr President, it ill behoves Barbados to
13 lecture us about the need not to introduce new evidence by
14 means of counsel's submissions. It was because of that
15 that I drew Mr Volterra's attention on Friday afternoon to
16 the map submitted by Sir Henry Forde, when he made his
17 submissions to you last Monday. Those maps show - perhaps
18 ought to show purported to show - the location of fishing
19 communities in Barbados. They have not been put in as
20 evidence and yet the Tribunal is, apparently, being
21 invited to rely on them on questions of pure fact. Not
22 about questions of the intentions of state for the future,
23 but questions of pure fact about the present. Indeed,
24 Barbados itself had applied to put these maps in as
25 evidence in its letter to the PCA in September of this
26 year and your order entitled Barbados to do so. But to a
27 timetable and with the opportunity for Trinidad and Tobago
28 to submit evidence in response. Barbados chose not to
29 take you up on that, but instead it has put the maps in

1 now when no response evidence is possible. The argument
2 put forward by Mr Volterra that Trinidad and Tobago had
3 somehow consented to this conduct, based on a comment in
4 its letter of 15th September, is wholly unfounded. If I
5 could take you briefly to that letter, which is at tab 12
6 of the Judges' folder. Mr Volterra read to you paragraph
7 5 of that letter on page 3, but that relates to a
8 proposal about an illustrative map concerning the nature
9 of the claim. It might have been more appropriate for Mr
10 Volterra to read you what Trinidad and Tobago's agents had
11 said at paragraph 3 at the bottom of page 2. "Barbados
12 attributes to the Republic of Trinidad and Tobago
13 Rejoinder the statement that 'there are no communities in
14 Barbados that are reliant upon fishing as a means of
15 livelihood' and then seeks in response to this statement
16 to Exhibit 7 to the Rejoinder (the 1962 thesis of Annette
17 Bair). I just in parenthesis say that you have heard on
18 several occasions Ms Bair's thesis being dismissed as a
19 40-year old work by a Canadian research student. That was
20 not the way that it was characterised by Barbados when
21 Barbados introduced the thesis or rather a short extract
22 from it as one of the exhibits to its Reply. At that
23 stage it was considered to be evidence that would be
24 helpful to the Tribunal. It was not, of course, because
25 they put the wrong chapter of it in. We put in the whole
26 thesis and we leave the Tribunal to draw its own
27 conclusions.

28 I revert to the quotation "to adduce 'a map showing
29 location of communities reliant on fishing in Barbados'.

1 This Application is wholly without merit. It is Barbados
2 that has asserted throughout that its fisherfolk are
3 dependent upon fishing in the waters off Tobago and
4 Barbados should have submitted any evidence in support of
5 that assertion in its Memorial or, at the latest, in its
6 Reply." I need not read the rest of the paragraph, Mr
7 President.

8 Mr President, the suggestion on the basis of that
9 letter that Trinidad and Tobago had consented to those
10 maps being put in at all, let alone being put in at the
11 beginning of the oral hearing, when it would have been
12 impossible to do anything about them, is wholly
13 misleading.

14 Mr President, the maps are clearly intended to have
15 evidential value, but no application has been made to
16 admit them as such. Let me make quite clear that I am
17 making no suggestion whatever of impropriety against Sir
18 Henry Forde or indeed against any other member of the
19 Barbadian legal team in respect of that. Nor am I saying
20 that Barbados is behaving improperly. My point is simply
21 to suggest that, if Barbados is going to adopt a holier
22 than thou attitude it needs to make sure its own house is
23 in order. That was why, Mr President, rather than raising
24 this matter in the hearing I raised it privately with Mr
25 Volterra afterwards. He chose and was perfectly entitled
26 to do so, I do not make any complaint about that, to
27 mention our conversation in his speech on Monday morning.

28 I was trying to deal with the matter quietly. What we
29 object to, Mr President, is being lectured about our own

1 conduct by those who play fast and loose with the very
2 distinction between evidence and argument which they
3 demand we must respect. Mr President, allegations of
4 impropriety should not be banded around in the careless
5 way in which they have been in these proceedings. That is
6 not how these cases are conducted. The matter has wasted
7 enough of everyone's time already. Let us put an end to
8 it and get on with what this case is really about.

9 Mr President, that concludes my submissions. I would
10 have finished about ten minutes early. Would it be a
11 convenient moment at which to stop for coffee?

12 THE PRESIDENT: Thank you so much, Professor Greenwood. We will
13 adjourn until 4.30.

14 **(Short Adjournment)**

15 THE PRESIDENT: Professor Crawford.

16 PROFESSOR CRAWFORD: No, sir, but I am keeping you in
17 anticipation. It is Professor Greenwood.

18 PROFESSOR GREENWOOD: Mr President, in double anticipation,
19 first a brief word from me and then a speech from Mr
20 Wordsworth. If that is all right.

21 THE PRESIDENT: Yes.

22 PROFESSOR GREENWOOD: Mr President, I will stand, if you do not
23 mind, although I do not have my lectern, in my
24 presentation this afternoon I made comment about the
25 failure of Barbados to answer certain fundamental
26 questions. I was not aware that at one minute to three
27 this afternoon there had been emailed to me a document
28 setting out Barbados' answers to three of the questions
29 put by Professor Lowe. The memorandum that was emailed to

1 me is 31 pages long. Interestingly, page 2 begins
2 "Barbados' interim response to the first question". Well,
3 if this is an interim response, the mind boggles as to
4 what the full and detailed response might be or, indeed,
5 how many forests will be cut down in order to produce it.

6 Mr President, we understand the difficulties of counsel
7 operating away from base, but the fact of the matter is
8 that this is not a proper way in which to conduct
9 proceedings, to dump a series of answers like this on us
10 on the penultimate day of the hearings to which we can
11 only endeavour to reply overnight. We will endeavour to
12 reply overnight, but I must reserve our position in
13 relation to submitting part of our commentary in writing,
14 given what we have just been presented with is more than
15 half the length of the Memorial with which Barbados began
16 these proceedings. Moreover, two of the questions - I
17 accept that the first question raised matters that would
18 have required some research, although in the courts in
19 this country you would have been expected to do it
20 overnight - the second and third questions are both
21 matters that are central to Barbados' case. They are
22 issues that they must have been aware of months if not 18
23 months ago when they first filed this application. We say
24 that it really is not right that we should be expected to
25 respond on the hoof in that way. We have endeavoured to
26 answer the questions put to us as they have been raised.
27 The only time we have not been able to do that directly is
28 where it required factual material which had to be
29 obtained from Trinidad and Tobago.

1 THE PRESIDENT: Thank you so much. Please, Mr Wordsworth.

2 MR WORDSWORTH: Mr President, members of the tribunal, I would
3 like to touch briefly on the question of whether there was
4 a dispute between the parties for the purposes of article
5 283 and then I will be coming back to the question of the
6 meaning of fact of article of 283.1 as far as concerns
7 what is meant by exchange of views with reference to the
8 question raised by Sir Arthur Watts just before the coffee
9 break.

10 So far as concerns dispute, Barbados started its
11 reply to our jurisdictional objections on Monday with two
12 very big guns blazing at what might be thought to be a
13 very small target. This was Professor Reisman quoting Sir
14 Elihu to the effect that it was absurd to suggest that
15 there was no dispute between the parties ready for
16 disposition by this Tribunal. The guns were, as would be
17 expected, unerringly accurate. The trouble is that they
18 were aiming at the wrong target. The question is not
19 whether after two rounds of written pleadings, after ten
20 days of oral argument, there is now a readily-
21 ascertainable dispute before this Tribunal. The answer to
22 that is simple. Of course there is such a dispute. The
23 question for this Tribunal for the purposes of article 283
24 is, was there a dispute ascertainable as of 16 February
25 2004 when Barbados commenced this arbitration and, of
26 course, had there been an exchange of views? Our position
27 is firmly that the answer to both these questions is "no".
28 As of 16 February, Barbados had yet to submit a claim
29 line.

1 Professor Greenwood before the break spoke I think
2 rather generously, as his wont, about Barbados having
3 submitted an illustrative proposal of its claim line in
4 the final round of the negotiations. That is, in fact,
5 putting matters rather too high, because you will recall
6 that the furthest that Barbados got was as follows. I am
7 quoting Mr Volterra at the final round of maritime
8 delimitation negotiations. He said, "This is just a chart
9 for illustrative purposes, but one of the bases that
10 Barbados has repeatedly mentioned to Trinidad in these
11 discussions is Barbados' historic fishing rights both in
12 and around the arm of Tobago and over towards Grenada, and
13 that whole are over here" - presumably referring to the
14 beak - "and if one takes those historic fishing rights
15 into account, then it is possible to contemplate for
16 illustration purposes a maritime boundary between the two
17 countries that follows this red line". Of course that is
18 the red line that we have never ever been shown. But I
19 think that it is too high to say that that is the proposed
20 median line or a provisional median line or a provisional
21 claim line of any sort. It is just simply, "here is
22 something that it is possible to contemplate". And
23 Barbados never went any further.

24 THE PRESIDENT: You are saying that it was not ever shown, it
25 was not even shown as Mr Volterra illustration.

26 MR WORDSWORTH: I presume that, when he said "to contemplate for
27 illustration purposes a maritime boundary between the two
28 countries that follows this red line here", that was on
29 the PowerPoint presentation. That was on the slides that

1 we have never seen and this Tribunal has never seen.

2 THE PRESIDENT: That the Tribunal has never seen, but the
3 parties saw when they were then in the room.

4 MR WORDSWORTH: The Trinidad and Tobago delegation was of course
5 in the room then and they asked for copies and they were
6 refused copies. That is as far as it ever went.

7 The position so far as we are concerned is that as of
8 16th February 2004, Barbados was still very much keeping
9 its powder dry and the first time, of course, we ever saw
10 a claim line from Barbados was in its Memorial.

11 I turn to the question of what is meant by an
12 exchange of views as raised by Sir Arthur. As I
13 understood the question, it was whether it is an exchange
14 of views on the substance of a dispute - i.e. in essence
15 negotiations - or whether it is more of an exchange on the
16 means by which this dispute could be settled. It is more
17 of an administrative procedure.

18 Our first point on that is that, well, it does not
19 matter at all, because whatever happened as of 16 February
20 2004 Barbados jumped from deciding there is a dispute, we,
21 Barbados, consider there is a dispute, right up to
22 submitting its claim to arbitration under article 286.
23 There was no intermediate stage of any kind. There was no
24 exchange of views. We say that whatever it means we are
25 home and dry so far as concerns the need for such an
26 exchange.

27 Looking at it in a little more detail, I hope that
28 you have close to hand the second volume of our
29 authorities bundle, because I would like to take you to a

1 passage in the Virginia Commentary. This is at the very,
2 very last page of this volume, so it is very easy to find.

3 It is right at the back of tab 30. You will see on the
4 right-hand side there is a commentary on article 283.

5 THE PRESIDENT: This is the last page of the tab?

6 MR WORDSWORTH: Yes, it is the back of the last page.

7 Regrettably not. It is a difficult world to live in.

8 Could I possibly have one of the Tribunal's bundles and
9 see if I can find it? On your version, which I have to
10 say is a rather superior version, it is on the very first
11 page of the tab. Of course, where it should be!

12 If I can ask you to pick up from 283.1, the right-
13 hand corner, "A text similar to article 283 had already
14 been inserted in the text prepared by the informal working
15 group on the settlement of disputes in 1975, as a result
16 of the insistence of certain delegations that the primary
17 obligation should be that the parties to a dispute should
18 make every effort to settle the dispute through
19 negotiation." On the basis of that, it looks like article
20 283 on the exchange of views is really aimed at
21 negotiating on the substance of the dispute. I think that
22 I have to continue. "The text refers to this obligation
23 in an indirect fashion making it the main objective of the
24 basic duty to exchange views regarding the peaceful means
25 by which the dispute should be settled". That, I think,
26 is implying that it is slightly more administrative in
27 nature. "As President Amoras Singer explained it, while
28 imposing the general obligation to exchange views and to
29 settle disputes by peaceful means, these articles give

1 complete freedom to the parties to utilise the method of
2 their choosing, including direct negotiation, good
3 offices, mediation, conciliation, arbitration or judicial
4 settlement. This mandatory exchange of views is not
5 restricted to negotiations but also includes other
6 peaceful means". Really, what seems to be being thought
7 of there is that you are within an article 283 exchange
8 and there are a variety of possibilities between the
9 parties, one of which is let's negotiate. In the instant
10 case, it could have been let's negotiate, and it would
11 almost certainly have been Trinidad and Tobago saying
12 "and, so that we can have meaningful negotiations, can you
13 please show us what your claim line is and then we can
14 actually get a serious negotiation going" or there are
15 obviously other avenues for the parties with a view to the
16 peaceful settlement of their dispute, one of which, for
17 example, might be referring the dispute to binding
18 settlement by way of a compromise. There are many, many
19 different possibilities.

20 4.45

21 I think there is just one other passage that I should
22 draw your attention to, which is in the middle of
23 paragraph 283.3, and again this slightly supports the
24 interpretation that this is a means towards achieving a
25 settlement. Half way down paragraph 283.3 "in particular,
26 as is made clear in paragraph 2, the obligation to
27 exchange views on further means of settling a dispute
28 revise whenever a procedure accepted by the parties for
29 the settlement of a dispute has been terminated without a

1 satisfactory result and no settlement of the dispute has
2 been reached."

3 We say that that is an important passage, and the
4 whole of this passage is extremely important, concerning
5 the interpretation of Article 283. But it is not that
6 clear, but it seems that so far as concerns the commentary
7 what was being thought of was perhaps more means of
8 settlement than necessarily negotiations on the substance.

9 It has to be said however that that is not really how
10 parties to disputes under sections 1 and 2 of Part XV have
11 approached this in practice. If one thinks back to
12 Southern Blue Fin Tuna and the MOX plant case and the
13 Straits of Johor, in each instance the parties had been
14 having negotiations on the substance of the dispute, and
15 it is when those negotiations on the substance have broken
16 down that there has been a submission to arbitration, and
17 in each case the question of whether or not there has been
18 an exchange of views under 283 has been decided by
19 reference to the preceding negotiations on the substance
20 of the dispute.

21 SIR ARTHUR WATTS: Does that suggest that when there are
22 negotiations, if those negotiations hit the buffers the
23 practice has been not to have further exchanges of views
24 on what the next steps might be?

25 MR WORDSWORTH: That question is saying should this Tribunal
26 just look at this existing practice under SBT, MOX and
27 Straits of Johor and feel reassured that it can simply
28 approach matters in the same way in this case, and the
29 answer to that question is No, because although these

1 cases are very helpful for one purpose, which is to show
2 to the Tribunal that you cannot just bypass Article 283,
3 you have to go through the process of an exchange of
4 views, the cases do not address this issue which is how do
5 you effect the transition between a state of negotiation
6 under Article 74 and 83 of UNCLOS to exchange of views and
7 then on to commencing arbitration under Article 286, and
8 our case has always been that these are separate
9 processes. You have to go through Article 74 and 83
10 process, section 1 of Part XV and then on to section 2 of
11 Part XV; and if you do not follow that process you
12 essentially deny parties under Article 74 and 83 part of
13 the procedural protections that are put in place by those
14 Articles. Article 74.2 and 83.2 could have said if
15 negotiations break down then either party would have the
16 right to commence arbitration under section 2 of Part XV.
17 That is simply not what those provisions have said.

18 When it comes to the cases themselves I think the Law
19 of the Sea Tribunal has actually been in a very simple
20 position so far as deciding whether or not the
21 requirements of Article 283 have been met. If you take a
22 case like MOX one party says you are about to pollute our
23 sea. The other party says No, we are not about to pollute
24 the sea, the discharges that we have under consideration
25 are entirely lawful and will have no significant impact.
26 So you have two immediately competing positions taken by
27 the parties.

28 Then they come to UNCLOS in the context of a breach
29 of UNCLOS, and the first party then says we do not accept

1 your position, we consider that commencing operation of
2 such and such a nuclear facility will pollute our seas,
3 and there you have a dispute and there it seems very
4 simple to say the requirements of Article 283 have been
5 met.

6 Here we come to Article 283 in a very different
7 scenario. This is not an scenario of alleged breach of
8 certain specified provisions, say, of Part 12 of UNCLOS.
9 Here we are coming to UNCLOS in a situation where parties
10 are seeking to implement UNCLOS, are seeking to effect an
11 agreement under Articles 74 and 83, and that is a very
12 different situation. Because Articles 74 and 83 existed
13 in UNCLOS as a powerful means of achieving an agreed
14 settlement on maritime boundaries there is the need for
15 the extra protection, so you do not just say let us seek
16 to reach an agreement, if we fail we will immediately go
17 to arbitration. If that were the case then Articles 74
18 and 83 would simply be a conduit through to Article 286
19 and Part XV, and not really very useful provisions at all.

20 That is why we say there are these stages, you have
21 to go through them, and if you break down in your
22 negotiations under Articles 74 and 83 then you can move
23 through to section 1 of Part XV. The exchange of views
24 under section 1 of Part XV does not have to be exhaustive.

25 All the three cases make that perfectly clear, and you
26 can certainly understand that, once you are operating
27 within section 1, if your exchange of views goes nowhere
28 then the exchange of views goes nowhere and then you can
29 move on to section 2, one party acting unilaterally.

1 But what cannot happen is that you simply bypass
2 section 1 altogether.

3 I wonder if it is worth going briefly to the SBT case
4 which is in the judges' folder, tab 14. There are two
5 points. If you look around paragraph 50 you see the
6 positions of the parties being identified by the Court,
7 and the fact of negotiation. Then you see the position of
8 Japan at paragraph 56, considering that Japan contends
9 that Australia and New Zealand had not exhausted the
10 procedures for amicable dispute settlement under Part XV,
11 section 1. Fine, we say that is not harmful to us at all,
12 because ours is not a non-exhaustion case, ours is there
13 has to be a bypass not a failure to extend section 1
14 indefinitely. Over the page on 57, consideration that
15 negotiations and consultations had taken place between the
16 parties, I think that is substantive negotiations, and
17 that the record shows that these negotiations were
18 considered by Australia and New Zealand as being under
19 the Convention of 1993 and under UNCLOS. Then we see the
20 key paragraphs so far as concerns whether or not there is
21 need to exhaust remedies under Part XV section 1 are
22 paragraphs 60 and 61. Considering that in the view of the
23 Tribunal a state party is not obliged to pursue procedures
24 under Part XV section 1 of the Convention when it
25 concludes that the possibilities of settlement have been
26 exhausted, considering that in the view of the Tribunal
27 the requirements for invoking the procedures under Part XV
28 section 2 of the Convention have been fulfilled.

29 We say that is not problematic for us because ours is

1 not an exhaustion of remedies case.

2 Mr President, if I could ask you to turn to tab 13 in
3 the bundle I would like to address one of Professor
4 Reisman's arguments on the interpretation of Article 283.1
5 where he said on Monday "A more sensible reading of
6 Article 283 would take the reference to the exchange of
7 views not as a requirement to go through what already had
8 been done for another five or ten years, but to exchange
9 views with respect to the organisation of the arbitration
10 as was done".

11 Of course Professor Reisman puts forward that as an
12 interpretation because Barbados is on relatively solid
13 ground there. They can say Yes, we did liaise with
14 Trinidad and Tobago so far as concerns the organisation of
15 the arbitration. Of course only after they had submitted
16 their Article 286 notification. So this is a very
17 different sort of exchange of views. You will see in tab
18 13 what we have done is to put down for you the test of
19 Article 283.1 as now devised by Barbados, just to show how
20 that interpretation simply does not work. "When a dispute
21 arises between states parties concerning the
22 interpretation or application of this Convention one of
23 the parties may have unilateral recourse to Article 286
24 subsequent to which the parties to the dispute shall
25 proceed expeditiously to an exchange of views regarding
26 organisation or other matters". It is simply not what
27 Article 283.1 says and we would ask you to reject that new
28 interpretation or that new construction of Article 283.1
29 firmly.

1 4.00

2 Otherwise perhaps picking up on the theme of silences
3 that was introduced by Professor Greenwood I would like to
4 touch on two silences so far as concerns Professor
5 Reisman's argument in response. First of all he said
6 nothing at all on our interpretation of articles 74 and
7 83, and particularly so far as concerns the second
8 paragraph of both those articles which we contend in their
9 ordinary meaning direct parties to section 1 not section 2
10 of Part XV. He also said nothing at all on our
11 interpretation of article 283.2. In fact, he said nothing
12 at all on article 283.2 or on that passage of the Virginia
13 Commentary that we were looking at earlier where there is
14 a passage to which I did not take you, but at the very end
15 of paragraph 283.3 in the Commentary, the Commentary
16 confirms that a party may transfer a dispute from one mode
17 of settlement to another, especially one entailing a
18 binding decision, only after appropriate consultations
19 between all concerned. That is at tab 30 of our
20 authorities bundle.

21 We say that this is absolutely key, because suppose
22 that Barbados is right and a dispute did crystallise
23 whilst the parties were engaged in negotiations under
24 articles 74 and 83 and that they were then seeking to
25 settle the dispute, when that attempt at settlement
26 failed, it was still for the parties to enter into
27 appropriate consultations, possibly on the substance of
28 the dispute, possibly so far as concerns the means of
29 settlement of the dispute before Barbados could move on to

1 article 286. Of course, it simply did not do that.

2 Professor Reisman's major argument is to say that, if
3 a bilateral agreement is required to move to the stage of
4 commencing arbitration, then of course you never get to
5 the stage of arbitration. He says bilateral requirement
6 would simply end the state's right to invoke an
7 arbitration clause as long as the other state is willing
8 to keep saying "let's talk more". Very elegantly put,
9 "let's talk more". Of course, that is precisely what
10 section 1 of Part XV does not allow. That is why Southern
11 Blue Fin Tuna and the other two cases are very relevant,
12 because they are saying that there is no obligation to
13 exhaust negotiations or exchange of views under section 1
14 of Part XV. As long as you are then there, if those
15 negotiations break down, either party can move on to
16 article 286.

17 Mr President, a brief word on article 298 - article
18 298 and the significance that Trinidad and Tobago never
19 made an article 298 declaration effectively excluding the
20 jurisdiction of this Tribunal and the fact that it is said
21 that it will not make such a declaration as the Attorney
22 General said in our opening. As I understood Professor
23 Reisman, he was making the argument that the only impact
24 of Barbados' precipitant move to arbitration was that
25 Trinidad and Tobago lost the opportunity to make an
26 article 286 declaration, as - and I think that this is how
27 the argument continued - as Trinidad and Tobago made clear
28 that it was not going to and will not now make an article
29 298 declaration, it has effectively lost nothing. This is

1 to turn Trinidad and Tobago's argument completely on its
2 head. Trinidad and Tobago has never put its case as one
3 of having been deprived of the right to make an article
4 298 declaration. Its case is that it has been deprived of
5 the right to have the exchange of views, so have a means
6 of negotiations on the amicable settlement of this
7 dispute. The fact that it has made clear to this Tribunal
8 that it will not make an article 298 declaration simply
9 emphasises its seriousness in this regard. Trinidad and
10 Tobago is here to negotiate with Barbados. If those
11 negotiations were to fail in the future, then either party
12 would still have the remedy of an article 286 submission
13 to arbitration.

14 I am going to deal very briefly with the facts of the
15 meeting of 16 February 2004. I am sure that the Tribunal
16 must feel that they have almost heard enough. Professor
17 Reisman's point was a very attractive point for this
18 Tribunal, which say saying, "frankly, it does not matter".

19 He said, "I do not believe that these issues" - these are
20 the factual issues as to what happened on 16 February 2004
21 - "I do not believe that these issues are critical to
22 establishing jurisdiction in this case for it is manifest
23 that a dispute existed and that is decisive". Well, we
24 say absolutely not. So a dispute did exist, according to
25 Barbados, on February 16, 2004, but what about the
26 exchange of views? Until it is made clear that there is
27 no exchange of views, there has been an exchange of views,
28 then there is no question of the article 283 criteria
29 having both been met. This is why there is a degree of

1 common ground between the parties, because we accept that
2 the factual questions of what happened on 16 February are
3 of limited relevance in so far as Barbados takes the view,
4 and still takes the view, that once it had decided that
5 there was a dispute on 16 February, it could just jump on
6 to arbitration, bypassing the exchange of views. If it is
7 common ground between the parties that there was no
8 exchange of views on 16 February 2004, then it seems, on
9 our interpretation of article 283, that clearly the
10 requirements of that provision have not been met.

11 So far as concerns the facts themselves, Professor
12 Reisman rather ignored the contemporaneous evidence and
13 asked you to prefer the evidence of Teresa Marshall and at
14 the same time chose to impugn the testimony of Mr Charles
15 and Mr Laveau. I am not going to take you to the document
16 now, but I do ask you to turn at some stage to Trinidad
17 and Tobago's Cabinet paper of 17 February 2004. This is
18 the best contemporaneous record of what happened. This is
19 not a document created for the purposes of this
20 litigation. Of course, it is not. It is a confidential
21 private Cabinet Memorandum. It records what happened.
22 There is no mention of intractable, no mention of any
23 invitation for Barbados to take Trinidad and Tobago to
24 arbitration. The second key contemporaneous document is
25 Prime Minister Arthur's statement immediately as Barbados
26 was making its submission under Article 286. So of his
27 statement of 16 February 2004 Professor Reisman said that,
28 well, do not look at this too seriously, because it was
29 couched in diplomatic language. So what if he did not say

1 that Trinidad and Tobago was acting in an intransigent
2 way? So Barbados had no choice but to pursue the course
3 of going to arbitration. Well, that actually makes no
4 sense at all. Prime Minister Arthur was trying to
5 explain to his people why they are taking this radical
6 step of commencing these proceedings in such
7 circumstances, if he had been left no choice by Trinidad
8 and Tobago, he certainly would have said so. If the aim
9 was somehow to be diplomatic and to soften the blow so far
10 as concerns Trinidad and Tobago, again, Prime Minister
11 Arthur would have made it clear that he was acting more in
12 sorrow than in anger, that it was with extreme reluctance
13 that he felt that Barbados had to take that step.

14 That submission for us cannot be sustained. So far
15 as concerns the witnesses, very briefly, it was said that
16 Mr Charles lacked credibility. We submit that that is
17 completely impossible to sustain. Mr Charles was a
18 credible and truthful witness. But, perhaps, even more
19 relevant, his evidence had nothing whatsoever to do with
20 the meeting of February 16, 2004. He was not there, he
21 never said he was there and he never said anything in his
22 statement about that meeting. I do not really see the
23 point of the side swipe at Mr Charles.

24 So far as concerns Mr Laveau, he was criticised for
25 being unable to confirm that he had not left the room a
26 number of times during the meeting. Well, is there any
27 evidence before this Tribunal that he did leave the room?

28 None whatsoever. You would have expected Barbados to put
29 in a statement from somebody saying, "Oh well, actually

1 this Mr Laveau you have put up is unreliable. He was
2 always nipping out of the room". It never came.

3 So we say that, if the Tribunal is having to prefer
4 one witness's evidence over another's, it should be
5 preferring the evidence of Mr Laveau over Ms Marshall
6 because Mr Laveau's is consistent with the contemporaneous
7 documentation and Ms Marshall's evidence is not.

8 If I can just ask you to turn to tab 15 of the
9 Judges' folder, by way of a little tease, because we know
10 that Barbados has got useful contemporaneous evidence, but
11 it has chosen not to put it in. This is Barbados' letter
12 of 9 September 2005. This is where it was requesting the
13 Tribunal's permission to put in additional evidence. If I
14 can ask you to turn over the page to the table which
15 contains all the new evidence that it was looking to put
16 in and look at item 2, there it seeks to address the
17 argument in relation to the views expressed by Trinidad
18 and Tobago's Prime Ministers at the meeting of Prime
19 Ministers on 16 February 2004. You will see that what it
20 is offering is contemporaneous manuscript notes of members
21 of the Barbados delegation at the meeting. That is what
22 we were expecting to see and we got very excited about
23 that. But, of course, nothing ever came. So presumably
24 someone on the Barbados legal team looked awfully
25 carefully at those notes and decided, oh, they do not use
26 the word "intractable" or they do not contain any
27 suggested invitation to arbitration by Prime Minister
28 Manning, what they do contain is something that is
29 completely inconsistent with Barbados' position before

1 this Tribunal. So contemporaneous notes never arrived.

2 Mr President, I move now on to a different topic
3 which is the failure to conclude a new fishing agreement.

4 This was touched on briefly by Professor Greenwood this
5 morning and this is an issue that is important to
6 jurisdiction because it concerns the issue of whether
7 there was a breakdown of negotiations, but it is also
8 important so far as concerns Barbados' case on
9 catastrophe. We say that, if we were offering to
10 negotiate a fishing agreement, how can there possibly have
11 been a catastrophe so far as concerns your fishery? No
12 catastrophe. If you do not want to negotiate with us, you
13 are simply bringing problems on yourself. Barbados'
14 position now is a reluctant concession that Trinidad and
15 Tobago was willing to conclude a fishing agreement as of
16 16 February 2004, but the position now taken is that it
17 was not the right sort of agreement. So it is an
18 agreement, but the wrong sort of agreement. It is a new
19 contention and it is unsupported by any particulars at all
20 and it is completely inconsistent with Barbados' position
21 at the time.

22 5.15

23 If I can ask you to turn to tab 16 of the Judges'
24 folder, just to look at this very quickly. This is a
25 statement by Barbados on 2nd February 2004, so this is two
26 weeks before commencement of arbitration. This is
27 Barbados saying in as many words that, oh, the
28 negotiations towards concluding a fishing agreement are
29 going very well indeed. Half way through the third

1 paragraph on the first page of this statement, Barbados
2 says "To date we have held four rounds of negotiations and
3 made considerable progress on the drafting of a new text."

4 It does not sound like doom and gloom. Over the page,
5 page 2 of this statement, "While it is acknowledged that
6 there are still outstanding issues, Barbados believes that
7 with good faith on both sides these can be resolved
8 through the negotiating process". The contemporaneous
9 documents show that Barbados thought it could resolve all
10 the outstanding issues and nothing happened between 2nd
11 February and 16th February to change the picture.

12 Over the page in tab 17 of the Judges' folder, we
13 have just included the text of the draft fishing agreement
14 as it stood as of November 2003. This is to make the
15 point that actually there were a very considerable number
16 of issues on which the parties were agreed, because you
17 will see from the text of this draft, which I should say,
18 incidentally, is a Barbados draft, that many, many of the
19 matters were agreed. If you just cast your eye down the
20 pages of the preamble, we see "agreed", "agreed",
21 "agreed", "agreed" and so on it goes. I am not suggesting
22 that everything in the agreement was agreed. It certainly
23 was not. But Barbados has not shown to us or to this
24 Tribunal any sticking points, anything that could not be
25 resolved. You often see after a particular piece of text
26 the words "to be negotiated". Fine. There were still
27 things to be negotiated, but no suggestion that things
28 could not be negotiated, certainly not so far as concerns
29 Trinidad and Tobago.

1 If I could ask you at your leisure, as it were, if it
2 can be seen as leisure, to look at the key articles, which
3 are articles 4, 5, 6 and 7, which are matters like
4 permitted species, vessels and fishing gear, duration of
5 the fishing season, number of eligible authorised fishing
6 vessels per season, licensing arrangement and access fees.

7 All the sort of basic sea matters that you would expect
8 to be included in a fishing licence agreement. You will
9 see that these are for the large part either agreed or the
10 rubric says "To be negotiated". We simply do not see from
11 the contemporaneous evidence anything like the case that
12 Barbados is now putting before you that Trinidad and
13 Tobago was unwilling to agree the right sort of fishing
14 agreement. It was simply not the case.

15 This leaves Trinidad and Tobago's fallback argument
16 so far as concerns the fishing agreement, which is to say
17 that, well, a fishing agreement could not be concluded as
18 of 16 February because our position was that the fishing
19 issue was inextricably linked with the maritime
20 delimitation issue. Well, that is a bizarre position to
21 take if one is looking at the context of in particular an
22 alleged catastrophe to Barbados fishermen. It only make
23 sense if one steps back and looks at what Barbados is
24 really trying to achieve. If Barbados is trying to
25 achieve or trying to protect its fishermen from impending
26 catastrophe, the refusal to agree a fishing agreement
27 simply because you take it as being interlinked with the
28 issue of maritime delimitation negotiations makes no sense
29 at all. If what Barbados is really trying to do is to

1 create rights to hydrocarbons by interlinking the issues
2 of maritime delimitation, on the one hand, and fishing, on
3 the other hand, then the insistence on interlinking starts
4 to make sense, but this is part of a litigation strategy.

5 It has nothing whatsoever to do with fishing agreements
6 or the need to avert a catastrophe.

7 Mr President, I am going to move on to a completely
8 different topic now, which is the topic of abuse of
9 process. This is a topic that I can deal with briefly
10 because it was passed over completely by Professor
11 Reisman. Mr Volterra dealt with our interpretation of the
12 1990 fishing agreement in the context of his speech on
13 estoppel and acquiescence and I will just pause to deal
14 with his argument on interpretation. What he said was as
15 follows. He said look at the language of article 11 of
16 the 1990 fishing agreement. You can actually see this at
17 tab 18. He said, look at how Trinidad and Tobago has
18 construed an identical provision in the course of the 2002
19 to 2003 fisheries negotiations. That is what you can see
20 underneath article 11 in this extract from the Judges'
21 folder. I will just read what he said from the
22 transcript. "What I have put up on the screen is article
23 16 of the draft agreement proposed by Barbados during the
24 most recent round of negotiations." In fact, he was wrong
25 about that, because what he put up was the draft agreement
26 from March 2003 negotiations not the most recent which is
27 November 2003 which you also see on the piece of paper in
28 front of you.

29 He said, "It is tab 161, but I suggest you need not

1 go to it, because the language is precisely the same as
2 article 11. The text is identical and I am not going to
3 repeat it." The point that he was making was to say,
4 look, here you have article 11, you say that actually this
5 does not preserve relevant rights of Barbados, but here is
6 article 16, 2003 version, and look at what Trinidad and
7 Tobago said at the time so far as concerns this article.
8 They said - and this is a quote from the third round of
9 fisheries negotiations - "It was agreed that the agreement
10 should include a provision indicating that the fishing
11 agreement should in no way affect the parties' respective
12 maritime delimitation claims". Mr Volterra takes that
13 statement as effectively interpreting article 11 of the
14 1990 agreement by reference to article 16 of the current
15 agreement, a slightly convoluted exercise in
16 interpretation. And one which you see completely falls
17 apart when you look at the new article 16 up against the
18 old article 11 and you see that they are, in fact,
19 materially different. They are not identical at all.

20 Article 11 of the 1990 fishing agreement we say is
21 divided in effect into two provisions. This is at the top
22 of the page that you have in tab 18 of the Judges' folder.
23 This is the first. Article 11, preservation of rights
24 divides into two. The first part: "nothing in this
25 agreement is to be considered as a diminution or
26 limitation of the rights of either contracting party in
27 relation to the limits of its internal waters,
28 archipelagic waters, territorial sea, continental shelf or
29 exclusive economic zone". We say that that is not

1 problematic for Trinidad and Tobago in this case. It does
2 not seek to somehow absolve Barbados of the very fact of
3 having entered into an agreement that expressly recognised
4 Trinidad and Tobago's EEZ simply because the whole fishing
5 agreement is predicated on Barbados not having rights in
6 Trinidad and Tobago's EEZ. There is nothing in essence on
7 which this first half of the provision can bite.

8 Look at the second half of the provision. "Nor shall
9 anything contained in this agreement in respect of fishing
10 in marine areas of either contracting party be invoked or
11 claimed as a precedent". All this says is the fact of
12 Barbados' fishing in Trinidad and Tobago's EEZ cannot be
13 invoked as a precedent. Entirely as you would expect. It
14 is not open to Barbados to say that, well, you let us in
15 last year, you have to let us in again. Or it is not open
16 to Barbados to say that, oh, this is created. The fact
17 that we have now fished in your waters has created some
18 sort of right, so now we have a right to fish in your
19 waters. No such right created. If you look at the draft
20 which is in the middle of the page, and this is draft of
21 March 2003, you will see that the language is quite
22 different. It is not identical. I should stress that
23 this is Barbados' draft. This is the attempt of Barbados'
24 legal representatives 13 years down the line to put in a
25 provision which protects their position. You will see
26 that they do this by changing the language significantly
27 in the second line by adding a concept of derogation and
28 renunciation and also significantly in the final line
29 omitting the words "in respect of fishing in the marine

1 areas of either contracting party". So suddenly what you
2 have is an attempt at a much broader preservation of
3 rights which might indeed have protected Barbados in a way
4 that it now wishes it had been protected by the 1990
5 fishing agreement, but it simply was not. It may well
6 wish that it should not be taken as having renounced any
7 rights to Trinidad and Tobago's EEZ by entering into the
8 1990 fishing agreement, but, as I said, the concept of
9 renunciation was not in article 11 of the 1990 fishing
10 agreement. You will see below the final article on this
11 page is the article that was in Barbados' draft of
12 November 2003. You will see that the lawyers have been at
13 it again, because it was obviously considered that the
14 article 16 in the middle of your page was not sufficient
15 to protect Barbados' position. So they have another go
16 and greatly expand article 16 again, so that it now covers
17 the concept of effecting or prejudicing in any way the
18 views of either contracting party with regards to any
19 matter relating to the law of the sea. Far, far broader
20 language. Again, the concepts of derogation and
21 renunciation; again the concept of precedent being created
22 is not limited to matters in respect of fishing in the
23 marine areas. It is much, much broader wording.

24 We say, Mr President, that when it comes to the 1990
25 fishing agreement this is still there for you in fact to
26 look at, to take into account, both in terms of Trinidad
27 and Tobago's argument on abuse of process and in terms of
28 Trinidad and Tobago's argument on recognition by Barbados
29 of the existence of Trinidad and Tobago's EEZ. That was

1 spelled in very large letters both in the preamble to the
2 1990 fishing agreement and in the first article to the
3 1990 fishing agreement or the first substantive article in
4 the 1990 fishing agreement. There is nothing in Article
5 11 that takes away the force of the 1990 fishing
6 agreement.

7 5.30

8 Mr President, the issue of scope, the scope of
9 Barbados' claim in this matter and also the scope of your
10 jurisdiction has been slightly hijacked in a sense in that
11 it is only half an hour or maybe an hour ago - how time
12 flies - that we have received the position of Barbados so
13 far as concerns article 297.3. Our position on Article
14 297.3 is quite clear. I just stress that we made this
15 from the very beginning in our Counter Memorial. We
16 reacted to a passage in Barbados' Memorial where they
17 quoted Eritrea-Yemen. This is paragraph 108 of Barbados'
18 Memorial. They said, having quoted Eritrea-Yemen,
19 "however, after considering the special circumstances
20 advanced by each state in that case the Tribunal decided
21 that no variance was necessary as they concluded that the
22 special circumstance could be protected by the award of
23 non-exclusive rights for artisanal fishing".

24 That rung an alarm bell with us, because although in
25 its statement of claim Barbados had made it crystal clear
26 that it was only seeking a single maritime boundary line,
27 suddenly it seemed to be laying the groundwork at least
28 for a broader claim, a claim that involved non-exclusive
29 fishing rights. So we responded to this in our Counter

1 Memorial at paragraphs 132-135 and we said it should be
2 stressed that Barbados has not claimed and cannot claim
3 any remedy relating to fishing rights in the EEZ of
4 Trinidad and Tobago.

5 We then pointed to the passage from the Memorial that
6 had caused us concern and we then pointed to an extract
7 from Nauru to the effect that Barbados could not go beyond
8 the confines of its notice to arbitration and statement of
9 claim, and we then said as follows: "It follows from this
10 principle that the Tribunal would lack jurisdiction in
11 respect of any remedies sought by Barbados relating to
12 fishing rights in the EEZ of Trinidad and Tobago. Nor
13 could the Tribunal have any such jurisdiction given the
14 restrictions on its jurisdiction that flow from Article
15 297(3) of the Convention". So there we flag that up as
16 clear as day at the end of March of this year.

17 Barbados' response in its Reply as I showed you last
18 week was to say we are not claiming any remedy for non-
19 exclusive fishing rights, but that has now been
20 accompanied by the ever heavier hints from Sir Eli and
21 from Professor Reisman to the effect that what they really
22 want in this case is non-exclusive rights.

23 Barbados has now had, I have calculated, six months
24 and 27 days in which to address the issue of Article
25 297(3) which we say is comprehensive so far as concerns
26 this aspect of Barbados' claim and, at well past the 11th
27 hour, we have just received Barbados' case on Article
28 297(3). The cogs have been whirring for months and months
29 and months, and at last something has come out. With your

1 leave, Mr President, I am not going to seek to address
2 that on the hoof, not having had a chance to even read
3 what Barbados has said, so I will come back to that
4 tomorrow.

5 If I can deal very briefly with Barbados' case on the
6 extended continental shelf, where it was accepted by
7 Professor Reisman that Trinidad and Tobago's claim to an
8 extended continental shelf was indeed mentioned in the
9 course of the negotiations on maritime delimitation. He
10 said that through gritted teeth and said the mention was
11 not sufficient, or words to that effect, and just to
12 refresh your memory of what the joint report of the first
13 round in fact records, it is "Trinidad and Tobago is not
14 looking to stop at 200 nautical miles but to extend its
15 seabed jurisdiction up to the maximum limit of 350
16 nautical miles or 100 nautical miles from the 2,500 metre
17 isobath which is subject to approval by the Commission on
18 the Limits of the Continental Shelf." So we say that it
19 is as clear as day that that was what Trinidad and Tobago
20 were seeking, and it strikes us as rather curious now to
21 say that that is not a sufficient marker.

22 Of course the other key point on this which Professor
23 Greenwood alluded to earlier is simply that Trinidad and
24 Tobago is not restrained by having to meet the criteria of
25 Article 283. It is Barbados that has sought to seize this
26 Tribunal by Article 286, it is Barbados that has to meet
27 the requirements of Article 286 and Article 1 of Annex VII
28 of UNCLOS and of course of Article 283. So we say simply
29 no need for you to go into the history of our claim.

1 If I could test that submission supposing parties A
2 and B are negotiating under Articles 74 and 83 of UNCLOS
3 and at round two of the negotiations party A sets out its
4 claim, at round three of the negotiations party B puts
5 down its response to party A's claim but that is in
6 essence all it does, or maybe it outlines in broad
7 language where it is coming from so far as its own claim.

8 But it is addressing party A's claim at round three. At
9 the end of round three party A says it is not working, off
10 we go to Article 286 and we are off to arbitration now,
11 and that of course Barbados says is entirely open to party
12 A.

13 In those situations could it be said that party B's
14 case in the arbitration is constrained to find by what it
15 said during the first three rounds of negotiation? That
16 would make no sense at all. All it has done in the
17 negotiation is receive party A's claim, it has set down
18 its response on party A's claim. It has not yet had an
19 opportunity to develop its claim and yet here it is
20 suddenly in front of an arbitration Tribunal. In those
21 circumstances it would be bizarre indeed if party A could
22 then said Oh well, so far as concerns your claim Article
23 283 applies, and we have not had an exchange of views on
24 it, so the Tribunal does not have jurisdiction.

25 PROFESSOR LOWE: Could I ask a question just to make sure

26 I understand what the submission is. Take a different
27 examples where parties A and B are negotiating over a
28 territorial sea boundary, negotiations break down, party A
29 goes to a Tribunal. Can party B put in by way of its

1 response a claim to an EEZ boundary in addition to the
2 territorial sea claim, and what if any is the difference
3 between that situation and a situation where there has been
4 discussion over an EEZ boundary and a separate discussion
5 over extended continental shelf boundary?

6 MR WORDSWORTH: That is a difficult question without any
7 doubt, but I do not think it is one that we have to
8 respond to, because the negotiations in this case were
9 under Articles 74 and 83 of UNCLOS. So it is not a case
10 where there have been very confined negotiations under one
11 particular part of UNCLOS and where you can say whatever
12 was in the parties' minds was constrained by a particular
13 concept, i.e. negotiations in relation to the territorial
14 sea.

15 So far as concerns our case whatever was in the
16 parties' minds was at all times delimitation of both the
17 EEZ and the continental shelf, so we would say the
18 question does not really arise.

19 PROFESSOR LOWE: And that is evident in the record of the
20 meetings, is it? I cannot remember.

21 MR WORDSWORTH: That they are negotiations under Articles 74
22 and 83, yes, absolutely.

23 Mr President, with your permission that concludes my
24 remarks on jurisdiction. I know it is rather later in the
25 day than we would have hoped, but if I could ask you to
26 invite Professor Crawford to make his remarks so far as
27 concerns delimitation up to 200 miles.

28 THE PRESIDENT: Mr Wordsworth, I think Professor Orrego has a
29 question.

1 PROFESSOR ORREGO: Mr Wordsworth, if I might take you back to
2 tab 17 which is the draft fisheries agreement and go back
3 from the eastern sector to the western part, there are two
4 questions that I would like to ask in respect of annex 1
5 of that agreement which you have attached at the end,
6 which is the sketch showing different areas. The proposed
7 fishing area and the closed area. We are well aware of
8 course that that was put forth by Trinidad and Tobago only
9 for illustration and that there was no agreement and that
10 Barbados had another idea which was referred to, relevant
11 fishing areas and so on.

12 My first question is this. Was this a type of area
13 admitting beforehand that nothing was as precise as it
14 could be in a final agreement because this was just a
15 sketch, but was this a kind of area that Trinidad and
16 Tobago was prepared to consider in which there could be
17 fishing activities by Barbadian vessels of some sort?
18 That is one question.

19 The other one is that this is evidently confined to a
20 certain part of the map, but that further up there would
21 be in principle the equidistance line separating Barbados
22 from Barbados from Tobago which is not drawn. Would there
23 be any relationship between this graphic that was drawn
24 and the existence or non-existence of an equidistant line
25 in between the two islands, or was that entirely unrelated
26 in your view? Did you grasp that?

27 MR WORDSWORTH: I think I did grasp it, which is to say what
28 is the relationship, if any, between this proposed fishing
29 area and the equidistance line?

1 PROFESSOR ORREGO: Yes, from the point of view that one is
2 in the graphic and the other one is not. Does that mean
3 anything or nothing?

4 MR WORDSWORTH: I would have thought it meant nothing because
5 the date of this agreement is November 2003 when Barbados
6 had recoiled completely from its earlier statements that
7 there was a de facto median line between the parties so
8 far as concerned fishing, and I am thinking for example of
9 the passage that Professor Greenwood took you to earlier.
10 I think it would be quite surprising to see a median line
11 on this map as late as November 2003 because that would
12 have been inconsistent with Barbados' case as of November
13 2003, which was suddenly developing in a very unexpected
14 rush so far as we were concerned to all this in fact being
15 within Barbados' EEZ.

16 PROFESSOR ORREGO: Thank you; and on the first question,
17 I am not pressing you to answer anything now, because I
18 understand that you will come back to this tomorrow. Is
19 that correct; you may wish to consider that.

20 5.45

21 MR WORDSWORTH: I may wish to, but the genesis of the fishing
22 area as I understand it can be found in the second round
23 of negotiations on the fishing agreement, where paragraph
24 21 - I will just give you the reference and read out the
25 passage - Barbados tried to shift matters forward and said
26 "in response to Trinidad and Tobago's rejection of the use
27 of a Common Fisheries Zone approach and its assertion that
28 Barbados' fishing boats were habitually fishing areas
29 close to the territorial sea which were unquestionably

1 within the jurisdiction of the Trinidad and Tobago, the
2 Barbados delegation proposed that as a way forward the
3 Trinidad and Tobago side might wish to indicate an area
4 unquestionably within its national jurisdiction and in
5 which consideration could be given to granting access to
6 Barbadian boats and the specifics of access can be
7 negotiated. Barbados suggested that this area should be
8 just outside Trinidad and Tobago's territorial sea".

9 You can see that as late as March 2002, Barbados is
10 taking a position that, oh well, we do accept that large
11 swathes of this maritime territory in fact do
12 unquestionably fall within Trinidad and Tobago's EEZ, but
13 to enable us to make progress while we are fighting over
14 maritime boundaries and the like, let us see if we can
15 agree an area which is unquestionably within your EEZ so
16 that we can have access to that area. That was clearly
17 the thinking behind Barbados at this stage and along the
18 line that evidently results in the area that you can now
19 see in annex 1 to Barbados' draft of November 2003. I
20 think that before going final on that, I would like to
21 check that with my colleagues behind.

22 PROFESSOR ORREGO VICUNA: One just further clarification for
23 discussion, if I understood rightly this is an
24 illustration put forward by Trinidad and Tobago, in spite
25 the fact that the draft is a Barbados draft, because at
26 some point in the text in connection with Article 4, which
27 is the one that defines it, if I remember rightly ...

28 MR WORDSWORTH: I think that it is Article 2.

29 PROFESSOR ORREGO VICUNA: Article 2. There is reference to an

1 alternative TT at the top of page 6 and then says ...

2 MR WORDSWORTH: Professor, I quite see that.

3 PROFESSOR ORREGO VICUNA: That would be a reflection of the TT
4 suggestion.

5 MR WORDSWORTH: Yes.

6 PROFESSOR ORREGO VICUNA: Thank you.

7 THE PRESIDENT: Thank you so much, Mr Wordsworth. Do you wish
8 to begin in these remaining ten minutes, Professor
9 Crawford?

10 PROFESSOR CRAWFORD: Sir, a leading question has been defined as
11 a question to which the asker knows the answer. Sir, we
12 have had quite a lot of searching questions today and we
13 have had dumped on us 30 pages of response to which we
14 will want to respond tomorrow to remove the word "interim"
15 to the response, so that at the end of tomorrow pleadings
16 are over. The word "interim" gives us considerable
17 concern. We will respond to that, but, on the basis that
18 everything will then have been said. On that basis, I am
19 going to deal, if I may, very briefly, with the argument
20 for conduct and I will come back to what I may describe,
21 with respect to Mr Volterra, as the real arguments
22 tomorrow.

23 Mr President, members of the Tribunal, in this
24 presentation, now sub-divided and not merely divided, I am
25 going to deal with the issues concerning the Atlantic or
26 eastern sector raised by counsel for Barbados in their
27 Reply. The presentation is now in three halves. In the
28 first half, which is the first ten minutes, I am going to
29 deal with the conduct argument. Tomorrow I am going to

1 deal in my first part of tomorrow's presentation with the
2 question of delimitation within 200 nautical miles of the
3 coast of Trinidad and Tobago and then I will deal with the
4 question of declaration of the continental shelf beyond
5 200 nautical miles in the final part of that presentation.

6 I shall start with Barbados' argument on conduct
7 north of the equidistance line in the Atlantic sector
8 which is said to give rise to an estoppel. Professor
9 Greenwood has dealt with the law of estoppel. The crucial
10 point is that Barbados has been on notice for the best
11 part of 20 years that we have a claim to the outer edge of
12 the outer edge of the continental margin. I refer very
13 briefly to four documents. First is the amendment to our
14 continental shelf legislation of 1986, the Continental
15 Shelf Amendment Act of 1986, which is tab 19 in your
16 folders. It is absolutely explicit. It extends the
17 continental shelf of Trinidad and Tobago to the outer edge
18 of the continental margin using definitions drawn from the
19 1982 Convention. That is 1986. Of course, the Convention
20 was not then in force as between the parties. This was
21 simply a freestanding act of legislation by Trinidad and
22 Tobago, though of course based upon the language of the
23 1982 Convention. That is the first step. I should say
24 that Barbados does not have continental shelf legislation.

25 It does not need to have it. No one is suggesting any
26 adverse inference is to be drawn from that, but we do and
27 our legislation was clear.

28 The second document I took you through in the first
29 round. This was the third party note of 27 March 1992

1 which makes it clear. It was rather dismissed by counsel
2 for Barbados who said that it was rather general. Well,
3 it is categorical, you can read it, but you read it in the
4 context of the existing legislative definition.

5 The third was the unequivocal statement made in the
6 first round of the boundary talks to which Mr Wordsworth
7 has already referred.

8 The fourth was the third party note of 2001 to which
9 I also took you in the first round. Those four items -
10 there are others, but they will do - are internally
11 consistent and coherent and they go all the way back to
12 1986. That position was never abandoned.

13 In a situation where a party is on notice that
14 another party brings forward a claim in the context of a
15 maritime boundary delimitation, there is a strong
16 presumption against the abandonment. There is a strong
17 presumption that miscellaneous items of conduct at inter-
18 Governmental level - at some intermediate level,
19 arrangements about seismic searches and so on - do not
20 amount to an abandonment of a position taken at the
21 highest level of government through the third party note
22 from the Ministry of Foreign Affairs and so on.

23 It is against that background that the extremely
24 unpromising argument against estoppel has to be put
25 forward.

26 Mr Volterra complained that I did not deal in the
27 first round with the various items of conduct that he
28 relied on. In fact, I did, but I did it briefly because I
29 did not think they were worth - if I may say so with great

1 respect - a row of beans in the light of the test laid
2 down by Cameroon and Nigeria which Mr Volterra dismissed
3 in a line. That test is so stringent, the Cameroon and
4 Nigeria test, that nothing of this sort could possibly
5 meet it. The evidence in Cameroon and Nigeria was
6 infinitely stronger than it is here and it still was not
7 enough.

8 The Tribunal may be interested in the discussion of
9 the question of conduct which is made by the arbitral
10 tribunal in the Nova Scotia/Newfoundland case, which was
11 before Cameroon and Nigeria and which took as its basic
12 text the positions taken by the court in the Libya-Malta
13 case and still, of course, dismissed the argument on
14 conduct. You will be able to see, if you read that award,
15 that the conduct on which the parties relied in that case
16 was somewhat more extensive than the conduct on which
17 Barbados relies here. I will leave you to make that
18 assessment for yourself. It still was not enough. And
19 that is on a more flexible and more open test for the
20 effective conduct than anything that could survive what
21 the court said in Cameroon-Nigeria.

22 That having been said, at six minutes to six, let me
23 deal with the five issues of conduct. Oil licensing.
24 There was no specific licensing of the area which is
25 claimed by Trinidad and Tobago. There was a general
26 licence, the 1978 concession, but it covered the whole
27 region and was unspecific. Mr Volterra said (I quote day
28 5, page 25, line 23) "Oil companies in the region,
29 including oil concessionaires of Trinidad and Tobago, have

1 recognised Barbados' jurisdiction in the area". Mr
2 President, members of the Tribunal, it is not for oil
3 companies to recognise the sovereign jurisdiction of other
4 states. They are subject to the sovereign jurisdiction of
5 other states. Recognition is an inter-state process, not
6 a process carried out by oil companies. There were
7 reports in the press in the Cameroon-Nigeria case of
8 arbitrations between oil companies. Whether or they
9 happened we do not know, but they would have been
10 irrelevant if they did. We are dealing with sovereign
11 rights. We are not dealing with corporate rights.

12 As you can see from the Conoco letter, which I am
13 afraid I have lost in the array of paper here, there was
14 in fact no wells drilled at relevant times in the area
15 claimed by Trinidad and Tobago.

16 Let me take you to the seismic map produced by
17 Barbados. Now, you can see up in the north west area,
18 that is what I call seismic. That is seismic. That is
19 systematic seismic shooting on a grid basis. Compare that
20 with the area below our claim line. Those are sporadic
21 lines not part of any systematic programme. Lines in the
22 sea transient - and I am sure that there are both 18th and
23 17th century poems about transient lines in the sea. I
24 was not quoting the Aegean Sea case, which of course was
25 on a somewhat different issue, for anything more than the
26 quite simple proposition that seismic explorations come
27 and go. That is not a systematic seismic programme. It
28 is nothing about which we should have protested.
29 Trawling. As in Jan Mayen, boats can come and go. We are

1 not dealing with land sovereignty. We are not dealing
2 with effectivités along inhabited frontiers. We are
3 dealing with maritime delimitation in the context in which
4 claims are being put forward. If this Tribunal is to move
5 the law of maritime delimitation towards the situation in
6 which every time someone does something on one side of a
7 marine boundary someone else has to protest, there are
8 going to be extreme difficulties. There are many
9 situations in the world in which claims are opposed and
10 unresolved. The thought that, once the claim is on the
11 table nonetheless everyone has to continue to protest,
12 continue to obstruct, continue to watch out, would be a
13 most counterproductive precedent that I am sure you are
14 not contemplating.

15 Full co-operation in the Zone of Co-operation. We
16 had the wonderful sight on Tuesday of Mr Volterra having
17 made so much of the Zone of Co-operation having to refer
18 back to find out if anything had been done. We have
19 raised that question on several occasions, in fact I have
20 raised it at each stage of our pleadings, and we got no
21 reply. When Mr Volterra was asked point blank by a member
22 of the Tribunal, he had to go back to base. He said " ...
23 the requirement, for example, in relation to the Co-
24 operation Zone Treaty, to do due diligence" - a splendid
25 phrase - "and confer with the Ministry back in
26 Bridgetown". He had to confer with the Ministry back in
27 Bridgetown. Now we have a reply on bits of paper. There
28 are meetings that had to be postponed. You might say, to
29 paraphrase St Augustine, "Lord give me effectivités but

1 not yet". In any event, to talk about the conservation of
2 the marine resources of this tiny speck in the middle of
3 the globe - which I have to say even for a sailor as
4 accomplished as Mr Paulsson - if it could even be located,
5 is quite bizarre. So let us not talk more about the Zone
6 of Co-operation.

7 Then we have the preparation for the Annex II
8 Commission. Mr Volterra has complained. I thought I was
9 going to be struck off by the Tribunal. I am grateful to
10 Professor Greenwood for his defence. I am waiting for his
11 fee note with perhaps as much trepidation.

12 I have to say, Mr President, whether a state
13 contemplates making an application which it is entitled to
14 make under a treaty to an international body is a matter
15 of which that state has notice, and I do not apologise for
16 telling you that we have that intention. We have not
17 provided you with a desk-top study any more than they
18 have. The only desk-top study you have got is one that was
19 put in late, the Parsons report, which relates to the
20 continental shelf of a third state. That is the only
21 information you have got. I will come back to this
22 question tomorrow when I am dealing with the substance of
23 the outer continental shelf. But that is the situation.

24 6 pm

25 In any event, the preparation of a claim to the Annex
26 II Commission is not an effectivité. As I showed you in
27 the first round, the Annex II Commission has no competence
28 over lateral boundaries. This was not challenged by
29 Barbados. No one denies that Barbados will be in a

1 position to claim an outer continental shelf. It has
2 always been accepted and the fact that it is making tracks
3 - it does not seem to be making much by way of tracks of a
4 substantive character which you have to make for an outer
5 continental shelf argument, but I will let that remark
6 pass. No inference of abandonment of claims is to be
7 drawn.

8 I refer you again to what the court said in Cameroon-
9 Nigeria to which Mr Volterra devoted one sentence.

10 "Conduct is irrelevant in maritime delimitation unless it
11 amounts to an agreement express or implied. In the
12 context where a state has put forward categorically for 20
13 years a claim to an outer Continental Shelf no agreement
14 can be implied"

15 6.00

16 As the Tribunal in the Newfoundland/Nova Scotia case
17 said, you do not improve a bad argument about agreement by
18 converting it into an argument about estoppel. Actually
19 those of us who understand the law of estoppel think it
20 made matters worse. Mr President, I will stop there.

21 THE PRESIDENT; Thank you so much, Professor Crawford. It is
22 now 6 o'clock. We will adjourn till tomorrow morning at
23 10.

24 MR VOLTERRA: Mr President, if I may, before you move to
25 rise. Barbados feels that it must respond to the remarks
26 of Professor Greenwood at the outset of his address after
27 the coffee break, with the permission of the Tribunal.

28 These remarks will be very brief.

29 THE PRESIDENT: Please proceed.

1 MR VOLTERRA: Thank you. This is in relation to Professor
2 Greenwood's comments about Barbados' response to Professor
3 Lowe's question. And may I start my remarks with the
4 observation that Professor Greenwood's comments about that
5 are as untenable as his earlier attempts to excuse
6 Trinidad and Tobago's improper pleading from last week.
7 Good counsel that he is, he took the opportunity of
8 defending Professor Crawford to repeat all of the
9 assertions that were made by Professor Crawford. But they
10 became neither more proper nor should the Tribunal pay any
11 more attention to them merely by their indirect
12 repetition.

13 I have three observations to make about Professor
14 Greenwood's response to Barbados' answers to Professor
15 Lowe's question. The first is that, of course, Barbados
16 was asked some dozen questions by the Tribunal and we
17 welcomed them and we welcome any more that the Tribunal
18 has for us. The Tribunal is of course aware of the
19 calendar of the hearing, the order of pleading and the
20 timing of the questions and the timing of our response,
21 and I do not feel that I need to go into that
22 particularly.

23 But the suggestion that Barbados has been lax somehow
24 in its efforts to respond in terms of timing cannot be
25 seriously made. By way of comparison, Trinidad and Tobago
26 was left at the end of round 1 with one question from the
27 Tribunal and it took three nights and two and a half days
28 before it gave its answer to Barbados on the afternoon on
29 Monday, as Barbados began its second round. Barbados

1 makes no complaint as to that timing.

2 Second, in relation to the remarks about the
3 reference in the answer to it being interim, the Tribunal
4 will of course recall that Professor Lowe asked for a
5 review of all the case law and a note about it. The
6 Tribunal will of course be aware that this was in the
7 midst of our pleadings. We did what we could with the
8 available time and resources that we have and we tried to
9 give a serious, reflective answer to a very serious
10 question and deservedly so. But it is not a comprehensive
11 view, as the answer explains, and it is not a
12 comprehensive view as was requested. Barbados recognises
13 that there is still work to do and in the note suggests
14 that if the Tribunal still wants a further comment from
15 Barbados that we are prepared, within a reasonable period
16 of time, to do so to the extent that it feels that we have
17 not answered the question fully. We did not want the
18 Tribunal to think that we were telling them that this was
19 something which was a full response. We wanted to give a
20 answer to Trinidad and Tobago in time for Trinidad and
21 Tobago to make a response. So we are in the Tribunal's
22 hands and undoubtedly it will give directions to the
23 parties on this point.

24 Thirdly and finally, Mr President, in relation to the
25 outrage that has been expressed by all three counsel for
26 Trinidad and Tobago today about the timing of the
27 response, I would only direct the Tribunal (I am afraid
28 you do not have it in front of you) to the relevant
29 transcript from day 6 of the hearing. I will read the

1 references into the record, but this is the uncorrected
2 version I think so there might be some variation. At page
3 31, Professor Crawford notes exactly what I have just
4 described in terms of Trinidad and Tobago's timing for its
5 response. He says "When we were asked a question by
6 Professor Orrego Vicuna we took some trouble to ensure
7 that the answer to that question was provided in writing
8 on the first day of Barbados' reply", and so they did just
9 as we have done in relation to Professor Lowe's questions.

10 He then goes on to say, at the bottom of page 31 top
11 of page 32 "but we would have grave concern if those
12 replies", and he is talking about the replies of Barbados,
13 "were provided later than Thursday". That is of course
14 today. Professor Crawford then states definitely at what
15 I have as line 8 of page 32 "Sir, the questions were asked
16 yesterday. Yesterday is Monday and we are asking for
17 replies on Thursday. Close of business on Thursday will
18 be enough." Therefore, Mr President, Barbados apologises
19 for having submitted the questions some three hours
20 earlier than the close of business on Thursday.

21 Thank you, Mr President.

22 THE PRESIDENT: Thank you, Mr Volterra. Professor Crawford.

23 PROFESSOR CRAWFORD: Mr President, can I take it that it

24 is then understood that the word interim was interim in
25 relation to a potential order from the Tribunal? We want
26 to reach a situation in which these pleadings are closed
27 by the end of business tomorrow. If of course the
28 Tribunal, having reviewed, we will respond to the 31 pages
29 or whatever it is tomorrow, and those responses of course

1 will not be in writing but in the course of our oral
2 submissions, and if necessary we will make a special short
3 presentation.

4 Our concern is to ensure that the situation after the
5 end of tomorrow is that if the Tribunal would like further
6 information or argument from either of us the Tribunal is
7 at liberty to ask for it, but in the absence of a request
8 we remain silent and await your eventual award.

9 THE PRESIDENT: Thank you so much. We will resume tomorrow
10 morning at 10 o'clock. Thank you very much for your
11 arguments today.

12 **(Adjourned till tomorrow morning at 10 o'clock)**

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