PERMANENT COURT OF ARBITRATION

ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

In the Matter of Arbitration Between:	:	
REPUBLIC OF GUYANA,	:	
Claimant,	:	Case No. 2004-4
and	:	PCA Reference GU-SU
REPUBLIC OF SURINAME,	:	
Respondent.	:	
	x	Volume 7

Friday, December 15, 2006

Organization of American States
17th Street and Constitution Avenue, N.W.
Guerrero Conference Room, Second Floor
Washington, D.C.

The hearing in the above-entitled matter convened at 9:30 a.m. before:

H.E. JUDGE L. qDOLLIVER M. NELSON, President

PROF. THOMAS M. FRANCK, Arbitrator

DR. KAMAL HOSSAIN, Arbitrator

PROF. IVAN SHEARER, Arbitrator

PROF. HANS SMIT, Arbitrator

Permanent Court of Arbitration:

MR. BROOKS W. DALY, Registrar
MR. DANE RATLIFF

Tribunal Hydrographer:

MR. DAVID GRAY

Court Reporter:

MR. DAVID A. KASDAN, RDR-CRR
Worldwide Reporting, L.L.P.
529 14th Street, S.E.
Washington, D.C. 20003
(202) 544-1903
worldwide.reporting@verizon.net

APPEARANCES:

On behalf of the Claimant:

HON. S.R. INSANALLY, O.R., C.C.H., M.P.,
Minister of Foreign Affairs

HON. DOODNAUTH SINGH, S.C., M.P.,
Attorney General and Minister of Legal Affairs

AMBASSADOR ELISABETH HARPER,
Director General of the Ministry of Foreign Affairs

MR. KEITH GEORGE,
Head, Frontiers Division, Ministry of Foreign Affairs

AMBASSADOR BAYNEY KARRAN,
Ambassador of Guyana to the United States

MS. DEBORAH YAW,
First Secretary, Embassy of Guyana to the United States of America

MR. FORBES JULY,
Second Secretary, Embassy of Guyana to the United States

SIR SHRIDATH RAMPHAL, S.C.,
Co-Agent for Guyana

MR. PAUL S. REICHLER,
Co-Agent for Guyana; Attorney, Foley Hoag, L.L.P.

MR. PAYAM AKHAVAN,
Co-Agent for Guyana; Associate Professor, Faculty of Law, McGill University

MR. PHILIPPE SANDS, Q.C.,
Professor of Law, University College London; Barrister, Matrix Chambers

MR. NICO SCHRIJVER,
Professor of Public International Law, University of Leiden

APPEARANCES: (Continued)

On behalf of the Claimant:

MR. GALO CARRERA,
Scientific/Technical Expert, Advisor to the Government of Guyana

MR. LAWRENCE MARTIN
MR. ANDREW LOEWENSTEIN
MS. SARAH ALTSCHULLER
MS. NIENKE GROSSMAN
MS. CLARA BRILLEMBOURG
Foley Hoag, L.L.P.
1875 K Street, N.W.
Suite 800
Washington, D.C. 20006-1238
(202) 223-1200
saltschuller@foleyhoag.com

MS. BLINNE NI GHRALAIGH,
Barrister, Matrix Chambers

MR. SCOTT EDMONDS,
International Mapping Associates

MR. THOMAS FROGH,
International Mapping Associates

APPEARANCES:

On behalf of the Republic of Suriname:

HON. LYGIA L. I. KRAAG-KETELDIJK,
Minister of Foreign Affairs and Agent

MR. CAPRINO ALLENDY,
Deputy Speaker of the Parliament

MR. HENRY ILLES,
Ambassador of Suriname

MR. WINSTON JESSURUN,
Member of Parliament

MS. JENNIFER PINAS,
Ministry of Foreign Affairs

MR. KRISH NANDOE,
Ministry of Justice and Police

MR. HANS LIM A PO,
Co-Agent

MR. PAUL C. SAUNDERS,
Co-Agent, Counsel and Advocate

PROFESSOR CHRISTOPHER J. GREENWOOD, CMG, QC,
Counsel and Advocate

MR. STEPHEN S. MADSEN
MS. MICHELLE K. PARIKH
Cravath, Swaine & Moore, L.L.P.
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
smadsen@cravath.com

MR. DAVID A. COLSON
MR. BRIAN J. VOHRER
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 986-8089
dacolson@llgm.com

APPEARANCES: (Continued)

On behalf of the Republic of Suriname:

PROFESSOR SEAN D. MURPHY,
Counsel and Advocate

PROFESSOR BERNARD H. OXMAN,
Counsel and Advocate

PROFESSOR DONALD M. McRAE,
Counsel and Advocate

PROFESSOR ALFRED H.A. SOONS,
Counsel and Advocate

DR. ALEX OUDE ELFERINK,
Counsel and Advocate

MR. COALTER LATHROP,
Cartography Consultant

MR. DAVID SWANSON,
Cartography Consultant

MS. REBECCA R. SILBER,
Law Clerk, Cravath, Swaine & Moore, L.L.P.

C O N T E N T S

P R O C E E D I N G S

PRESIDENT NELSON: Good morning. And I see Mr. David Colson before us. I give the floor to Mr. Colson.

CONTINUED OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MR. COLSON: Thank you very much, Mr. President and Members of the Tribunal. It is a great honor for me to be here today and to appear before this Tribunal on behalf of the Republic of Suriname.

Just two housekeeping matters before I begin. As it is clear, I'm not Professor McRae, and I just wanted to be clear. He will resume his presentation tomorrow morning that was interrupted yesterday afternoon, and he will be our first speaker tomorrow morning.

And then also, as is normally the case, there is a book in front of you. It has copies of all of the slides that you will see today, plus the documents that are related to those slides. I don't really intend to call your attention to the various tabs. They're there for your reference. There are two or three documents, though, that will not be shown in slides, and I will be making a specific call to those tabs throughout the presentation, in case you would care to turn to those tabs.

My task today is to address the subject of the conduct of the parties, the conduct of the parties insofar as it relates to the boundary beyond the territorial sea. We have

09:33:08 heard about the conduct of the parties in respect of the territorial sea yesterday, and today my task is to talk about the conduct of the parties relating to the delimitation of the continental shelf and the exclusive economic zone beyond the territorial sea.

Now, the Tribunal will appreciate that over the course of the pleadings in this case, we have been treated to a collection of propositions by Guyana insofar as conduct is concerned. Guyana, in its Memorial, took the view that there was an agreement between the parties on the 34-degree line; and, in fact, it also used the term modus vivendi in several places in the Memorial to describe the relationship between the parties in respect of the 34-degree line.

In its Reply, it softened its position and began to explain that it was really talking more about an indicia; that if the Tribunal looked, it would find that in the conduct of the parties there was an indicator of what the parties might have deemed to be equitable and to have acted upon as such, the words that the Court used in the Tunisia-Libya case.

Now, in the oral proceedings last week, we heard a slightly different twist on this. The indicia argument was maintained, but we also heard that perhaps special circumstances existed in this case, special circumstances that would call for the Tribunal to adjust a provisional equidistance line by virtue of the conduct of the parties to

09:35:11 the 34-degree line; and then we also heard what I think is a new argument, in maritime boundary cases at least, that there was an admission against interest in respect of Suriname and in Suriname's conduct in this matter.

Now, each one of these formulations, each one of these propositions, is different in legal terms, and Guyana has made no effort to describe those differences, nor to connect those legal relationships to specific facts that have existed in the relationship between the parties over the last 40 or 50 years.

Now, I don't intend to quibble or spend any time on that because at the end of the day, it seems that what Guyana really wants the Tribunal to do, however the Tribunal might do it, is to find that Suriname, by its conduct, for approximately 50 years--and here is a quote from the transcript--"that for 50 years, Suriname has been respectful of Commander Kennedy's historical equidistance line." You can find that on page 99 of the transcript of the 9th of December. And on that basis, if that is true, of course, Guyana wants the Tribunal to find that the 34-degree line is the right and proper boundary in this case.

In other words, Guyana wishes the Tribunal to find that Suriname, its government and its people, have all along thought and acted as if Guyana's position was the right position.

Now, my task this morning is simply to demonstrate

09:37:16 that that's not true. I don't bear the burden of trying to prove to you that Guyana has accepted Suriname's position. Suriname makes no such claim. We simply assert and believe it to be true that there has been a dispute between the parties for more than 40 years about this maritime boundary problem and that the conduct of the parties simply reflects that dispute.

Now, Suriname addressed the conduct of the parties in its Counter-Memorial and in its Rejoinder, in its Counter-Memorial at paragraphs 4.37 to 4.41, and 5.1 to 5.89; in the Rejoinder at paragraphs 3.81 to 3.157. And Professor Oxman yesterday reiterated and elaborated on that presentation making clear how this matter has been treated in the cases and how it should be treated in a case that is conducted under the Law of the Sea Convention.

Based on the applicable law, Suriname's view is that the facts of conduct in this case do not--do not--demonstrate the location of an agreed boundary. They do not reflect a modus vivendi. They do not indicate line or lines that the parties have deemed to be equitable and have acted upon as such. They do not constitute a special circumstance, and that there is no basis for saying that Suriname's conduct--anywhere that we find in the record before us that Suriname's conduct constitutes an admission against Suriname's interest. If there is an admission against interest in this case or perhaps more accurately an admission against the arguments of counsel, it is

09:39:43 that Guyana's conduct acknowledges that the maritime boundary has been a matter of dispute for 40 years.

Now, in considering how to approach this subject, it seems useful to begin by addressing the case law in some detail. The cases have received short shrift in Guyana's pleadings. To be sure, there have been many citations and there have been many quotations, but virtually no investigation into the nature of the conduct that was before the Court that led to various passages in various judgments. Last week Professor Schrijver made reference in his presentation by citing to paragraphs in the judgments of Tunisia-Libya, Libya-Malta, Jan Mayen, and even Cameroon and Nigeria. He even brought up the Temple case, but in no case, no situation was there any effort to look at the conduct in those cases against what the Court might have said in those cases.

And it seems appropriate to investigate those judgments, including those paragraphs that were cited more thoroughly beyond just a passing reference, and to at least look at one more case, the now infamous Gulf of Maine case, in which conduct, of course, played a substantial role in the arguments of the parties in that case.

Now, after I do that, which will probably take about an hour, I would propose to set out clearly and simply the facts that are in the record before the Tribunal. I would try to do this chronologically. I'm not going to say the

09:41:52 diplomatic facts are in one basket, the fisheries facts are in a different basket, and the oil facts are in another basket. It seems to us that if you go through the facts that are in the record chronologically, you will get--the Tribunal will get--a good picture of what was going on in the diplomatic relationships between the parties throughout the course of this dispute. And before I close, I hope to say just a word or two about conduct as it may pertain to third states.

Now, before turning to the treatment of conduct in the cases, it might be useful just to remind us for a moment about the two core elements of Guyana's factual conduct argument. The first is based in the 1958 proposal that the Netherlands made to the United Kingdom that the continental shelf boundary should be based on Article 6(2) of the Continental Shelf Convention. Now, there is no doubt that that proposal was made, but in Suriname's view, Guyana takes its argument too far in suggesting that it was understood that this meant that Suriname was prepared to accept a strict equidistance line in 1958. And Guyana tries to take this even further by trying to keep this proposal alive and well, at least for eight years up to the time of the Marlborough House Talks, disregarding substantial conduct and substantial diplomacy and substantial proposals that are in the record between the time of the '58 proposal and the time of the Marlborough House Talks.

The second element of Guyana's factual argument

09:44:05 concerning the conduct of the parties relates to the oil practice in the disputed area. Now, Guyana tries to make much of the fact that numerically, Guyana has issued more concessions that have some limits that overlap into the disputed area than Suriname has issued. Guyana also tries to make much out of the fact that there was one well drilled 30 years ago, an exploratory well, in the disputed area. And it also takes note of the fact that there was more seismic research done under Guyana's licenses that pertain to the disputed area than others under Suriname's concessions, and we don't contest that fact, and we don't contest the fact that there was one well drilled under Guyana's license.

Now, we will come back to this as we go through it, the summary of conduct, but those are the two baskets. You have a 1958 proposal that was made by the Netherlands, and you have some oil conduct that pertains to the disputed area, and that is the sole--that's the sum of the argument that you have before you from Guyana: That out of this the Tribunal should find that the 34-degree line is the equitable boundary in this case.

Now, I take it ultimately that the position of Guyana is that out of this conduct there is an "indicia," the word that was used by the Court in Tunisia-Libya, and we might begin by asking ourselves, what does that really mean? Now, it's a common view, I believe, that modus vivendi is a provisional

09:46:19 arrangement upon which the parties have relied, and at a minimum it would seem that a modus vivendi requires a structure and requires some long-standing practice.

Now, presumably, an indicia or an indicator is something less. It is perhaps only a signpost, a signpost that points in a particular direction, and it may perhaps point toward a modus vivendi or something else. As we know, in and of themselves, signposts aren't the answer. Signposts only help us if they point in the right way. Signposts, if they are misplaced or misunderstood, do not give us the answer to the question of the direction in which we are to follow.

Now, this is the way the Court used the term in Tunisia-Libya. The Court used the term with reference to the fact that there were abutting limits of oil concessions in Libya-Tunisia, in the near shore part of the disputed area in that case, which had been in place for eight years, that abutting practice of the two powers pointed toward a modus vivendi that had been in place between the colonial powers since 1913, and that modus vivendi used a perpendicular to the general direction of the coast as a way of dividing fisheries enforcement activities by the two colonial powers.

Now, in the Counter-Memorial of Suriname, this case, the Tunisia-Libya case, was reviewed in some detail. The facts were reviewed in some detail, and the Court's analysis was reviewed in some detail, and Guyana has not taken issue with

09:48:41 1 that presentation. But, given Guyana's continuing reliance on
2 that case and the indicia formula, if you will, it seems to us
3 that it would be useful to revisit the Tunisia-Libya facts once
4 again that gave rise to this word or this formula "indicia."
5 Now, the case was brought to the Court by a special
6 agreement in 1977, and in the preceding months, specifically
7 from early 1976 onward, there were several serious incidents
8 between Libya and Tunisia involving the naval units of both
9 countries trying to either disrupt or to support drilling
10 operations or seismic operations, and tensions had mounted to a
11 crisis level.
12 Now, the most famous of those incidents were the
13 SCARABEO IV and the J.W. BATES incidents which occurred in the
14 middle of 1976. The SCARABEO IV was a drill ship that was
15 operating under Libyan authorization, and it was owned by an
16 Italian company, and the Tunisian Navy ran off the SCARABEO IV,
17 and the Italian Navy--or it tried to run off the SCARABEO IV,
18 and the Italian Navy showed up to protect the Italian lives on
19 that drill ship.
20 The SCARABEO IV withdrew, but then the Libyan
21 authorities enlisted another drill ship. Please note the name.
22 It was the J.W. BATES. And it was to resume drilling
23 operations. And then both Navies, both the Libyan and Tunisian
24 Navies, showed up.
25 Now, we had a focus from Guyana's counsel on the

09:50:59 affidavits of persons that were aboard the CGX drill ship, and it was pointed out to us that those persons had never before for 40 years heard of anything like what might have happened in the CGX operation to try to ask a drill ship to leave a disputed area.

Now, that person on that drill ship who gave that affidavit clearly had not read the Tunisia-Libya case, nor had they read the history of that company's own operations because, as that affidavit shows, that oil rig supervisor was an employee of Reading and Bates, a U.S. company that does this kind of thing all over the world.

Now, fortunately within months of these standoffs, the two countries agreed to take the boundary dispute to the Court. Now, Libya pled that the boundary ought to follow the meridian, the due north line from the land boundary terminus, and Tunisia pled that the boundary ought to run at a 45-degree angle, it would get out to the 50-meter isobath on that 45-degree angle and thereafter would follow something called the sheaf of lines.

Now, we are putting on the screen map two from the Court's judgment. Now, we have added for your information two dots. One of those dots locates where the SCARABEO IV and the J.W. BATES incidents occurred, and the red dot on the screen identifies a point at 33 degrees north, or 33, 55' north, 12 degrees east, that played a substantial role in the way that

09:53:16 the Court went about constructing its decision.

Now, concerning the oil--and let me just point out here, you can see the Libyan position which is the due north position coming off of the land boundary terminus turning to give effect to the Kerkennah Islands, and then the Tunisian position which is running off to the northeast.

Now, we will put on the screen a second map, and this is a map that has been extracted from the Libyan Memorial, and I would just like to call your attention to the red dot. The red dot is in the same place as it was in the previous pleading or previous slide, and it simply identifies that that was the northernmost extent of where the two concessions abutted. Now, the map depicts these two concessions, and there is at least one error on the map that is in the Libyan pleading because it identifies the Tunisian concession as beginning in 1967. Actually, that concession was issued in October of '66, and it is shown in a purple color here, and Libya came in two years later and issued its concession, and that was the one on the right of the screen in green hash marks, and there aligned, as we can see, only so far as that red dot.

Now, one of the key things in understanding the judgment is that that line did not correspond to the position of either state before the Court, and it should be noted--and you can find this in Tab 3 of your folder--that the Libyan agent during the oral hearings told the Court that it had been

09:55:27 Libya's intent to align its concessions with those of Tunisia in order to avoid a dispute. Now, why did Libya do that? Indeed, why did Tunisia do that? Because the concession limits here don't correspond to the formal position of either state.

Now, I can't answer that. It would be speculative. Nobody really knows why those governments, some, now 30 years ago, did this, but each one of them granted concessions that didn't correspond to their formal positions, and the only speculative answer one can give is that it was the same oil company that was operating on both sides, and oil was being discovered on both sides, and therefore the parties were intent upon ensuring that they would receive the benefits from that oil and gas operation. That's speculative.

Now, it might be useful in looking at this map for just a further moment that we can see that the oil concession conduct stops at that red mark, red dot, but if you read the judgment further, read the judgment, you will find that at paragraph 124 of the judgment when the Court starts talking about the first segment of its line being the line that is perpendicular to the general direction of the coast and a line that is rooted in the colonial modus vivendi, it extends that line north of that red dot. It extended it about 15 miles further north. It extended it to the latitude of 34 degrees 10'30" north, which was the westernmost point of the Gulf of Gabes, which you aren't able to see on this map, but you can

09:57:38 see that that line would extend well north of the line of latitude that is marked there on that map.

So, it's hard to escape the conclusion that the first segment of that boundary in Tunisia-Libya, the one that the word "indicia" is always used in connection with, it's hard to escape the conclusion that the first segment of the boundary is the line based in the geographical circumstances, it was perpendicular to the general direction of the coast, and both inshore, where it was perpendicular, and offshore, where it reflected an adjustment, an angle bisector adjustment, if you will, for the presence of the Kerkennah Islands, and it reflected a modus vivendi that had been in place since 1913 between France and Italy as the colonial powers.

Now, in analyzing the case and in considering just what the Court was talking about when it was using this term "indicia," which is used only once in the judgment at paragraph 118, it's useful to take account of the structure of the judgment, the way the Court's judgment is structured as how it builds up to that word. And in your book at Tab 4 we have included paragraphs 86 to 120 of the Court's judgment. And it is here that the Court is addressing the interrelationship of the perpendicular line, the modus vivendi line, and this abutting oil concession practice. And obviously I'm not going to read all of this, but we thought that it would be useful for you to see the totality of this discussion and to have it

09:59:38 1 available to you.
2 Now, at paragraph 86, the Court--this is at Tab 4, if
3 you wish to follow this. At paragraph 86 the Court begins its
4 discussion by saying that there are three basic lines in this
5 case, and it then says that there is the Tunisian 45-degree
6 line, and then it says there is the Libyan northward line, and
7 then it refers to the third line, and it says the Court
8 referred to the third line by saying Ras Ajdir, which is the
9 land boundary terminus, "is also the point of departure of the
10 line perpendicular to the coast proposed by Italy in 1914, and
11 of the line of 26 degrees northeast which had been followed by
12 the two parties in the granting of concessions for the
13 exploration and exploitation of mineral resources during the
14 period 1964 to 1972."
15 From paragraphs 87 to 92, the Court proceeds to assess
16 these three lines. It finds that the Tunisian line and the
17 Libyan line are without merit because the Court refers to them
18 as unilateral acts, and it finds as well that such arguments as
19 had been made in that case to the effect that one party or the
20 other had agreed with the other party's positions, that those
21 arguments were also unsupportable. That's the discussion that
22 you find at paragraphs 87 to 92.
23 Then we come to paragraph 93, and it begins with the
24 words on the screen: "In the view of the Court, a line which
25 does have a bearing on the questions with which it is concerned

10:01:59 1 is the third line mentioned in paragraph 86 above, the line
2 designed to be normal or perpendicular to that section of the
3 coast where the land frontier begins."
4 The Court proceeds in the remainder of that paragraph
5 and on through paragraphs 94 and 95 to address the point that,
6 in fact, there appeared to the Court to be a tacit modus
7 vivendi between France and Italy starting in 1913 to recognize
8 the perpendicular to the general direction of the coast as a
9 line to be used for the enforcement of fisheries regulations.
10 We then come to paragraph 96. And this paragraph,
11 which begins, "Lastly, in this connection," and we have the
12 words of the whole paragraph on the screen, but I want to note
13 the words that are highlighted. It says, "This line of
14 adjoining concessions which was tacitly respected for a number
15 of years, and which approximately corresponds furthermore to
16 the line perpendicular to the coast at the frontier point which
17 had in the past been observed as a de facto maritime limit,
18 does appear to the Court to constitute a circumstance of great
19 relevance for the delimitation."
20 The Court is saying it would appear that a line that
21 shares all of these characteristics is a line that constitutes
22 a circumstance of great relevance for the choice of
23 delimitation method.
24 At paragraph 113 in its discussion, for now we are
25 discussing delimitation method, the Court says that "the

10:04:22 1 methods proposed by the parties give insufficient weight to one
2 circumstance," and then it says, "The Court will therefore
3 indicate what this circumstance is, and how it serves, with the
4 support of other circumstances which the parties themselves
5 have taken into account to produce an equitable delimitation."
6 Then we come to 117. We are getting close to the
7 indicia paragraph at 118. At paragraph 117, the Court says,
8 "The circumstance alluded to in paragraph 113 which the Court
9 finds to be highly relevant to the determination of the method
10 of delimitation is a circumstance related to the conduct of the
11 parties." The Court then goes on to note the oil concession
12 conduct; and it is then in the following paragraph, 118, that
13 the Court says, "It is evident that the Court must take into
14 account whatever indicia are available of the line or lines
15 which the parties themselves may have considered equitable or
16 acted upon as such."
17 The Court then goes on to say that the oil conduct
18 line was consistent with the colonial modus vivendi. That is
19 the discussion in 119. And then at 120, the Court comes back
20 again to the point that the line is perpendicular to the
21 general direction of the coast. Thus, the Court found that the
22 positions of both parties were without merit, and it adopted
23 the third line that the Court had found to be present in the
24 case. That third line, in the main, was a compromise line
25 between the claims of the two parties, and that line reflected

10:06:50 basic facts. One was the geographical circumstances of the case; a second was the historical practice of the colonial powers dating back to 1913 of a modus vivendi, something that had lived for 40 years and had been acted upon by both France and Italy, where they had tacitly but jointly applied a perpendicular to the general direction of the coast for fisheries enforcement purposes. Their conduct was unequivocal, and both colonial powers had relied upon it.

And then there was the third fact, and that was in the near shore part of the delimitation area. There had been a deliberate effort by both countries to avoid overlapping concessions which had gone on for eight years until shortly before the dispute had emerged and which amounted to the compromise line between their respective positions.

Now, states that attempt to make conduct-based arguments, such as Guyana tries to make in this case, focus in on that eight-year alignment of oil concessions and maintain that that was the driving force in the Court's decision. However, we believe that a thorough assessment of the judgment makes abundantly clear the reverse. An equitable boundary was demonstrated by the geographical circumstances by the perpendicular to the general direction of the coast, and that same perpendicular had served the colonial powers well for more than 40 years as a modus vivendi for fisheries enforcement purposes.

10:09:05 And the oil concession alignment, to be sure, pointed--it was an indicator--to that line that had been used by the colonial powers, and it gave some refinement to that line. It gave some precision to that line, but it was in all events a perpendicular to the coast.

Now, you do not need to take my word for this. The Tribunal will recall that after the 1982 judgment, Tunisia requested revision and interpretation of the judgment under Articles 60 and 61 of the Court's Statute. Tunisia's revision argument was based on certain technical facts associated with the limits of these aligned oil concessions, and under Article 61 of the Court Statute, these new facts to be admissible had to amount to a decisive factor in the Court's judgment. Tunisia argued that the entire decision of the Court was based upon the concession alignment.

Now, the Court gave its answer, and we are showing that now on the screen, and this full paragraph is, I believe, at Tab 7 of your book, but I simply want to note here the first line of what the Court said: "This, however, seems to the Court to be an oversimplification of its reasoning."

Now, what happens next? What happens next is the Gulf of Maine case, and it had something to say about the conduct of the parties. It will be recalled that in that case one aspect of Canada's argument was that the United States, by its conduct, had consented to the equidistance method. The

10:11:40 Chamber's judgment at paragraph 128 recounts Canada's argument, and Canada tried to make this argument in three ways. It tried to put forward a complete acquiescence argument. It tried to put forward the argument that there was a modus vivendi. And then, thirdly, since by this time Canada had the benefit of the Court's 1982 judgment, it put forward the indicia argument. As you will find the words in paragraph 128 of the Chamber's judgment, Canada had argued that the conduct of the United States reflected, and here is the quote, "indicia of the type of delimitation that the parties themselves considered equitable."

The facts there were that Canada had began in 1964 to issue oil and gas permits on Georges bank, and Canada had carried out significant seismic activities in that regard, and there had been communications that had passed between the oil and gas authorities in the United States and Canada, and Canada argued that these communications between mid-level government officials provided notice and demonstrated U.S. acceptance of Canada's position.

And furthermore, there was diplomatic contact and correspondence in 1968 by the United States with Canada that had not gone so far as to reserve the United States' position as to what was going on in the northern part of Georges Bank. It was only in 1969 that the United States protested and sought to bring Canada's activities to a halt. It may be recalled in

10:13:48 this regard that both United States and Canada at the time were parties to the 1958 Continental Shelf Convention.

Now, the Chamber reviewed these facts, and it noted at paragraph 138 that the conduct of the United States, as it said, and here is a short quote, "revealed uncertainties and a fair degree of inconsistency." And, indeed, at paragraph 140, it also said "that the United States showed a certain imprudence."

Nonetheless, having chastised the United States, the Court, based on these facts, did not find the elements of acquiescence or estoppel to be present, and then it approached--then it addressed Canada's arguments that relied upon the Tunisia-Libya case discussion. Now, we are putting on the screen paragraph 150, and here the Court said, "Without going into these differences of detail, the Chamber notes that, even supposing that there was a de facto demarcation between the areas for which each of the parties issued permits (Canada from 1964 and the United States from 1965 onwards), this cannot be recognized as a situation comparable to that on which the Court based its conclusions in the Tunisia-Libya case. It is true that the Court relied upon the fact of the division between the petroleum concessions issued by the two States concerned. But it took special account of the conduct of the powers formerly responsible for the external affairs of Tunisia-France and of Tripolitania-Italy, which it found

10:16:03 amounted to a modus vivendi, and which the two States continued to respect when, after becoming independent, they began to grant petroleum concessions."

Now, Canada had gone on to argue that even if the elements of acquiesce, estoppel, or modus vivendi were not present, the pattern of oil practice was, nevertheless, an indicia, an indicator that the parties regarded equidistance, the equidistance line, as the appropriate method for the delimitation process. And in this regard, Canada had noted that when the United States began its full oil and gas leasing program on Georges bank in 1975, while it had asserted its formal claim, it had nonetheless, according to Canada, showed its true colors when it removed the blocks in areas that Canada claimed from the U.S. oil and gas lease sale so as not to exacerbate the dispute with Canada.

Now, the Chamber's response is at paragraph 152 of the judgment: "Canada invokes the conduct of the Parties finally in support of its arguments that both in fact regarded the use of an equidistance line as an equitable culmination of the delimitation process. This argument is based, in the final analysis, on the facts already advanced in support of the acquiescence, estoppel, and modus vivendi claims: In the view of the Chamber, these facts cannot support this idea any more than the others. Each Party has adopted a clear position on what it would consider a just or equitable balance between

10:18:12 their respective interests, and the Chamber cannot but take note of this. By way of conclusion it can merely reconfirm its previous comment on the reliance placed on the conduct of the parties for the purposes examined above."

Now, the question, the same question comes up in Libya-Malta, and it comes up in two different ways. At Tab 10 of your book, we have included two or three key paragraphs from that judgment. It should be paragraphs 24 and 25, and Professor Schrijver called your attention to paragraph 25 last week. Before I come to paragraph 25, I would like to recall what paragraph 24 says.

Now, paragraph 24 recounts Malta's argument that it had indicated its belief in the equidistance line as early as 1965, and Libya had not reacted until 1973. And also that Libya, which had set its northern limits of its concessions well north of the median line, had nonetheless exempted the work requirements from those concessions in the areas north of the median line, doing sort of the same thing that the United States had done by removing its oil and gas leases that were in Canadian claimed area from the final U.S. oil and gas lease sale. Libya had done something similar by telling its concessionaires, yes, you have that concession, but we are not asking you to do any work in that area pending the resolution of the dispute. This is the same argument, as I said, that Canada made, and frankly, it is the same argument that Guyana

10:20:45 makes here in connection with the Burlington and Repsol and Maersk concessions or licenses that solely granted that were intended not to go into the area in dispute with Guyana.

Now, the Court didn't find Libya's conduct to be legally meaningful, and in reaching this conclusion the Court said at paragraph 25 of its judgment, that the question is whether--and this is the same language, I think, Professor Schrijver drew attention to. I would take it exactly opposite of the way he proposed its meaning. And the language is: The question is whether there is "any pattern of conduct on either side sufficiently unequivocal to constitute either acquiescence or any helpful indication of any view of either party as to what would be equitable differing in any way from the view advanced by that party before the Court."

Now, the Court didn't find that Libya's conduct, either in its silence for eight years about Malta's equidistance ambitions or the fact that it removed the work requirements from its permits in areas claimed by Malta, the Court didn't find that to fit the standard that it asserted there in paragraph 25. The Court was not convinced that Libya's restraint in suspending work requirements north of the median line was such a helpful indication as to what Libya thought might be equitable. Nor was Libya's silence between 1965 and 1973 in the face of Malta's promotion of the equidistance line either such a helpful indication to the

10:23:27 Court. These were facts, indeed, but the Court found they were not a helpful indication of Libya's view as to what would be equitable differing from its position before the Court.

Now, the next case that we come to in which conduct played a substantial role in the arguments of the parties--and we don't think of this as a conduct case very often, but it was Jan Mayen. Review of the judgment indicates that there were at least eight conduct-related arguments made by Norway, and there were two conduct-related arguments made by Denmark. Now, we are going to put up on the screen just for reference here the Sketch Map 1 from the Court's judgment just to help us orient ourselves.

It will be recalled that in this case, Norway's position was that the boundary between Jan Mayen and Greenland should be the equidistance line, the median line as it appears on this map. And Denmark's argument on behalf of Greenland was that Greenland should get its full 200-mile zone, and Jan Mayen should be limited. Thus, Norway's conduct--Norway's argument was that Denmark's conduct reflected a profound commitment to equidistance. And Denmark's argument was that Norway's conduct reflected a commitment to providing for full 200-mile zones in the North Atlantic region, and the Court found these arguments to be without merit, all of them, all 10 of them.

Now, I will quickly go through these arguments. The first Norwegian argument was that the 1965 Norway-Denmark

10:26:20 agreement, which established an equidistance line in the Skagerrak and in the North Sea, that that Treaty between the parties was actually a treaty of general application, and the delimitation which it effected was really a demarcation agreement, and the Court disposed of that argument at paragraph 30 of its judgment after reviewing the text of that 1965 Treaty.

The second Norwegian argument pertained to Article 6(1) of the Continental Shelf Convention which both parties were--both countries were party to, and this was regarded as binding in the circumstances. And in this regard, Norway argued that the meaning of Article 6(1) was that equidistance was already established in law between the parties, and the Court disposes of that argument at paragraph 31 of the judgment by reminding that before that conclusion can be reached an examination of whether special circumstances exist is required, and that is for the Court to do.

The third Norwegian argument related to a 1963 Danish Royal Decree, which pertained to sovereignty over the continental shelf. Now, that Decree, the sort of broad decree that states make, that Decree referred to Article 6 of the Continental Shelf Convention. It even referred to the median line, and it did not refer to special circumstances. And as one might imagine, Norway argued that the absence of reference to special circumstances in such a decree indicated that

10:28:34 Denmark had committed itself fully to a strict equidistance line. The Court was not persuaded by that argument, and said that this was simply a general statement of the Danish position and that it was compelled not to advance other positions in its boundary relations.

The fourth Norwegian argument pertained to a 1976 Danish law that empowered the Prime Minister to proclaim 200-mile fishing zones in Danish waters, and it further provided that in the absence of agreement, the limit of the zone would be the median line. Now, in 1976, Denmark decided not to extend its fishing zone in respect of Greenland north of 67 degrees north latitude. In other words, Denmark did not extend its fishing zone into the vicinity of the Jan Mayen Greenland boundary problem. It was clear to the Court from the record that in 1976, Denmark believed it was inexpedient to raise the question of delimitation with Jan Mayen, about Jan Mayen with Norway, and therefore its conduct in this regard was deemed not to be prejudicial to Denmark.

The fifth Norwegian argument focused on the fact that in 1980, when Denmark did finally act to establish a fishing zone in these waters pursuant to that 1976 law, that law still required that the limits of Danish jurisdiction not extend beyond the median line, that for over a year there was a Danish 200-mile zone extending from Greenland that was limited by the median line between Greenland and Jan Mayen. Thus, for over a

10:31:11 year, there was a line on the map that looked like a de facto limit along the median line that was legally required by Danish and Norwegian law. The Court did not find that to be relevant, and here I would like to call up the next slide, and this is what the Court said about that situation: "Denmark, however, explains that the reason for showing restraint in the enforcement of its fishing regulations in this area was to avoid difficulties with Norway. From earlier diplomatic exchanges, it was clear that Norway contemplated an equidistance line delimiting the waters between Jan Mayen and Greenland, and Denmark had indicated that this would not be acceptable." Everyone knew that the median line was not Denmark's real position, in other words.

And the Court says then: "The Court cannot regard the terms of the 1980 Executive Order which was amended," and so on, "either in isolation or in conjunction with other Danish acts, as committing Denmark to an acceptance of a median line boundary in this area." In other words, the fact that for a while there was a median line limit to Denmark's conduct in this area had to be assessed against the totality of Denmark's and Norway's practice in this area.

The sixth Norwegian argument pertained to a 1979 agreement between Norway and Denmark, on the Faroe Islands--that established the equidistance line as the boundary. Now, among other things at paragraph 37 of the

10:33:26 judgment, and this is a paragraph that Professor Schrijver referred to, the Court says this "does not commit Denmark to a median line boundary in quite a different area." I have struggled to find what it is in this paragraph that Professor Schrijver might think supports his position.

Now, the seventh Norwegian argument pertained to certain Danish correspondence in memorandum that could be understood to be supportive of the equidistance method or at least not to renounce it in this matter. The Court in paragraph 38 said nonetheless, that these communications did not prejudice Denmark's position, and again this is a paragraph that was referred to by counsel for Guyana, and it's hard to say how there was anything in this paragraph that would support Guyana's position.

The eighth Norwegian argument--and this is one that we could all probably smile about--the eighth Norwegian argument pertained to the fact that Denmark, like Norway and like Guyana, were members of the equidistance group at the Third U.N. Conference on the Law of the Sea. And again Norway tried to make something out of this, but the Court at paragraph 39 said it was not inclined to put much legal weight on membership in negotiating groups at the Conference.

Now, altogether here, though, this is a substantial record indicating that Denmark had an affinity for the equidistance method. In other locales it had entered into

10:35:24 agreements with Norway based on equidistance, and there was a line on a map for over a year suggesting that the limits of the respective fishing zones coincided along a median line in what was an active fishing area. Nevertheless, the Court put all of these arguments aside.

Let's just turn quickly to Denmark's arguments. For future reference, these arguments and discussion are found at paragraphs 82 to 86 of that judgment, and apparently Denmark tried to frame its arguments to fit within the Tunisia-Libya approach. This is referred to by the Court at paragraph 82 of the judgment, and the two facts that Denmark now called upon were Norway's dealings with Iceland and Norway's own internal dealings with itself with regard to Bear Island in the Svalbard archipelago. Norway had not contested Iceland's full 200-mile zone in spite of the fact that there would be normally a delimitation, and it had entered into agreements with Iceland in that regard. And what Denmark sought was equal treatment with Iceland. And in respect of the Svalbard archipelago, Norway had granted itself a full 200-mile limit from its mainland, but it had limited the zone, and it had given basically Bear Island no zone whatsoever.

Now, Denmark, then, is arguing that it is entitled to the same treatment that Norway gave Iceland and that it gave itself in respect of Bear Island. And just quickly, we will take a look at the two paragraphs that relate to this. As for

10:37:52 Bear Island, at paragraph 85, and you can see the words highlighted, "The Court would observe that there can be no legal obligation for a party to a dispute to transpose, for the settlement of that dispute, a particular solution previously adopted by it in a different context."

And moving to the next one with respect to Iceland, which may be more apropos since it really does relate to the general area of the Greenland Jan Mayen delimitation, "In the particular case of maritime delimitation, international law does not prescribe, with a view to reaching an equitable solution, the adoption of a single method for the delimitation of the maritime spaces on all sides of an island, or for the whole of the coastal front of a particular state, rather than, if desired, varying systems of delimitation for the various parts of the coast. The conduct of the parties will in many cases therefore have no influence on such a delimitation."

Now, there were, of course, many other cases. We've got Guinea-Guinea Bissau, St. Pierre-Miquelon, Eritrea-Yemen, Qatar-Bahrain, Cameroon-Nigeria, Barbados-Trinidad and Tobago, and in each one of those cases there has been one party or the other arguing its position to be based in conduct, and in all of these the arguments failed, based on the facts that were presented. But it was the foregoing cases where parties made an argument that is comparable to the one that we have heard from Guyana about that there is an indicia in this case that

10:40:11 should lead the Tribunal toward finding that the 34-degree line or, indeed, the equidistance method has become ingrained in the practice of the parties, the conduct of the parties, and that that is either the line or the method that you should adopt.

I just to want mention for a moment the new argument which we heard from last week that the Temple case also lends some weight to Guyana's position. That's a hard one again to understand how Guyana can try to suggest that that case, the facts of that case, get anywhere near the facts of this case. In that case we had an old Treaty dating from 1904. We had a watershed boundary that was described in that Treaty. There was a Mixed Commission that was established by that Treaty, and it had authority to delimit without further subsequent review.

Now, the work of the Mixed Commission was poorly documented. However, there were maps; and those maps, as we know, indicated that the temple was on Cambodia's side. And Thailand, for a substantial time, 50 years, had acted consistent with that position. And the Court found that although the map did not follow directly from the Treaty, because the Mixed Commission had ceased to function, the map nonetheless was authoritative in the circumstance, and had not been contested by Thailand over those many years. And since the Court found that Thailand had enjoyed the benefits of 50 years of stability, in the settlement of the question it was essentially estopped from seeking to overturn it.

10:42:31 Now, there is nothing like that in these facts.

Finally, I just mention, so we cannot say we have conceded this, that the argument was made that there is an admission against interest of some sort in Suriname's facts, in Suriname's conduct, and the two cases that were cited were the Nicaragua-U.S. case and the more recent Congo-Uganda case, and I won't go into those in any detail, but it does seem that this is a remarkable stretch to try to suggest that Suriname, in participating in these pleadings, is analogous to the United States that wasn't participating in those pleadings in that case, and that therefore Nicaragua and the Court had to rely on certain statements by government officials, that because the United States was not trying to defend itself in those proceedings. And likewise, in the Congo-Uganda case, there we have a situation where there was better evidence that had been given under oath in the case of a judicial commission of inquiry, and the Court determined to look at that and give it whatever weight that it thought that inquiry testimony was entitled to.

Now, when we get done with this review of conduct in the cases, we need now to take a look at that conduct against the facts in this case. Suriname pointed out in the Rejoinder, and Guyana did not contest this, that the facts--that is, what has happened--are, for the most part, uncontested. The difference is in the positions of the parties as to whether

10:44:47 there should be any conclusions that would be drawn from those facts. And as I mentioned earlier, Suriname is confident that the facts show no agreement, they show no modus vivendi, and there is no line mutually used in the conduct of the parties that provides an indicia of a line that both parties regarded as equitable and have treated as such.

Now, apart from the relationship between the 1936 Point and the 10-degree line which was discussed yesterday, one may review again the facts of conduct that pertained to the continental shelf delimitation, and those facts, we are reminded, start after World War II, when the United Kingdom made a proposal to revive the 1939 draft Treaty. And the Netherlands apparently did not respond to that, and Professor Soons indicated why that was true. The bottom line was that by 1952, it was clear that the deal that the Netherlands had been prepared to make in 1939, where it would sacrifice Suriname's interests in the disputed triangle, that that deal was no longer possible. We know that there was a new charter for the Kingdom in 1954, and again Professor Soons has described the legal implications that after that time it is Suriname that is deciding its boundary policy, whatever the officials might have thought about that in the Foreign Ministry in The Hague.

Now, by the later half of the 1950s, interest in oil and gas and the offshore oil and gas was developing both in this part of the world and in most other parts of the world.

10:47:03 And in Suriname this interest led to a concession granted to the Colmar Company in 1957 by Suriname's Law Number 15. You can find that concession agreement in Annex 11 of Suriname's Preliminary Objections. And in Guyana this interest led ultimately to a concession granted to the California Oil Company, about 15 months later, on 15 April, 1958, and you can find that concession agreement in Annex 105 of Guyana's Memorial.

We also know that at the same time this is happening, we have the International Law Commission completing its work and the first U.N. Conference on the Law of the Sea going through its negotiation and completing its work on four Conventions which were produced at 29 April, 1958.

Now, before going further into this discussion, and perhaps I will finish with a few remarks before we break for coffee about these concessions and the concession picture in general, we are going to go through some concession limit information after the coffee break. Sometimes it gets a little tedious, but I will do my best to spice it up. But I think it would be useful for the Tribunal to appreciate the exact picture of the offshore petroleum situation in both countries as it exists at the present time.

First, it should be clear that there has not been any commercial discovery made offshore Guyana or offshore Suriname to date. That is for about 50 years. There has been no

10:49:14 commercial discovery made on the continental shelf of either country. I'm not saying that's never going to happen. I hope it does happen. But today there are no commercial discoveries in that area.

Second, exploratory wells had been drilled offshore of both countries in uncontested areas routinely over the last 50 years, and there have been no commercial discoveries. There are not a lot, but there are quite a few. There has only been one exploratory well drilled in the disputed area. That's the Arbary I well that was drilled in 1974, and we will come back to that further after the coffee break. And Suriname acknowledges there has been more seismic work done under licenses granted by Guyana than done by Suriname.

Now, anyone that follows maritime boundary cases knows that oil concession limit information is routinely offered up by states in these cases to demonstrate their claims. Now, presumably the reason that states do this is because the grant of authority by a government to a company to engage in activities in a particular area is a manifestation of that state's claim to the area concerned. We have heard from Professor Oxman about what the Court had to say about oil practice in the recent judgment of Cameroon-Nigeria at paragraph 304, and the Barbados-Trinidad and Tobago Tribunal said virtually the same thing.

Over the years--over the years--there have, indeed,

10:51:41 been more concessions granted by Guyana that extend into some part of the disputed area than Suriname has granted. If this is a game of numbers, Guyana wins. However, while Suriname may have granted fewer concessions, they have been longer standing in terms of years, and its presence, if this is again a game of do you have a concession in the disputed area, the presence of Suriname's concession holders in the disputed area has been for more years than Guyana has had a concession holder in the disputed area. Just for instance in these first concessions, the Colmar concession lasted up to 1982. It's a concession that lasted for 25 years. Guyana's first concession to the California Oil Company disappeared in two years.

Now, this pattern of conduct is now going to be shown in a graphic that we presented in the--I guess it was the Counter-Memorial, and this is simply to show that over a period of time, Guyana's concession holders have not been present in the disputed area for almost 14 years during a period. There was one period where, for two years, Suriname had no coverage. You can also look at that, and you can see that there have been a number of concession holders from Guyana. And in Suriname there has really been just two: Colmar and Staatsolie.

Now, we have seen throughout the pleadings that Guyana simply does not give much weight to either of those concessions. It likes to speak of Staatsolie's concession as being one that Suriname gave to itself because Staatsolie is a

10:54:08 national oil company, but it seems to us that it misses the point. It is a grant by the Government of Suriname by legislative decree to the national oil company to operate in that area, and it is not any different from some of or any of Guyana's concessions where it has given a grant of authority to a private oil company. So, the public-private business doesn't seem to be very material in assessing this sort of thing.

But probably more to the point, the real issue is that there is no rule of law that says that when you grant a concession it's got to go right up to your boundary claim. There is nothing like that in any book that you can find. There is nothing like that in the cases.

So, while concession limits may reveal that a state believes or a state has a claim to an area, it doesn't necessarily say that is all that the state claims, and we will show later on after the break that some of Guyana's concessions don't go anywhere close in their eastern limits to Guyana's boundary claim in this case.

Mr. President, perhaps this would be a good time to take the break, or I can continue on, if you wish.

PRESIDENT NELSON: Thank you, Mr. Colson.

I think this is a good time to take a break, and we'll resume this hearing at 11:15. Thank you.

(Brief recess.)

PRESIDENT NELSON: I give the floor to Mr. Reichler,

11:21:05 speaking for Guyana.

MR. REICHLER: Thank you, Mr. President, and good morning, gentlemen. It's the first chance I have had to greet you formally today, since it's not our turn to have the floor. And I regret to have to raise this matter with the Tribunal. I had hoped to avoid it. I had raised it with Mr. Greenwood, hoping that we could come to an agreement upon it, but it appears that we cannot, and I'm sure that Mr. Greenwood will explain when I cede the microphone his position on the matter, in his usual eloquent manner.

The issue is this: It concerns the expert witness, Dr. Smith. We have, of course, complied with the--with our undertakings not to discuss substantive matters with the witness, who is formally sequestered. We have not provided transcripts, of course. We have certainly honored our commitment. In fact, we have even refused to allow him to see the transcript of his own testimony, which, arguably, any witness would have the right to see, but we are certainly not going to do that without the Tribunal's approval.

The issue is this, however: Over the past couple of days, we have heard very, how can I say, extensive attack on the witness both in terms of the substance of his report and, indeed, I'm afraid, in terms of his objectivity, his alleged bias, his competence, even his integrity. We believe that if we exercise our right to call the witness in rebuttal, that it

11:23:10 is appropriate that he be allowed to see the portions of the transcript and only those portions of the transcript that relate to him personally. That is to say, where my friend Mr. Greenwood and my friend--I'm sorry, Professor Greenwood and my friend Professor McRae invoked him and invoked his report and leveled their criticism at it.

This is, of course, appropriate rebuttal testimony, should we decide to exercise our right, and it seems to me fairly obvious--I guess it isn't my good friend Professor Greenwood, but it seems to me fairly obvious that the gentleman ought to be allowed to see what criticisms have been made of him, both in terms of his report and personally, before he gives his rebuttal testimony.

The alternative, it seems to me, would be to say, have him called and say, here is what Professor McRae had to say about your report. Here is what Professor Greenwood had to say about your report. What do you think about it? Well, he has to answer on the spot without thinking about it, and in some cases they presented elaborate charts and diagrams which they developed, which, of course, is their right, as a way of attacking Dr. Smith's report.

He should have a chance to think about the criticisms that they have--that they have leveled at him. He, after all, is an expert witness. He has given opinions. He's been called as an expert. He's been recognized as such. This is not a lay

witness who is being asked, now, precisely what time was it when the light turned red? Those are the kind of witness, the lay witnesses, that are normally sequestered because we don't want lay witnesses, fact witnesses, hearing each other's testimony and then adjusting what they are going to say so that we have perfect coordination and coherence and honesty.

In the case of expert witnesses, it's been our experience, at least consulting with all of the members of my team, some of whom who have more experience in these proceedings than I do, that it's really not normally the case that expert witnesses get sequestered.

Now, we haven't opposed that. We have gone along with that, certainly in this--since his testimony. The issue came up, do we oppose his sequestration after his testimony, and we said no. We didn't to want make an issue of it.

But really this is an expert witness in the first place. There's really is some doubt about whether sequestration is appropriate at all. But in this case we are not asking for the sequestration to be ended. We are not asking that he be allowed to see the entire transcript, or all of the arguments that our learned colleagues from Suriname have made. We only are asking for what we think is inherently fair, appropriate to the sound administration of justice, necessary for the equality of arms between the parties, and, indeed, fundamental fairness to the witness, that he be allowed to see

11:26:38 these rather vociferous and extensive attacks against him. We take some comfort in the fact that Suriname believes his report and his testimony is so important that they have devoted so much of their presentation in an effort to attack him. Well, that's their right to do that, if they will, but the witness certainly should have the right to respond to the criticisms they made of him personally and his report, and it's really just not fair to say, Dr. Smith, here it is. Do you agree? Not? Why is this criticism right or wrong? He ought to have a day to think about it, and that's all we are asking. And we frankly cannot understand or see any valid basis for an objection to that.

PRESIDENT NELSON: Thank you, Mr. Reichler.

I give the floor to Professor Greenwood.

PROFESSOR GREENWOOD: Thank you very much. Mr. President.

Sir, this issue has its origins in the order which the Tribunal announced on the very first day of the proceedings, and if I could remind you what you said at page eight of the transcript, in a decision expressly described as unanimous, the Tribunal unanimously decides that he, that is Dr. Smith, may be recalled only for rebuttal and with regard to matters that he could not have addressed in his first round of testimony.

Now, Mr. President, the grounds of criticism of Dr. Smith stem from matters that he did address in his first

11:28:03 round of testimony. If we take, first of all, the question of the figures which he used and which he admitted were wrong, those were his corrections. He put the figures in at page 477 of the transcript. That makes it clear.

And secondly, the criticisms we made of those figures that they weren't, in fact, accurate transcriptions, accurate conversions from nautical miles into kilometers, those precise points were put to him in cross-examination by my learned friend Mr. Saunders. Page 491 if the transcript is the place where that begins.

Now, he put these corrected figures in. He got them wrong. The matter has been addressed, and there is no need for it to be readdressed. And, indeed, it's very noticeable that there was no application to re-examine him at the time. Mr. Reichler had ample opportunity to re-examine the witness if he thought the witness was being unfairly treated or had not done himself justice. He asked no questions at all in re-examination.

As for the other criticisms made of the report by Professor McRae and myself, well, first of all, I take exception at the suggestion that there has been an attack on Dr. Smith's integrity. There has been nothing of the kind. An attack on his competence, yes, but that again stems from the way in which he answered questions when they were put to him.

And all of the issues on which he is being criticized,

11:29:29 the handling of South American boundaries in the Aréchaga report, the Berbice Headland, the fact he doesn't know what low-water springs means, all of those points were put in cross-examination.

Now, we therefore don't believe that the conditions which the Tribunal itself laid down for recalling Dr. Smith have been satisfied in this case; but even if there is occasion for recalling Dr. Smith, the whole point of sequestering him would be lost if he were now to be shown the transcript, however selectively, so that he can go away and massage his answers by looking up how many meters there are in a nautical mile or what the term low-water springs means.

PRESIDENT NELSON: Thank you.

MR. REICHLER: If I may, very briefly, it's worth noting that Suriname chose not to criticize Dr. Smith or his report in their Rejoinder. I point out that in Dr. Smith's report, which was dated in March, was filed as Annex 1 to Guyana's Reply, which was submitted April 1 of this year; the Rejoinder was submitted, I believe, 1 September. There are only passing references to Dr. Smith. There's a quote from one of his articles, but there is no criticism. There is no attack on his competence, his integrity. There is no mention in the Rejoinder of the so-called Berbice Headland and what Professor McRae described as Dr. Smith's puzzling--yesterday his puzzling silence on the so-called Berbice Headland. None of that is in

11:31:20 the Rejoinder. So, the idea that Dr. Smith could anticipate what the criticisms were and should have addressed or that we could have and addressed them in his direct examination really misses the mark.

Now, if, as a tactical matter--and we understand, we are all advocates here, and tactics are part of trial or litigation strategy. If as a tactical matter the Suriname side decided they were going to hold on to all of their criticism, they were going to--even that they had a Rejoinder, they had a chance to respond to everything they objected to in Dr. Smith's report and they decided as a technical matter, and I don't blame them for this the--maybe I would have done the same if I were on the other side, so this is not clearly a criticism of Suriname or its lawyer, but they made a tactical decision to let it go. Essentially why do you do that? You do that so you can surprise the witness when he comes to testify.

You raise things on cross-examination that you did not signal in the Rejoinder. As I said, there is mention of Dr. Smith in his report in the Rejoinder, but it's very, very mild, very meager. Certainly nothing like the kind of onslaught we heard from Professor Greenwood and his colleague Professor McRae, so they decided to surprise him. Fine. A fair tactic. But now they want to deprive him of an opportunity to set the record straight, to explain what he did and why he did, and why would they want to deprive the Tribunal

11:32:54 of hearing him? If he has something useful to say, the Tribunal ought to have the benefit of it. We are not talking about a jury of unsophisticated laypersons who might be unduly influenced by the words of an expert. We are talking about a panel of Arbitrators who are every bit as expert, if not more so, than the witness himself. What are they afraid of? Why do they want to surprise him? Why do they want to us foreclose him from bringing him back? They want to attack him, but they don't want him to be able to defend himself or his report?

There is really something behind all of this, and it really oughtn't be part of these proceedings, and I don't believe, with respect, that the Tribunal should accept it. The Tribunal should give the man a chance to respond to the criticisms that have been made, and the Tribunal can decide whether that's a credible and effective response or not, and whether Professor McRae's attack on him is valid, if it sticks, and then let the Tribunal sort it out. I don't think the sound administration of justice is served by limiting the access to information by the Tribunal.

Thank you.

PROFESSOR GREENWOOD: Well, Mr. President, with the greatest of respect, this is the Alice in Wonderland. If one looks at Chapter 3 of the Rejoinder, it's redolent with criticisms of the approach taken by Dr. Smith.

As for the question of his competence about how he

11:34:32 assessed his figures, it wasn't until his so-called corrected figures were put in that we had any occasion to doubt the figures that he produced in his report. There has been, and will be, no attack on Dr. Smith's integrity, but there was ample opportunity for him, first of all, to get it right in the first place; secondly, to put in a corrected table that was properly explained; and thirdly, for Mr. Reichler to ask him these questions in re-examination. That is, after all, what re-examination of a witness is for.

What my learned friend is now trying to do is to bring back a witness in the desperate hope of breathing some credibility back into the corpse of a dead horse, and we don't think that that has to do anything with the sound administration of justice. It's also, I may say, hardly commensurate with the approach that he himself took to the scheduling of this hearing where he was most insistent that the second round hearing should be short and to the point. So, we oppose this application. Obviously, if the Tribunal wishes to hear from Dr. Smith again, that's a matter for the Tribunal to determine, but we see no occasion for it, and we certainly see no occasion for the Tribunal now to be asked to revisit its sequestration decision.

PRESIDENT NELSON: Thank you very much, Professor Greenwood.

Well, we Members of the Tribunal have heard the

11:35:49 representatives of the parties, and it is my intention to discuss the matter with the Tribunal and come to a decision as early as possible.

Thank you very much.

MR. REICHLER: Thank you very much, Mr. President.

PRESIDENT NELSON: And now we will resume the hearing with Mr. David Colson.

MR. COLSON: Thank you, Mr. President.

Mr. President, we're going to or I'm going to have to move a bit more swiftly through the material now, and from time to time I will simply be skipping over some of the relevant events because each year has a relevant event in it, but your books have the maps of the concession limits as they appear from year to year. Many of those are minor changes and adjustments, and I'm not going to spend any time on those right now because I think there are other things that perhaps are more important in the conduct of the parties to talk about, other than the fact that somebody's concession limit changed from 1978 to 1979.

But we do have to start the discussion now with the fact that in 1957 we had these two concessions first granted, and the Colmar concession was on the Suriname side, California concession was on the Guyana side, and on the Suriname side that concession was issued first without any reference to a western limit. On the British side, the concession was issued

11:37:51 in the first place after a great deal of discussion within the British Government--and you have all of that relevant material in Guyana's Memorial--you have a concession that was granted with a specific eastern limit, and it was supposed to be--it got a little screwed up in the implementation, but it was supposed to be a 10-degree line attached to a 33-degree line out to the 25-fathom depth contour. This again is--predates the '58 Convention.

Now, one of the important things I would like to call attention to at this point is during the course of these pleadings, the Guyana team has routinely said, and there was no protest from the other side. This has been a constant refrain on just about every event. Now, I would simply note for the Tribunal's information that if you go through the record that you have in front of you in the Annexes to these pleadings, if you are going to decide this case based on the number of protest notes that you have in the record, prior to the CGX incident, and I want to emphasize that point, prior to that incident you are going to have very sparse material to work with. There are, in fact, two protest notes in the record leading up to the CGX incident, so there is a tie, if that's the way the game is played, one by Guyana and by Suriname, and there is another one that is mentioned but not produced in an affidavit that one of Guyana's affiants has produced to say that there was a protest, but we don't have that note.

11:39:47 So, I think the issue is, where were the protests. If the party doesn't bring a protest forward, a protest note forward, it's not there, and there are plenty of cases where there were opportunities to protest from the Guyana and U.K. side, and there were no protests there. I will simply mention the places where we have protest notes in the record.

Now, we have this event where there is the California Oil Company concession limit at 33 degrees. That is informed to the Dutch Government, and it was told to the Dutch Government that it was not supposed to be prejudicial to eventual boundary settlement. That you will find in Tab 16 of your book, and we'll have it on the screen just for a moment, but this was the copy of the internal Dutch memo that they received when we were told, when our side was told, that that limit was not supposed to be prejudicial.

Now, we come along to the time where we get to--we have both concessions being out there now, and it's obvious that we are supposed to have a boundary negotiation if we are going to settle the fact that there is no agreed boundary in the continental shelf in early 1958.

Now, one of the important parts of the story from the other side is that when the Netherlands, in August of 1958, provided the U.K. with a proposal that this delimitation be based on Article 6(2), that it was known and understood on this side that that meant a strict equidistance line. Now, there is

11:41:51 nothing in the record to that effect. There is nothing that you can find in any of the documents that says that. There are certainly inferences within the British Government that maybe that is what the British thought was going on, but there is no exchange, and there is nothing to demonstrate that the Dutch side thought that this was going to be a strict equidistance line.

Now, one of the important arguments that was made last week was we heard that there was a new document that had been discovered in the restricted Dutch archives. It was a document dated 11 March, and it was put forward by Professor Schrijver, and it was put forward for the proposition that the Dutch side, in presenting the 1958 proposal to the United Kingdom, was encouraged to do so by Suriname. It hadn't just been done in consultation with Suriname, as the '58 note says in consultation with Suriname, that it was actually--the Netherlands was encouraged to do that by Suriname, and it was encouraged to do that because the Colmar Company wanted to have a concession limit.

Now, we are not going to deny any of that. I don't think--that's probably what happened, but in the exchange that Professor Sands and Professor Greenwood had on that day in which that document was introduced, it was agreed that our side could introduce the document that that letter of March 15 refers to, and that document is in your tab, in your folders.

11:43:46 1 It is Tab 18 in your folders.
2 Now, this is largely confirmatory of the point that
3 was made. Yes, the Suriname side was encouraging The Hague to
4 get on with boundary negotiations, and it wanted to do so
5 because there was the Colmar concession; and to that point,
6 there had been no limit expressed.
7 I want to just put up on the screen one sentence from
8 that document. And all I want to draw attention to is that
9 these are two Dutch officials in the Netherlands talking to
10 each other, and they are saying that I'm informed--if I am
11 informed correctly, the exploration, meaning the Colmar
12 exploration, will take place in particular in continuation of
13 the mouth of the Corantijn River.
14 Now, I don't want to make too much of this, but it is
15 at least plausible that even at that time the Suriname side was
16 thinking that the boundary on the continental shelf should be a
17 seaward extension of the river.
18 Now, the next sentence in that document goes on, and
19 the Dutch officials say, well, let's talk to those Surinamers
20 about the equidistance method. Now, again, these are old
21 documents, and one can't know too much more about them than
22 what we can see there in the words before it, but it seems to
23 us that at least the document is subject to the interpretation
24 that the--please, Philippe.
25 PROFESSOR SANDS: I wasn't intending to interrupt

11:45:58 Mr. Colson, and I can wait. I indicated he could continue, and I would when he'd finished, step in. It was merely a question I was going to ask at an appropriate moment, sir.

PRESIDENT NELSON: Thank you.

MR. COLSON: The point that we simply wished to make is that this document is subject to at least the interpretation that the Suriname side, based upon the Colmar, the fact that the Colmar concession had been issued, was at least thinking at that time that the continental shelf boundary should be an extension of the line of the river. And it was the Dutch side in Holland, in the Netherlands, that brought up the suggestion of trying to talk to the Surinamers about the equidistance method. It's plausible, it's just as plausible, we submit, that when the '58 proposal was made, that the reference to Article 6(2) was intended by Suriname to mean that the continuation of the land boundary could be advanced as a special circumstance. There is nothing in the record that would support any perspective that Suriname was prepared to accept a strict equidistance line as the continental shelf boundary.

PROFESSOR SANDS: I do apologize. It was not my intention to interrupt. It was simply by way of question to the other side via the Tribunal. This issue came up as Mr. Colson explained, because Professor Schrijver had introduced a document. That document we only had in draft

11:47:55 form. And the question that we therefore had for the other side was whether, in the interest of filling out the materials to assist the Tribunal and get a full picture of what actually happened, whether the other side has available to it that document referred to by Professor Schrijver in final form; and relatedly on the basis of the material that has been put in front of us--on the basis of the material that they have put in front of us, whether the document referred to in the opening paragraph of this new document, which seems also relevant, is in the possession of the other side and if, in the interest of making all the information available, it could be made available to the Tribunal. That document is referred to as a secret communication of 12 September, 1957. I believe that is not in the record at this point, and following on from the principle quite rightly put by Professor Greenwood of tracing documents back, if that is available to the other side, would they be willing to make it available to the Tribunal.

Thank you very much.

MR. COLSON: Mr. President, I can't answer that question right now, and I will have to consult with my colleagues about what is available. I assume that we would have no difficulty if this is a matter of tracing documents or if we have a better copy than Guyana that we would make them available, but I just don't have that knowledge in my mind at the moment and would have to consult, and presumably we can

11:49:37 answer that question after the lunch break.

PRESIDENT NELSON: Thank you, Mr. Colson.

MR. COLSON: Now we come to the 1958 proposal, and I want to spend a little bit of time with this because it is perhaps the key ingredient in the argument of Guyana. That--on the screen now is that document. It would be your number 16, I believe.

This proposal was a proposal by the Netherlands to delimit the continental shelf by the equidistance method as it is set out in Article 6(2) of the Continental Shelf Convention. And what the Netherlands proposed was to reach agreement on a map that would show that line, and then that map would be attached to an exchange of notes that would then constitute an international agreement between the parties.

Now, no one, then or now, could discern the line on the map that Suriname thought would be agreed on this basis. The line was to be subject to negotiation. That is the first requirement of Article 6(2), and in the course of those negotiations that would lead to an agreement, among the issues that would have to be sorted out was the fundamental question of whether special circumstances existed, obviously a matter that's prominent in Article 6(2), and there was the issue of the 10-degree line in the territorial sea and how far it would run, leading to the issue of where the 10-degree territorial sea boundary would stop and the continental shelf boundary

11:51:55 begin. And there were then all of the complexities that are associated with drawing an equidistance line itself, which Commander Kennedy had continued to tell his colleagues.

Now, I'm just not rationalizing this because I think it's very important to note that the Dutch side had just received notice of the limits of the California oil concession that were purported to be an equidistance line. They had a formal notice from the U.K. at that moment, and they didn't go back and say, okay, let's accept what you have done with the California oil concession limit as an equidistance line. They didn't answer in that regard. They simply went back and said, no, we are going to propose a negotiation based on Article 6(2), and that is what they did.

Guyana suggests, however, there is more here, and they speak of an unequivocal agreement. They speak that the United Kingdom accepted the Dutch proposal and that there was, in fact, a deal on a strict equidistance line in 1958. That's not going to be found in the record. There are musings of British officials about all of this, but the only evidence that Guyana has to this effect, which I will go through very carefully, are mostly internal memorandum of the British Government that relate to their own perceptions of what the Dutch were proposing. There are four pieces of evidence that are offered.

Now, I'm going to go through these, and then we will come back to them in a minute because the documents are really

more relevant to a different point, but one of these documents is the 1958, 16 October memo that we've heard about from the other side. It's found in Annex 23 of Guyana's Memorial, and it's prominent in the position expressed by both Professors Schrijver and Sands, and this is the memo where Scarlett says he's had a conversation with the Ambassador of the Netherlands, and that Scarlett indicates that both sides were agreed that there was nothing between us, or something to that effect. I'm going to come back to that, but that's one piece of evidence. There's this discussion that is being reported in a British memo, that there is nothing between us.

The second piece of evidence now isn't in '58. It's dated 11 March 1964, and it's an internal briefing memorandum in the Dutch Foreign Ministry about the history of this matter. And in that history, somebody writes that it had already been agreed. This is the 11 March, '64 document. It's found in Annex 33 of Guyana's Reply.

Now, the third piece of evidence--it's not even 1964, it's now 1966--this was brought up in the hearings last week--this was a reference to a document dated 21 June, 1966, and you're going to find that at page 73 of the transcript of December 9th.

And the last piece of evidence that is offered really is simply the Diplomatic Note that the British sent back to the Dutch actually after almost three months, and when they went

back, they didn't say--they said, oh, yes, we like this continental shelf idea, but we are not going to take you up on your proposal right now to draw a line on a map and attach it to a Diplomatic Note. We're going to provide you with a whole draft Treaty on everything. And it took them three years to do that.

Now, it seems to me that putting something off for three years is really setting the other parties' proposal aside, and in our view, by the time we got to 1961, by the time we got to the British proposal of 1961, whatever life there was in the 1958 proposal had simply disappeared. When the British came back in 1961, they put everything back on the table, and in doing so, they rejected a Dutch proposal to deal with this continental shelf boundary without reference to the other boundary issues between the parties, and that blew the political lid off the pot in Suriname.

Now, you cannot take the documents following that 1961 British proposal and look at them and say that Suriname was still committed in any way to Article 6 of the Continental Shelf Convention. By the time we get--or let me put it differently. Let me put it in terms of a strict equidistance line. By the time we get to 1962, we have the Netherlands proposal being offered, and there that proposal was for a 10-degree line both in the territorial sea and on the seabed. You did not hear one word last week about the 1962 Dutch Treaty

11:57:51 proposal.

Now, it's remarkable because here is a document that is a major part of the diplomacy. Certainly, it's not subject to the interpretation that Guyana gives it that, for some reason, the Dutch side simply left the continental shelf boundary out of the picture. I mean, states don't do that sort of thing. If you have a comprehensive treaty proposal from one party, the other side goes back with its comprehensive treaty proposal. And we are told repeatedly by the other side that the Dutch didn't know what they were doing in their treaty drafting, and the ambiguity in that language was something that the British side found to be irregular, and therefore within the confines of the British Colonial Office and the British Foreign Ministry, yes, there are a lot of documents that question just what does this mean because it wasn't put quite the way the British meant. But when we come to the--when we come to the real people, the Governor of British Guiana and the legal Ministry of the Foreign Office, they understood fully. And if I could just have slide 20 at this point, this is the memorandum of conversation from the British Foreign Ministry in which we have P.J. Allott of the Legal Office of the Foreign and Commonwealth Office talking with Sir Ralph Grey of British Guiana, and they're talking about the Dutch 1962 Treaty proposal, and they say the Dutch proposal suggested an alternative method. They're comparing it to their method which

12:00:07 was, of course, the equidistance line on the continental shelf, Commander Kennedy's equidistance line on the continental shelf. They suggested an alternative method of dividing the territorial waters in the continental shelf. Well, forgive them for their imprecision in the way the memo is drafted because they said territorial waters in the continental shelf, but they could certainly only mean the waters of the continental shelf.

Now, we have Commander Kennedy's proposal from 1961, and I'm going to come back to that in a presentation tomorrow, so I'm not going to dwell on the segments that he suggested, but one can simply recognize--and this was discussed yesterday, and I think Professor Franck even had a question on it, that Commander Kennedy was proposing to follow the 10-degree line for 6 miles, and then he was moving to segmented equidistance, and he developed an equidistance line in three segments that went out to the 200-meter isobath. And I will come back to that again tomorrow, and we will look at that.

Now, we have the '62 proposal, and then the next real large event in this history is in 1964 when we have the Colmar concession, which had up to that time not had a defined western limit. In Suriname, a law is passed, and we get a defined western limit along the 10-degree line. Now, a map of that concession is our slide 21, and this is Suriname's law 86, and one can have no doubt that by this time, one can have no doubt

12:02:07 by this time--if you don't believe the '62 Dutch proposal, here we have the '65 Colmar oil concession with the 10-degree line. If you don't believe the '62 Dutch proposal included a 10-degree line for the continental shelf, and if you don't believe the '61 British proposal knocked any opportunity for the parties to reach agreement on an Article 6(2) line that would be a strict equidistance line, if you don't believe it was knocked out of the box by the 1962 proposal, I would suggest here in '64 there can be absolutely no doubt that in Suriname they were not interested in a strict equidistance line.

Now, we come to 1965. This map--this concession is out there, the Colmar concession. And on the British side, a new concession was granted, and that was the concession that was given to Shell, and this is shown that by '65, everybody in the oil and gas business knew that there were overlapping concessions on the continental shelf between the two countries. We showed this using data out of public sources that were vintage 1965, the 1965 American Association of Petroleum Geologists Bulletin. And we simply put two maps together that were in that bulletin, and this would be our number 22 right now, if we could put that one up, simply to show that by 1965, certainly everyone in the oil and gas industry recognized that the Shell concession overlapped with the Colmar concession.

Now, we come after this to the events that relate to

12:04:23 the Marlborough House meeting, and that's been discussed, and I'm going to pass that over. And also I'm going to pass over the very interesting story that concerns the problems that Foreign Ministries have when they have to support inconsistent positions, one might say. Obviously Professor Riphagen had his own objectives in trying to support a particular position of the Netherlands before the International Court of Justice, and he was not interested in the fact that there were others within the Kingdom of the Netherlands that were doing things that he didn't support. And, of course, Foreign Ministry officials are looking out for what they are going to have to do before the International Court of Justice, and they're going to try to suppress activities or diminish activities that might in any way be picked up in the wind by the other side and used against them in their arguments.

And as we pointed out in the Rejoinder, Professor Jaenicke did, in fact, get wind of the fact that there was an inconsistency in the Dutch position, and he did bring that to the attention of the Court. Now, that's very interesting, and one could have a lot of fun with it. We are going to have move on, I'm afraid.

We go from the oil picture, though, and I would just like to move for a moment. In response to the information and the argument that Guyana has made to the effect that the Netherlands in Europe didn't really support Suriname, I'd

12:06:17 simply like--we brought forward some information in the Rejoinder that is not--was not intended to say that Guyana agreed with any of this. It was simply to point out that authorities in Europe acted consistent with Suriname's boundary position, and this is shown by some continental shelf research. This is slide 26, some continental shelf research that was done in 1966 by Dutch survey vessels, and these are just the plots of various stations that they were sampling starfish on the continental shelf, and presumably they had British authority to do some of this work because they were sampling starfish on Guyana's continental shelf, and they were simply attributing which continental shelf were they on, and they were using the 10-degree line to do that.

There is another interesting picture that was in the Rejoinder--this would be our slide 27--and these are hydrographic survey. These are reports from--of hydrographic surveys conducted by Dutch vessels and the hydrographic survey lines that they were running. And I think we can tell now, we know enough about the geography of this area. We can see they are not following anything like an equidistance line. They are basically running north-south of the coast of Suriname, and largely that one that is furthest to the west looks pretty close to the 10-degree line.

Now, I would like to bring you to the next document, and this, again, was something, frankly, that has been found.

12:08:10 It was in Guyana's Memorial, and we didn't pay too much attention to it, but more and more it's come to be an interesting document because Professor Oxman used it the other day, and Professor Greenwood used it the other day, and this is the memorandum that was written in 1966 by the hydrographer of the British Navy to one of his captains, Captain of the ship VIDAL, and that ship was going out to do seismic work. And if we could have that slide, I want to point out different passages of that letter because my job here is simply to convince you that the British understood that there was a dispute.

And here we have some references that cannot be interpreted--this would be our slide 28. And the full document is number 31, and you have seen this before, but here we have the hydrographer of the British Navy indicating very clearly that he knows that there is a dispute. He's coordinating with the Dutch side, and the two European governments are doing everything they can not to exacerbate this dispute. And there is survey work, so one of them is going to survey up to their position, and the other is going to survey to the other position. Now, this is sort of standard practice. We both let each other operate consistent with one's position. We won't go out and arrest each other in this survey, and as he says, this was hydrographic survey. At that time, both of those states would have regarded this as something that they were entitled

12:10:09 to do without reference to a boundary claim, but here both sides are acting consistent with their position, and the British are acting consistent with their position, and it indicates that the Dutch are going to act consistent with their position.

Again, we offer this not to try to suggest that the British side recognized that Suriname's position was the correct position. It is only to demonstrate that everyone knew that there was a dispute.

Now, we go into a period of time after the mid-sixties, and we go through a period of oil concessions, and I'm not going to run through them. We are not going to have time now, but I want to just bring you up to 1977, when, of course, the conference is going on at that time, and now we have to--we have Guyana passing a law. And this is our slide 32, and this, again, is Guyana's maritime law in which it states very explicitly that its maritime boundary position, as described in that law, is the equidistance line.

Now, we have heard repeatedly that Guyana has always understood this to mean the 34-degree line, yet Guyana will tell us that it enforces its fisheries enforcement jurisdiction to a different line, and it's just inconceivable that you can reconcile these two positions.

The fact is in 1966 at the Marlborough House Talks, and the fact is in 1977, Guyana had an equidistance position.

12:12:00 They may have simplified it in some way. They may have thought about it in some way as a series of bearings approximating 33 or 34 degrees out to the 200-meter isobath. But they didn't think of a 34-degree line, I submit, going to the 200-mile limit when they introduced this law, and we think that their Fisheries Jurisdiction practice makes very clear that they know and understand that.

Now, I want to bring us, then, to 1980, which is when we have Staatsolie being created. Again, Guyana tries to diminish this by saying this is an act of the state to grant something to itself, but we want to simply note that it seems that if there is any value in looking at oil concession limits, the value comes from the act of the state, and it is the state that is granting this national oil company its specific limits, and it has done so to the 10-degree line. Staatsolie is the only company that may get a concession from the Government of Suriname. It gets its concessions by legislative act, and then it enters into licenses and contracts with international oil companies. It's a different process than Guyana uses, but the legal effect of the government grant of authority, we submit, is not any different.

I want to just mention one of Guyana's concessions in this period. Guyana--this would be our slide 34--Guyana has made much out of the fact that it doesn't think much of either the Colmar or the Staatsolie concessions insofar as they

12:14:27 demonstrate Suriname's commitment to its boundary claim, and it has argued that the Colmar concession, because it did not do a lot of work in the disputed area, therefore it doesn't have much relevance, and that Staatsolie being a government oil company, it doesn't really have value in these proceedings.

Now, I simply want to note this one concession that Guyana entered into with the company called Major Crude. Now, this is a company that you can see here in a memorandum that was prepared for the cabinet by the Minister of Energy and Natural Resources of Guyana what Guyana thought of this company. This is a document out of Guyana's Memorial. It's Annex 120, and it talks of the kind of company that they were working with.

Now, I'm not--I don't want to diminish Major Crude, but Guyana knew, and Guyana's held these kind of concessions up as having substantial value in these pleadings, and demonstrating Guyana's boundary claim. When this company--there was substantial question about the concession to begin with, they did enter into the concession and then it disappeared in a few months. Now, it's just not worth much when you start adding up numbers of concessions.

So, Major Crude left the scene, and then we come to the period of 1986 to 1990. We heard about the 1989 Presidential meetings and the 1991 MOU, and those events were described in great detail in both Suriname's Preliminary

12:16:33 Objections and Guyana's Memorial, and we heard about them last week.

Now, you cannot look at those events which were initiated by a grant of authority by Guyana to the LASMO/BHP Company. You can't look at those events and come away with any conclusion other than there is a dispute. The Presidents meet and they talk about a dispute. There is a set of meetings of the petroleum officials, and they're talking about a dispute. There is an MOU, whether it entered into force or not, describing the area in dispute as between the 10 and the 30-degree line. You can't walk away from that story without acknowledging that at least at this time these officials recognized that there was a dispute.

And I wanted to just mention something. We heard last week about how difficult it had been for Suriname to get to reaching an agreement on this MOU, and there was a lot of comment that Suriname had been dragging its wheels, and I just to want note something. If you go in the record, you will see that Guyana started meeting with LASMO/BHP in 1986, and it took them more than or at least 24 months, actually just over 24 months just to issue the concession to the oil company.

Now, the fact that it took 18 months to get from a Presidential meeting in 1989 to an MOU about how operations would proceed in a disputed area between two governments, the very sensitive matter, I would say that that is not dragging

12:18:41 one's feet. There would be a lot of governments that wouldn't be able to figure out how to do joint operations in a disputed area within an 18-month period of time.

Now, it's in this period also, I mentioned I would mention where the protests are. It's in this period 1989 where you will find the two protests in the record. There is a protest from Guyana to Suriname about an option, I guess is the best word, that Suriname had with a company called IPEL, and this got out, and Guyana protested it, and Guyana only said that the area in which they're operating, or IPEL proposes to operate, is going to be an area that Guyana claims.

Suriname went back, and the other protest note is in the record--and Suriname went back and clearly expresses its position in that note that its position is the 10-degree line. Those are the only two Diplomatic Notes leading up to the CGX incident that are in the record that you have before you, and it is all about this IPEL issue in 1989.

Now, I want to move away from petroleum for a minute and I just want to show a couple of fish maps, fish slides, shrimp. This would be our number 42, I think. We have a Regional Fisheries Convention in this area that, under the FAO and FAO Fisheries Convention that is called "WECAF," and, of course, there are always reports in these kinds of institutions, and I just wanted to draw attention to a document that's in our Counter-Memorial showing Suriname's fishing area,

12:21:08 and again, this is the statistical areas that Suriname uses for reporting shrimp catches simply to note its shape, and it's obviously the 10-degree line. There was a similar picture from Guyana, and this would be slide 43, and this is Guyana's perspective and, of course, the--you need to think about the right-hand side of that line, and you can see that it's a curvy line, and it's a rough approximation of the equidistance line as the 1977 law calls for.

Now, if we go back just for a second to 1986, it's an important point that I wanted to point out. In the record, up to 1986, you do not have any real indication of a position of Guyana that extends the 34-degree line beyond the 200-meter isobath. There is nothing there. You have assertions, but there is no proof.

What you had in 1986 was Guyana established a new law designed to promote petroleum activity, and it got working with World Bank consultants. And at that time in 1986, there was, for the first time, a grid map prepared by folks working for the World Bank in which that 34-degree line for the first time goes straight out to the 200-mile limit. That's the first time you will find that in the record before us.

Now, we come to 1997, and Guyana at that time again passes another new law, and this is a new tax code again designed to bring foreign investment into the country, and one of the immediate results of that was to bring forward a new

12:23:30 concession that covered part of the disputed area, and I just to want show you that picture. It would be on slide 45. And this was the Maxus concession. And can you see there the Maxus concession overlapping with Staatsolie's concession in the disputed area, the darker blue.

Now, here is one of Guyana's concessions, and the only point I want to make here is it is the only concession that does not go up to its boundary claim. That's the only point I want to make.

Now, after this, we have many other activities in the petroleum world. It begins to accelerate. We come to 1999, and Guyana enters into its two concessions with CGX. It enters into a concession with Esso. For the first time in 1999, Guyana is issuing a concession that in any material way extends seaward of the 200-meter isobath. And that's in the Esso concession. The Esso concession approximately went up to the limits of Guyana's boundary claim. On the Suriname side, at the same time Burlington came to Suriname and asked for a concession to the east of the Esso concession, and that was granted.

And so, at the end of 1999, before the CGX incident, we would have the following picture if you looked out at the oil concessions. This would be 46, I think. So, we have the Staatsolie concession going in the southern part of the disputed area going over all the way to the 10-degree line. We

12:25:47 have the darker blue representing an area of overlap of the concessions issued by Guyana and by Suriname. And in the seaward area we have an Esso concession basically going up to its boundary claim and a Staatsolie license to Burlington to operate in areas that were not in dispute.

Now, to conclude this review of the facts, I need to mention some fisheries information that was put into the pleadings. In the Memorial, Guyana offered up the argument that it had enforced its fisheries law west of the 34-degree line, and it helpfully included some enforcement information. We plotted those coordinates, and we found them to be very demonstrative of exactly what Guyana's fishery enforcement looked like, and that's shown on Number 47.

Now, here we have Guyana's fishery enforcement information that it has provided to the Tribunal. You can see there the 10-degree line, the 34-degree line, the equidistance line, and you can see that there is virtually no law enforcement on fisheries in the disputed area that Guyana has offered up in evidence in this case. And most of what it has offered up is fishing enforcement that fall well outside of the disputed area.

Now, we showed in the next slide the information that Suriname has brought forward to the Tribunal about Suriname's fishing enforcement in the disputed area to the extent we have records. Guyana hasn't contested any of this, and the

12:28:00 information has been put in the Counter-Memorial, and here you see by those red dots the coordinates of fishing inspections or fishing arrests that have been undertaken by Suriname in the area of overlapping claims. When we compared this information, we did not provide you with fishing enforcement information that fell outside of the disputed area because we simply thought it wasn't pertinent to the arguments that were being made.

Now, I want to now--Professor Murphy is going to be dealing with CGX incident this afternoon, and so I'm not going to say anything about it, but it does seem to me that it's hard to look at these facts and reach any other conclusion other than there has been a disputes between the parties. You can't create an argument such as Guyana made in its Memorial when it said at paragraph 5.1 that Guyana had no reason to expect that activities under the CGX License should cause any particular difficulties. Well, I suppose it depends on what kind of activities. You know, perhaps some study of the disputed area, but drilling a well is a very different proposition, and you will not find a government in the world that would allow another government in a disputed area to go drill a well in that area. It just won't happen. Therefore, I don't find it unusual there was diplomacy before that. When Suriname found that it was fully the intention to drill the target that was in the disputed area and not other targets that CGX had outside of

12:30:14 the disputed area in its concession area, that the boundary problem became ripe, and the rest is now in the Tribunal's hands.

I want to just mention one more fish-related issue, and then I want to turn very briefly to some third state conduct issues, and then we will try to finish by the appointed hour, Mr. President.

At Annex 84 of its Memorial, Guyana provided a copy of a Diplomatic Note dated 15 September, 2000. This was after CGX. After CGX we started sending lots of protest notes to one another, but--and after in September we get this protest note that Guyana has put in its pleadings, and it complains of fisheries law enforcement by Suriname that was in the disputed area, and it referred to three different vessels, refers to the shallow water, the ebb tide, and the OLIVIA, and all of these are said to be Guyana fishing vessels, and Guyana is asserting those vessels were fishing in Guyana waters in the traditional way that you formulate these things in Diplomatic Notes, but they were fishing in an area obviously that Suriname claimed.

Now, two of these vessels are on the fisheries enforcement information, on some of the information you have seen before, because those vessel had been arrested before, and they had been released. But this information which postdates CGX was not on that map. So, if we had used this new information that helpfully Guyana provided, there would have

12:32:15 been more dots on the map in the disputed area.

The point that I really want to draw out is that in the same Memorial, the same Memorial that Guyana says it has no information about Suriname's fisheries law enforcement practices it put in this Diplomatic Note. Now, I will let the Tribunal draw its own conclusions about that.

Now, after this review of the conduct leading up to the CGX incident, I would like to turn just very briefly before we conclude to refer to the arguments that Guyana has made that pertained to a third state.

Now, presumably, the way the Court has dealt with this issue, particularly in Jan Mayen, should dispose of this, but I do want to draw the attention of the Tribunal to two aspects of Guyana's argument. Guyana has raised in its pleadings Suriname's relationship with French Guiana, and it has done so in two ways to assist its argument. First, Guyana wants to give the Tribunal an impression of how much maritime space Suriname might someday get, depending on how this Tribunal addresses its jurisdictional responsibilities and how this boundary in this case will someday be decided, and what will someday be decided in connection with the French Guiana-Suriname situation. You have seen lines put forward that have no basis in both Guyana's pleadings and in the last few days. They're using their version of the way a provisional equidistance line would be constructed, and certainly they can

12:34:27 find some support in diplomatic records dating back many, many years that perhaps this boundary would run at 30 degrees.

But those are against diplomatic documents talking about things long ago, and we pointed out in our Rejoinder that the only discussions that are going on--that there is no agreement in the first instance between France and Suriname. There are technical level discussions that have occurred between the two sides; and what has been determined in those technical level discussions is that if you would have a simplified equidistance line running off the coast seaward of the Marowijne River, it would probably run at a 24- to 25-degree bearing.

Now, I can disclose those technical discussions, and that's all they are. Neither government, neither France nor Suriname has decided that that's what the boundary is going to be, but the technical people on both sides have agreed that's what a simplified equidistance line would look like.

Now, the other thing, other reason that we have the argument being brought forward is, of course, in the diplomacy you find in the record that France and Suriname, France and the Netherlands have, in the past, talked about the equidistance line, the equidistance method being followed to construct that line. Whether that will, in fact, happen is not clear, but even if it does, we have seen from Jan Mayen that there is no reason that Guyana should be entitled to the same treatment

12:36:38 that Suriname might be willing to give a third state.

The geographic situation is different, and what happens through negotiation, what happens through dispute settlement have different characteristics.

Now, finally, I want to close by simply noting--and this has been mentioned by others on our team--that Guyana has invoked Judge Jiménez Aréchaga's writings in the international boundary series in Volume I to support what is, in effect, a regional argument, that all of the boundary lines on the west coast of South America are equidistance lines.

Now, we have shown that that's an overstatement, and we have shown that even in Judge Aréchaga's writings in the same volume when he got down to specifics talked about these lines in the main as perpendiculars to the general direction of the coast, in particular with respect to the France-Brazil boundary and the Brazil-Uruguay boundary.

Now, I'm going to have the opportunity tomorrow to talk to the Tribunal a bit more about Judge Aréchaga, and I welcome the fact that he has been brought into this case by Guyana, but I can assure the Tribunal that he was in this case before that happened because many of the things that Judge Aréchaga has taught in the law are part of Suriname's basic arguments in this case, and I want to come back to this tomorrow.

Judge Aréchaga knew something about coastal fronts and

12:38:33 their projection into the sea. He also understood the inequities that equidistant lines create. And he understood the application of delimitation method to geography and the law better than most people.

His separate opinion in Tunisia-Libya, and I wish to come back to that tomorrow, but his separate opinion stands out as perhaps the most articulate reasoning of how the Court's words in the North Sea case are to be understood in terms of the projection of coastal geography into the sea.

The separate opinion also is a contemporaneous account by a nonparticipant in the work of the Third U.N. Conference on the Law of the Sea, and how equidistance, as expressed in the '58 Convention, was rejected. I'm told that I misspoke, and said that Judge Aréchaga's analysis was part of Guyana's presentation. I certainly meant to say his analysis was part of Suriname's presentation. Thank you for that.

I guess that's the reason you get to correct transcripts from time to time.

But Judge Aréchaga's separate opinion speaks of the work of the Third Conference and the relationship between the work of the Third Conference, the result of Articles 74 and 83, and what that meant for the rule that had been set out in Article 6 of the Convention. And finally, before I conclude, Mr. President, I could not help but note, and it has not yet been said in this case, but--in this pleading, but I want to be

12:40:34 the first to say it that Judge Aréchaga, of course, was the President of the Tribunal in St. Pierre and Miquelon, and you saw what that Tribunal did with coastal front projections yesterday.

Thank you, Mr. President. I look forward to coming back before you tomorrow. And if this is a timely time, it's time for the lunch break.

PRESIDENT NELSON: Thank you.

May I just, I would like to ask you just one very brief question, and I hope it will be a brief response.

What is your conclusion with regard to the relevance of fishing activities with respect to drawing the line? The conclusion?

MR. COLSON: Our view is that the unilateral acts of conduct, whether they are expressed in terms of fishing or oil conduct, are not relevant considerations in a case of a single maritime boundary. That is the short and sum of it. We have said if there is really a full tacit agreement, whether it's on fishing activities or oil activities, as the Court said, in paragraph 304, that might be a different matter. We have the one time in the jurisprudence since the Gulf of Maine case in Jan Mayen, where there was a very small adjustment made in the southern part of the delimitation area, it was a very small adjustment, but it was made to ensure equitable access to the fishing resources, to the caplin resources that were available

12:42:23 so that both parties would have an opportunity to get to those resources on their side of that boundary line. That's the only case.

PRESIDENT NELSON: Thank you very much, Mr. Colson.

I now give the floor to Mr. Reichler.

MR. REICHLER: Thank you, Mr. President.

And very briefly, in an effort to be helpful to the Tribunal as it deliberates over the lunch break, Mr. Greenwood suggested that Chapter 3 of the Rejoinder was, I think his word was replete with references to Dr. Smith's report. There are 279 paragraphs in Chapter 3 of the Rejoinder, of which seven of them contain a reference to Dr. Smith or his report. The first one at 3.159, just says that they will be addressing it.

The next five at paragraphs 3.164, 3.173, 3.174, 3.177, and 3.191 all comment favorably on Dr. Smith's report because they have observed correctly that there are areas in which he disagrees with Guyana's position, either contradicts or doesn't support it. So there are five favorable references to Dr. Smith.

The only--the last, the seventh reference at paragraph 3.219 is the only part of the Rejoinder where they criticize any aspect of Dr. Smith's report, criticizes his opinion on the effects of erosion in this region. That's an issue that they had not raised so far in these oral proceedings, and it is an issue as to which we would not propose to question him on

12:44:07 rebuttal.

All of the other criticisms that they have made in these oral proceedings are absent from the Rejoinder.

PRESIDENT NELSON: Thank you, Mr. Reichler.

I give the floor to Professor Greenwood.

PROFESSOR GREENWOOD: Thank you, Mr. President.

Mr. President, Members of the Tribunal, you will be well aware that this is not a matter of a game of mathematics in which I have got seven references to your four or I've picked up the word Smith by going through the transcript nine times and you've only picked it up three. It is a matter of what Chapter 3 of the Rejoinder deals with substantively, and Chapter 3 is quite a rejection of the basic analysis of Guyana, which in its turn is based almost entirely in large areas on the analysis offered in Dr. Smith's report. There is nothing in the cross-examination of Dr. Smith which can come as a surprise to Guyana.

PRESIDENT NELSON: Thank you very much.

We will have a lunch break and return at 14:30.

(Whereupon, at 12:45 p.m., the hearing was adjourned until 2:30 p.m., the same day.)

12:45:26 1 AFTERNOON SESSION

2 PRESIDENT NELSON: My apologies for the delay. He
3 reported on the preliminary meeting of the experts as follows:
4 One, the parties' expert met in a preliminary meeting
5 with the Tribunal hydrographer on 9th December, 2006.
6 Two, minutes of that preliminary meeting have been
7 prepared and will be made available to the parties.
8 Three, the parties' experts agreed to provide certain
9 further information to the Tribunal hydrographer as described
10 under further action in the minutes. The parties are asked to
11 facilitate the work of the experts in providing this further
12 information.
13 Finally, the Tribunal hydrographer sees no need for a
14 further meeting for the time being.
15 Thank you.
16 I now will resume the hearing, and I give the floor to
17 Professor Sean Murphy. You have the floor, sir.
18 PROFESSOR MURPHY: Thank you, Mr. President.
19 It's a great honor to appear before this Tribunal, and
20 a great privilege to do so on behalf of the Government of
21 Suriname. I will be addressing Guyana's submissions 3 and 4 as
22 set forth in the Reply brief. These were originally styled as
23 Guyana's submissions 2 and 3, and I will begin by giving a word
24 on the burden of proof here. As the proponent of these
25 submissions Guyana must bear the burden of proving them to the

14:35:22 satisfaction of the Tribunal. I think that is plain from Article 11 of the Tribunal's Rules of Procedure.

Suriname, as a general matter, asks that these submissions be rejected as either outside the Tribunal's jurisdiction or as inadmissible, and in the alternative, Suriname requests that these submissions be denied on the merits, and that the Tribunal find that it is Guyana who has violated the Law of the Sea Convention by authorizing the drilling of an exploratory well in a disputed maritime area and refusing to make every effort to enter into a provisional arrangement of a practical nature regarding a disputed area.

My presentation will take up each of Guyana's submissions in turn.

Let me begin, then, with submission number 3. The basic allegation here is that Guyana says Suriname has used armed force on June 3rd, 2000, in violation of the Law of the Sea Convention, the U.N. charter and general international law against the territorial integrity of Guyana and/or against its nationals, agents, and others lawfully present in maritime areas within the sovereign territory of Guyana or other maritime areas over which Guyana exercises lawful jurisdiction.

I will note here, Mr. President, that Guyana did not say in the submission anything about a threat to use armed force, and I suggest that under the Tribunal's Rules of Procedure, Article 9(b), such a submission should have been

14:36:59 made at the time of the Memorial, and that Guyana is not in a position to unilaterally change that submission at this point.

Now, as a consequence of this submission, Guyana is asking for damages in an amount of no less than $33.8 million. Suriname submits that there are multiple fatal defects in this submission relating to jurisdiction, admissibility, merits, and damages. My presentation will proceed as follows: First, I will speak about the facts of the CGX incident, and the fact that it occurred in the area of overlap of maritime claims after Guyana unilaterally authorized exploratory drilling.

Second on the issue of jurisdiction, I will argue that Guyana failed to satisfy in two respects the requirements of Part XV of the Law of the Sea Convention with respect to the CGX incident, and therefore cannot invoke the compulsory jurisdiction procedures.

Third, on admissibility, the claim is inadmissible because Guyana comes before the Tribunal with unclean hands, and because such issues of state responsibility have no place in a boundary delimitation case.

Fourth, on the merits, Suriname's conduct in June 2000 was enforcement of a coastal management measure. It was not a use of force and not a threat to use force within the meaning of international law.

And fifth, with respect to damages, even if Guyana prevails on the merits, Guyana is not entitled to damages for

14:38:36 submission number 3.

Let me turn to the facts first, where I will focus on two things, first on the location of the CGX incident, and second on the incident itself.

First, the CGX incident clearly occurred in the area of overlap, an area that was clearly not under the sovereignty or sole jurisdiction of Guyana. As Mr. Colson discussed in depth this morning, the conduct of the parties over the past few decades readily reveals conflicting claims to the area of the seas between the 10-degree line and the 34-degree line. This might be referred to as the area of overlap or the area of dispute. On the screen is a map that Mr. Colson also used. It's a graphic showing the British concession to Shell mapped onto Suriname's Colmar concession. I think we may have spelled Colmar improperly there and I apologize for that, but basically this is a map showing those two concessions mapped onto each other. Since it is a little difficult to see what's happening here, we have developed a simpler map for you just showing the basic lines, and what you see there is the color for the Shell concession, the color for the Colmar concession. Where they overlap is the dark blue area, and that is the area of overlap.

While Suriname refrained from engaging in exploratory activities in this area of overlap from the 1960s forward, we maintain that that reflects responsible behavior concerning a disputed area, not a concession of Guyana authority in this

14:40:22 area, and indeed, we think it a dangerous proposition that a state's restraint in aggravating a dispute over a disputed maritime area should be held against it in determining who has jurisdiction over that area. We think that is a very bad proposition.

In formal diplomatic documents, both states clearly recognize this area as an area of overlap. You are, of course, aware of the Agreed Minutes of 1989. This is reflecting a meeting between the Presidents of the two countries, and in this you clearly are seeing that they are identifying an area of potential oil development along their northeastern and northwestern boundaries that is disputed by the two sides. We submit this hardly establishes a belief that Guyana alone has jurisdiction in this area, let alone sovereignty over it.

Similarly, if you look at that Memorandum of Understanding of 1991, you see there confirmation that both countries, both countries, considered that there existed an, "area of overlap" in their offshore claims to oil resources. Moreover, the 1991 MOU clearly defines within it that there is an overlap of an area, and it's bounded by the lines north 10 degrees east and north 30 degrees east.

Again, this is hardly showing a belief that Guyana alone has either sovereignty or exclusive jurisdiction over this maritime area.

In our Rejoinder at paragraph 4.17 we list the various

14:42:11 statements in Guyana's evidence where Guyana itself admits that the CGX incident occurred in the area of overlap. Now, why do I belabor these facts? Guyana simply cannot establish that it alone exercised sovereignty, authority, or jurisdiction in this disputed area, and that presents a core factual problem for submission number 3. Guyana launched this submission in its Memorial at a time when it claimed there existed an agreement between the two parties about the so-called 34-degree historical equidistance line. Since the Memorial, Guyana's position has changed. Guyana now argues that one can identify indicia that the parties thought the 34-degree line was equitable.

We dispute that any such indicia exist, but even so, Guyana is now adopting a much, much softer position regarding the status of this area of overlap, one that we submit rips away the foundation of submission number 3. For if Guyana is now accepting that this was a disputed maritime area rather than an area exclusively under Guyana's jurisdiction or sovereignty, then it takes quite a bit of wind out of this use of force claim.

Let me turn now to the second part of my factual discussion, the CGX incident itself. Without question, the CGX incident occurred in the area of overlap. On the screen, you have the map showing that location. The coordinates were 7 degrees, 19 minutes, 37 seconds north, 56 degrees, 33 minutes,

14:44:04 36 seconds west. Both parties agree on this position. I point to you Guyana's Memorial, paragraph 5.9, Suriname's Rejoinder, Figure 12.

Guyana at some point in the period 1999 to 2000 decided to authorize a Canadian oil company, CGX, to drill for oil at this location in the area of overlap. That decision was never--never--communicated to the Government of Suriname. Counsel for Guyana had a lot to say about how Suriname should have invoked compulsory dispute settlement procedures at some point at this period of time, but it failed to note that Guyana never, prior to the incident, informed Suriname about the fact that it planned to drill for oil in the area of overlap, the location of the drilling, or the timing of the drilling.

Indeed, Guyana did its best not to inform Suriname of such information. Now, I would direct you in the Judges' folder to your Tab H, and there will be there a series of documents relating to my presentation. At document number one, you will find a table of evidence in the record showing the diplomatic exchanges between the governments in the lead up to the CGX incident. This is Tab H in your folder, item number one. It's a table we prepared to just give you a road map through the evidence. This is showing you all the diplomatic exchanges in the lead up to the CGX incident.

What's the first step that happens here? Suriname--Suriname, having gleaned bits and pieces of

14:46:03 information from the press about a possible drilling operation, initiates this diplomatic dialogue on May 11th, 2000. This is the Diplomatic Note that is in the Guyana Memorial at Annex 76. In that Diplomatic Note, it's Suriname who expresses grave concern about this possible drilling that may be intended for the disputed area, it doesn't really know, and it asks for clarification.

It further says, if there are any activities along these lines, Suriname states they should be terminated immediately. We submit that is a very appropriate, careful, and judicious response to what Suriname regarded as a potentially unlawful act.

Guyana responds on May 17 with what you might characterize in layman's terms as a mind your own business response. This is a Diplomatic Note at Guyana's Memorial Annex 77. In this Diplomatic Note, Guyana did not state the location where the drilling would occur. Guyana did not indicate when the drilling would occur. Guyana doesn't even say drilling is going to occur in the area of overlap. It simply asserts that any exploration or exploitation will occur in the territory of Guyana, even though Guyana obviously knew this was going to happen in a recognized area of overlapping claims.

Guyana also stated that the two countries' Border Commissions should reconvene for the purpose of deliberations on issues relating to developments in the Corantijn area.

14:47:55 Guyana clearly had no intention of informing Suriname of its exploration plans. Even though it had been expressly asked for that information, it had no intention of discussing them with Suriname.

What's the next step? Suriname responds by a note on May 31st, 2000. This is in Guyana's Memorial at Annex 78. Suriname calls upon Guyana to terminate any activities planned for west of the 10-degree line. At this point it still hasn't heard anything from Guyana about where this drilling is going to happen, and Suriname proposes a meeting between the two governments to clarify any misunderstanding concerning the maritime border.

All right. The next step is Guyana responding on June 2nd, 2000, and this is in Guyana's Memorial Annex 79. Guyana says the maritime boundary is the line of equidistance, and it invites Suriname to send a delegation to Guyana to discuss the matter. Mr. President, at this point, Guyana had a choice. Suriname had formally protested any proposed drilling. Suriname had formally asked that the drilling not proceed, and Suriname had formally asked for negotiations about this matter. Guyana could have postponed the deployment of the CGX rig to the area of overlap. There was no reason--no reason--why the drilling had to go forward prior to engaging in good faith negotiations between the two governments. Both were obviously prepared to engage in such discussions.

14:49:39 There was also no reason why the drilling had to go forward prior to pursuing Law of the Sea Convention dispute settlement, either conciliation or arbitration, if that's what Guyana wished to do. Instead, Guyana proceeded to drill for oil.

Now, if, as learned counsel for Guyana asserts, the medium is the message, then the message here was a Guyanan rejection of solving a dispute through adherence to the rule of law, and instead acceptance of unilateral action.

From the newspaper accounts, Suriname became aware that a drilling operation was imminent in the area of overlap, so not having heard anything from Guyana about it, Suriname dispatches aircraft to engage in surveillance of the area of overlap. This occurs between May 31st and June 2nd, 2000. On the morning of June 2nd, the CGX rig is discovered in the area of overlap and that it had begun the process of its drilling activities. The legs were going down.

All right. Let's say a little bit about the CGX rig. Here you have it up on the screen. This rig was built in 1974. It is flagged to the Marshall Islands, and it is owned by a company based in Texas, a U.S. company based in Texas. I have placed also in your Judges' folder, this time at Tab Number 2, so H2, the specifications of the rig. And what you will find there is that it has a length of about 231 feet, a breadth of about 200 feet. This is not a small object. It sleeps 88

14:51:36 persons on this rig. It has a 71-foot diameter deck for landing a helicopter. There are three square legs. You can see them sticking up there, the three pinkish grids going up into the air because the legs have not been deployed downward at this point. Those legs can go down and deploy onto the shelf, and that is shown in the next picture, which is not a terrific picture, but the legs are down there. Once it is set up, this rig can drill to a depth of 25,000 feet.

Once the CGX rig was located in the area of overlap, the President of Suriname was informed. The President of Suriname immediately called the President of Guyana on June 2nd and asked that the rig not conduct drilling in the area of overlap. I direct to you Suriname's Rejoinder, Annex 15 at paragraph eight. The President of Suriname then informed the Suriname military that diplomatic efforts had been unsuccessful in getting the rig to depart.

At around 7:00 p.m. on June 2nd, Suriname dispatches two patrol boats to the location that had been identified by its surveillance aircraft. On the screen now you have a picture of one of Guyana's patrol boats. I'm sorry, Suriname's patrol boats. This is also in your Judges' folder, this time at Tab 3.

Now, Guyana's counsel made much of the fact that these patrol boats are part of Suriname's Navy, and therefore under military control. Military control of coastal patrol vessels,

14:53:32 of course, is pretty standard worldwide. Most countries do not have the resources to have a separate navy from their coast guard patrol, and, indeed, both Suriname and Guyana have coastal patrol boats, and both have placed them under the authority of their military.

Both also send their personnel from their coastal services to train with the U.S. Coast Guard, and in the declarations we submitted to you of the Suriname individuals involved in this incident, you will see reference to some of the men having been trained in the United States with the U.S. Coast Guard.

The bottom line is, Suriname has a small navy of just a few of these patrol boats whose principal mission is patrolling Surinamese waters to stop illegal fishing, illegal smuggling--there is a big drug problem, drug trafficking problem--and immigration violations.

What are the features of these vessels? They are small, fiberglass patrol boats. They have a length of about 30 meters, a width of about six meters. If you wanted to compare the footprint of this vessel to the CGX rig, you would find this vessel has a footprint of about 180 square meters, and the rig has a footprint 4,270 square meters, meaning that the rig footprint is about 24 times larger than the patrol boat. That explains why when the patrol boats approached the rig in the middle of the night, they thought they were coming across a

14:55:08 lighted city because it looked so large to them.

What are the weapons these gunboats--sorry, these patrol boats carried? These are not gunboats. Counsel for Guyana many times referred to these as gunboats, but these patrol boats do not have any armaments mounted on them, at least they didn't at that time. They are not equipped for, they were not equipped for and did not display any armaments. Indeed, nothing was mounted on them. The crew had only very standard weapons. They had their sidearms, and they had a group weapon which was stored below deck throughout this incident.

Now, counsel for Guyana tried to make something out of that squad automatic firearm or light machine gun, whatever one wants to call it, but that weapon is pretty standard on Coast Guard vessels worldwide, including Coast Guard vessels here in the United States.

Who were the Surinamese officers involved in this incident? We have provided you with five declarations from the men involved in the incident, and you will find them in our Rejoinder at Annexes 16 and 17 and 19 through 21.

Captain John Paul Jones, an excellent name for a mariner, was named the mission commander. His declaration appears at our Rejoinder Annex 20. One of the patrol boats, you will see it referred to as PO2, was commanded by Captain Bhola. His declaration is at the Rejoinder Annex 16. The

14:56:42 other control boat, PO3, was commanded by First Lieutenant Galong, who later becomes Captain Galong, and that's at the Rejoinder Annex 17.

Captain Jones is the mission commander, and he is located on PO3 throughout the course of this incident.

Now, counsel for Guyana noted that Jones was selected because of his experience, but then he somewhat distorted the reason for his selection. As you can see in his declaration, or not his declaration, the declaration of the individual who appointed him as mission commander, and this is at our Rejoinder Annex 17, paragraph 12, Jones was selected because, and I quote here, "he was known for his calm and authority with the men, and he had gained some experience while leading operations during the interior war."

Now, we submit that the point here is that Suriname was not picking someone to engage in a commando-type operation. They were picking someone who they knew was calm under pressure. That's who they wanted to lead this mission.

I would also note that Captain Jones is one of the individuals who's trained with the U.S. Coast Guard. You will see that in his Annex--his declaration which is Annex 20, paragraph one.

Now, what were the instructions given to these patrol boat commanders? You have up on the screen the instructions that were given by the Lieutenant-Colonel who was the commander

14:58:17 of Suriname's Air Force and Navy, and what you see here is that he is instructing the commanders to proceed to the location identified by the Suriname aircraft to determine if there is a drilling platform engaged in economic activity, and if so, to notify that rig that it was conducting these economic activities in Suriname's waters without permission and should leave within 12 hours. If the rig did not comply, further instructions had to be sought. The patrol boats had no authority to initiate or threaten any kind of force.

What were the instructions given to the crews of the patrol boats? Again, here you have Lieutenant-Colonel de Mees, who spoke directly to the crews, and you will see as you read through this that he says to them, do not shoot your guns, do not issue threats, do not stand on deck and wave your guns around. All right? Only use your weapons in self-defense. These are the instructions being given to the crew.

Now, counsel for Guyana points to this statement and says look, they're talking about the first shot being the start of a war, yet the statement in this context is clearly a warning. We do not want war, is what Lieutenant-Colonel de Mees says. That is the hallmark of a country, of a military officer, trying to prevent armed conflict, not to instigate it.

At 7:00 p.m. on June 2nd, the patrol boats set out to sea. Around 1:30 a.m. on June 3rd, the patrol boats arrive at the site. The patrol boats establish radio communications with

15:00:13 the rig. Captain Jones informs the rig that it's in Suriname's waters without consent and he orders it to leave. He says if you don't leave, the consequences will be yours. The rig asks for 24 hours to leave. They needed more time in order to get themselves organized. Jones agreed.

Shortly thereafter, Lieutenant Galong requests that they cooperate, and he assures them that it is not our intention to harm them. The rig asks where it should go. It receives directional instructions from Lieutenant Galong. The patrol boats then depart the area, they're only there for about an hour, and within 24 hours the CGX rig departs. That's the CGX incident. The bottom line here is no boarding or seizure of the CGX rig. No physical harm to anyone on the CGX rig. There is no firing of weapons. One thing for counsel for Guyana was certainly right about is there was certainly no smoking gun here, no display of weapons, no threat that weapons will be used. All we have are the words, "or the consequences will be yours," which carry no particular meaning and were coupled with the words, "It's not our intention to harm you," which I submit does carry some meaning.

Counsel for Guyana hypothesized that the patrol boats would have used force if the CGX did not comply. We submit that is sheer conjecture, wholly unsupported by the evidence. The patrol boats had no such instructions. The commander of the mission felt he didn't have the authority to engage in such

15:02:01 action. Indeed, I have up on the screen here Captain Jones's statement in paragraph four. He's basically saying in short, I didn't even take weapons with me, or I took weapons with me which were completely ineffective to enforce an involuntarily removal of the platform, and I wasn't even allowed to use these weapons without specific instructions unless I was acting in self-defense.

And then in paragraph 9 he says, if the platform had not left our waters voluntarily, I definitely would not have used force. I had no instructions, and anyhow I did not have the right weapons to do it. I even had no instructions to board the drilling platform, and also I did not consider that.

Now, counsel for Guyana also hypothesized that the patrol boats would have received further instructions to attack the rig. It would have called home, gotten some more instructions of some kind. That, too, we submit is sheer conjecture. It's wholly unsupported by the evidence. In the statement you now have up on the screen, slide 16, you have the Commander-in-Chief of the Suriname armed forces stating that basically under no scenario was the armed forces command going to use force. He's talking here about the instructions that they gave and things of that sort, and that they were having internal conversations within the command group, and towards the end of this thing, he says we concluded that Suriname would not use force in any case unless it was called for as a basis

15:03:39 of self-defense.

Now, what would have been the consequences for Suriname had it unleashed armed force? Well, there were probably going to be lots of different consequences, but here is one consequence that it would have had. Up on the screen you have a further statement by Colonel Sedney, the Commander-in-Chief of the Suriname armed forces. He says that in the period just prior to the CGX incident, he gets a visit from the American Ambassador in Paramaribo, who requested to see him. "The Ambassador told me that he had appreciated the manner in which Suriname had defended its interests up to then, and he didn't want to take sides or intervene in the dispute. Neither did he wish to indicate which actions Suriname should or should not take, but he asked me explicitly, in case of action to be taken, to take note that there were also American nationals on the platform. I," meaning Colonel Sedney, "told him not to worry about the safety of people on board, and I got the impression that his mind was set at ease with this assurance."

So what should we take from this? We should take from this, I think that the idea of the Suriname military deciding it was a good next step to shoot up a U.S.-owned oil rig with U.S. nationals on it who might be injured or killed was definitely not at the top of their priority list. It strikes us as highly implausible, and if we were going to engage in

15:05:19 conjecture here, the conjecture should be that Suriname was not going to pursue that course of action. It was going to pursue other courses of action most likely diplomatic in nature.

All in all, the incident has all the hallmarks of a law enforcement operation in a coastal management zone. Captain Galong, one of the commanders of the patrol boats, had the following to say. He said: "In the periods of May 1989 to 1990 and then from 1997 up until now, I have performed at least 30 patrol missions off the coast of Suriname. These patrol missions also involve the sea area between 10 degrees and 30 degrees north, which is disputed between Suriname and Guyana. The patrols had mainly to do with expelling fishermen without a license from Suriname waters. This has always been achieved by issuing a summons."

Then he says, "My instructions never imply that I may use force, and I have never used force. All things considered, the course of the removal of the drilling platform, as far as I'm concerned, does not differ essentially from the course taken during other patrols." We submit that Captain Galong had that entirely right. This operation was no different from standard law enforcement operations in a maritime zone.

Let me leave the facts behind and move on to talk about jurisdiction. On Wednesday, Professor Greenwood spoke about the importance of paying attention both to the law applicable to a dispute before this Tribunal, and the

15:07:02 significance of whether a state has consented to the jurisdiction of a tribunal formed under the Law of the Sea Convention. In that regard, I begin by noting that submission 3 alleges that Suriname has violated certain international law norms other than the Law of the Sea Convention, including the U.N. Charter and customary international law. With respect, this Tribunal does not have jurisdiction to adjudicate alleged violations of the U.N. Charter or customary international law. To the extent that Guyana's claims are based on those violations, they must be dismissed.

Now, that leaves two alleged violations of the Law of the Sea Convention, the first one is under Article 279, which obligates the parties to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means in accordance with the U.N. Charter, and an alleged violation as well of Article 301. Here it states that in exercising the rights and duties under the Convention, states parties shall refrain from any threat or use of force against territorial integrity or political independence.

There are two jurisdictional problems for Guyana with respect to submission 3. Two jurisdictional problems. First, Guyana never satisfied the requirements of Part XV Section 1 of the Law of the Sea Convention before they brought submission number 3.

And second, since Guyana's claim relates to a dispute

15:08:43 concerning a coastal state's enforcement of sovereign rights with respect to nonliving resources, the claim also falls outside this Tribunal's jurisdiction pursuant to Part XV Section 3. On both grounds Guyana cannot take advantage of the compulsory dispute settlement procedures under Section 2 of the Law of the Sea Convention.

Let me briefly discuss each of these jurisdictional defects in turn.

Article 283(1), which appears in Section 1 of Part XV, is an Article entitled "Obligation to Exchange Views." It says that when a dispute arises between state parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

Part XV Section 2 then provides in Article 286 that any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted to compulsory dispute settlement.

The problem for Guyana is as follows: In the period from the time of the CGX incident, June 3rd, 2000, up until the point where the application was filed before this Tribunal in February 2004, Guyana never informed Suriname that Guyana believed that Suriname had violated Articles 279 or 301, or

15:10:39 even that it had violated the Law of the Sea Convention generally by Suriname's conduct in June 2000.

Similarly, Guyana never requested that Suriname, in light of those violations, provide to Guyana reparation, whether in the form of satisfaction or compensation. Again, in your Judges' folder, Tab H, item four, I prepared a table to show the evidence recording where Guyana asserted to Suriname that it had violated Articles 279 to 301, and you will find in that table no evidence because there is none. There is plenty of discussion after June 2000 about the need to resolve the boundary dispute. That's in the evidence, but there is zero discussion about a violation of the Law of the Sea Convention because of the CGX incident. The first time Guyana makes any such claim is when it files the Notice of Arbitration on February 24th, 2004, almost four years after the incident.

Now, Mr. President, we submit that Guyana had an obligation under Article 283, paragraph one, to inform Suriname of any alleged violation of the Law of the Sea Convention. They were supposed to proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. By failing to fulfill that obligation, Guyana did not undertake recourse to the Section 1 procedures, and because of that failure to take recourse to Section 1 procedures, Guyana cannot avail itself of the Section 2 compulsory dispute jurisdiction.

15:12:36 Now, this is not just a technical or arid plea. Section 1 is designed to require the parties to discuss the claimed violation prior to the resort to compulsory dispute settlement. It's an integral part of the entire Part XV dispute resolution process. If a state feels aggrieved, it first has to go to the allegedly offending state. Why do that? Well, the matter might be resolved diplomatically. The matter might be pursued through conciliation under Article 284 of the Convention and Annex 5 of the Convention. The parties might decide on some binding dispute settlement process other than that envisaged by the Commission.

There are all sorts of possibilities, and none of that was able to play out because of this failure to bring the violation to the attention of Suriname.

Now, of course, I'm sure the Tribunal is aware that this issue of whether Article 283 has been satisfied has arisen in other cases arising under the Law of the Sea Convention. The Southern Bluefin Tuna cases, the MOX Plant Case, the Land Reclamation cases all had the issue arise within them.

In all of the cases, the Tribunal did see Article 283 paragraph one as a significant requirement prior to the triggering of compulsory dispute settlement. In all of those cases the facts demonstrated that the applicant state had raised during the course of prior negotiations the assertion that the Respondent had violated the Law of the Sea Convention.

15:14:26 In this case, the facts establish exactly the opposite: No effort at any prior point to engage in any negotiations of any kind regarding these alleged Law of the Sea Convention violations.

One can compare what has happened in this proceeding to, for instance, the Southern Bluefin Tuna Cases. In that case, by Diplomatic Notes, Australia and New Zealand notified Japan of the existence of a dispute arising under the Law of the Sea Convention and requested negotiations. The slide up on the screen shows you a portion of the oral proceedings at the provisional measures stage. Here you have Mr. Campbell, I believe, on behalf of Australia, providing information regarding the diplomatic negotiations that preceded the filing of the cases at ITLOS. First what happened is they sent Diplomatic Notes expressly informing Japan of the existence of a dispute concerning the matter at hand. The Diplomatic Notes asserted that Japan had violated the Law of the Sea Convention. Express reference was made to Law of the Sea Convention obligations, such as the obligation to conserve highly migratory species, and further, Australia and New Zealand requested negotiations about Japan's obligations under the Law of the Sea Convention, and thereafter those negotiations took place.

Here you also see in the provisional record that these negotiations were held, and at them Australia and New Zealand

15:16:08 clearly stated their position citing expressly to Articles 64 and 116 to 118 of the Law of the Sea Convention. Now, those negotiations failed, but only then did Australia and New Zealand trigger the compulsory dispute settlement procedures of the Law of the Sea Convention. You will see in the next slide that in the provisional measures order, the International Tribunal for the Law of the Sea found prima facie jurisdiction only after concluding, and I quote, "negotiations and consultations have taken place between the parties, and the record show that these negotiations were considered by Australia and New Zealand as being under the Convention of 1993, and also under the Convention on the Law of the Sea." That's at paragraph 57.

Likewise, "Australia and New Zealand have invoked the provisions of the Convention in Diplomatic Notes addressed to Japan in respect to those negotiations." That's at paragraph 58.

It then, of course, proceeded to the Annex VII Tribunal, and in that award, the Annex VII Arbitral Tribunal decided that Article 283 had been satisfied--of course, found for other reasons that there was no jurisdiction--but found that 283 had been satisfied because the negotiations about the matter under the Law of the Sea Convention had been "prolonged, intense, and serious," and during the course of those negotiations the applicants had invoked the Law of the Sea

15:17:44 Convention.

Now, by contrast, Mr. President, in the proceeding before this Tribunal, it's rather hard to say that there were any prolonged, intense, or serious negotiations about Suriname's alleged violations of Articles 279 and 301 since there were no Diplomatic Notes and no negotiations of any kind regarding these alleged violations. Guyana simply never bothered to undertake such action.

We view it as instructive to consider the decision in the Barbados versus Trinidad and Tobago case on this issue. You will find the relevant discussion there at paragraphs 201 to 202 of the Barbados judgment. The Tribunal took seriously the question of whether Article 283 paragraph one had been satisfied because it said this is an Article of general application to all provisions of UNCLOS.

The Trinidad and Barbados Tribunal found that Article 283 had been satisfied because for years the parties had engaged in negotiations over their maritime boundary. However, the Tribunal noted that for other kinds of disputes, meaning other than a boundary dispute under the Law of the Sea Convention, disputes arising under other Articles, Articles other than Articles 74 and 83, an aggrieved state must, and I quote, "as a first step," resort to the Article 283 procedure before invoking compulsory dispute settlement. In this case, we submit, Guyana never took that first step.

15:19:37 Let me turn to the second jurisdictional defect which arises with respect to Part XV, Section 3. The Tribunal is aware that Section 2 on compulsory jurisdiction procedures begins with Article 286. That Article, in turn, begins with the words, "subject to Section 3." Section 3, in turn, contains certain limitations and exceptions to Section 2 jurisdiction. One of those limitations appears in the first Article in Section 3, which is Article 297. Article 297 says that Section 2, compulsory dispute settlement, is only available for certain kinds of disputes that relate to the exercise by a coastal state of its sovereign rights or jurisdiction. Among the three kinds of disputes listed in Article 297, there is no reference to a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources. Since Guyana's submission is a dispute concerning a coastal state's enforcement of its sovereign rights with respect to nonliving resources, the dispute is not encompassed in Section 2 of the Law of the Sea Convention.

So, in sum, both jurisdictional defects place Guyana's submission number 3 outside the jurisdiction of this Tribunal.

Mr. President, I will now turn to why submission number 3 is inadmissible before this Tribunal. Two key defects exist here. One concerns Guyana's unclean hands, and the second concerns the inappropriateness of trying to transform a

15:21:47 case concerning a maritime boundary delimitation into a case concerning state responsibility for acts taken prior to the delimitation of the boundary.

With respect, first, to the issue of unclean hands, we have addressed this in considerable detail in the pleadings. I direct you to the Preliminary Objections, Chapter 7, and the Rejoinder, Chapter 2, subsection 2(c), and I won't recount all the information in the pleadings in that regard. But I would like to remind the Tribunal that the basic doctrine is traced back to the River Meuse case normally, and there you do find Judge Manley Hudson stating in his concurring opinion, that it would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligations, one party which is engaged in a continuing nonperformance of that obligation should not be permitted to take advantage of a similar nonperformance of that obligation by the other party.

So, in essence, the idea is that if one party is engaging in nonperformance, then the party shouldn't be able to claim for a reciprocal obligation if they themselves are engaged in nonperformance.

We think this is a well established principle in international law, and we maintain that both Suriname and Guyana had reciprocal obligations under the Law of the Sea Convention with respect to this area of overlap. Guyana, in

15:23:31 proceeding to drill in that area, breached its obligation, and under this doctrine of unclean hands, Guyana cannot now press a claim before this Tribunal that Suriname has violated its reciprocal obligation. That's all I'm going to say about the clean hands doctrine, Mr. President, but we do think it squarely is applicable as a matter of inadmissibility in this case. The second issue of inadmissibility concerns the inappropriateness of transforming a boundary case into a state responsibility case. This, too, is thoroughly outlined in our pleadings.

Here, the central issue in this case is that the Tribunal is delimiting a maritime boundary. I think that should be clear from the fact that we are spending seven days so far talking about maritime boundary delimitation and a little less than a day talking about these submissions 2 and 3, so the basic premise here is that we have a maritime boundary case, and underlying that is the fact that we don't have a boundary, an agreed boundary at least.

We think, therefore, it is inappropriate for Guyana to be advancing a claim that turns inescapably on whether Guyana has sovereignty over a disputed maritime area. Indeed, Guyana's entire submission number 3 is built around the idea that there was a fixed maritime boundary, one that clearly established Guyana's control over a particular area that Suriname moved into. That's not the case here. That's clearly

15:25:10 not the case.

Now, presumably, Guyana is prepared to accept a decision by this Tribunal that the 10-degree line is the appropriate maritime boundary, and if so, then Guyana cannot maintain that Suriname was wrongful in regarding the 10-degree boundary as the extent of Suriname's maritime jurisdiction. Suriname certainly intends to accept the Tribunal's decision regarding the location of the boundary; and in the event that the Tribunal finds it has jurisdiction to delimit, and if it concludes that Suriname is wrong about the 10-degree line, and if the CGX incident occurred in an area of the seas allocated by this Tribunal to Guyana, we submit Suriname should not be condemned for actions previously taken in a mistaken belief regarding the location of the boundary.

States normally do not bring such claims of state responsibility in a maritime boundary delimitation case. I would refer you to the Tunisia-Libya case. Mr. Colson noted this morning that in that case there were some fairly dramatic incidents in the mid-1970s, the SCARABEO IV incident, the J.W.S. BATES incident, where a drill ship was sent into disputed waters, various navies showed up, there was a big to-do about it. Yet, when that case ended up going to the International Court of Justice, there was no effort by any of the parties to argue that its sovereignty had been infringed based on those incidents. That is true of most delimitation

15:26:57 cases, including where fisheries disputes have unleashed very significant forms of violent activity. Guyana has cited no case--no case--where a territorial dispute is decided in favor of one state and where the losing state was then held responsible for its effort to exercise control over the formerly disputed area. The fact that states generally are not advancing state responsibility claims and that tribunals are never accepting such claims we think speaks volumes.

Now, other tribunals when faced with a rare claim that sovereignty has been infringed have quite prudently refrained from passing upon the state responsibility issue. I would refer you to the Cameroon-Nigeria case, where, of course, there was a boundary delimitation issue there, and Cameroon alleged that Nigeria had used force in violation of U.N. Charter Article 2(4) and customary international law.

Now, in delimiting the border between Nigeria and Cameroon, the Court did award to Cameroon certain areas that had been occupied by Nigerian military forces, and in the next slide you see that although it did that, it stated in the delimitation judgment in conjunction with Nigeria's anticipated withdrawal, that that sufficiently addressed any injury allegedly incurred by Cameroon. I quote, "The Court will not seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon has been engaged as a result of that occupation."

15:28:48 Counsel for Guyana asserted on Monday that the Court's finding was based on a lack of evidence, but the Court's language says nothing about a lack of evidence. I encourage the Tribunal to look at the relevant portion of the Court's decision. The Court basically accepted that injury was probably suffered by Cameroon due to Nigeria's occupation. Indeed, it would be rather hard to argue that the occupation of the Bakassi Peninsula did not injure Cameroon.

Guyana appears to be confusing this part of the judgment with a different part, paragraphs 320 to 324 of the judgment, where the Court finds a lack of proof regarding certain other charges made by Cameroon. Those were charges about an alleged Nigerian violation of the provisional measures order of the Court and an alleged Nigerian responsibility for certain boundary incidents. Those matters the Court did find there was a lack of proof on, but with respect to this issue, paragraph 319, what you have up on the screen, this is not one where the Court found there was a lack of proof. This is one where the Court found that on the basis of its delimitation of the area and the expected withdrawal of Nigerian troops, that should end the matter.

We submit that it's no surprise that the International Court of Justice President Rosalyn Higgins has recently noted that the Court has never yet made a finding that a state's responsibility is engaged in a case where the main focus is

15:30:28 territorial title. We think there are several prudential reasons why tribunals have dismissed state responsibility claims when raised in a boundary delimitation case. In the short term, tribunals no doubt sense that it is not helpful when trying to encourage states to accept and to abide by a boundary delimitation if that decision, the delimitation decision, includes some sort of condemnation of one side or the other for prior conduct. In his opening comments, Guyana's Minister of Foreign Affairs, Mr. Insanally, spoke rather eloquently about Guyana and Suriname's friendship and respect that they will no doubt share over eternity as neighbors living in peace and harmony and ever increasing cooperation. Very eloquent words. Yet, surely it is not helpful in fostering that relationship for Guyana to be asking this Tribunal in the delimitation award to condemn Suriname for having violated the U.N. Charter.

In the long term, tribunals probably sense that states may be discouraged from bringing boundary disputes to arbitration if they are going to face the possibility of claims of wrongdoing based on delimitation conduct.

Moreover, we submit that allowing states to pursue state responsibility claims in this context may create perverse incentives in favor of unilateral action in disputed boundary situations. A state that has designs on occupied but contested land or marine areas may think that moving people or rigs into

15:32:24 the area will give it a stronger territorial claim. Such thinking, we think, will only be reinforced if the state believes that its opponent is less likely to respond for fear that it will be exposed to a state responsibility claim. In other words, by allowing such claims, we may be encouraging states to take unilateral actions with respect to disputed territory--an undesirable outcome for those interested in maintaining international peace.

So, for both of these reasons, clean hands and the inappropriateness of introducing a state responsibility claim into a boundary delimitation case, the Tribunal should dismiss submission number 3 as inadmissible.

Mr. President, let me turn to the merits of Guyana's submission number 3. For four reasons we think that Guyana's submission number 3 fails on the merits. First, Suriname's conduct in June 2000 was enforcement of a coastal management measure. It was a law enforcement.

Second, Suriname's action was not a use of force nor a threat to use force within the meaning of international law.

Third, Suriname's conduct was not directed against Guyana, but against a vessel flagged to a third state.

And fourth, Suriname's action was a lawful countermeasure taken in response to Guyana's unlawful action. I will address each of these points in turn.

First, Suriname's action was a reasonable exercise of

15:34:13 law enforcement measures. As the Tribunal is well aware, countries worldwide use patrol boats to monitor unlawful areas of maritime areas under their jurisdiction. When they do so, they are regarded as exercising a law enforcement function. Even if warning shots are fired or boardings of vessels occur, this is still regarded as a law enforcement operation.

Suriname is no different in this regard. Suriname's national law prohibits fishing and mining activities in Suriname's maritime zones without Suriname's permission. For example, as Mr. Colson mentioned this morning, Suriname's mining decree of May 8, 1986, sets forth general rules regarding exploration by and exploitation of minerals in the continental shelf. And if you violate that, you can be punished for imprisonment of up to two years and fined 100,000 Suriname guilders.

Suriname regularly uses its patrol boats which comprise its Navy to enforce these laws. That's what they do. Now, we presented evidence to you regarding Suriname's law enforcement in the area of overlap. Suriname's patrol boats regularly police vessels operating in the area of overlap, mostly for fishing violations. Mr. Colson provided you with these two maps this morning. They show on the left Suriname's stopping and inspecting of, I believe, 17 fishing vessels in the area of overlap. Those were Suriname vessels. They were Guyana vessels. They were third country vessels. There were

15:36:04 at least two arrests made in these incidents. It's not surprising that Suriname would be conducting its enforcement operations in the area of overlap since Guyana was not doing so. When you look at the map on the right, this is Guyana's evidence--the maps are ours, but they put in information about their fisheries enforcement activities. We plotted those activities, and what you have is that map on the right side of the graphic.

Guyana in its presentation last week conceded that it was not exercising law enforcement operations up to its claimed 34-degree line, and I direct you to page 406 of the transcript.

Now, we have mapped this law enforcement activity onto a single map with respect to the area of overlap, and we think it's pretty apparent who was engaging in law enforcement activity with respect to at least fisheries in this area of overlap.

Now, we submit that while there were obviously heightened political sensitivities about the idea of an oil rig coming into this area, nevertheless, the CGX incident has all the characteristics of a law enforcement-type operation. Suriname believed its national law was being violated by the drilling that was going to take place in this area of overlap. It consulted with its Attorney General on that matter. When it was decided that action should be taken, the same patrol boats and the same personnel that normally engage in law enforcement

15:37:46 activities in Suriname's waters were dispatched to the CGX location. The patrol boats, after reaching the location, instructed the oil rig to leave because they were violating Suriname's law. The oil rig left. That's exactly what happens in countless times, countless times and countless situations every day worldwide when countries are engaging in coastal maritime law enforcement activities.

Guyana's behavior at the time of the incident suggests to us, too, that they expected Suriname to engage in this law enforcement action. By letters of November 8, 2005, and March 2nd, 2006, counsel for Suriname requested from Guyana all records of communications between the government of Guyana and the CGX company, including those relating to the aftermath of June 2000 incident, and you will find those letters at our Rejoinder Annex 42.

We were told by counsel for Guyana that no such records exist of any communications between the Government of Guyana and CGX Company relating to the CGX incident.

Now, if that's true, and we have no reason to think that it's not, but if that's true, the lack of any such communications demonstrates to us that Guyana fully expected that Suriname would request the CGX rig to leave the area of overlap. Otherwise, there should be records of Guyana contacting CGX about what happened, how did it happen, where did it happen, letters going back and forth, logs of some kind

15:39:40 or another, what did they say to you? If this was such a big use of force that suddenly came out of the blue, you would expect some sort of documentary record relating to it. Well, there isn't one. There is no such record. Instead, the Government of Guyana appears to have fully anticipated that what would happen did happen, and that may well be because this is an area where Suriname has been regularly exercising its law enforcement function, and it's no surprise it sent out its coastal patrol vessels in the way that it did.

So, to sum up this point, we think Suriname's acts fall well within the scope of what would normally be considered law enforcement activity in the sense that its conduct did not rise to the level of some sort of use of force.

So, let me turn to the next point, which is that the action was not a use of force or a threat to use force within the meaning of international law.

Guyana has framed the submission as a use of force against an area over which Guyana has either sovereignty or lawful jurisdiction. Now, that submission was predicated upon the idea of using force against Guyana territorial integrity--that's what the submission says--or against persons present in maritime areas under the sovereign territory of Guyana or over which Guyana exercises lawful jurisdiction. But as I've noted, you can't think of the area of overlap in those terms. That's simply not what it was.

15:41:21 Further, the conduct at issue in this incident is not of the nature that one would normally associate with the use of force as that concept is understood in Article 2(4) of the U.N. Charter and associated instruments. Instructing a vessel to leave an area of disputed waters is a long way--a long way--from the kind of coercion that characterizes an unlawful use of force. No shots were fired, no one was harmed, no weapons were brandished. If one were to regard this conduct in this incident as constituting a violation of U.N. Charter Article 2(4), we would have vastly expanded the scope of that Article to cover minor incidents that occur worldwide every day.

Mr. President, I'm about halfway through my presentation. I note that we are close to the coffee break, and if this is an opportune time to take it, I'm happy to do that, or I'm happy to continue.

PRESIDENT NELSON: Thank you very much, Mr. Murphy.

We shall continue with this hearing at 4:00.

PROFESSOR MURPHY: Very good. Thank you, sir.

PRESIDENT NELSON: Thank you.

(Brief recess.)

PRESIDENT NELSON: I have to read what I call here the Second Order regarding the recall of Dr. Smith.

The Tribunal has considered the positions of the parties regarding Guyana's request to recall Dr. Robert Smith

16:07:27 during his second round of oral pleadings, and decides as follows:

First, the Tribunal affirms the terms of its order of 7 December 2007, in which it stated that Dr. Smith may be recalled only for rebuttal and with regard to matters he could not have addressed in his first round of testimony. Accordingly, Guyana may recall Dr. Smith within the limits of its 7 December 2007 Order. 2006, it should be, yes. Sorry to be jumping the gun.

Second, prior to recalling Dr. Smith, the Tribunal will allow Guyana to share portions of the transcript with Dr. Smith that directly pertain to his report or testimony. Guyana shall notify Suriname of the portions of the transcript that it wishes to share with Dr. Smith by 8:00 p.m. today, and the parties shall seek to stipulate to those portions. Any objection by Suriname that portions of the transcript proposed by Guyana to be shared with Dr. Smith are not within this order and shall be raised with the Tribunal at 9:30 a.m. tomorrow, 16 December 2006.

MR. REICHLER: May I address you, Mr. President?

PRESIDENT NELSON: Of course.

MR. REICHLER: Thank you.

Of course, we appreciate the deliberation and the Order of the Tribunal. I just wonder if we might have a tiny bit more time. I have not been through the transcript yet. I

16:09:58 have only been through my notes that I took during the testimony, and I may need a little bit more time to go through the transcript and identify those portions that we would want to disclose to Dr. Smith, if it would be possible. And we certainly are mindful of the fact that our colleagues need to have an opportunity to review so they can determine whether we have selected appropriate portions consistent with the Tribunal's order, but I wonder if 10:00 might not be too late to disclose. They would have tomorrow morning, or if they're up as late as we are, 10:00 won't be so late, but I don't want to cause any inconvenience to Mr. Greenwood and his team or the other side, but I will have to read through the transcripts tonight and actually pick out portions, so I just wonder if we might have a bit more time.

PRESIDENT NELSON: Is this--

PROFESSOR GREENWOOD: Mr. President, sir, we are mindful of Guyana's problems in that regards, but there are also difficulties for us. I don't think it's reasonable to expect us to deal with what might be a substantial portion of the transcript and to go through it between 10:00 tonight and half past nine tomorrow, and that would, of course, include going back to Mr. Reichler to negotiate with him, if needs be, what portions should be produced.

May I suggest this, that Guyana has until 10:00 tonight to notify us of what it wants to produce. We will

16:11:36 respond to Guyana--we will try to respond to Guyana by 9:30 tomorrow morning, and any applications to be made to you should be made at the end of tomorrow morning's hearings rather than at the beginning.

PRESIDENT NELSON: Is that acceptable?

MR. REICHLER: It could be, and I'm trying very hard to accommodate so we can relieve the Tribunal of any additional burden. We would hope that we would be able to resolve this among ourselves, and there won't be any disagreement about portions of the transcript to be disclosed. My hope is that, by Sunday morning, we would know what the portions are that need to be disclosed, so there is some time for the witness to at least think about it. So, if the close of the session tomorrow is sufficient time--leaves sufficient time for the Tribunal to resolve any disputes--and we hope there are none by Sunday morning--then that would be perfectly fine with us.

PROFESSOR GREENWOOD: Mr. President, I would envisage that we would be able to agree with this. In the event we are not able to agree with everything, then if you could be told at the close of business tomorrow morning, that would give the Tribunal the luncheon recess in which to decide the matter. I hadn't imagined that you were proposing to decide it on the hoof at half past nine anyway.

MR. REICHLER: That's very kind and accommodating of you, Mr. Greenwood. I would have expected nothing less,

16:13:17 because that's been your attitude throughout, and I appreciate that, and that's perfectly acceptable to us.

I would like to make one request, is that you tolerate and understand--and my apologies to Professor Murphy, I have enjoyed listening to his argument thus far today--but given the Tribunal's order, I will entrust Guyana's conduct during the rest of the proceedings today to my colleagues, and if I may be excused so that I can go back to my office and start reviewing the transcript right now. If we can get the portions to Mr. Greenwood before 10:00, we certainly will.

PRESIDENT NELSON: Thank you very much.

PROFESSOR GREENWOOD: Thank you, Mr. President.

If Mr. Reichler is going to leave, may I quickly deal with now what I was going to raise at the end of today's hearing rather than leaving it up until then, and that was just in relation to the documents requested by Mr. Sands. I have spoken to my learned friends about this, and we have gotten an explanation of what the position is.

The documents to which Mr. Colson referred this morning was put in by agreement with the Guyanese counsel in response to a letter that was referred to by Mr. Schrijver because it is itself referred to in the letter that Professor Schrijver put before you. The letter that Professor Schrijver put before you, as far as we can tell, is a final copy, a final version, not a draft. It does, however, have the Dutch word

16:14:41 for copy on the top of it, so it is a photostat of a 1950s copy.

The document Mr. Colson put in refers to a letter of 1957. I have provided copies of that to my learned friends for their convenience, but a copy was, in fact, handed over to Professor Schrijver in the Netherlands in February of this year, so it's not a document they're being sandbagged with.

PRESIDENT NELSON: Thank you.

MR. REICHLER: Professor Greenwood just proved my point about his courtesy and accommodation, and we thank him very much for his accommodation with respect to this document.

Thank you.

PRESIDENT NELSON: Again, I thank you gentleman very much for your spirit of cooperation. Thank you.

You can continue, Mr. Murphy, Professor Murphy.

PROFESSOR MURPHY: Thank you, Mr. President.

I'm delighted to take you from the sandbagging of procedural issues back to the situation of the CGX incident and specifically to the question of whether if there is jurisdiction for the Tribunal to address this matter and, if the matter is admissible before you, whether or not on the merits one could say that there was, in fact, a use of force with respect to Suriname's conduct in the CGX incident.

I was at the part of my presentation where I was maintaining that, because of the location of the CGX incident,

16:16:08 one should initially approach this with some caution in thinking about whether it is a use of force against the territorial integrity of Guyana. And further I noted that the nature of the action is not one where you would normally expect it to be regarded as a use of force; that is, no shots being fired, no weapons being brandished--things of that sort.

I would also note that there are other incidents that are far more dramatic than this that also have not been regarded as constituting an unlawful use of force. Rather, tribunals tend to view these incidents as falling within the general category of law enforcement activity, and in this regard I think it's worth taking note of the Spain versus Canada Fisheries Jurisdiction Case.

The Tribunal, of course, will be well aware that Spain's application in that case described the incident involving the Spanish vessel, the Estai, and it was an incident where you had warning shots fired from a 50-millimeter gun, obviously a weapon of much greater caliber than what's at issue or what's not at issue in this case, and there was a boarding of the Estai by the Canadian coastal vessels. Canada took control of the Estai, forcibly escorted it to a Canadian port, imprisoned the Captain, confiscated items from the Estai.

Spain, of course, then came to the International Court of Justice asserting that this conduct constituted a use of force against a Spanish vessel in violation of Article 2(3) and

16:17:48 Article 2(4) of the U.N. Charter.

Well, what did the International Court of Justice do with this matter? You will see in the next slide that the International Court found that the use of force authorized by Canada falls within the ambit of what is commonly understood as enforcement of conservation and management measures. "Boarding, inspection, arrest, and minimum use of force for these purposes are all contained within the concept of enforcement of conservation and management measures according to a natural and reasonable interpretation of this conduct."

Now, admittedly, the issue before the International Court in that case was the scope of Canada's reservation to the Court's jurisdiction, and this was noted by Guyana's counsel last week. That distinction actually is germane, we would submit, to our second jurisdictional argument, which is that the Tribunal has no jurisdiction over this claim since Suriname's conduct was enforcement of a coastal State's rights that fall outside the scope of Part XV of the Convention.

However, with respect to the merits of Guyana's claim, we don't think this distinction is germane. Had the International Court regarded Canada's action as something more than standard coastal State enforcement action, then the Court would have found jurisdiction. Yet the Court did not find jurisdiction because Canada's action, which was far more aggressive than anything that Suriname allegedly did in this

16:19:37 case, Canada's action, according to the Court, constituted an enforcement action, and we submit that that conclusion is directly relevant to the merits of Guyana's claim.

The fact that the incident occurred on the high seas we also don't think is germane. If anything, Suriname has greater rights to exercise such measures within this area of overlap than it does on the high seas, given Suriname's claims to this area, and nothing in the Court's judgment suggests otherwise.

Now, you can look at other cases as well. The Saiga case is also something worth paying attention to. There, we had a Coast Guard vessel stopping and ordering another vessel to cease activity, and there the International Tribunal for the Law of the Sea talks about what would be regarded as a use of force in the context of stopping a vessel. And in the slide that you have on the screen, slide 38, we are seeing the International Tribunal for the Law of the Sea saying that there is a normal practice used to stop a ship at sea, and you give them certain visual signals. When that doesn't succeed, certain actions may be taken, including the firing of shots across the bow, and I note here the Tribunal said it is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, it's still permissible, but we are submitting that the Suriname patrol boat didn't even get to this point in the matter at issue

16:21:16 1 before this Tribunal.
2 Now, ultimately, the Tribunal for the Law of the Sea
3 did find that a use of force had occurred in the Saiga case,
4 but under vastly different circumstances. You may recall that
5 the Guinea patrol boat fired at the Saiga with live ammunition
6 without issuing any of the signals or warnings required by
7 international law and practice. It also used excessive force
8 after they boarded the vessel, firing indiscriminately on the
9 deck and using gunfire against the ships' engine, and the
10 Tribunal found that in using force in that way they did not
11 attach sufficient concern to the safety of the ship or the
12 persons on board. But Suriname's conduct comes nowhere close
13 to that sort of conduct. When you look outside what tribunals
14 are saying, to what the views of scholars are on this issue, we
15 submit that it confirms that the type of conduct at issue here
16 was not a use of force as that term is understood in
17 international law.
18 So, for example, in the chapter on enforcement of the
19 law in his classic treatise, Dr. O'Connell explains that
20 international practice in the arrest of foreign ships in
21 jurisdictional zones varies. Some countries do resort to
22 gunfire after signals to receive boarding parties are ignored,
23 but the legal standard is not necessarily complied with merely
24 because of an immediate failure to respond to those orders.
25 This is basically discussing how, in the context of law

16:22:53 enforcement activities, it is the case that there will be situations where you may need to use weapons of some kind or another.

Now, again our incident didn't even get to that point, but the idea of a patrol vessel being out there with a weapon and possibly in some circumstances using the weapon does not take the matter outside the scope of typical coastal law enforcement action. So, we would submit to you that there clearly was not a use of force in violation of Article 2(4) of the Charter or the Law of the Sea Convention in this context.

Now, could Suriname's conduct be regarded as a threat to use force? Understandably, counsel for Guyana made this kind of an argument. Since there wasn't any actual use of force, you're pretty much left with trying to argue that there was a threat to use force, but we submit that Guyana has not even begun to prove that any such threat existed. Guyana referred to the views of Professor Ian Brownlie as good authority, and indeed, Professor Ian Brownlie is a good authority on the use of force.

Well, what does he say? He says a threat of force consists in an express or implied promise by a government of a resort to force conditional on nonacceptance of certain demands of that government. That's the first sentence. The second sentence here says: If the promise is to resort to force in conditions in which no justification for the use of force

16:24:30 exists, the threat itself is illegal.

So, there are two things going on there. There needs to be an express or implied promise that force will be used if you don't accept a certain condition; and then secondly, it's occurring in the context where there was no justification for issuing that threat.

Well, was there an express promise to use force in this case? No. There was no express promise to use force of any kind. In fact, you can contrast what happened here with the Corfu Channel Case, one of the first cases decided by the International Court of Justice. You may know that, in that case, Britain issued a Diplomatic Note in August of 1946 which concluded with a threat to use force against Albanian coastal guards if the Albanian Coast Guard attempted to prevent passage of U.K. ships through the Corfu Channel, and if they opened fire on the British warships, then the Diplomatic Note said "we will fire back." Now, that's an express promise to use force, and that's nowhere near what we had going on in this case, so we would submit that there is no question there is no express promise here.

Is there an implied promise to use force? Well, in what sense would there be an implied promise to use force? The only thing at issue here appears to be the use of the words "leave or the consequences will be yours." That, I guess, according to Guyana, is an implied threat to use force.

16:26:10 Now, counsel for Guyana made some big issue out of the perception by the individuals on the CGX rig, that the declarations that a couple of those gentlemen have submitted indicate that they felt threatened. Well, if that's the issue, the perception of the persons on the rig, then all of the discussion we heard from counsel of Guyana about the high-level meetings back in Suriname, in Paramaribo, is irrelevant because the people on the rig don't know anything about that.

And, indeed, the people on the rig don't know anything about the weapons on the patrol boats either, so all the discussion about what was this group weapon is irrelevant, too. The reality is it's the middle of the night. The guys on the rig aren't seeing anything, except maybe a couple of very small blips on their radar screen; right? So, what they are getting is, over the radio, someone who has shown up, identified themselves as the Suriname Navy, and saying "you must leave the waters or the consequences will be yours," and coupling that with, "and by the way, we don't intend to harm you." That's what they're getting.

Now, I have no doubt that the gentlemen on the rig were nervous. Any time law enforcement officers show up and tell you "leave the area," one gets nervous; right? You get pulled over for a speeding ticket, it makes you nervous. But the fact that you get nervous does not constitute a threat to use force against you, and we submit that there is nothing in

16:27:42 the record that justifies taking this matter to the level of identifying that Suriname has engaged in an unlawful threat to use force. It's unfortunate that these gentlemen's oil company forced them to go out and drill in an area that they knew was a disputed area. I'm sure they felt nervous, it's the middle of the night, patrol boats showing up. That, however, does not satisfy the evidentiary standard required for the Government of Guyana to establish that a very serious violation of international law has been committed.

The whole case here comes down to a few cryptic words issued over the radio, and we submit that is far too thin a reed to rest a use-of-force claim upon.

The fourth point I wanted to make with respect to the merits of this claim is that Suriname's conduct was not directed against Guyana. Even assuming that the measures taken by the patrol boats constituted some sort of use of force or threat to use force within the meaning of international law, the reality is this was not being used against anything that's the territory of Guyana or under Guyana's exclusive control, and it's common ground that the CGX rig was not property of Guyana. It wasn't flagged to Guyana, it wasn't owned by anyone in Guyana. There may have been some Guyana nationals on the rig, but from what we can tell, it was crewed almost entirely by non-Guyanaian nationals, so any use of force or threat to use force was not directed against Guyana. It was directed

16:29:24 against the CGX rig, a rig flagged to the Marshall Islands, a rig owned by a U.S. company, and a rig that appears to have been crewed by many individuals from third countries, not Guyana.

Now, that's fatal, we submit, to Guyana's claim. You simply cannot maintain an interstate claim on behalf of the national of another state, and we cited in our proceedings to jurisprudence such as the Barcelona Traction case. Any interests of Guyana in the vessel are not significant for purposes of applying the Law of the Sea Convention, and we cited here again to the Saiga case, where you will see that the Tribunal clearly talked about the ship as being a unit and that the obligations of the flag state relate to that ship, and the right of the flag state to seek reparation for loss or injury caused to the ship, that's the right of the flag state. It's not the right of somebody else who is out there.

Now, there is other conduct that Guyana also alleges constitutes the use of force, and they talk about this in terms of measures taken by Suriname in making communications to three oil companies--CGX, Maxus, and Esso--and that somehow these communications scared off those countries from engaging in oil-exploration activities in the area of dispute and, apparently, according to Guyana, elsewhere as well. Again, we submit that that can't possibly fall within the scope of what would be regarded as a use of force or threat to use force in

16:31:08 international law. There is nothing in any instrument, whether it's the Charter or the Definition of Aggression or anywhere else, that one would find conduct of that kind constituting a use or threat to use force.

My fifth point on the issue of the merits is that Suriname's conduct was a lawful countermeasure. This is an argument we make in the alternative, and I stress very much "in the alternative." We submit that Suriname that has done nothing wrong. But, if the Tribunal for some reason regards Suriname's action as violating some international obligation, we submit that the conduct was nevertheless a lawful countermeasure taken in response to Guyana's prior unlawful act.

What's the requirement for a countermeasure? Well, you have to have an act that's taken in response to a previously wrongful act. It has to be preceded by a request that the other State discontinue its wrongful conduct. It must be commensurate with the injuries suffered, and it must be for the purpose of inducing the other State into complying with its international obligations. We run through in our pleadings the jurisprudence on this. We submit that Suriname's conduct fully satisfies these criteria.

I will take the last three criteria first. Suriname did clearly ask Guyana through diplomatic channels to refrain from the drilling activity; I discussed that before.

16:32:40 Suriname's conduct was narrowly tailored to the minimal action necessary to get the rig to leave the area, and the conduct was solely for the purpose of inducing Guyana into refraining from its wrongful conduct. So, we think the last three criteria that you have on the screen there were fully satisfied.

With respect to the first criterion, Suriname's conduct was in response to Guyana's wrongful act, a wrongful act in the form of authorizing unilateral drilling in a disputed area of the continental shelf. We know from the Law of the Sea Convention Article 83(3) that you may not engage in drilling for oil in a disputed area of the continental shelf. It's not expressly stated there, but that's clearly the implication of Article 83(3). You're not supposed to jeopardize or hamper the reaching of a final delimitation agreement. This is a duty. It's a duty not to undertake an activity that radically affects the ability to reach a final delimitation agreement, but drilling is just such a radical activity. It's invasive. It's potentially a permanent exercise of sovereign rights over natural resources. It entails the establishment of a permanent installation on the seabed. It's not transitory in nature. It can cause environmental damage to the seabed and marine environment, and coastal States have an obligation to protect the environment in this area. If it succeeds in finding oil, it can radically alter the dynamics of reaching a final delimitation agreement.

16:34:29 It's worth pondering the Aegean Sea Continental Shelf Case in this regard. There, the International Court declined to issue interim measures because Turkey's conduct in the disputed area was not radical in nature. It was seismic and aeromagnetic surveying, there was no risk of physical damage, it was transitory in nature, no establishment of a permanent installation, and therefore the Court did not issue the provisional measures in that case. We submit that the clear implication of this is that conduct in a disputed area of the type attempted by Guyana is--is--of a radically different nature, and we submit that the scholarly commentary supports this proposition. Many scholars have inferred from the Court's opinion that any activity which represents irreparable prejudice to a final delimitation agreement--namely, the establishment of installations on or above the seabed or the actual appropriation or other use of the natural resources--those activities are prohibited by Article 83(3).

For instance, Churchill and Lowe have said that 83(3) suggests that neither party should take any action in the area subject to delimitation, such as engaging in exploratory drilling for oil or gas, which might be regarded as prejudicial by the other party. Thus, we submit that 83(3) protects against this kind of conduct taking place, and Guyana violated its duty under Article 83(3) by authorizing the drill rig to operate in the area of overlap.

16:36:21 Now, if I understand counsel for Guyana correctly--and this is at the transcript at page 584--he argued that, since Guyana had waited a long time trying to get Suriname's agreement to joint exploration in this area of overlap, that meant Guyana could unilaterally decide on drilling. We think that's a rather astounding and astonishing claim. It isn't supported either in the Law of the Sea Convention or in any Article referred to by Guyana or in any other scholarly commentary.

For example, if you look at a recent article written by David Ong about Article 83(3), he indicates that it is an Article that contains general obligation to cooperate. He says the substantive content of this cooperative requirement is uncertain, but he ultimately concludes that the only recourse available, should negotiations prove fruitless, is the resort to dispute-settlement procedures under Part XV, meaning that Guyana should have pursued dispute settlement if they felt negotiations were fruitless, not that they should go out and engage in unilateral drilling. Indeed, I think counsel for Guyana tripped himself up on his own argument; for if Suriname was obligated to seek provisional measures from ITLOS prior to deploying the patrol boats, which is what I think their argument was, then surely Guyana was obligated to pursue dispute settlement prior to unilaterally deciding to deploy this rig into the area of overlap. By failing to do so, Guyana

16:38:08 violated its obligations under the Law of the Sea Convention. That was a wrongful act.

Now, we maintain that even if you think that Suriname's conduct was somehow wrongful in June of 2000, which we maintain it was not, even then the action does not engage Suriname's state responsibility since it was a lawful countermeasure to Guyana's prior wrongful act. Now, Guyana has asserted that the law on countermeasures does not permit a response that constitutes a use of force. Well, with respect, we don't think that this Tribunal is facing that situation in that there was no use of armed force here.

Moreover, if we understand Guyana's argument correctly, they are saying that they can prevail on submission 3, even if they don't prove that there was a use of force or a threat to use force. I refer you to the transcript at page 575, lines 20 to 25.

So, they're saying that they don't even necessarily have to show a use of force. Our reference to countermeasures is speaking generally to the proposition that Suriname engaged in conduct in response to prior wrongful conduct, and so, at best, the Tribunal is faced with a situation where, in response to a wrongful act, Suriname engaged in a mission that sought to affirm a right that was being unjustly denied. Again, the Corfu Channel Case is of interest here.

As I noted before, the United Kingdom made an express

16:39:49 promise to use force against Albania if its passage through the Corfu Channel was challenged, and then the U.K. did, in fact, send four warships through the Channel. The Court recognized this threat in its judgment. It says here the diplomatic correspondence from the United Kingdom made this threat and ended with this warning that this threat would occur.

But the Court then goes on to say that the United Kingdom's express threat to use force--express threat to use force--one that was clearly understood by the Albanian coast guards, was legal--was legal--because it sought to vindicate Britain's right to innocent passage. "The legality of this measure taken by the United Kingdom cannot be disputed, provided it was carried out in a manner consistent with the requirements of international law. The mission was designed to affirm a right which had been unjustly denied. We submit that, if you get to this point, Suriname was affirming a right that was being unjustly denied."

Let me turn to my last point with respect to submission number 3, which is that even if Guyana prevails on the merits of submission 3, it is not entitled to damages. We have outlined in our Memorial in some detail why the evidence presented to you with respect to damages in this submission is quite flawed. The information there is quite speculative, it is quite lacking in detail. When you get down to the bottom of it, what they are basically trying to argue is that Guyana is

16:41:40 entitled to recover for expenses that were not incurred by these oil companies; that is, by the oil companies not going into the disputed area and not expending some $30 million, that somehow that means Guyana has been injured $30 million. It doesn't make any sense, and we encourage you, if you get to this point, to read closely our arguments in that regard because we just don't think that they can establish that any damages to Guyana occurred.

Mr. President, that concludes my argument with respect to submission 3. Unless there are any questions, I will move on to submission number 4.

PRESIDENT NELSON: I give the floor to Professor Smit.

ARBITRATOR SMIT: Professor Murphy, I'm sure that the day you left Columbia Law School you blessed the day because you would no longer be subject to my nasty inquiries.

PROFESSOR MURPHY: Many students feared your inquiries.

ARBITRATOR SMIT: Absolutely. But now you have chosen to subject yourself again.

PROFESSOR MURPHY: I'm afraid so.

ARBITRATOR SMIT: I have wondered about one thing. If the Tribunal were to conclude that--let me phrase it that way--is the exercise of jurisdiction by the Tribunal dependent on whether there was a failure of trying to reach agreement before?

16:43:18 PROFESSOR MURPHY: Yes.

ARBITRATOR SMIT: All the cases you have cited the courts rule they were the necessary attempts to reach agreement and therefore it had jurisdiction. We did not see a case in which the Court said they didn't try to reach agreement and, therefore, we have no jurisdiction. And if we were to decide, we wouldn't reach any of the other points that you had discussed.

PROFESSOR MURPHY: If you were to find that there were no negotiations on the submission prior to the point at which it was filed?

ARBITRATOR SMIT: Right, and that the Tribunal, therefore, has no jurisdiction.

PROFESSOR MURPHY: Yes, that's absolutely correct.

ARBITRATOR SMIT: That is your position?

PROFESSOR MURPHY: That is our position.

ARBITRATOR SMIT: But you have not cited any authority in favor of that proposition.

PROFESSOR MURPHY: Yes, I fully accept, Professor Smit, that in the cases that occurred to date--and there is only a handful because the Convention has been in force for only a certain number of years and these disputes are starting to bubble up, but I fully accept that in the cases where this issue has arisen, the evidence established that there were diplomatic communications between the two governments about the

16:44:21 Law of the Sea Convention having been violated and identification of the Articles that were allegedly violated, and therefore the tribunals found that the jurisdictional requirement had been met.

So, I can't rely on those cases for the proposition that, in our case, there are or are not diplomatic negotiations, but I can point to the evidence in our case and say that there are no such negotiations. And given that those other tribunals saw Article 283 as a relevant issue--it wasn't that they looked at the Article and said, "Well, it does say there need to be expeditious consultations, but that's not really so important." They thought it was important. They looked at it, and they then looked at the evidentiary record before them, and they said, "The record shows there were negotiations."

Now, it is interesting that in the boundary delimitation context, the fact of lengthy negotiations about the boundary, perhaps that doesn't require the two sides talking about the Law of the Sea Convention because I think the Barbados decision stands for the proposition that you can assume that, as a course of these long 1980s, 1990s discussions about delimitation, that the parties had negotiated to the extent one could do it, and there didn't need to be some second stage of negotiations occurring where they talk about the Law of the Sea Convention, but with respect to other kinds of

16:45:50 Articles, like Article 301 at issue here, I think it is clearly the case that there is expected to be a first step--that's how the Barbados Tribunal put it--a first step in negotiations. We submit there is nothing in the record showing that first step occurred, and therefore no jurisdiction and therefore you don't get to any of the other issues I'm arguing.

ARBITRATOR SMIT: Thank you.

PRESIDENT NELSON: Please continue.

PROFESSOR MURPHY: Thank you, Mr. President.

With respect to submission number 4, again we have a basic allegation from Guyana that Suriname violated the Law of the Sea Convention by failing to make every effort to enter into provisional arrangements of a practical nature and by jeopardizing or hampering the conclusion of a final delimitation agreement.

Now, this submission also has multiple defects, and I believe that there are about six of them that I have identified. Fortunately, I will be able to go through these, I think, fairly quickly.

First, I'm going to talk about what is required and what is not required in Articles 74 and 83. Second, I'm going to talk a little bit how it's only conduct postdating August 1998 that is relevant in this matter. Third, I will demonstrate that Suriname did engage in a good-faith effort to enter into a provisional arrangement and took no action to

16:47:19 jeopardize a final agreement. Fourth, by contrast, Guyana did not engage in good-faith efforts to reach a provisional arrangement. Fifth, we submit that by trying to exploit the oil resources, Guyana jeopardized the reaching of a final agreement in violation of the Law of the Sea Convention. And then finally, if, for some reason Guyana prevails on the merits, they have proven no damages in this submission.

So, let me turn to the first point of what is required and what is not required by Articles 74(3) and 83(3). Well, this language I'm sure is quite familiar to the Tribunal, and I just want to focus on the fact that there's basically two components here pending a final delimitation agreement. In a spirit of understanding and cooperation, the parties are supposed to make every effort to, and there is two things, enter into provisional arrangements of a practical nature and during the transitional period not to jeopardize the hampering of a final agreement.

These are interesting provisions. I would submit that key characteristics are that they do not provide a concrete obligation to actually conclude a provisional arrangement or to actually conclude the final delimitation agreement. That's not what is being stated here. There is no specific course of action being called for, certainly not in the sense of requiring the states to conclude particular types of agreements. States are free to develop their own negotiating

16:48:55 positions and to press them in the negotiations. Indeed, the use of the word arrangement itself signals that a binding agreement is not even necessarily what is at issue.

So, we have argued in our pleadings, this is best viewed as an agreement to agree. That is, it is an obligation, but it leaves considerable discretion to states in how they pursue and develop these transitional arrangements, and it cannot be viewed as a violation of this type of obligation to reject the preferred outcome of another party.

The negotiating history of paragraph three supports this basic proposition, and you will have seen this slide before when Professor Oxman did his presentation. You see there that paragraph three did go through some changes in the course of the negotiations. The first formula you have there from the 1975 draft is basically the pro-equidistance states formally. Note there that there is no requirement of any kind that one conclude an arrangement or even try to conclude an arrangement. That was not in that draft. In the 1976 draft--this is the pro-equity states formula--you will see here that there is an explicit requirement that you conclude a provisional arrangement. States "shall" make provisional arrangements.

Then you get to what ultimately became paragraph three of the Treaty, and the implication of the ultimate formulation in light of the negotiating history is that the formula that

16:50:38 would have required states to enter into a provisional arrangement was not adopted. Instead, you have text that basically encourages states that enter into provisional arrangements and not jeopardize a final delimitation agreement.

So, I just raise this to note that the drafters expressly eschewed an approach that compelled the state to enter into a provisional arrangement.

Now, other tribunals looking at this, tribunals and scholars looking at this, have made the same type of interpretation that I'm placing before you. So, for instance, with respect to the issue of provisional arrangements, Professor Cameron recently wrote in the "International Comparative Law Quarterly," that Article 83(3) does not impose an obligation to in fact conclude a provisional arrangement. Rather, this is in the nature of an agreement to agree, and if the agreement cannot be reached on a provisional arrangement, that alone would not be a violation.

With respect to the final delimitation agreement, you can look at the Cameroon-Nigeria case where similarly the Court said that the failure to reach a final delimitation agreement doesn't mean there has been a violation of the Articles; that, instead, there is basically an obligation to negotiate in good faith.

So, the bottom line of all this is that there is an obligation to engage in good faith negotiations. We accept

16:52:12 that, but we believe that that is established if one sees a party attempting to enter into discussions with the other party advancing its position. It doesn't require you to accept the other side's position or even meet somewhere in the middle. It just requires the two States to be engaging in some level of discussions that are meaningful and that do address the issues between them.

Let me move, then, to my second point, which is that only conduct by Suriname and Guyana on this issue that postdated August 1998, is what's relevant for the Tribunal. We made this argument in the Rejoinder. The Convention only entered into force as between Guyana and Suriname in August of 1998, and under standard international law, whether we are talking customary international law or whether we are talking about the Vienna Convention on the Law of Treaties Article 28, which is about to pop up on the screen. You cannot retroactively apply a treaty obligation to facts that arose before the Treaty entered into force, and so our basic argument here is that since the Treaty only entered into force in August of 1998 as between these two States, then the only factual events relevant in determining a violation under the Treaty are those events that are occurring in the post-August 1998 period.

We believe that we have demonstrated in our pleadings--and I'm not going to go into this in any detail, but we believe we demonstrated in our pleadings--that prior to

16:53:56 August 1998, we fully engaged in negotiations with the Government of Guyana, but I'm going to leave that aside because I think the only relevant issue is what happened after August of '98.

So, let me move on to my third point. At all times--at all times--after August of '98, Suriname engaged in a good faith effort to develop a provisional arrangement, and it at no time undertook action that would jeopardize the reaching of a final agreement. There is simply no evidence in the record that Suriname sought to frustrate the conclusion of a provisional arrangement or a final agreement.

Now, we in our pleadings have argued this, and I'm just going to put up on the screen at slide 56 the places in our pleadings where we have run through the negotiations that we engaged in, and in those pleadings there are, of course, a number of Annexes cited.

I have also tried to assist the Tribunal by placing at Tab 5 of your hearing folder a table of the evidence regarding these negotiations because you will find there, unlike the earlier table I referred to, you will find there a significant number of meetings that have occurred of various kinds.

Now, obviously the two parties disagree about what was going on in these post-'98 negotiations. Guyana apparently thinks that Suriname was simply stonewalling. Suriname sees these negotiations as suffering from Guyana's single-minded

16:55:36 effort to get Suriname to accept, the oil concessions that Guyana had already issued in the disputed area and suffered from Guyana's unwillingness to share information from Suriname that would have allowed Suriname to understand what these concessions were. That's the Suriname perspective.

We also think that rather than stonewalling, the record shows that we were trying, Suriname was trying to understand the extent of the numerous concessions granted by Guyana in the area of overlap, what the implications were of those concessions. We were asking for seismic information. We were asking for copies of concession agreements such as the agreement with CGX.

In order for Suriname to engage in a meaningful dialogue about whether we would do joint exploration of some sort, Suriname felt it needed information. It needed information before it agreed to do things, such as accept the concessions that had already been issued by Guyana.

We were also trying to find our way forward in the aftermath of the CGX incident, which was a politically sensitive thing, and it was difficult to do that in this context.

These were very difficult politically sensitive discussions that were taking place, and looming over all of this, as you will see in the record, was the fact that there were disagreements between the two States about other aspects

16:57:14 of the boundary and that that was also posing difficulties for both sides.

Now, the Tribunal will obviously wish to review the evidence for itself and reach its own conclusion about whether one side was stonewalling or the other, and I won't try to go through that, but I would like to make four observations as you think through this record. First, when you look through all of the Annexes listed in that table that I have provided to you, you will find all sorts of meetings taking place, meetings at the Presidential level, meetings at the level of Minister, meetings of a Joint Technical Committee, meetings of the Guyana-Suriname Border Commission and its subcommittee, meetings at a CARICOM summit, meetings in the context of facilitation by the Prime Minister of Jamaica acting as a CARICOM facilitator.

So, the idea that Suriname was not engaged in negotiations is completely wrong. Suriname and Guyana were engaged in negotiations in many different kinds of ways.

My second observation is that Suriname was open to whatever process might help resolve the dispute. In July 2000, the CARICOM negotiator--again, the Prime Minister of Jamaica--proposed a Memorandum of Understanding for resolving the boundary problem. Suriname accepted this Memorandum of Understanding, coming from a neutral facilitator. Guyana did not. This is in Suriname's Counter-Memorial, Volume 2, Annexes

16:58:52 1 6 and 7. The MOU isn't there, but the letters between Suriname
2 and the Prime Minister of Jamaica make this clear. We think
3 this is an important factor, in that the MOU was the proposal
4 of the neutral entity seeking to get the two countries
5 together. Suriname accepted it. Guyana did not.
6 My third observation is that the negotiations that
7 unfolded were not fruitless. They did have meaning to them.
8 For instance, you have been presented before with the fact that
9 there was a declaration, a joint declaration, by the Presidents
10 of Suriname and Guyana, and you see a relevant passage up here
11 on the screen. The two Presidents reconfirm their belief that
12 the border issue should be resolved in a spirit of
13 understanding.
14 And then they noted with satisfaction the progress
15 made at the third meeting of the Joint Border Commissions.
16 So, what do you have here? You have the President of
17 Guyana in January of 2002 saying he's satisfied with the
18 progress of these negotiations. It's rather hard, we think, to
19 assert that this was stonewalling or this was fruitless if you
20 have the President of Guyana saying that these negotiations
21 were proceeding satisfactorily.
22 Now that's, of course, at a very high level. What's
23 happening at a lower level? Well, what you will find in the
24 evidence are things such as this example, Agreed Minutes of the
25 Fourth Joint Meeting of the Border Commission. This is

17:00:35 occurring in October of 2002. It's in Guyana's Memorial, Volume II, Annex 87. What you see here is, and these are agreed minutes. These are agreed by both sides. The two sides agreed on the examination of a number of relevant issues for which further detailed information would be required to effectively move the process forward, and then it lists various things, licenses issued, funding operation, environmental protection. You can see it all there.

The two sides were obviously discussing serious issues in attempting to find solutions to them.

My fourth observation is that an odd aspect of submission number 4 by Guyana is that Guyana cannot, and has not, established that Suriname somehow benefited from its alleged thwarting of a provisional arrangement or a final agreement. As Guyana's Foreign Minister noted in his opening statement, there has been no developmental activity in the disputed area, and, he said, it has not benefited either Guyana or Suriname. So, we are left with Guyana arguing that Suriname was simply stonewalling for no apparent reason. That is not only highly implausible it's insufficient for Guyana carrying its burden of proof.

Putting all this together, the myriad ways in which the negotiations were occurring, the willingness of Suriname to accept a third party facilitation, the substance of the discussion that was occurring, and the lack of any established

17:02:18 motive for Suriname to thwart the negotiations, putting all that together, we submit that this Tribunal cannot find that Suriname was not engaging in good faith negotiations.

My fourth point with respect to submission number 3 is that, by contrast, we believe Guyana did not engage in a good faith effort to enter into a provisional arrangement. It focused exclusively on securing rights for CGX to drill in the area of overlap, and we submit that that violates Articles 74(3) and 83(3). If you go through the record, I think you will find that after August '98, Guyana's sole focus was on allowing Guyana's licensee, CGX, to resume its exploratory drilling, that Suriname not disturb the terms and conditions of Guyana's concessions, and that Suriname accept those concessions. That's what was going on in this negotiation. And as such, to the extent that either side is stonewalling or making it impossible to reach some sort of provisional arrangement, we submit that it is Guyana that has failed in that regard.

Consequently, we did, as one of our submissions, maintain that the Tribunal should issue a declaration that Guyana violated its obligations to Suriname by failing to make every effort post-August '98 to enter into a provisional arrangement.

Now, my fifth point here is that in seeking to exploit the oil resources in the area of overlap, we believe that

17:04:04 Guyana also violated Articles 74(3) and 83(3) by jeopardizing the reaching of a final agreement. I won't repeat all the points that I made before about how you can't go into this area of overlap and begin drilling. That's got to be a violation of these Articles. Yet, those same points establish that Suriname's conduct not only was a lawful countermeasure, but that there was this preceding wrongful act, and that preceding wrongful act was a violation of these Articles of the Convention. Again, we have asked in our submissions to you that you find and declare that Guyana breached its legal obligations by thwarting or hampering the conclusion of a final delimitation agreement by attempting to engage in this drilling activity.

Sixth and final point on submission number 4, even if Guyana somehow miraculously prevails on the merits with respect to this submission, Guyana has proven no damages of any kind. They submitted no evidence on this at all. They have not even asked the Tribunal for a specific amount of damages, so we submit that such a generalized request for damages, cannot be taken seriously and should be dismissed.

Mr. President, that concludes my presentation with respect to submissions 3 and 4. Unless you have any questions, that concludes Suriname's presentation for today.

PRESIDENT NELSON: Thank you, Professor Murphy.

Any questions?

17:05:48 I give the floor to Professor Smit.

ARBITRATOR SMIT: Professor Murphy, in your Rejoinder you asked for a declaratory judgment, but no affirmative relief; right? Although it doesn't say specifically that you abstained from asking for affirmative relief. You just asked for a declaratory judgment.

PROFESSOR MURPHY: That's correct.

ARBITRATOR SMIT: What is the appropriate legal basis for this Tribunal to give you a declaratory judgment in a situation in which, if you wished, you could ask for affirmative relief? I'm referring to maybe domestic court cases in which the courts have said, "We don't give declaratory judgments as an exercise in theoretical considerations and speculation." If you have a claim, make the claim. Don't ask for declaratory relief without making the claim. If you say you want declaratory relief and you don't make a claim for affirmative relief because you think that the appropriate remedy is to give a declaratory relief without affirmative relief, that may be something for the Tribunal to consider, but I was just a little bit struck by the fact that you asked for declaratory relief in a situation in which you could ask for appropriate affirmative relief.

PROFESSOR MURPHY: Thank you, Professor Smit.

Suriname has approached this proceeding in the hope that it will not aggravate the situation between the two

17:07:37 countries as many of the speakers before have said. These are two countries that in many respects are friendly and wish to live in peace for many years to come, and it was our belief that it was appropriate to the extent that the Tribunal was going to be addressing whether or not Articles 74(3) and 83(3) had been violated, to the extent that it was going to be doing that, it would be appropriate for it to make a statement regarding our belief that Guyana had engaged in the violations. It is the case that International Tribunals have issued statements that are basically declaratory in nature without at the same time providing other forms of reparation, damages, compensation, things of that sort. We believe it's perfectly appropriate to do it in this case. There are examples of this that if it's helpful for to us provide it to you, we are happy to do so.

And it may be helpful in terms of the development of the Convention in its early years for the Tribunal to speak to that issue, but we are in your hands. If there is a complication because of the way we framed the request for relief, we accept that, but our feeling is that it is perfectly appropriate to ask for this kind of relief as we have done it.

ARBITRATOR SMIT: Thank you.

PRESIDENT NELSON: I give the floor to Dr. Hossain.

ARBITRATOR HOSSAIN: Mr. Murphy, you mentioned that, in respect of this concession, Suriname had not earlier been

17:09:24 notified that such drilling was about to take place?

PROFESSOR MURPHY: Yes, that's correct. We had no notification.

ARBITRATOR HOSSAIN: Okay. My more general question is this morning also there was a question. There were no protests from Suriname's side. Now, these concessions that were being granted, do you have evidence on the record that protests, in fact, were lodged by Suriname whenever they became aware that concessions were being granted in this area which they regarded as the area of overlap?

PROFESSOR MURPHY: You know, I think, unfortunately, I should defer that to one of my colleagues. The issue of protest to the concessions once the concessions were being issued was addressed by Mr. Colson this morning. He will be addressing you tomorrow and could revisit that issue. For purposes of submissions 3 and 4, our position is that the fact that there was no notification to us of the effort to engage in this drilling speaks volumes, and I'm talking about diplomatic notification. Obviously, ultimately, Suriname became aware that something was up due to the press, but it was not coming from the Government of Guyana. The issue of protests to the concessions as they were occurring, we didn't think was directly relevant to these particular submissions.

ARBITRATOR HOSSAIN: If I could ask one more question. In this case you just said there was no formal notification of

17:10:53 the drilling, but presumably you were aware of this activity because the patrol boat had gone, and when it came to your knowledge that this was going, and presumably the drilling rig would have taken some time to start positioning itself and so on, so during that time was there no exchange of correspondence saying this has come to our notice and we think it shouldn't be happening?

PROFESSOR MURPHY: I think the record before you shows that in the May-June time frame, there began to be certain reports circulating through the media that were coming to the attention of the Government of Suriname. So, again, it was not the Government of Guyana telling Suriname anything, but it was the Government of Suriname becoming aware that something was up. They didn't know exactly where--I mean, the reports were that it would be in this area of overlap. They didn't know exactly when, but they began to get certain reports and they tried to piece things together. They weren't getting information from the Government of Guyana. They ultimately sent out the surveillance aircraft at the end of May and early June. That aircraft ultimately spotted the rig, and that's the point at which the patrol boats could go out and find the rig.

ARBITRATOR HOSSAIN: Thank you.

PRESIDENT NELSON: Thank you very much, Professor Murphy.

PROFESSOR MURPHY: Thank you, Mr. President.

17:12:17 PRESIDENT NELSON: These hearings have come to an end today. We shall resume them tomorrow morning at the usual time. Thank you.

(Whereupon, at 5:12 p.m., the hearing was adjourned until 9:30 a.m., the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

_____

DAVID A. KASDAN