REPORTS OF INTERNATIONAL ARBITRAL AWARDS

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NATIONS UNIES - UNITED NATIONS

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Règles de procédure–confidentialité des procédures sauf accord contraire entre les parties–refus d'admettre la demande d'un État frontalier d'avoir accès aux documents d'arbitrage en tant que partie intéressée à la procédure.

Agents de l'État devant les tribunaux internationaux–un État est juridiquement lié par les engagements pris pas ses agents devant les tribunaux internationaux–obligation pour l'État d'agir en conformité avec les engagements ainsi pris–perception de l'Agent du gouvernement comme un intermédiaire entre l'État et le Tribunal.

Méthode de délimitation de la frontière maritime–procédure de délimitation en deux-temps désignée comme le principe « équidistance/circonstances pertinentes »–dans un premier temps, établissement de la ligne équidistante provisoire–adaptation ultérieure de la ligne provisoire en fonction des circonstances spéciales particulières afin de parvenir à un résultat équitable–test de proportionnalité servant uniquement à vérifier le caractère équitable du résultat–caractère non-contraignant de la méthode en « deux-temps » considérée seulement comme la plus adéquate pour éviter une délimitation subjective–méthode de délimitation identique pour des États disposant de côtes adjacentes et opposées.

Circonstances spéciales–facteurs pertinents pour ajuster la ligne équidistante provisoire–longueur des côtes–pas d'application de ratio mathématique lors de la prise en compte de la longueur des côtes–proportionnalité entre la longueur des côtes respectives afin de parvenir à une délimitation équitable–la détermination du point d'inflexion de la ligne corrigée est laissée à la discrétion du Tribunal–exercice discrétionnaire dans les limites du droit applicable.

Orientation des lignes côtières–détermination d'après les côtes elles-mêmes et non d'après les lignes de référence–lignes de référence considérées seulement comme des méthodes pour faciliter la détermination des limites extérieures des zones maritimes dans certaines régions particulières comme les États archipélagiques.

Principes de délimitation des frontières maritimes–stabilité, prédictibilité, objectivité et équité dans le cadre de l'état de droit–équité non une méthode juridique du fait du caractère incertain du résultat–délimitation devant éviter les empiétements.

Délimitation de la frontière maritime–ligne suivant les points équidistants entre la ligne basse des eaux de la Barbade et le point d'inflexion le plus proche des lignes de référence archipélagique de Trinité-et-Tobago.

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Régime juridique des zones maritimes–absence de prévalence entre le plateau continental et la ZEE–coexistence des deux régimes juridiques présentant de nombreux éléments significatifs communs–pratique des États de tendre vers l'harmonisation et la coïncidence des régimes juridiques pour des raisons de commodité pratique–coïncidence non établie en droit conventionnel.

Effet des traités sur les tiers–la délimitation par voie conventionnelle de la frontière maritime entre deux États sans effet sur les droits d'un État tiers–prise en compte des revendications et des renonciations faites par un État dans un tel traité relativement aux modifications subséquentes des zones de chevauchement entre les Parties au différend.

Droits de pêche–caractère exceptionnel de la délimitation de la frontière maritime en fonction des pêches historiquement effectuées par les parties–implication des droits de pêches limitée aux circonstances dans lesquelles des effets catastrophiques résulteraient de l'adoption d'une ligne frontière particulière–six à huit années de pratique de la pêche sont insuffisantes pour mettre une tradition en évidence–la création de dommages à l'économie nationale d'un État non considérée comme un titre légal pour obtenir un ajustement de la frontière.

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

IN THE MATTER OF AN ARBITRATION BETWEEN:

BARBADOS

-AND-

THE REPUBLIC OF TRINIDAD AND TOBAGO

AWARD OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal:

Judge Stephen M. Schwebel, President
Mr. Ian Brownlie CBE QC
Professor Vaughan Lowe
Professor Francisco Orrego Vicuña
Sir Arthur Watts KCMG QC

The Hague, 11 April 2006

AGENTS, COUNSEL AND OTHER REPRESENTATIVES OF THE PARTIES

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- Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
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- Ms Megan Addis, Counsel, Latham & Watkins
- Ms Teresa Marshall, Permanent Secretary, Foreign Affairs
- Mr Edwin Pollard, High Commissioner for Barbados in London
- Mr Anthony Wiltshire, Minister/ Counsellor at the Barbados High Commission in London
- Mr Francois Jackman, Senior Foreign Service Officer
- Mr Tyronne Brathwaite, Foreign Service Officer
- Mr Christopher Parker, Fisheries Biologist, Fisheries Division
- Ms Angela Watson, President of Barbados Association of Fisherfolk Organisations
- Mr Anderson Kinch, Fisherman/Boat owner
- Mr Oscar Price, Latham & Watkins
- Ms Phillippa Wilson, Latham & Watkins
- Mr Dick Gent, UK Hydrographic Office
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- Mr Eden Charles, Ministry of Foreign Affairs
- Mr Martin Pratt, International Boundaries Research Unit
- Mr Francis Charles, Expert
- Dr Arthur Potts, Ministry of Fisheries and Agriculture
- Mr Charles Sagba, Ministry of Foreign Affairs
- Mr André Laveau, Ministry of Foreign Affairs
- Ms Glenda Morean, High Commissioner for Trinidad and Tobago in London

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* Secretariat note: The following page numbers have been modified accordingly.

Chapter I

PROCEDURAL HISTORY

1. By a Notice of Arbitration dated 16 February 2004, Barbados initiated arbitration proceedings concerning its maritime boundary with the Republic of Trinidad and Tobago. The proceedings, which, in the view of Barbados, relate to the delimitation of a single maritime boundary between the exclusive economic zones and the continental shelves appertaining to Barbados and Trinidad and Tobago respectively, were begun pursuant to Article 286 of the 1982 United Nations Convention on the Law of the Sea (the "Convention" or "UNCLOS") and, Barbados maintains, in accordance with Annex VII to the Convention.

2. In its concurrently submitted Statement of Claim, Barbados stated that neither Party had declared, pursuant to Article 298 of the Convention, any exceptions to the applicability of the dispute resolution procedures of Part XV, nor had either Party made a written declaration choosing the means for settlement of disputes under Article 287(1) of the Convention.

3. In its Notice of Arbitration, Barbados appointed Professor Vaughan Lowe as a member of the Arbitral Tribunal to be constituted pursuant to Annex VII. Trinidad and Tobago subsequently appointed Mr. Ian Brownlie CBE QC. The remaining three members of the tribunal were duly appointed in accordance with Article 3 of Annex VII and were Judge Stephen M. Schwebel (President), Professor Francisco Orrego Vicuña, and Sir Arthur Watts KCMG QC.

4. On 15 April 2004 the Parties sent a joint letter to the Secretary-General of the Permanent Court of Arbitration ("PCA"), asking whether the PCA would be ready to serve as Registry for the proceedings.

5. On 16 April 2004 the Secretary-General of the PCA responded that the PCA was prepared to serve as Registry for the proceedings. Ms. Bette Shifman was appointed to serve as Registrar, assisted by Mr. Dane Ratliff. Ms. Shifman was subsequently replaced by Ms. Anne Joyce.

6. On 19 May 2004 the President of the Tribunal, counsel for the Parties, and a member of the Registry participated in a conference call. It was agreed that the Parties would each submit a brief to the Tribunal on 26 May 2004 with their respective views on the schedule and order of written pleadings. It was also provisionally agreed that a meeting be held in London on 21 June 2004 to determine any outstanding procedural matters.

7. On 26 May 2004 both Barbados and Trinidad and Tobago made written submissions on the timing and order of written pleadings. Barbados proposed that pleadings be exchanged simultaneously, whereas Trinidad and Tobago proposed that the pleadings be sequentially filed, with Barbados submitting its Memorial before Trinidad and Tobago submitted its Counter-Memorial.

8. On 3 June 2004 the Tribunal changed the date for the first procedural meeting of the Tribunal with the Parties from 21 June 2004 to 23 August 2004.

9. On 7 June 2004 the Tribunal issued Order No. 1[1] which provides in operative part:

> 1. Barbados shall file its Memorial no later than five months from the date of this Order, by 30 October 2004.
>
> 2. Trinidad and Tobago shall file its Counter-Memorial no later than ten months from the date of this Order, by 31 March 2005.
>
> 3. The question of whether and which further written pleadings shall be exchanged simultaneously or sequentially shall be the subject of a further Order.

10. On 17 August 2004 the Minister of Foreign Affairs of Guyana wrote to the President of the Tribunal and requested that the Tribunal make available to Guyana a copy of the Application and Statement of Claim by Barbados, together with copies of the written pleadings of both Parties, on the basis that it, as a neighboring State, had an interest in the proceedings. The President of the Tribunal consulted with the Parties regarding Guyana's request and subsequently responded (on 26 October 2004) that, based on the wishes of the Parties, the request could not be accepted.

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[1] The Orders, Rules of Procedure, and the pleadings in the arbitration are filed in the archives of the PCA in The Hague, and are available on the PCA website at: http://www.pca-cpa.org.

11. Also on 17 August 2004 Trinidad and Tobago wrote to the Registry requesting an order from the Tribunal for "the disclosure of limited information and documentation from Barbados" concerning "self-help" measures by Barbados (including making presentations to oil companies) with respect to four submarine areas for petroleum exploration and production known as blocks 22, 23 (a), 23 (b) and 24.

12. On 23 August 2004 the Tribunal met with the Parties in London to conclude arrangements for the logistical and procedural aspects of the arbitration, and heard arguments from both Parties on Trinidad and Tobago's application for disclosure. At the conclusion of the meeting, the Tribunal issued Order No. 2 which provides in operative part:

> 1. The Rules of Procedure as assented to by the Parties and as attached to Order No. 2 are adopted;
>
> 2. Following the submission of the Counter-Memorial, Barbados shall submit a Reply by 9 June 2005, and Trinidad and Tobago shall submit a Rejoinder by18 August 2005;
>
> 3. The place of arbitration shall be The Hague;
>
> 4. Oral hearings shall be held in London, unless by 1 October 2004 the Parties have agreed on a situs in the Caribbean;
>
> 5. Oral hearings will take place in October or November 2005, on dates to be fixed by the Tribunal after further consultation with the Parties; and
>
> 6. Barbados shall submit its views by 6 September 2004 on Trinidad and Tobago's application for the disclosure of certain information by Barbados.

13. On 6 September 2004 Barbados submitted its views on the application of Trinidad and Tobago, arguing that the Tribunal did not have the power to issue the requested order, and asking that Trinidad and Tobago's request be refused, and if it were not, then Trinidad and Tobago should on the basis of reciprocity be required to disclose information to Barbados.

14. On 17 September 2004 the Tribunal issued Order No. 3 which provides in operative part:

> 1. Trinidad and Tobago shall on or before 1 October 2004 submit a Reply to the observations of Barbados in its Response, including its position on the Tribunal's jurisdiction to grant the request for disclosure made in Trinidad and Tobago's Application;
>
> 2. Barbados shall on or before 15 October 2004 submit a Rejoinder on the observations of Trinidad and Tobago made in its Reply, addressing in particular those on jurisdiction.

15. On 30 September 2004 the Parties informed the Tribunal that they would be available to attend oral hearings during the two-week period commencing on 17 October 2005. The dates for the hearings accordingly were fixed for 17-28 October 2005, to take place in London.

16. On 1 October 2004 Trinidad and Tobago submitted its Reply to Barbados' Response of 6 September 2004, arguing, *inter alia*, that the Tribunal was empowered to make the requested order.

17. On 15 October 2004 Barbados filed a Rejoinder to Trinidad and Tobago's Reply of 1 October 2004, in which Barbados, *inter alia*, rejected Trinidad and Tobago's allegations that it engaged in "improper self-help".

18. On 26 October 2004 the Tribunal issued Order No. 4 regarding Trinidad and Tobago's application for disclosure of limited information and documentation from Barbados.

Order No. 4 provides in operative part:

> 1. The Application of the Republic of Trinidad and Tobago for "disclosure of limited information and documentation from Barbados" is denied, but without prejudice to its reconsideration by the Tribunal, if Trinidad and Tobago, in light of Barbados' Memorial, decides to resubmit it.

19. On 1 November 2004 Barbados filed its Memorial.

20. On 23 December 2004 Trinidad and Tobago filed a Statement of Preliminary Objections, which it stated were made "pursuant to Article 1 of the Tribunal's Rules of Procedure" and within the time limit set forth in Article 10(2) thereof. In its Statement, Trinidad and Tobago asserted that Barbados' claim was outside the jurisdiction of the Tribunal, or alternatively, inadmissible. With respect to the timing of the Tribunal's potential ruling on its preliminary objections, Trinidad and Tobago stated that "it is Trinidad and Tobago's view that, given the nature of its objections and the existence of a timetable for a final hearing commencing on 17 October 2005, these objections should be joined to the merits and determined in the Tribunal's final Award".

21. On 28 March 2005 Barbados wrote to the Tribunal raising concerns about the admissibility of the agreed minutes of negotiations between Barbados and Trinidad and Tobago that preceded the initiation of arbitral proceedings (the "Joint Reports"), which Barbados understood were to be annexed to Trinidad and Tobago's Counter-Memorial. Barbados based its objections in part on an agreement between the Parties to the negotiations that "no information exchanged in the course of their negotiations will be used in any subsequent judicial proceedings which might arise unless both parties agree to its use". Barbados requested the Tribunal to instruct Trinidad and Tobago that inclusion of the Joint Reports or the substance thereof in Trinidad and Tobago's Counter-Memorial, without Barbados' agreement or the Tribunal's permission, would constitute a breach of the confidentiality agreement and asked that the Joint Reports be withheld from the Tribunal pending its decision.

22. On 29 March 2005 Trinidad and Tobago wrote to the Registry proposing that, "if Barbados wishes to persist with its submission", the issue

of admissibility should be addressed by "brief written arguments" submitted by the Parties, followed by an oral hearing, pending which it was content for its Counter-Memorial to be circulated with instructions to the Tribunal not to read Chapter 2, section D, and without the relevant volume containing the Joint Reports.

23. On 30 March 2005 Barbados informed the Tribunal that Trinidad and Tobago's proposed approach with respect to treatment of the Counter-Memorial and the Joint Reports "largely meets the concern raised by Barbados in its letter . . . of 28 March", but that Barbados' "attitude towards the production of the Joint Reports will depend on the justification that Trinidad and Tobago may advance for its wish to refer to them".

24. On 31 March 2005 Trinidad and Tobago filed its Counter-Memorial and wrote to the Registry stating that "the issue of admissibility raised by Barbados [cannot] be left in abeyance", and requesting the Tribunal to invite Barbados to state, within three days, whether or not it was challenging the admissibility of the Joint Reports.

25. On 5 April 2005 Barbados stated that it was unable to agree to the admission of the Joint Reports until it was "in a position to know from Trinidad and Tobago the purpose for which the Joint Reports are to be used".

26. On 5 April 2005 the President of the Tribunal informed the Parties that the Tribunal had taken note of their positions on the admissibility of the Joint Reports, and requested both Parties to submit written analyses on the issue of admissibility by 25 April 2005, after which the Tribunal would decide whether an oral hearing was required.

27. On 22 April 2005 Barbados, in its submission on the issue of admissibility of the Joint Reports, stated that it would not "insist that Trinidad and Tobago withdraw its Counter-Memorial (including Volume 2(2)) and submit a revised Counter-Memorial that does not incorporate or refer to inadmissible material", but reserved its right to comment thereon in its Reply. Barbados also stated that it had not waived "the privileged and confidential status of the negotiations or Joint Reports", and asked the Tribunal "to take note of Trinidad and Tobago's violations [of confidentiality and its undertakings] in an appropriate manner".

28. On 25 April 2005 Trinidad and Tobago submitted its written arguments on the issue of admissibility of the Joint Reports, requesting that the Tribunal reject Barbados' objection to their admissibility.

29. Having reviewed the Parties' submissions, the President directed the Registry on 4 May 2005 to forward the Tribunal a copy of Volume 2(2) of the Counter-Memorial.

30. On 9 June 2005 Barbados filed its Reply.

31. On 17 August 2005 Trinidad and Tobago filed its Rejoinder.

32. On 9 September 2005 Barbados requested the Tribunal to grant it permission to submit supplemental evidence.

33. On 15 September 2005 Trinidad and Tobago responded to Barbados' letter of 9 September 2005 contesting Barbados' request to submit certain categories of supplemental evidence described by Barbados in its letter of 9 September 2005.

34. On 17 September 2005 the Registry informed the Parties that the Tribunal accepted the introduction of Barbados' supplemental evidence (to be filed by 19 September 2005), subject to the right of Trinidad and Tobago to transmit new evidence in rebuttal not later than 3 October 2005.

35. On 19 September 2005 Barbados informed the Tribunal that it would be willing to forego the opportunity of submitting evidence under two of the five contested categories. Barbados submitted its supplementary evidence relating to the remaining categories of evidence it set out in its letter of 15 September 2005.

36. On 3 October 2005 Trinidad and Tobago submitted evidence in rebuttal to the supplementary evidence of Barbados.

37. On 23 October 2005, after consultation with the Parties, the Tribunal appointed a hydrographer, Mr. David Gray, as an expert to assist the Tribunal pursuant to Article 11(4) of the Rules of Procedure.

38. During the period 17-28 October 2005 hearings were held at the International Dispute Resolution Centre in London.

39. On 24 October 2005, in the course of the hearings, Barbados objected to certain reports that had appeared in the Trinidad and Tobago press, and requested the President of the Tribunal to issue a statement recalling the Parties' undertaking of confidentiality regarding the arbitral proceedings. The President issued the following statement:

> Reports have appeared in the Caribbean press about contents of the arbitral proceedings currently taking place in London between Barbados and Trinidad and Tobago concerning their maritime boundary. In that regard, the Tribunal draws attention to its Rules of Procedure, which, in Article 13(1), provide: "All written and oral pleadings, documents, and evidence submitted in the arbitration, verbatim transcripts of meetings and hearings, and the deliberations of the Arbitral Tribunal, shall remain confidential unless otherwise agreed by the Parties".
>
> The Tribunal accordingly trusts that this rule will be observed by the Parties and any spokesmen for them.

40. On 28 October 2005 the President of the Tribunal was sent a letter by the Foreign Minister of Guyana, which provided information to the Tribunal regarding the outer limit of Guyana's Exclusive Economic Zone ("EEZ"). On 9 November 2005 the President responded to the Foreign Minister, acknowledging his letter and noting that it had been brought to the attention of the members of the Tribunal.

Chapter II

INTRODUCTION

A. BACKGROUND

41. While the Parties differed on many of the facts concerning their respective patterns of resource use, and salient features of geography, and the legal significance to be attached to those facts, it will be convenient at the outset to recall facts that appear to be common ground between the Parties.

1. Relevant Geography

42. The islands of Trinidad and Tobago lie off the northeast coast of South America. At their closest, Trinidad and Venezuela are a little over 7 nautical miles ("nm") apart. Seventy nm to the northwest, there starts a chain of rugged volcanic islands known collectively as the Windward Islands, made up of Grenada, The Grenadines, St. Vincent, St. Lucia, Martinique, Dominica, and others. Barbados is not part of that chain of islands, but sits east of them. Collectively, all the aforementioned islands, and others that are farther north, make up the Lesser Antilles Islands.

43. Barbados consists of a single island with a surface area of 441 sq km and a population of approximately 272,200. The island of Barbados is made up of a series of coral terraces resting on a sedimentary base. Barbados is situated northeast of Tobago by 116 nm and nearly 80 nm east of St. Lucia, the closest of the Windward Islands.

44. The Republic of Trinidad and Tobago is made up of the islands of Trinidad, with an area of 4,828 sq km and an approximate population of 1,208,300, and, 19 nm[2] to the northeast, the island of Tobago with an area of 300 sq km and an approximate population of 54,100, and a number of much smaller islands that are close to those two main islands. Trinidad and Tobago has declared itself an "archipelagic state" pursuant to provisions of UNCLOS. The islands of Trinidad and Tobago are essentially the eastward extension of the Andean range of South America.

45. East of Trinidad and Tobago, the coast of South America trends in an east-southeasterly direction, first with part of the coast of Venezuela, then the coasts of Guyana, Suriname, and French Guiana. The Windward Islands lie as a string of islands in a south to north orientation starting directly north of the Boca del Dragon, the channel between the northwest corner of the island of Trinidad and the Peninsula de Paria of Venezuela.

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[2] British Admiralty Chart 493, "Approaches to Trinidad including the Gulf of Paria", Scale 1:300,000, Taunton, UK, 8 May 2003, corrected for Notices to Mariners up to 5090/05.

2. Factual Context

46. Over a period of some three decades prior to the commencement of this arbitration, the Parties held high-level diplomatic meetings and conducted negotiations concerning the use of resources in the maritime spaces they are respectively claiming, chief among them being fisheries and hydrocarbons.

47. Barbados adopted an "Act to provide for the establishment of Marine Boundaries and Jurisdiction" (the "Marine Boundaries and Jurisdiction Act") in February 1978, for the purpose of extending its jurisdiction beyond its territorial sea, and in order to claim its EEZ and the rights appertaining thereto.

48. After several meetings of the Parties concerning resource use and trade beginning in 1976, on 30 April 1979 the Parties entered into a Memorandum of Understanding on Matters of Co-operation between the Government of Barbados and the Government of Trinidad and Tobago, covering, *inter alia*, hydrocarbon exploration and fishing.

49. In 1986 Trinidad and Tobago adopted the "Archipelagic Waters and Exclusive Economic Zone Act" (the "Archipelagic Waters Act"), in order to define Trinidad and Tobago as an archipelagic State, and to claim its EEZ in accordance with UNCLOS.

50. On several occasions during the period 1988-2004 (approximately) Trinidad and Tobago arrested Barbadians fishing off Tobago and accused them of illegal fishing.

51. On 18 April 1990 Trinidad and Tobago and Venezuela concluded a "Treaty on the Delimitation of Marine and Submarine Areas". There was an Exchange of Notes relating to that Treaty on 23 July 1991. The 1990 Treaty and 1991 Exchange of Notes are referred to as the "1990 Trinidad-Venezuela Agreement".[3]

52. In November 1990 the Parties concluded the "Fishing Agreement between the Government of the Republic of Trinidad and Tobago and the Government of Barbados" (the "1990 Fishing Agreement"), regulating, *inter alia*, aspects of the harvesting of fisheries resources by Barbadian fisherfolk in Trinidad and Tobago's EEZ, and facilitating access to Barbadian markets for Trinidad and Tobago's fish.

53. During the period July 2000 to November 2003 the Parties engaged in several rounds of bilateral negotiations which included maritime boundary negotiations and fisheries negotiations. The Parties differ as to whether the maritime boundary and fisheries negotiations were part of a single negotiating

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[3] Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990, *reprinted in The Law of the Sea – Maritime Boundary Agreements (1985-1991)* pp. 25-29 (Office for Ocean Affairs and the Law of the Sea, United Nations, New York 1992).

process or separate negotiations. A Joint Report of each round of negotiation was approved by the Parties. Those Joint Reports essentially set out the respective positions of each Party on the issues discussed at each meeting.

54. The Parties agreed at the end of the fifth round of maritime boundary negotiations in November 2003 to hold further negotiations in February 2004.

55. On 6 February 2004 Trinidad and Tobago arrested Barbadian fisherfolk and accused them of illegal fishing.

56. Prime Minister Manning of Trinidad and Tobago met, at his initiative, with Prime Minister Arthur of Barbados in Barbados on 16 February 2004. It is the contention of Barbados that, at that meeting, Prime Minister Manning characterized the maritime boundary dispute as "intractable", and challenged Barbados to take it to arbitration, statements that Trinidad and Tobago denies were ever made. Barbados commenced the present proceedings immediately after that meeting.

B. THE PARTIES' CLAIMS

57. On 16 February 2004 Barbados filed a Notice of Arbitration and Statement of Claim, claiming a "single unified maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS".

58. According to Barbados:

> [I]nternational authority clearly prescribes that the Tribunal should start the process of delimitation by drawing a provisional median line between the coasts of Barbados and Trinidad and Tobago. This line should be adjusted so as to give effect to a special circumstance and thus lead to an equitable solution. The special circumstance is the established traditional artisanal fishing activity of Barbadian fisherfolk south of the median line. The equitable solution to be reached is one that would recognise and protect Barbadian fishing activities by delimiting the Barbados EEZ in the manner illustrated on map 3.

59. Barbados' claim line for a single unified maritime boundary illustrated on Map 3 of its Memorial is reproduced as Map I, facing.*

60. Barbados described the course of that claim line in its Memorial as follows:

> 142. The proposed delimitation line is a median line modified in the northwest to encompass the area of traditional fisheries enjoyed by Barbados. The line is defined in three parts from points A to B, B to C and the third part from points C to E.
>
> 143. The first part of the line from A to B is defined by the meridian 61°15'W. This line runs south from point A, the point of intersection of this

* Secretariat note: See map No. I in the back pocket of this volume.

meridian with a line of delimitation between Trinidad and Tobago and Grenada, to point B, the intersection of this meridian with the 12 nautical mile territorial sea limit of Trinidad and Tobago.

144. The second part of the proposed delimitation line is the 12 nautical mile territorial sea limit of Trinidad and Tobago, running from point B around the northern shores of Tobago to point C, the intersection of the parallel 11°08'N and the 12 nautical mile territorial sea limit of Trinidad and Tobago lying southeast of the island of Tobago.

145. The third part of the proposed delimitation line is defined by a geodesic line from point C, following an azimuth of 048° until it intersects with the calculated median line between Barbados and Trinidad and Tobago at point D; then the line follows the median line south eastwards running through intermediate points on the median line numbered 1 to 8.

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

61. The coordinates of Barbados' claim line are as follows:

Coordinates listed are related to WGS84 [World Geodetic System 1984] and quoted to 0.01 of a minute

Point	Latitude			Longitude		
A[*]	*11*	*37.87*	*N*	*61*	*15.00*	*W*
B[#]	11	13.30	N	61	15.00	W
C[#]	11	08.00	N	60	20.47	W
D	11	53.72	N	59	28.83	W
1	11	48.25	N	59	19.23	W
2	11	45.80	N	59	14.94	W
3	11	43.61	N	59	11.08	W
4	11	32.88	N	58	51.40	W
5	11	10.76	N	58	11.42	W
6	10	59.71	N	57	51.54	W
7	10	49.21	N	57	33.15	W
8	10	43.54	N	57	23.23	W
E[*]	*10*	*41.03*	*N*	57	*18.83*	*W*

[*] Positions listed in italics are only indicative of the positions described in the text which will require separate bi-lateral or tri-lateral agreements to define coordinates.

[#] The latitude of point B and the longitude of point C will change with the variation of the territorial sea limit of Trinidad and Tobago over time.

62. Trinidad and Tobago in its Counter-Memorial set out its own positive claim, and stated with respect thereto:

> In the relatively confined waters of the western or Caribbean sector, there is no basis for deviating from the median line – a line which Barbados has repeatedly recognised and which is equitable in the circumstances. The position is quite different in the eastern or Atlantic sector where the two states are in a position of, or analogous to, adjacent States and are most certainly not opposite. As a coastal State with a substantial, unimpeded eastwards-facing coastal frontage projecting on to the Atlantic sector, Trinidad and Tobago is entitled to a full maritime zone, including continental shelf. The claim that Barbados has now formulated in the Atlantic sector cuts right across the Trinidad and Tobago coastal frontage and is plainly inequitable. The strict equidistance line needs to be modified in that sector so as to produce an equitable result, in accordance with the applicable law referred to in Articles 74 and 83 of the 1982 Convention.

63. Trinidad and Tobago described the course of its claim line as follows:

> (a) to the west of Point A, located at 11°45.80'N, 59°14.94'W, the delimitation line follows the median line between Barbados and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;
>
> (b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88° extending to the outer limit of the EEZ of Trinidad and Tobago;
>
> (c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

64. Trinidad and Tobago's claim line is illustrated in Figure 7.5 of its Counter-Memorial and is reproduced as Map II, facing.[*]

65. Trinidad and Tobago objects to the entire claim of Barbados on grounds of inadmissibility, maintaining that the procedural preconditions of UNCLOS have not been fulfilled. Barbados objects that the claim of Trinidad and Tobago in respect of the extended continental shelf ("ECS" or "outer continental shelf")[4] is beyond the scope of the dispute referred to the Tribunal.

66. The arguments of the Parties with respect to their claims are summarized in the following Chapter.

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[*] Secretariat note: See map No. II in the back pocket of this volume.

[4] Although the Parties have used the term "extended continental shelf", the Tribunal considers that it is more accurate to refer to the "outer continental shelf", since the continental shelf is not being extended, and will so refer to it in the remainder of this Award.

Chapter III

ARGUMENTS OF THE PARTIES

A. DOES THE TRIBUNAL HAVE JURISDICTION OVER BARBADOS' CLAIM, AND, IF SO, ARE THERE ANY LIMITS TO THAT JURISDICTION?

Barbados' Position

67. Barbados maintains that the Tribunal's jurisdiction is founded in the provisions of Part XV of the Convention concerning the settlement of disputes, and, in particular Articles 286,[5] 287[6] and 288,[7] coupled with Annex VII to the

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[5] Article 286 provides:

Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

[6] Article 287 provides:

Choice of procedure

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with Annex VII;

(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

Convention. Together, according to Barbados, these provisions "establish compulsory jurisdiction at the instance of any party". Barbados notes further that neither Party has made any declarations under Article 298[8] of UNCLOS,

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8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

[7] Article 288 provides:

Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

2. A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.

3. The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea established in accordance with Annex VI, and any other chamber or arbitral tribunal referred to in Part XI, section 5, shall have jurisdiction in any matter which is submitted to it in accordance therewith.

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

[8] Article 298 provides:

Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;

(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless the parties otherwise agree;

(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

(b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;

(c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

which sets out optional exceptions to the applicability of compulsory and binding procedures under Part XV, or made any written declaration selecting a particular means for the settlement of disputes pursuant to Article 287 of UNCLOS. Barbados cites Article 74[9] (relating to delimitation of the EEZ) and Article 83[10] (relating to delimitation of the continental shelf ("CS")) both

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2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it, or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.

3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

4. If one of the States Parties has made a declaration under paragraph l(a), any other State Party may submit any dispute falling within an excepted category against the declarant party to the procedure specified in such declaration.

5. A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree.

6. Declarations and notices of withdrawal of declarations under this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.

[9] Article 74 provides:

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

1. The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

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

[10] Article 83 provides:

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

1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

of which provide that "[i]f no agreement can be reached within a reasonable period, the States concerned shall resort to the procedures provided for in Part XV".

68. Barbados bases its submissions with respect to jurisdiction essentially on two arguments. First, it argues that the existence of a dispute was clear from the numerous differences between the Parties that emerged during multiple rounds of negotiations concerning access for Barbadian fisherfolk and delimitation of the maritime boundary. According to Barbados, the differences between the Parties included: the relationship of fisheries and maritime delimitation negotiations, the existence and legal implications of Barbadian artisanal fishing, the methodology of delimitation, and the nature and implications of the relationship between the Parties' coastlines. Second, Barbados argues that it understood the negotiations to have "deadlocked" when, according to Barbados, the Prime Minister of Trinidad and Tobago declared the issue of the maritime boundary "intractable" and invited Barbados to proceed with arbitration, if it so wished. As evidence for its understanding in this regard, Barbados submitted written and oral testimony to this effect by Ms. Theresa Marshall, Permanent Secretary of the Ministry of Foreign Affairs. As a final point to justify the timing of its Notice of Arbitration, Barbados states that it "also had reason to believe that Trinidad and Tobago intended imminently to exercise its right to denounce its obligation to submit to third party dispute resolution under Article 298, paragraph 1, precisely to avoid this Tribunal's jurisdiction".

69. Five years and nine rounds of unsuccessful negotiations, involving extensive but unproductive exchanges of views between the Parties, Barbados argues, led it reasonably to conclude that a sufficient period of time had elapsed and that "the possibilities of settlement had been exhausted". In Barbados' view, such a conclusion is justifiable under the terms of the Convention, and is supported by the International Tribunal for the Law of the Sea's findings in the "relevant" case law – namely, previous arbitrations conducted pursuant to Annex VII of the Convention.[11] Furthermore, Barbados argues that nothing in UNCLOS grants a "recalcitrant party the unilateral right

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

[11] See the *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), International Tribunal for the Law of the Sea (ITLOS), Order of 27 August 1999, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 3* (International Tribunal for the Law of the Sea, Kluwer Law International 1999); *The MOX Plant Case* (Ireland v. United Kingdom), ITLOS, Order of 3 December 2001, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 5* (International Tribunal for the Law of the Sea, Kluwer Law International 2001); and *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia v. Singapore), ITLOS, Order of 8 October 2003, Request for Provisional Measures, *Reports of Judgments, Advisory Opinions and Orders, Vol. 7* (International Tribunal for the Law of the Sea, Kluwer Law International 2003).

to extend negotiations indefinitely to avoid submission of the dispute to binding third-party resolution".

70. In response to arguments put forward by Trinidad and Tobago that Barbados has sought to "bypass" the "pre-conditions to arbitration" under UNCLOS, Barbados characterizes Trinidad and Tobago's multi-tiered approach as "idiosyncratic", "formalistic", and even, in the terms of the Vienna Convention on the Law of Treaties, "manifestly absurd or unreasonable". Moreover, Barbados states, "Trinidad and Tobago's interpretation would frustrate the object and purpose of Part XV as a whole".

71. Barbados takes issue in particular with Trinidad and Tobago's argument that the agreement of both Parties is needed before moving from maritime boundary negotiations pursuant to Articles 74 and 83 of UNCLOS to dispute resolution procedures under Part XV. Barbados contends that this "would simply end the State's right to invoke an arbitration clause as long as the other State was willing to keep saying 'Let's talk more'". Barbados also rejects Trinidad and Tobago's argument that, following a referral by the Parties to Part XV, a further "exchange of views" is then required pursuant to Article 283.[12] According to Barbados, "a more sensible reading of Article 283 would take the reference to the exchange of views, not as a requirement to go through what already had been done for another five or ten years, but to exchange views with respect to the organization of the arbitration, as was done". Barbados contends further that Trinidad and Tobago's arguments on this point lack legal foundation, whether one considers the text of UNCLOS itself, or the *travaux préparatoires*, or scholarly views, such as the UNCLOS commentary produced by the University of Virginia (*United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V* (Shabtai Rosenne & Louis B. Sohn eds., 1989) *"Virginia Commentary"*)).

72. At the oral proceedings, Barbados also addressed the issue of the Tribunal's jurisdiction to award a fisheries access regime for Barbadian fisherfolk in Trinidad and Tobago's EEZ. Barbados argues that, once a relevant circumstance has been established, the Tribunal "will have at its disposal a spectrum of remedies", including such an access regime. "As long as it is less than what Barbados has requested, it will still be infra petita." Barbados principally cites in support of this argument the award issued in Part II of the Eritrea/Yemen arbitration *(Eritrea/Yemen, Award of the Arbitral*

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[12] Article 283 provides:

Obligation to exchange views

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

2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), 119 I.L.R. p. 417 (1999) *("Eritrea/Yemen II")*) (see also paragraphs 272-283 below).

Trinidad and Tobago's Position

73. Trinidad and Tobago maintains that the Tribunal has no jurisdiction to hear Barbados' claims because Barbados has not given effect to "the wording of the relevant provisions of UNCLOS", which Trinidad and Tobago states are Articles 74 and 83, as well as 283, 286, and 298. In Trinidad and Tobago's view, Article 283 is of particular importance in this regard.

74. Trinidad and Tobago contends that Article 283(1) makes the exercise of jurisdiction by an Annex VII tribunal contingent upon two factors: first, the existence of a dispute, and second, an exchange of views having taken place regarding settlement by negotiation or other peaceful means.

75. As to whether a dispute exists in this case, Trinidad and Tobago argues that negotiations between the Parties were ongoing and at an early stage when Barbados initiated arbitral proceedings on 16 February 2004 and that, until such time as Barbados' claim line had been illustrated on a chart and discussed, meaningful negotiations as to Barbados' claim under Articles 74(1) and 83(1) of UNCLOS could not yet have taken place. Hence, a dispute as to the location of the maritime boundary could not exist. Trinidad and Tobago denies that its Prime Minister ever said that the maritime boundary dispute was "intractable". It rather maintains that all that was said was that "the delimitation negotiations were likely to be more protracted than the fisheries negotiations". In support of these submissions, Trinidad and Tobago cites, *inter alia*, two statements by the Prime Minister of Barbados – the first, shortly prior to submission of the Notice of Arbitration, for its indication that negotiations between the countries were going well, and the second, following submission of the Notice, for its failure to mention that negotiations had become "intractable" – as well as written and oral testimony from officials present at the meetings on 16 February 2004.

76. Trinidad and Tobago argues further that negotiations under Articles 74 and 83 are not in any event the same as the "exchange of views" referred to in Article 283(1) and that, moreover, where parties are engaged in such negotiations, and a dispute crystallises, they must agree jointly to proceed to such an exchange of views. "It is not envisaged that one state acting alone will immediately and without notice resort to the procedures of Part XV."

77. In Trinidad and Tobago's view, even if the Parties were to be taken as being in a situation of dispute while they were in negotiations under Articles 74(1) and 83(1), Article 283(2) would require Barbados to "terminate the attempts at settlement of the dispute, *i.e.* the negotiations, and for the parties then to proceed expeditiously to an exchange of views". Citing the *Virginia Commentary*, Trinidad and Tobago maintains that "Article 283(2) ensures that a party may transfer a dispute from one mode of settlement to

another, especially one entailing a binding decision such as arbitration under Annex VII, 'only after appropriate consultations between all parties concerned'".

78. As to Barbados' contention that such consultations could have stimulated Trinidad and Tobago to opt out of compulsory dispute procedures pursuant to Article 298 of UNCLOS before Barbados could invoke arbitration, Trinidad and Tobago responds with a statement that such concerns were baseless, that Trinidad and Tobago had no such intention, and that it would undertake for the future not to exercise this right.

79. Trinidad and Tobago also questions what it terms the "scope" of Barbados' claims and challenges the Tribunal's jurisdiction to award Barbados' fisherfolk access to the fishery resources that lie within the EEZ of Trinidad and Tobago. Trinidad and Tobago contends, first, that Barbados has not put forward a claim for a fishing access regime in any of Barbados' written pleadings and it was thus not open to Barbados to seek to "broaden the remedy that it claims" in the oral proceedings. Moreover, Trinidad and Tobago argues, Article 297(3)(a) of the Convention, which states in relevant part that "coastal states shall not be obliged to accept the submission to . . . settlement [in accordance with Section 2 of Part XV] of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise", makes clear that the Tribunal has no jurisdiction to hear such a claim.

B. DOES THE TRIBUNAL HAVE JURISDICTION TO CONSIDER TRINIDAD AND TOBAGO'S CLAIM?

1. Are the requirements for jurisdiction under UNCLOS, Part XV, the same as, or different from, those for jurisdiction over Barbados' claim, and have they been met?

2. Should the Tribunal make a distinction between areas within 200 nm of the Parties' coasts and areas beyond 200 nm and, if so, what, if any, are the consequences of making the distinction?

Barbados' Position

80. Barbados' position is that the Tribunal does not have jurisdiction to hear Trinidad and Tobago's claim to the extent it involves a claim to Trinidad and Tobago's outer continental shelf. For the Tribunal to have jurisdiction over Trinidad and Tobago's claim, Barbados maintains, the two core elements of Article 283(1) of UNCLOS must be satisfied, *i.e.* the existence of a dispute, and an exchange of views regarding its settlement by negotiation or other peaceful means. Barbados claims that at no point in the negotiations did Trinidad and Tobago put forward any specific claims to the outer continental shelf, nor did Trinidad and Tobago raise the issue of delimitation between its

possible outer continental shelf and the maritime territory of Barbados. In fact, according to Barbados, the transcripts of the meetings show that, "in the fifth round of negotiations, Trinidad and Tobago confirmed that its claim line stopped at the 200 nautical mile arc".

81. Barbados argues further that the Tribunal lacks jurisdiction to make any determination with respect to Trinidad and Tobago's outer continental shelf because the dispute submitted to the Tribunal did not relate to delimitation of any potential outer continental shelf entitlement beyond 200 nm of either of the Parties.

82. It is also Barbados' position that any delimitation of the outer continental shelf beyond 200 nm from Trinidad and Tobago, but within 200 nm of Barbados, would constitute a violation of Barbados' sovereign rights over its EEZ and would be contrary to Part V of UNCLOS. Moreover, Barbados maintains, "any delimitation over the ECS beyond 200 nm would affect the rights of the international community". In particular, delimitation of the outer continental shelf in the way proposed by Trinidad and Tobago would, in Barbados' view, interfere with the core function of the Commission on the Limits of the Continental Shelf ("CLCS" or "Commission"). In support of its argument, Barbados relies primarily on the findings of the Arbitral Tribunal in the *St Pierre et Miquelon* case (*Case Concerning Delimitation of Maritime Areas between Canada and France (St Pierre et Miquelon)*, 95 I.L.R. p. 645 (1992)).

Trinidad and Tobago's Position

83. Trinidad and Tobago's position is that the jurisdiction of the Tribunal extends to determining the maritime boundary to the full extent of its potential jurisdiction under international law, and, at a minimum, this means delimiting the maritime zones of the Parties which lie within 200 nm of either of them and which are claimed by both.

84. Trinidad and Tobago argues that a State that submits a maritime delimitation claim to arbitration under UNCLOS cannot limit the Tribunal's jurisdiction to the scope of its own claim or prevent the Tribunal from dealing with the whole dispute (including claims made against it) by reference to Article 283. As Trinidad and Tobago is not the applicant in this case, and is not seeking to seize the Tribunal by virtue of Article 286, "the requirements of Article 283(1) do not have to be fulfilled for the Tribunal to exercise jurisdiction in respect of Trinidad and Tobago's claim". According to Trinidad and Tobago, "the only constraint on the Tribunal's jurisdiction and on the admissibility of the claim put forward by Trinidad and Tobago as the Respondent State is that it should form part of the overall dispute submitted to arbitration".

85. In response to Barbados' contention that Trinidad and Tobago never put forth its claim to an outer continental shelf, Trinidad and Tobago argues that the Joint Reports show that from the very first round of the maritime delimitation negotiations, Trinidad and Tobago was looking to agree on a

boundary extending beyond 200 nm. Such a claim was also implicit in the 1990 Trinidad-Venezuela Agreement, where an open-ended delimitation extends beyond 200 nm. Accordingly, Trinidad and Tobago argues that even if Article 283 of UNCLOS applies to a respondent State, then Barbados had notice of the claim and sufficient opportunity to discuss it.

86. Relying on a number of earlier cases,[13] Trinidad and Tobago argues further that international tribunals can determine the direction of the maritime boundary as between the two States over which they do have jurisdiction even though, when faced with a potential tripoint with a third State, they cannot determine the extent of the entitlement of the third State to the EEZ or continental shelf. Citing the example of the 1990 Trinidad-Venezuela Agreement, Trinidad and Tobago observes that no State has made a claim to the north of the 1990 line and states that "the spectre of third State interests, so heavily relied on by Barbados, is illusory".

87. With respect to Barbados' arguments regarding the CLCS, Trinidad and Tobago acknowledges that under Article 76(8) of UNCLOS, the outer limit of the continental shelf is to be determined by processes that involve the CLCS. Trinidad and Tobago contends, however, that there is no overlap between the functions of the Commission and the Tribunal by virtue of Article 76, as Trinidad and Tobago is asking for "the establishment of a direction - an azimuth, not a terminus", while the Commission's concern is exclusively with the location of the outer limit of the shelf. Indeed, Trinidad and Tobago maintains, the CLCS "has no competence in the matter of delimitation between adjacent coastal States; that competence is vested in a tribunal duly constituted under Part XV of the Convention".

C. ESTOPPEL, ACQUIESCENCE, AND ABUSE OF RIGHTS

1. Has Barbados recognized and acquiesced in the existence of an EEZ appertaining to Trinidad and Tobago in the area claimed by Barbados to the south of the equidistance line and does Barbados' claim in this sector constitute an abuse of rights?

Trinidad and Tobago's Position

88. Trinidad and Tobago argues that Barbados' claim to an adjustment of the equidistance line in the Caribbean sector is inadmissible because Barbados has recognized Trinidad and Tobago's sovereign rights to the area south of the

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[13] See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria Equatorial Guinea intervening)*, I.C.J. Reports 1998, p. 275; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, I.C.J. Reports 2001, p. 40; *Arbitration between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act, Award of the Tribunal in the Second Phase*, 26 March 2002; and *Eritrea/Yemen II*, 119 I.L.R. p. 417.

equidistance line. In light of such recognition, Barbados' claim is also, in Trinidad and Tobago's view, an abuse of rights under Article 300[14] of the Convention.

89. Trinidad and Tobago argues that Barbados' recognition of Trinidad and Tobago's sovereign rights in the area south of the provisional equidistance line can be seen above all in the 1990 Fishing Agreement. According to Trinidad and Tobago, the development in the late 1970s of a Barbadian flyingfish fishing fleet with the capacity to fish in the waters off Tobago led to negotiations and discussions between the two governments, and the 1990 Fishing Agreement was the culmination of these negotiations. The 1990 Fishing Agreement was, in Trinidad and Tobago's view, "not a hasty compromise, pieced together to resolve a controversy regarding the arrests of Barbadian fishing vessels by the Trinidad and Tobago coastguard. [. . .] It was the product of several years of negotiations about the terms on which Barbadian access to what were acknowledged to be Trinidad and Tobago's waters was to be granted". Trinidad and Tobago invokes the preamble to the 1990 Fishing Agreement in support of its claim, which states:

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

90. Trinidad and Tobago responds to Barbados' claim that the 1990 Fishing Agreement was provisional by stating that, although the Parties were unable to agree on the terms of a new agreement, Barbados made repeated calls for a new bilateral fishing agreement. Barbados also listed a series of concerns when meeting with Trinidad and Tobago officials such as the high cost of the licence fee, the desire for an extended fishing area and the restrictiveness of the fishing schedule, but "[a]t no point did Barbados question the principle that the waters to which the [1990 Fishing] Agreement applied belong to Trinidad and Tobago". Trinidad and Tobago views this as acquiescence by Barbados in its jurisdiction to the south of the equidistance line.

91. Trinidad and Tobago also contends that Barbados' recognition of Trinidad and Tobago's right to arrest Barbadian fisherfolk fishing in its waters negates the idea that Barbados believed that Barbadian fisherfolk exercised traditional fishing rights in an area claimed by Barbados as EEZ appertaining to Barbados. Trinidad and Tobago argues that Barbados did not protest the arrests as beyond the former's jurisdiction and instead sought only to inform

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[14] Article 300 provides:

Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

its fisherfolk by a Government Information Service press release that they should remain within the waters of Barbados and should not fish south of the equidistance line. The only form of protest related to the severity of the measures being taken by Trinidad and Tobago and did not purport to suggest that the arrest of vessels and the trial of Barbadian nationals concerned were not within Trinidad and Tobago's rights. Although Prime Minister Arthur of Barbados requested a moratorium on arrests in January 2003, while the bilateral negotiations were in progress, he did not suggest that they were not within the authority of Trinidad and Tobago.

92. Finally, Trinidad and Tobago states that it does not argue that Barbados is estopped by virtue of the 1990 Fishing Agreement. Instead, it argues that the 1990 Fishing Agreement, read together with the Parties' prior and subsequent negotiations regarding fisheries, indicates that what was being negotiated was Trinidad and Tobago's granting access to Barbadian vessels to fish in Trinidad and Tobago's EEZ.

93. Trinidad and Tobago argues further that Barbados' claim is inadmissible because it constitutes an abuse of rights. Trinidad and Tobago's contention in this regard is that Barbados' employment of Article 286 to claim a single maritime boundary is incompatible with its previous recognition of the extent of the EEZ of Trinidad and Tobago and its own domestic legislation and is thus arbitrary and capricious and an abuse of its rights. In Trinidad and Tobago's view "[w]here, by treaty and by its own internal legislation, Barbados has recognised limits on the extent of its EEZ, [it] cannot ignore those constraints when it comes to formulating a good faith claim".

94. Trinidad and Tobago refers to the Marine Boundaries and Jurisdiction Act enacted by Barbados, Section 3(1) of which "established an exclusive economic zone, the outer limit of which was stated to be 200 nm from Barbados' baselines". According to Trinidad and Tobago, Section 3(1) was in turn made subject to Section 3(3) which provided that:

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

95. Trinidad and Tobago, meanwhile, in 1986 adopted the Archipelagic Waters Act, Section 14 of which provided that the outer limit of the EEZ was a line 200 nm from the Trinidad and Tobago baselines. Section 15 provided that:

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

96. Trinidad and Tobago maintains that "these were waters in respect of which Barbados made no claim during the fisheries negotiations and which, in accordance with Barbados' own legislation, fell outside the Barbados EEZ".

Barbados' Position

97. Barbados contends that it did not acquiesce in any of Trinidad and Tobago's exercises of sovereignty to the south of the equidistance line in the area of traditional fishing off the northwest, north and northeast of Tobago, and as a result Barbados cannot be estopped from making its claim for an adjustment of the equidistance line to the south. For largely the same reasons, Barbados rejects Trinidad and Tobago's claim that, by taking its claim to arbitration pursuant to Article 286, Barbados has engaged in an abuse of rights under Article 300 of UNCLOS.

98. In Barbados' view, no recognition of Trinidad and Tobago's sovereignty over the area south of the equidistance line may be implied from the 1990 Fishing Agreement because it was concluded for only one year and never renewed, was subsequently ignored by the Barbadian fishing communities, and did not change local and traditional fishing patterns. According to Barbados, the 1990 Fishing Agreement was only a "*modus vivendi*", which it was forced to conclude in order to enable Barbadian fisherfolk to resume their traditional fishing off Tobago without being arrested. In Barbados' view the situation was urgent as, following the 1989 arrests, the catches of Barbadian fisherfolk declined and the prices increased drastically, with the result that many Barbadians were unable to afford a dietary staple. Furthermore, Barbados argues, the "preservation of rights" language in Article XI of the 1990 Fishing Agreement,[15] as well as similar draft language being considered in subsequent attempts to negotiate another fishing access agreement, provide ample evidence that Barbados never intended to recognize Trinidad and Tobago's sovereignty over the area south of the equidistance line.

99. In response to Trinidad and Tobago's suggestion that, by warning its fisherfolk to fish only north of the equidistance line, Barbados has recognized Trinidad and Tobago's sovereign rights to waters south of the equidistance line, Barbados contends that the warnings given by it to its fisherfolk were intended only to give fisherfolk notice that they risked arrest if they continued to fish off Tobago at that time. Rather, Barbados states, it protested those

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[15] Article XI of the 1990 Fishing Agreement provides:

Preservation of Rights

Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its internal waters, archipelagic waters, territorial sea, continental shelf or Exclusive Economic Zone nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent.

arrests that did take place, as well as Trinidad and Tobago's sporadic attempts to engage in hydrocarbon activities in the area.

100. With regard to the specific issue of whether its claim constitutes an "abuse of rights", Barbados contends that it instituted this arbitration after Trinidad and Tobago's Prime Minister declared a critical issue in the dispute to be "intractable", leading it reasonably to conclude that further negotiations would be to no avail, and as such its claim does not constitute an abuse of rights. Barbados argues that "a State's invocation of its right to arbitrate under a treaty after it exhausts the potential for a negotiated resolution" is not an abuse of right, and it had no choice but to exercise its right to arbitrate and was, indeed, challenged to do so by Trinidad and Tobago.

101. Barbados relies on Oppenheim's definition of an abuse of right, said to occur "when a state avails itself of its right in an arbitrary manner in such a way as to inflict upon another state an injury which cannot be justified by a legitimate consideration of its own advantage" (*Oppenheim's International Law* (Jennings & Watts eds., Longman 9th ed. 1992), at p. 407). Barbados argues that its actions in no way conform to this definition: it invoked its right to arbitrate after years of good-faith negotiations, not arbitrarily or capriciously, and arbitration does not "constitute an injury, much less one that cannot be justified by a legitimate consideration of its own advantage".

102. To the extent Barbados took positions in negotiations with Trinidad and Tobago that differ from those now claimed in the context of the arbitral proceedings, this is simply a reflection of the differences between negotiation and litigation, Barbados maintains. With respect to Trinidad and Tobago's claims concerning Barbados' domestic legislation, Barbados argues that "Trinidad and Tobago cannot allocate to itself an authoritative right to interpret Barbados' laws" and, in any event, Barbados law sets forth only "default principles pending agreement" and "does not preclude Barbados from entering into agreements establishing its own exclusive economic zone other than by a median line".

2. Has Trinidad and Tobago recognized and acquiesced in Barbados' sovereignty north of the equidistance line, and, if so, is Trinidad and Tobago estopped from making any claim for an adjustment of the equidistance line to the north?

Barbados' Position

103. Barbados takes the position with respect to the area claimed by Trinidad and Tobago north of the equidistance line, in the Atlantic sector, that "the evidence on the record confirms that Barbados has exercised its sovereign rights and jurisdiction in the area . . . for a prolonged period of time and in a notorious manner, without protest from Trinidad and Tobago [. . .] The Tribunal is therefore precluded from considering Trinidad's claims to the north of the provisional median line". Barbados argues that its claims to sovereign rights in this area have been manifested primarily by its

hydrocarbon activities in the region over a period of more than twenty-five years. Barbados asserts further that its domestic legislation demonstrates a clear and consistent claim to sovereign rights to the north of the equidistance line, as its Marine Boundaries and Jurisdiction Act provides that, in the absence of any agreed EEZ boundaries with its maritime neighbours, the outer limit of Barbados' EEZ is the equidistance line. In addition, Barbados draws the Tribunal's attention to the Barbados/Guyana Joint Cooperation Zone Treaty dated 2 December 2003, the activities of its coast guard in the disputed zone, and the work undertaken by Barbados in relation to a submission to the CLCS.

104. Barbados maintains that juxtaposed against this evidence of exercise of sovereign rights by Barbados is a notable silence and lack of protest on the part of Trinidad and Tobago. The open nature of Barbados' activities called for an immediate reaction by Trinidad and Tobago, if it considered that it had asserted any sovereign rights over that area. Further, and as evidence of recognition on the part of Trinidad and Tobago of the equidistance line as the maritime boundary between the two countries, Barbados relies on a map drawn during the negotiations between Trinidad and Tobago and Venezuela, which shows all delimitation lines, both proposed and final, stopping at the Barbados/Trinidad and Tobago equidistance line. Consequently, Barbados maintains that Trinidad and Tobago must be considered to have acquiesced in Barbados' claims to sovereign rights to the north of the equidistance line, and is now estopped from making a belated claim to sovereign rights over that area.

Trinidad and Tobago's Position

105. Trinidad and Tobago does not accept Barbados' argument that it is estopped from making a claim to the area north of the equidistance line in the Atlantic sector. In Trinidad and Tobago's view, none of the conditions needed for an estoppel – a clear statement made voluntarily, and relied upon in good faith, either to the detriment of the party so relying or to the advantage of the party making the statement – has been met.

106. In particular, Trinidad and Tobago seeks to refute Barbados' factual claims that it was late in protesting Barbados' grant of oil concessions to Mobil and CONOCO, by saying that Barbados' own protest against Trinidad and Tobago's offer for tender of deep water hydrocarbon blocks off the coast of Tobago in 1996, 2001 and 2003 was only made on 1 March 2004, *i.e.* after the commencement of this arbitration. Trinidad and Tobago relies on the International Court of Justice's statement in the *Cameroon v. Nigeria* case where it was held that

> oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. (I.C.J. Reports 2002, p. 303, at p. 447, para. 304)

107. In Trinidad and Tobago's view, there was no express or tacit agreement with respect to Barbados' hydrocarbon activities in the area to the north of the equidistance line and it is not estopped by such.

108. Regarding Barbados' allegations of a lack of protest on the part of Trinidad and Tobago, the latter cites two Diplomatic Notes, one from 1992 and one from 2001, the first of which states: "The Government of Trinidad and Tobago does not recognize the equidistance method of delimitation and consequently rejects its applicability, save by express agreement to a maritime boundary delimitation". Trinidad and Tobago also seeks to refute with evidence of its own the evidence offered by Barbados concerning other activities in the sector claimed north of the equidistance line, and concludes that "in all of these cases the activity is transitory, occasional, relating to areas which are much broader than the areas in dispute here and not such as would, in any event, give rise to recognition or estoppel".

D. MERITS – GENERAL ISSUES

1. What is the significance of the fishery and maritime boundary negotiations between the Parties prior to the filing of the Statement of Claim? Are the records of the negotiations admissible?

Barbados' Position

109. Barbados claims that the issues of fisheries and maritime delimitation were linked and were negotiated together. It claims that this was made clear during the first five rounds of negotiations, and that Trinidad and Tobago had assented to this linkage. The primary significance ascribed to the negotiations by Barbados is that they show the existence of a dispute between the Parties, and one that had crystallised to the point where resort to arbitration under UNCLOS was both warranted and, in Barbados view, necessary.

110. As noted in paragraph 21 above, Barbados objected to the introduction into the pleadings of the so-called "Joint Reports" from the negotiations, as they considered such an introduction to be a violation of a confidentiality agreement between the Parties. Barbados further maintained that it is an accepted element of international adjudication and arbitration that settlement proposals are inadmissible in subsequent litigation. Barbados nevertheless agreed that the Joint Reports could be admitted to the record while reserving its rights on the matter (see paragraph 27 above). There was no further discussion of the matter at the oral proceedings.

Trinidad and Tobago's Position

111. Trinidad and Tobago's position is that there were two entirely separate sets of negotiations. "The first concerned the maritime boundary between the two States; the second, which began only two years after the first

set of negotiations had commenced, concerned the conclusion of a new fisheries agreement". Trinidad and Tobago contends that there were five rounds of delimitation negotiations and four separate rounds of fisheries negotiations and that the records of these negotiations evidence their separate nature.

112. In response to Barbados' objections, Trinidad and Tobago also argues that the records of negotiations should be admitted, in particular because they are central to the issues of jurisdiction. Without the records, Trinidad and Tobago maintains, the Tribunal cannot determine whether the preconditions to arbitration set out in Articles 283 and 286 of UNCLOS had been satisfied. Trinidad and Tobago also argues that the records of negotiations reveal the basis on which the Parties negotiated for years about access for Barbadian fishing vessels to the Trinidad and Tobago EEZ and is of significant relevance to Barbados' claims of "historic fishing rights". Finally, Trinidad and Tobago asserts that the Tribunal can only assess the veracity of claims by examining the agreed record of the negotiations.

113. Trinidad and Tobago also notes that Barbados made extensive reference to the records of the negotiations in the pleadings, despite Barbados' position that the Joint Reports are inadmissible.

2. What is the applicable law and appropriate method of delimitation in determining the boundary?

Barbados' Position

114. Barbados claims that under international law the application of what it terms the "equidistance/special circumstances rule" will produce the most equitable result. This method requires that a provisional equidistance line be drawn, every point of which is equidistant from the nearest points on the respective baselines of the Parties, the baseline being that from which the breadth of the territorial sea is measured. The line so established must then be considered for adjustment if so required by any relevant circumstances.

115. In support of its position, Barbados relies upon the International Court of Justice decision in the *Libya/Malta* case stating "[t]he Court has itself noted that the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts" (*Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, I.C.J. Reports 1985, p. 13). Barbados also refers to several other International Court of Justice decisions.[16]

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[16] See *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, I.C.J. Reports 1993, p. 38 *("Jan Mayen")*; the *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, I.C.J. Reports 1969, p. 4; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40; and *Cameroon v. Nigeria*, I.C J. Reports 1994-2002.

116. Moreover, Barbados observes that "the approach identified is as applicable to the determination of a single maritime boundary as it is to the delimitation of the EEZ and CS separately".

117. With respect to Trinidad and Tobago's approach to maritime delimitation, Barbados argues that international law does not recognize "regional implications" under the "so-called '*Guinea/Guinea-Bissau* test'" (*Arbitration Tribunal for the Delimitation of a Maritime Boundary between Guinea and Guinea-Bissau*, 77 I.L.R. p. 635 (1985)) as a relevant circumstance for maritime delimitation and, in any event, the instant case is not analogous. In this connection, Barbados recalls that the 1990 Trinidad-Venezuela Agreement "is not opposable to Barbados or any other third party state", and argues that the "regional implication theory opens a Pandora's box of problems, some jurisdictional, some substantive. . . It takes Tribunals beyond their consensual jurisdiction and it makes the acceptability of their decisions hostage to the concurrence of non-parties who have no obligation to accept the decisions."

Trinidad and Tobago's Position

118. Trinidad and Tobago agrees with Barbados that, under international law, courts and tribunals apply an equidistance/special circumstances approach so as to achieve an equitable result, and that the starting point for any delimitation is a median or equidistance line. Trinidad and Tobago maintains, however, that, although equidistance is a means of achieving an equitable solution in many cases, it is a means to an end and not an end in itself. In Trinidad and Tobago's view, "the equidistance line is provisional and consideration always needs to be given to the possible adjustment of the provisional median or equidistance line to reach an equitable result".

119. According to Trinidad and Tobago, the equidistance principle has particular significance in the context of opposite coasts. Furthermore, in determining whether "special circumstances" exist to warrant a deviation from the equidistance line, certain types of circumstances – such as the projection of relevant coasts, the proportionality of relevant coastal lengths, and the existence of any express or tacit agreement as to the extent of the maritime areas appertaining to one or other party – have been, in Trinidad and Tobago's view, deemed by courts and tribunals to be more relevant than others. Trinidad and Tobago relies in particular on the findings in the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4).

120. Finally, Trinidad and Tobago contends, "once a provisional delimitation line has been drawn by a tribunal, it is normal to check the equitable character of that line to ensure that the result reached conforms with international law". Trinidad and Tobago maintains that due regard must be paid in particular to other delimitations in the region, as was done in the *Guinea/Guinea-Bissau* case, and that courts and tribunals have also

considered in this connection issues of proportionality and potentially "catastrophic" consequences.

3. Are the distinctions drawn by Trinidad and Tobago between a "Western" and an "Eastern" Sector (and between "opposite" and "adjacent" coastlines) appropriate and, if so, what is the legal significance of the distinctions?

Trinidad and Tobago's Position

121. Trinidad and Tobago distinguishes between two sectors, arguing that both Trinidad and Tobago and Barbados face west towards the Caribbean (the "Western" sector), and east onto the Atlantic (the "Eastern" sector), and contends that, while the Parties may be in a position of opposition in the Western sector, they are not "opposite" in relation to the Eastern sector. Rather, according to Trinidad and Tobago, the Parties are in a position of "adjacency" as the Atlantic coastline of Trinidad and Tobago faces eastwards and is wholly unobstructed by any other coast. Where States are opposite to one another, Trinidad and Tobago maintains, the equidistance line is the preferred method of maritime delimitation, but where States are adjacent, the equidistance line has been found to lead to inequitable results.

122. Trinidad and Tobago contends that international law has consistently recognised distinctions between different sectors of maritime space and argues that courts and tribunals "have never accepted the proposition that if two coastlines are opposite at one point, that relationship must always be the dominant one. Rather they have carefully taken into account the changing nature of the relationships between coasts where the geography so required". Trinidad and Tobago relies in this regard on several decisions of the International Court of Justice[17] and in particular on the *Anglo-French* arbitration *(Delimitation of the Continental Shelf (United Kingdom v. France)*, 54 I.L.R. p. 6, paras. 233, 242 (1977)), where the Court of Arbitration held that the relationship between the UK and France was one of oppositeness in the Channel sector, but in the Western Approaches the relationship was essentially lateral. In Trinidad and Tobago's view, a similar approach was adopted by the International Court of Justice in the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246). Trinidad and Tobago argues that these cases cannot be distinguished on the basis that the coasts of Barbados and Trinidad and Tobago are too far apart, when in fact the distances are comparable. Nor, in Trinidad and Tobago's view, does the fact that the two States in the present case are relatively small preclude the application of the foregoing principles.

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[17] See *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, I.C.J. Reports 1984, p. 246; *Qatar v. Bahrain* case, I.C.J. Reports 2001, p. 40.

Barbados' Position

123. Barbados does not accept the distinctions drawn by Trinidad and Tobago between a "Western" and "Eastern" sector and argues that the Parties are coastally opposite islands and not adjacent at any point. According to Barbados, "Trinidad and Tobago is attempting to refashion geography in an untenable manner". Barbados argues that adjacency is a spatial relationship associated with the idea of proximity and argues that there is no support for the proposition that "two distant island States can ever be in a situation of adjacency, in contrast to coastal opposition".

124. Barbados also asserts that Trinidad and Tobago's reliance on the *Anglo-French* arbitration (54 I.L.R. p. 6), and the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40) cases to draw distinctions between a "Western" and an "Eastern", or a "Caribbean" and an "Atlantic", sector is misplaced, noting that "in each of the cases relied upon by Trinidad and Tobago, the actual physical relationship between the relevant coasts of the Parties changed along their length". In this case, however, Barbados maintains that there is no change in the physical relationship between the coasts of Barbados and Trinidad and Tobago: the two island States face each other across a significant expanse of sea, with extensive sea on either side of them. Barbados also rejects Trinidad and Tobago's reliance on the distinction between the Atlantic Ocean and Caribbean Sea: "Trinidad and Tobago never explains how nomenclature proposed for bodies of water can transform the spatial relationship between islands that are otherwise in situations of coastal opposition".

E. BARBADOS' PROPOSED ADJUSTMENT TO THE SOUTH OF THE EQUIDISTANCE LINE IN THE WESTERN SECTOR

1. What is the historical evidence of fishing activities in the sector claimed by Barbados south of the provisional equidistance line?

Barbados' Position

125. Barbados bases its claim in the Caribbean sector on "three core factual submissions":

> (1) There is a centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of the island of Tobago by Barbadian fisherfolk;
>
> (2) Barbadian fisherfolk are dependent upon fishing in the area claimed off Tobago; and
>
> (3) "The fisherfolk of Trinidad and Tobago do not fish in the area claimed by Barbados to the south of the equidistance line and are, thus, in no way dependent on it for their livelihoods".

126. Barbadian artisanal fishing is done for the flyingfish, "a species of pelagic fish that moves seasonally to the waters off Tobago". "Since the 1970s", Barbados states, "Barbadian fisherfolk fishing off Tobago have usually transported their catch back to Barbados on ice. Before then Barbadians fishing off Tobago used other preservation methods to transport their catches home, such as salting and pickling."

127. Barbados seeks to prove the historical nature of the artisanal fishing by proffering evidence to show that its fisherfolk had long-range boats and other equipment to enable them to fish off Tobago between the 18th century and the latter half of the 20th century. It states that a Barbadian schooner fleet operated off Tobago dating back to at least the 18th century, ice was available in Barbados from the 18th century onwards and its use for the storage of fish caught by Barbadian boats and schooners by the 1930s is documented. It refers to the availability and use of other storage methods for fish caught off Tobago; the public recognition by government ministers and officials from Trinidad and Tobago that Barbadians have traditionally fished in the waters off Tobago; the effect of the widespread motorisation of the Barbadian fishing fleet as early as the 1950s; and the fact that following the independence of Trinidad and Tobago in the early 1960s, Barbadian fisherfolk were recorded as fishing from Tobago for flyingfish in the traditional fishing ground.

128. Barbados states further that flyingfish is a staple part of the Barbadian diet, and constitutes an "important element of the history, economy and culture of Barbados". Barbados also argues that its limited land area and poor soil quality make it a weak candidate for agricultural diversification, making the contributions of its fishery sector to the economy even more important. Barbados argues that, without the flyingfish fishery, the communities concerned would suffer severe economic disruption, and in some cases, a complete loss of livelihood. A quantity of affidavits of Barbadian fisherfolk, attesting to the tradition and to the vital nature of Barbadian fishing for flyingfish off Tobago, as well as video evidence, were submitted in support of these contentions.

129. Barbados also contrasts its situation to that of Trinidad and Tobago where, it claims, "fishing is not a major revenue earner" and "the fisherfolk of Tobago generally fish close to shore and do not rely upon flying fish". According to Barbados, "[t]he overwhelming proportion of fishing vessels that fish out of Tobago remain to this day small boats powered by outboard motors". Barbados cites in support of this argument both the testimony of its own fisherfolk and statements by Trinidad and Tobago fishing officials during the course of negotiations over renewal of the 1990 Fishing Agreement.

Trinidad and Tobago's Position

130. Trinidad and Tobago disputes Barbados' claims to centuries-old artisanal fishing off Tobago as a matter of fact. Trinidad and Tobago presents extensive documentary evidence in support of the proposition that Barbadian

fisherfolk have been fishing in the waters now claimed by Barbados only since the late 1970s, and that there was no Barbadian fishing in the waters off Tobago before then. This, claims Trinidad and Tobago, is because before the late 1970s Barbadian flyingfish fisherfolk did not have the long-range boats and other equipment to enable them to fish in the area now claimed by Barbados. Trinidad and Tobago asserts that it was only with the introduction of iceboats in the late 1970s that Barbadian fishermen had the means to fish in the area now claimed by Barbados, and, moreover, that Barbadian fishing in the waters off Tobago is "not artisanal or historic in character", but instead "of recent origin and highly commercial".

131. Trinidad and Tobago also claims that Barbados exaggerates the economic importance of its flyingfish fishery. For example, Trinidad and Tobago cites an FAO country profile for Barbados which states that "the contribution of all fisheries to Barbados' GDP was only about $12 million, that is around 0.6% of GDP", and argues that the figures for flyingfish would be considerably lower, with the figures for flyingfish catches from the area now claimed by Barbados lower still. Citing its own continued willingness to negotiate a new fishing agreement with Barbados, Trinidad and Tobago argues further that any negative consequences for Barbadian fisherfolk are of its own making. In any event, Trinidad and Tobago continues, the evidence offered by Barbados on this point is unconvincing. Accordingly, Trinidad and Tobago claims there is no prospect of anything remotely approaching a catastrophe if Barbadian fisherfolk were not to be able to fish off Tobago.

132. At the same time, Trinidad and Tobago maintains, Barbados unduly dismisses the significance of such fishing to Trinidad and Tobago, and to Tobago in particular. Citing a report by Tobago's Department of Marine Resources and Fisheries, Trinidad and Tobago asserts that "all coastal communities on the island depend greatly on the fishing fleet and their activities for daily sustenance, while the flyingfish fishery accounts for about 70-90% of the total weight of pelagic landings at beaches on the leeward site of Tobago".

2. What, if any, is the legal significance of Barbadian "historic, artisanal" fishing practices in the sector claimed by Barbados south of the provisional equidistance line? In particular, do Barbados' fishing practices in this sector constitute a "relevant" or "special" circumstance requiring deviation from the equidistance line?

Barbados' Position

133. In Barbados' view, the demonstrated factual circumstances have resulted in the acquisition of non-exclusive fishing rights "which can only be preserved by an adjustment of the median line". According to Barbados, four rules of law are relevant in this regard:

(i) the exercise of traditional artisanal fishing for an extended period has been recognized as generating a vested interest or acquired right; this is especially the case when the right was exercised in areas theretofore *res communis*;

(ii) such traditional artisanal fishing rights vest not only in the State of the individuals that traditionally exercised them, but also in individuals themselves and cannot be taken away or waived by their State;

(iii) such rights are not extinguished by UNCLOS or by general international law; and

(iv) such rights have been held to constitute a special circumstance requiring an appropriate adjustment to a provisional median line.

134. For the first legal proposition – that traditional artisanal fishing can generate a vested interest – Barbados particularly relies on the views of Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law", 30 BYIL p. 1 at p. 51 (1953). Barbados also cites the *Behring Sea Arbitration Award (Behring Sea Arbitration Award between Great Britain and the United States*, 15 August 1893, Consolidated Treaty Series, Vol. 179, No. 8, p. 98), as well as "State practice in the form of treaties", which, in Barbados' view, "has long recognized the existence and the need for the preservation of traditional fishing rights when new boundaries that might interfere with those rights are established".

135. In response to what Barbados terms Trinidad and Tobago's argument that Barbados is in fact claiming exclusive rights to the relevant maritime zones, Barbados argues that

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

136. For the second proposition – that such rights vest not only in the State of the individuals but also in the individuals themselves – Barbados argues:

> A State that asserts an acquired, non-exclusive right in waters formerly part of the high seas on the basis of long use by some of its nationals need not, then, marshall evidence of its *effectivités à titre de souverain*. It need only establish that its nationals have for a sufficient period of time been exercising their non-exclusive rights in those waters.

137. Barbados also invites the Tribunal to take into account provisions of international human rights law, in particular that of the Latin American region.

138. As to the third proposition – that such rights survive the declaration by Trinidad and Tobago of an EEZ and the entry into force of UNCLOS – Barbados refers to the text of UNCLOS itself, and in particular Articles 47(6)[18] and 51(1)[19] concerning archipelagic waters and the protection of traditional fishing rights therein. Moreover, Barbados maintains, "it would be contrary to established methods of interpretation of treaties to read into a treaty an intention to extinguish pre-existing rights in the absence of express words to that effect".

139. In response to arguments of Trinidad and Tobago based on Article 62 of UNCLOS,[20] Barbados argues that "Article 62 of UNCLOS does not

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[18] Article 47(6) provides:

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

[19] Article 51(1) provides:

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

[20] Article 62 provides:

Utilization of the living resources

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

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

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

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, inter alia, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

purport to terminate acquired artisanal fishing rights or relegate them to a regime of access subject to the unilateral discretion of the coastal State". Further, Barbados contends that Article 62 has no application in the present dispute as the issue is not about sharing the surplus of Trinidad and Tobago's allowable catch, but Barbados' right to adjustment of the maritime boundary in light of its "special circumstances". Barbados also alludes to Article 293(1), which provides that principles of general and customary law apply in so far as they are not incompatible with UNCLOS. Accordingly, Barbados argues that the principle of intertemporality requires the conclusion that Barbadian nationals' preexisting rights to engage in artisanal fishing off the coast of Tobago survive the entry into force of UNCLOS.

140. Barbados argues further that, as a general principle of international law, acquired rights survive unless explicitly terminated, and nothing in UNCLOS or its travaux suggests that States intended to surrender rights not specified in the text. Finally, Barbados argues that customary international law, particularly as evidenced in the *Eritrea/Yemen* arbitral awards *(Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of Dispute)*, 114 I.L.R. p. 1 (1998) *("Eritrea/Yemen I"* and *Eritrea/Yemen II*, 119 I.L.R. p. 417), provides for the survival of traditional artisanal fishing rights where, as here, former areas of the high seas fished by one State's nationals are enclosed by the waters of another State.

141. As for the proposition that such rights have been held to constitute a "special circumstance" requiring an appropriate adjustment of a provisional equidistance line, Barbados states: "Access to fishery resources and fishing activities can constitute a 'special circumstance'", as confirmed by the

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(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other cooperative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations.

International Court of Justice in the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246) and, in particular, the *Jan Mayen* case (I.C.J. Reports 1993, p. 38), as well as by arbitral tribunals in *Eritrea/Yemen II* (119 I.L.R. p. 417) and *St Pierre et Miquelon* (95 I.L.R. p. 645). It is also, in Barbados' view, confirmed by "highly qualified publicists in major treatises" and State practice.

142. Thus, it is Barbados' position that the centuries-old history of artisanal fishing in the waters off the northwest, north and northeast coasts of the island of Tobago by Barbadian fisherfolk, coupled with the importance of flyingfish to both the Barbadian diet and the Barbadian fishing economy, constitutes a "special circumstance" warranting an adjustment of the boundary to the south of the equidistance line. As Barbados submitted during the oral proceedings,

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

Trinidad and Tobago's Position

143. Trinidad and Tobago contends that Barbados' fishing practices in Trinidad and Tobago's EEZ are of no consequence as a legal matter and, in particular, there is no "special circumstance" warranting an adjustment of the equidistance line to the south. In Trinidad and Tobago's view, even if the Tribunal were to find that artisanal fishing had historically occurred off the coast of Tobago, it would give Barbados no rights to an EEZ in this locality. "Distant-water fishing, whether it occurs on the high seas or the territorial sea of another coastal State, gives no territorial or sovereign rights to the State of nationality of the vessels concerned."

144. Trinidad and Tobago's position is that Barbados could not acquire fishing rights by virtue of the long and continuous artisanal fishing practices of Barbadian nationals in waters near Tobago because those waters formerly had the status of high seas and were *res communis*. Trinidad and Tobago argues that fishing by Barbadian nationals in those waters could not give rise to any sovereign rights over those waters, because the conduct of private parties does not normally give rise to sovereign rights and fishing by private parties in the high seas could not affect the sovereign rights of the coastal State in the seabed. Further, Trinidad and Tobago argues, non-exclusive rights to fish in the EEZ of another State are not sovereign rights and it is only sovereign rights which are in issue in the present proceedings.

145. Trinidad and Tobago maintains that UNCLOS addresses the preservation of existing fishing interests in Article 62, pursuant to which fishing rights are to be accommodated by a regime of access rather than by adjustment of the equidistance line. Trinidad and Tobago also argues that, regardless of UNCLOS, the practice of the International Court of Justice and arbitral tribunals indicates that even where there is genuine historic fishing, it

does not warrant a shift in a maritime boundary of the type proposed by Barbados. Citing the *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40) and *Cameroon v. Nigeria* (I.C.J. Reports 2002, p. 303) cases, Trinidad and Tobago also maintains that "recent decisions have suggested that historic activity, whether in the form of fishing activities or other forms of resource exploitation, could be relevant to delimitation only if they led to, or were bound up with, some form of recognition of territorial rights on the part of the State concerned".

146. Trinidad and Tobago argues further that fisheries are not the only resource in the area, and the existence of hydrocarbons there is very likely, with the result that fisheries cannot be decisive. How can it be, Trinidad and Tobago submits, that Barbados' fishing rights trump "any prior Continental Shelf rights" and that "a right of access to fishing in the EEZ can somehow convert what was previously one State's Continental Shelf into the Continental Shelf of another"? In this connection, Trinidad and Tobago distinguishes the *Jan Mayen* case (I.C.J. Reports 1993, p. 38), where the issue of access to fisheries led to an adjustment in the delimitation line, on the basis of the fact that, while a substantial portion of Greenland's population was almost wholly dependent on fishing, Jan Mayen has no fixed population at all. Trinidad and Tobago contrasts this with the fact that Trinidad and Tobago and Barbados both have substantial populations, both of which have "an interest in the fishery resources of the waters between the two islands".

147. Trinidad and Tobago also rejects the application of the "catastrophic consequences" proviso as not applicable under UNCLOS, and argues that were it to be found applicable, it would be necessary to examine the interests of the populations of both States. Trinidad and Tobago asserts as well that "it is highly unlikely that any maritime delimitation drawn in accordance with normal criteria could cause 'catastrophic repercussions'".

148. Finally, Trinidad and Tobago takes issue with Barbados' assertion that a "special circumstance" was created because its rights were denied when Trinidad and Tobago refused to agree to an access regime. In Trinidad and Tobago's view, Barbados is precluded from making this argument because it was Barbados that ended the negotiations by instituting arbitral proceedings. Moreover, even if – contrary to fact – Trinidad and Tobago had denied access rights that of itself could not give rise to adjustment of the maritime boundary.

3. Do these fishing practices give rise to any continuing Barbadian fishing rights if the area were to be held to be the EEZ of Trinidad and Tobago?

Barbados' Position

149. As noted in paragraph 72 above, Barbados argues that the Tribunal in this case is competent to award Barbados less than it has claimed, and, indeed, that if the Tribunal decides not to adjust the equidistance line as Barbados has petitioned, the Tribunal should instead award a fisheries access

regime to Barbadian fisherfolk. Such an award would be consistent with the arbitral tribunal's award in *Eritrea/Yemen II* (119 I.L.R. p. 417), and would not be contrary to the holdings in other maritime delimitation cases.

Trinidad and Tobago's Position

150. For its part, Trinidad and Tobago argues that the Tribunal has no jurisdiction to consider, much less award, a claim, expressly stated or not, by Barbados for a fisheries access regime. Moreover, Trinidad and Tobago contends, Barbados has provided no guidance to the Tribunal about what regime of access it might be asked to give. "There is a real danger", Trinidad and Tobago submits, "in an access regime which does not have a regulatory framework built into it. We came close to agreement with Barbados about such a regulatory framework. Before [the Tribunal] they have said nothing about the details that concerned them in those negotiations at all".

F. TRINIDAD AND TOBAGO'S PROPOSED ADJUSTMENT TO THE NORTH OF THE EQUIDISTANCE LINE IN THE EASTERN SECTOR

1. General

(*a*) What is the legal significance of the following "relevant" circumstances claimed by Trinidad and Tobago:

(i) Frontal projection and potential cut-off (application of the principle of non-encroachment)?

Trinidad and Tobago's Position

151. In Trinidad and Tobago's view, the principal issue in this case is "the delimitation of the Atlantic (eastern) sector, and the principal feature to which effect must be given in that delimitation is the lengthy eastern frontage of Trinidad and Tobago that gives unopposed onto the Atlantic". According to Trinidad and Tobago, the "relevant coasts are those looking on to or fronting upon the area to be delimited; this is not the same thing as the distances between the points which determine the precise location of the line eventually drawn". Trinidad and Tobago takes issue with Barbados' position that relevant coasts are those which generate the equidistance line and argues in this regard that the determination of relevant coasts must be carried out as an initial matter. Trinidad and Tobago cites the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Jan Mayen* (I.C.J. Reports 1993, p. 38) cases for support on this point.

152. Adoption of the equidistance line in the Atlantic sector, as claimed by Barbados, would, Trinidad and Tobago maintains, prevent Trinidad and Tobago from reaching the limit of its EEZ entitlement, and allow Barbados to claim 100% of the outer continental shelf in the area of overlapping

entitlements, a result which Trinidad and Tobago argues is inequitable and in violation of the principle of non-encroachment.

153. Trinidad and Tobago argues further that where there are competing claims, the Tribunal should draw the delimitation "as far as possible so as to avoid "cutting off" any State due to the convergence of the maritime zones of other States". Trinidad and Tobago cites, *inter alia, Tunisia/Libya (Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (I.C.J. Reports 1982, p. 18)) and *Libya/Malta* (I.C.J. Reports 1985, p. 13) as support for this proposition. In Trinidad and Tobago's view, although the principle of non-encroachment is not an absolute rule (as encroachment is inevitable where the maritime entitlements of two coasts overlap), the non-encroachment principle provides that "as far as possible the maritime areas attributable to one State should not preclude the other from access to a full maritime zone" and "should not cut across its coastal frontage so as to zone-lock it". Trinidad and Tobago argues that its geographic position is analogous to Germany in the *North Sea Continental Shelf* cases and cites the International Court of Justice's finding there that:

> delimitation is to be effected by agreement in accordance with equitable principles. . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other. (I.C.J. Reports 1969, p. 4, at p. 53, para. 101(C)(l))

Barbados' Position

154. Barbados rejects Trinidad and Tobago's submissions concerning relevant coasts, stating that "the two States' 'relevant coastal frontages', to use Trinidad and Tobago's phrase, can only be those that generate competing, overlapping entitlements". Barbados cites the *Jan Mayen* case (I.C.J. Reports 1993, p. 38) in support of this proposition and seeks to distinguish the *Anglo-French* arbitration (54 I.L.R. p. 6). "If anything", Barbados argues, "Trinidad and Tobago's southeast-facing coastal front produces an entitlement *vis-à-vis* Venezuela, Guyana and Suriname, not Barbados".

155. Barbados contends with respect to the notion of "cut-off" that it is a term of general reference, not a rule of absolute entitlement, and refers to an equitable delimitation that "takes account of geographical constraints and the claims of other States in order to ensure that a State will receive an EEZ and CS 'opposite its coasts and in their vicinity'". According to Barbados, "[a]ll the holdings of courts and tribunals on 'cut off claims refer to the CS or EEZ. None of them refer to a potential ECS claim".

156. In Barbados' view, an equidistance line boundary with Barbados will not in any event enclave or cut-off Trinidad and Tobago. The equidistance line gives Trinidad and Tobago a continental shelf in the Atlantic sector extending to more than 190 nm from its relevant baselines. "Thus",

Barbados concludes, "the adjusted median line described in [Barbados'] Memorial does not constitute a 'cut-off' in the sense in which Germany might have suffered a cut-off of its access to the North Sea by the Denmark-Netherlands attempt to apply the median line".

157. Barbados argues further that Trinidad and Tobago misstates and misapplies the principle of non-encroachment in the present case and, contrary to Trinidad and Tobago's portrayal of the Eastern sector as being comprised of open ocean, there are overlapping EEZ claims in the region. Barbados contends that Trinidad and Tobago is constrained in any case from reaching its full 200 nm EEZ entitlement and any full potential ECS claim by the presence of Venezuela, Guyana, and Suriname. Barbados, for its part, is faced with claims from St. Lucia and France to its north and is constrained from reaching its full 200 nm EEZ entitlement and any full ECS claim by the presence of Trinidad and Tobago, Venezuela, Guyana and Suriname. Barbados also argues that it is wrong for Trinidad and Tobago to suggest that there is an open maritime area to which Trinidad and Tobago is entitled and to argue that "it is *ex ante* entitled to partake of a share of maritime areas to which it simply does not reach".

(ii) Proportionality

Trinidad and Tobago's Position

158. Trinidad and Tobago argues that the relationship between the coastal lengths of it and Barbados is "of major relevance to the delimitation". Trinidad and Tobago relies on the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4), the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246), the *Cameroon v. Nigeria* case (I.C.J. Reports 2002, p. 303, at pp. 446-447, paras. 301, 304) and the *Jan Mayen* case (I.C.J. Reports 1993, p. 38) where, Trinidad and Tobago asserts, the proportionality of the relevant coastlines was considered relevant to delimitation. Trinidad and Tobago also quotes the arbitral tribunal in *Eritrea/Yemen II* (119 I.L.R. p. 417) where it was stated that "the principle of proportionality . . . is not an independent mode or principle of delimitation, but rather a test of equitableness of a delimitation arrived at by some other means". Finally, Trinidad and Tobago takes issue with Barbados' view that, in Trinidad and Tobago's words, "proportionality is something that only comes at the end [of a delimitation]. Proportionality . . . is also and has been in many cases part of the initial case for an adjustment as in *Jan Mayen*".

159. According to Trinidad and Tobago, the coastal frontage of Trinidad and Tobago is much greater than that of Barbados (in a ratio of the order of 8.2:1). Trinidad and Tobago also argues in this regard that Barbados' claim line would produce a division of the EEZ area of overlapping claims between the two states in a ratio of 58/42. Trinidad and Tobago's proposed claim line, on the other hand, would produce a division of approximately 50/50 of the overlapping claims.

Barbados' Position

160. Barbados argues that Trinidad and Tobago cannot use proportionality as a driving factor in delimitation. According to Barbados, "the concept of 'a reasonable degree of proportionality' was devised as a 'final factor' by which to assess the equitable character of a maritime delimitation effected by other means". Proportionality is not a positive method, it cannot produce boundary lines and it does not require proportional division of an area of overlapping claims, because it is not a source of entitlement to maritime zones. Barbados relies on the *North Sea Continental Shelf* cases (I.C.J. Reports 1969, p. 4), the *Gulf of Maine* case (I.C.J. Reports 1984, p. 246) and the *Nova Scotia v. Newfoundland* arbitration (*Award of the Tribunal in the Second Phase*, 26 March 2002), all of which, in Barbados' view, establish that proportionality is a final factor to be weighed only after all other relevant circumstances such as unusual features on the Parties' coasts, or islets off those coasts, have been accounted for.

161. Citing the *Tunisia/Libya* case (I.C.J. Reports 1982, p. 18), Barbados argues further that Trinidad and Tobago's reliance on proportionality is misplaced, as the archipelagic baseline referred to by Trinidad and Tobago is not a relevant coastline for the purposes of any argument of disproportionality. Moreover, Trinidad and Tobago ignores about half of Barbados' coastal length that would be relevant in a valid test of proportionality. Barbados also sought to demonstrate how, depending on the coastal factors considered, one might in any case arrive at a variety of conclusions regarding the proportional relationship of the Parties.

(iii) The "regional implications", including the 1990 Trinidad-Venezuela Agreement?

Trinidad and Tobago's Position

162. Trinidad and Tobago argues that "Barbados' claim line ignores the regional implications for all other States to the north and south" and is contrary to the principle set out in the *Guinea/Guinea-Bissau* case (77 I.L.R. p. 635) where the arbitral tribunal stated: "A delimitation designed to obtain an equitable result cannot ignore the other delimitations already made or still to be made in the region". "In the present case", Trinidad and Tobago argues, "in the Eastern Caribbean, the application of a rigid equidistance principle would give Barbados a massively disproportionate continental shelf at the expense of its neighbours, including Trinidad and Tobago".

163. In furtherance of its regional implications argument, Trinidad and Tobago points to two maritime boundary agreements in the region – the first between itself and Venezuela and the second between France and Dominica – which have, Trinidad and Tobago maintains, departed from the equidistance line "in order to take into account the general configuration of east-facing coastlines in the region, and to give at least some expression to the projection

of these coastlines to an uninterrupted (if still constricted) EEZ and continental shelf".

164. With respect to the 1990 Trinidad-Venezuela Agreement, Trinidad and Tobago argues that no third State has made any claim as to the areas north and south of the line drawn by the agreement. Trinidad and Tobago also quotes language from the treaty that states: "no provision of the present treaty shall in any way prejudice or limit these rights [. . .] or the rights of third parties". The agreement is thus not "opposable" to Barbados. Nevertheless, Trinidad and Tobago argues, the maritime delimitation reflected in that agreement may be taken into account by the Tribunal as a "relevant regional circumstance". Moreover, in Trinidad and Tobago's view, the 1990 treaty also "marks the limit" of the Tribunal's jurisdiction. "Any claim Barbados may wish to make to areas south of this line is a matter for discussion between Barbados and Venezuela or between Barbados and Guyana".

165. Finally, Trinidad and Tobago maintains that it does not view agreements concluded in the region or implications for third States as determinative of the delimitation, but it does view them as relevant factors that should be taken into account, all the more since so doing would support an equitable delimitation which does not zone-lock or shelf-lock either of the Parties.

Barbados' Position

166. As noted above (see paragraph 117), Barbados argues that international law does not recognise "regional implications" as a relevant circumstance for the purpose of maritime delimitation. Barbados counters Trinidad and Tobago's reliance on the *Guinea/Guinea-Bissau* case (77 I.L.R. p. 635) by arguing that the arbitral tribunal did not establish a "regional implications" test, and nowhere was it stated that "coastal States should enjoy, in disregard of geographical circumstances, the maximum extent of entitlement to maritime areas recognised by international law, at the entire expense of other States' entitlements".

167. Barbados thus contends that the Tribunal should not adopt the regional implications concept developed by Trinidad and Tobago and argues that if it did so, "[m]aritime delimitation would no longer be subject to concrete geographical fact and law but instead would be swayed by the interests of non-participating third States or nebulous 'regional considerations', whose meaning would vary according to a potentially indefinite number of factors that would be impossible to predict". Moreover, Barbados states, "[t]he theory of regional implication permits the party arguing it to pick and choose from regional practice, relying on agreements which it believes support its claim and ignoring those which do not".

168. Barbados argues further that the 1990 Trinidad-Venezuela Agreement has no role in the current delimitation and can only operate and be given recognition within the maritime areas that unquestionably belong to

Trinidad and Tobago and Venezuela, the parties to that agreement. According to Barbados, that agreement purported to apportion Barbados' maritime territory between Trinidad and Tobago and Venezuela as it disregarded the geographical entitlements of Barbados in clear violation of the principle of law of *nemo dat quod non habet*. Barbados adduces evidence contemporaneous with the negotiation of the agreement in the form of comments by Prime Minister Manning, then leader of the opposition in Trinidad and Tobago, contesting the propriety of the 1990 Trinidad-Venezuela Agreement on that very ground.

(*b*) If a deviation is required, is the turning point proposed by Trinidad and Tobago (Point A) the appropriate point, and what is the appropriate direction of the boundary line?

169. The map facing* illustrates Trinidad and Tobago's claim line in the Atlantic sector, as well as the location of the equidistance line in that sector.

Trinidad and Tobago's position

170. Trinidad and Tobago argues that it is "appropriate that there be a deviation away from an equidistance line to reflect the change in the predominant relationship from one of oppositeness to one. . . of adjacency" and identifies the point ("Point A") as "the last point on the equidistance line which is controlled by points on the south-west coast of Barbados". "Moreover", Trinidad and Tobago argues, "Point A is just to the north of the location of the 12 mile territorial sea of Tobago and well, well to the south of the equivalent place of Barbados. It leaves Barbados' eastwards facing coastal projection completely unobstructed for as far as the coast of West Africa".

171. With respect to the direction of the line eastwards from Point A, Trinidad and Tobago states that, as a general matter, "the adjustment should give adequate expression on the outer limit of the EEZ to the long east-facing coastal frontage of Trinidad and Tobago". According to Trinidad and Tobago, "that frontage can fairly be represented at that distance by the north-south vector of the coastline", which is a line 69.1 nm in length, and the idea of using a vector is "a concept taken from the *St. Pierre et Miquelon* case" (95 I.L.R. p. 645). Thus, by proceeding along an azimuth of 88° from Point A to the outer or eastern edge of the EEZ of Trinidad and Tobago, the point of intersection ("Point B") lies 68.3 nm from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana equidistance line. In Trinidad and Tobago's view, the adjustment "gives Trinidad and Tobago a modest EEZ façade of 51.2 nm, while leaving Barbados vast swathes of maritime zones to the north and north-east".

* Secretariat note: See map III in the back pocket of this volume.

Barbados' position

172. Barbados argues that Trinidad and Tobago's Point A has been calculated "by using contrived and self-serving basepoints". Barbados rejects Trinidad and Tobago's description of Point A as "the last point on the median line that is controlled by basepoints on the section of the relevant Barbadian coast that is deemed by Trinidad and Tobago to be opposite Tobago". Barbados argues that Trinidad and Tobago has selectively ignored certain basepoints on the northeast-facing baseline of Little Tobago island "that actually assist in generating the median line" and claims that this is done because they "clearly contribute to the construction of the median line to the east of Point A". In short, Barbados claims that Trinidad and Tobago's localisation of Point A is "arbitrary and self-serving, without any objective circumstances".

173. With respect to the direction of Trinidad and Tobago's claim line from Point A eastwards, Barbados argues similarly that Trinidad and Tobago has made a "random selection" of a north-south vector "which happens to correspond to the distance. . . between the latitude of the northernmost point of the southeast-facing baseline and the latitude of the southernmost point of that baseline" and then adjusts the eastern terminus of the delimitation line northward along its 200 nm arc in direct proportion to the length of the vector. Barbados argues further that "a vector is not a coast" and "the direction of the vector constructed by Trinidad and Tobago distinctly deviated from the actual direction of its coastline". Moreover, Trinidad and Tobago, in Barbados' view, "fails to explain the relationship between [the vector used to determine the azimuth], Point A, the International Hydrographic Organization frontier between the Caribbean and the Atlantic, and adjacency", and "purports to ignore the jurisprudence that allows adjustment of the median line only exceptionally, in cases of vast disproportionality between the relevant coasts, and even then implements only very limited adjustments to that line".

2. Delimitation beyond 200 nm: Does Trinidad and Tobago enjoy an entitlement to access to the ECS, and one that takes precedence over Barbados' EEZ entitlement or one that would accord Trinidad and Tobago continental shelf rights within the area of the EEZ of Barbados?

Trinidad and Tobago's Position

174. With respect to the area it claims beyond 200 nm from its coast (*i.e.* beyond its EEZ), Trinidad and Tobago argues that pursuant to Articles 76(4)-(6) of UNCLOS, coastal States have an entitlement to the continental shelf out to the continental margin. In addition, with reference to the specific area beyond its EEZ, but within 200 nm of Barbados, Trinidad and Tobago contends: "Under general international law as well as under the 1982 Convention, claims to continental shelf are prior to claims to EEZ".

175. Trinidad and Tobago argues that the older regime of the continental shelf cannot be subordinated to the later regime of the EEZ. According to Trinidad and Tobago, although the EEZ became a treaty-based concept and part of customary international law through UNCLOS, there was no expression of any intention in UNCLOS to repeal or eliminate existing rights to the continental shelf, which traces its roots to customary international law and the 1958 Geneva Convention on the Continental Shelf. Rather, Trinidad and Tobago maintains, UNCLOS created two distinct zones, and, while there is "undoubtedly some overlap between the two zones", it is important to remember that "UNCLOS proceeds by addition and cumulation, not by substitution or derogation, unless it expressly so provides", and that the EEZ is "an optional elected zone", with not all States having declared EEZs. Trinidad and Tobago refers to scholarly commentary for support of its view, as well as to the text of UNCLOS itself, where it points out, *inter alia*, that sedentary species, unlike other living marine natural resources, are deemed part of the continental shelf under Article 77, as they had been prior to the adoption of the Convention. Trinidad and Tobago also relies on the text of Article 56(3), which states: "The rights set out in this Article with respect to the seabed and subsoil should be exercised in accordance with Part VI". The phrase "in accordance with", in Trinidad and Tobago's view, signifies that the drafters intended the terms of Part V (concerning the EEZ) to be, in effect, subject to those of Part VI (concerning the continental shelf).

176. Trinidad and Tobago argues further that, despite Barbados' arguments to the contrary, there is no reason why the Tribunal cannot award Barbados EEZ rights and Trinidad and Tobago its continental shelf in the area beyond Trinidad and Tobago's EEZ, but within 200 nm of Barbados. According to Trinidad and Tobago, although it may be desirable for the continental shelf and EEZ boundaries to coincide, this is not legally required, either by UNCLOS or judicial precedent. Three International Court of Justice cases in particular are cited by Trinidad and Tobago in support of this view: *Jan Mayen* (I.C.J. Reports 1993, p. 38); *Libya/Malta* (I.C.J. Reports 1985, p. 13); and *Qatar v. Bahrain* (I.C.J. Reports 2001, p. 40).

177. Trinidad and Tobago also points to examples in State practice where different limits have been adopted for the continental shelf and the EEZ or fisheries jurisdiction zones – namely, the Torres Strait Treaty entered into by Australia and Papua New Guinea and the agreement between the UK and Denmark and the Faroe Islands in relation to delimitation of the maritime boundaries. With respect to the France-Dominica agreement cited by Barbados as a counter-example, Trinidad and Tobago argues, "There is no indication in the *travaux* of the agreement that the line stopped because of some *a priori* rule of international law that you cannot go within 200 nm of another State".

178. Finally, Trinidad and Tobago argues that "the coexistence of water column rights in one State with seabed rights in another" is not, as Barbados has argued, unworkable, particularly as there is no evidence that any fishing

occurs in the area concerned, "nor is there any evidence of artificial islands or other conflicting activities to which Barbados refers". Moreover, Trinidad and Tobago maintains, the situation of overlapping EEZ/CS rights occurs with some frequency around the world and thus the issue of which rights take precedence is "not a mere abstract question".

Barbados' Position

179. Barbados contends that, if the Tribunal finds that it has jurisdiction to hear Trinidad and Tobago's claim to an outer continental shelf, it should still reject the claim, which, in Barbados' view, invites the Tribunal to delimit five separate and distinct maritime areas with correspondingly different regimes of sovereign rights. According to Barbados, "Trinidad and Tobago cannot claim a right to an ECS unless and until it establishes that it is the relevant coastal State with an entitlement in accordance with Article 76 of UNCLOS". "In the area beyond the 200 nm arc of Trinidad and Tobago but within the undisputed EEZ of Barbados", Barbados argues, "Barbados enjoys sovereign rights under UNCLOS, including rights in relation to the sea-bed and its subsoil, that would be lost in the event that the Tribunal recognised Trinidad and Tobago's claim".

180. If the Tribunal were to accord Trinidad and Tobago continental shelf rights within the area of the EEZ of Barbados, it would, in Barbados' view, create an unprecedented and unworkable situation of overlap between sea-bed and water column rights. Barbados contends that a scheme of this sort can only be adopted with the consent of the States concerned, and that "instances of such State consent to apportion EEZ and CS jurisdiction are extremely rare". Barbados also notes that such a scheme was in fact not adopted in the France-Dominica Agreement of 7 September 1987 – an agreement on which Trinidad and Tobago otherwise relies and one where Dominica's 200 nm limit, like Trinidad and Tobago's, "does not reach the high seas so as to give it any entitlement to an ECS".

181. Barbados argues further that the Tribunal is precluded from drawing anything but a single maritime boundary in this case, in part because such a boundary was the focus of the negotiations between the Parties preceding the arbitration. Moreover, Barbados argues, the historical background outlined by Trinidad and Tobago with respect to the continental shelf is "of secondary importance to the contemporary state of international law under UNCLOS". Barbados continues:

> Pursuant to UNCLOS, the legal concepts of the EEZ and the CS exist side by side, with neither taking precedence over the other. If the sovereign rights of coastal states in each juridical area are to be exercised effectively under UNCLOS, each must be delimited within a single common boundary, save in those exceptional cases where the coastal States concerned reach some form of agreement as to the exercise of overlapping rights within a given area of maritime space.

182. Barbados cites several provisions of UNCLOS which it says would be "unworkable if 'the coastal State' in respect of a given area of EEZ were different from 'the coastal State' in respect of an overlapping CS", including: the "inter-relationship and overlap" between Articles 56 and 77 of UNCLOS, the interlinkage between Articles 60 and 80, and "the right of coastal States to 'regulate, authorize and conduct marine scientific research' in their EEZ and on their CS under Article 246". Barbados also refers in this regard to the fact that Article 56(3) uses the phrase "in accordance with" Part VI, rather than the phrase "subject to", which, Barbados states, was used elsewhere in the Convention and was thus "part of the lexicon of the drafters".

183. In support of its argument, Barbados also cites "the writings of highly qualified publicists", and dismisses as irrelevant the examples of State practice where different boundaries have been agreed. Barbados goes on to distinguish two of the cases cited by Trinidad and Tobago, arguing that *Libya/Malta* (I.C.J. Reports 1985, p. 13) "does no more than confirm that the legal concepts of the EEZ and CS remain separate and distinct at international law" and *Jan Mayen* (I.C.J. Reports 1993, p. 38), which Barbados contends "was of course regulated by a different law from that applicable to the present case". Rather, Barbados states, "in all of those cases of maritime delimitation that have been decided to date by courts or tribunals pursuant to UNCLOS (namely *Qatar v. Bahrain*, *Eritrea/Yemen* and *Cameroon v. Nigeria*), a single boundary has been the result".

184. With respect to Trinidad and Tobago's historical arguments for the precedence of continental shelf rights over those conferred by an EEZ, Barbados argues that international law concerning the continental shelf has evolved over time, and that, based on continental shelf definitions that pre-dated UNCLOS, "it was only under the 1982 Convention that Trinidad and Tobago could have first made a claim. . . [to] the areas beyond 200 nm which it is now claiming as its continental shelf". Moreover, Barbados contends, if "Trinidad and Tobago automatically acquired a continental shelf at some moment in the past then Barbados must have acquired its shelf at the same time. And Trinidad and Tobago's shelf would have stopped where Barbados' shelf encountered it".

185. Finally, Barbados submits that if Trinidad and Tobago's claim to the ECS were granted, it would produce "a grossly inequitable result. Barbados would receive 25 per cent of the extended continental shelf to which it is entitled under international law". In Barbados view, Trinidad and Tobago's approach is thus "a formula for inequity in this case and for chaos and conflict in any other cases in which it might be applied".

G. FINAL SUBMISSIONS OF THE PARTIES

1. Barbados

186. The final submissions of Barbados, made in the Reply, were as follows (footnote omitted):

> In conclusion, for the reasons set out in this Reply and in the Memorial, and reserving the right to supplement these submissions, Barbados responds to the submissions of Trinidad and Tobago as follows:
>
> (1) the Tribunal has jurisdiction over Barbados' claim as expressed at Chapter 7 of the Memorial and that claim is admissible;
>
> (2) the maritime boundary described with precision at Chapter 7 of the Memorial is the equitable result required in this delimitation by UNCLOS and applicable rules of international law;
>
> (3) the Tribunal has no jurisdiction over Trinidad and Tobago's claim beyond its 200 nautical mile arc; and
>
> (4) notwithstanding jurisdiction and admissibility, the delimitation proposed by Trinidad and Tobago represents an inequitable result. Being thus incompatible with UNCLOS and the applicable rules of international law, it must be rejected in its entirety by the Tribunal.
>
> Barbados accordingly affirms its claims as expressed in its Memorial and repeats its request that the Tribunal determine a single maritime boundary between the EEZs and CSs of the Parties that follows the line there described.

2. Trinidad and Tobago

187. The final submissions of Trinidad and Tobago, made in the Rejoinder, were as follows:

> 1. For the reasons given in Chapters 1 to 5 of this Rejoinder, the arguments set out in the Reply of Barbados are unfounded.
>
> 2. Trinidad and Tobago repeats and reaffirms, without qualification, the submissions set out on page 103 of its Counter-Memorial, namely that it requests the Tribunal:
>
> (1) to decide that the Tribunal has no jurisdiction over Barbados' claim and/or that the claim is inadmissible;
>
> (2) to the extent that the Tribunal determines that it does have jurisdiction over Barbados' claim and that it is admissible, to reject the claim line of Barbados in its entirety;
>
> (3) to decide that the maritime boundary separating the respective jurisdictions of the Parties is determined as follows:
>
> (a) to the west of Point A, located at 11° 45.80' N, 59° 14.94' W, the delimitation line follows the median line between Barbados

and Trinidad and Tobago until it reaches the maritime area falling within the jurisdiction of Saint Vincent and the Grenadines;

(b) from Point A eastwards, the delimitation line is a loxodrome with an azimuth of 88° extending to the outer limit of the EEZ of Trinidad and Tobago;

(c) further, the respective continental shelves of the two States are delimited by the extension of the line referred to in paragraph (3)(b) above, extending to the outer limit of the continental shelf as determined in accordance with international law.

Chapter IV

JURISDICTION

188. The Tribunal must begin by addressing the question of its jurisdiction to hear and determine the dispute which has been brought before it, which is a matter on which the Parties have taken opposing positions.

189. Barbados submits that the Tribunal has jurisdiction over the dispute which it, Barbados, has submitted to it, but that the Tribunal is without jurisdiction over what Barbados regards as an additional element introduced by Trinidad and Tobago concerning the boundary of the continental shelf beyond the 200 nm limit (see paragraphs 67-72, 80-82 above).

190. Trinidad and Tobago takes a different view, submitting that the Tribunal is without jurisdiction to hear the dispute which Barbados submitted to arbitration, but that if it did have such jurisdiction the dispute also involves the continental shelf boundary between the two States beyond 200 nm (see paragraphs 73-79, 83-87 above).

191. The Tribunal recalls that, at all relevant times, both Parties have been parties to UNCLOS. Accordingly, both Parties are bound by the dispute resolution procedures provided for in Part XV of UNCLOS in respect of any dispute between them concerning the interpretation or application of the Convention. Section 2 of Part XV provides for compulsory procedures entailing binding decisions, which apply where no settlement has been reached by recourse to Section 1 (which lays down certain general provisions, including those aimed at the reaching of agreement through negotiations and other peaceful means). Article 287 of UNCLOS allows parties a choice of binding procedures for the settlement of their disputes, but neither Party has made a written declaration choosing one of the particular means of dispute settlement set out in Article 287, paragraph 1 (see footnote 6 above). Accordingly, under paragraph 3 of that Article, both Parties are deemed to have accepted arbitration in accordance with Annex VII to UNCLOS.

192. Article 298 makes provision for States to make optional written declarations excluding the operation of procedures provided for in Section 2 with respect to various categories of disputes, but neither Party has made such a declaration. It follows that both Parties have agreed to their disputes concerning the interpretation and application of UNCLOS being settled by binding decision of an arbitration tribunal in accordance with Annex VII, without any limitations other than those inherent in the terms of Part XV and Annex VII.

193. In the present case, the Parties are in dispute about the delimitation of their continental shelf and EEZ in the maritime areas opposite or adjacent to their coasts. In accordance with Articles 74(1) and 83(1) of UNCLOS, they were obliged to effect such a delimitation "by agreement on the basis of international law. . . in order to achieve an equitable solution".

194. Since about the late 1970s the Parties have held discussions about the use of resources (especially fisheries and hydrocarbon resources) in the maritime spaces which are currently the subject of their competing claims (see paragraphs 46-48, 52 above). In July 2000 they began several rounds of more formal negotiations. Between then and November 2003 they held a total of nine rounds of negotiations, some devoted to questions of delimitation and others to associated problems of fisheries in waters potentially affected by the delimitation: a further round was to be held in February 2004 (see paragraphs 53-54 above). Despite their efforts, however, they failed to reach agreement.

195. In the Tribunal's view the Parties had negotiated for a reasonable period of time. No agreement having been reached within a reasonable period of time, Articles 74(2) and 83(2) of UNCLOS imposed upon the Parties an obligation to resort to the procedures provided for in Part XV of UNCLOS.

196. It was clear, by the very fact of their failure to reach agreement within a reasonable time on the delimitation of their EEZs and continental shelves and by their failure even to agree upon the applicable legal rules especially in relation to what was referred to as the ECS, that there was a dispute between them.

197. That dispute concerned the interpretation or application of Articles 74 and 83 of UNCLOS, and in particular the application of the requirement in each of those Articles that the agreement was to be "on the basis of international law": the Parties, however, could not agree on the applicable legal rules.

198. The fact that the precise scope of the dispute had not been fully articulated or clearly depicted does not preclude the existence of a dispute, so long as the record indicates with reasonable clarity the scope of the legal differences between the Parties. The fact that in this particular case the Parties could not even agree upon the applicable legal rules shows that *a fortiori* they could not agree on any particular line which might follow from the application of appropriate rules. Accordingly, to insist upon a specific line having been

tabled by each side in the negotiations would be unrealistic and formalistic. In the present case the record of the Parties' negotiations shows with sufficient clarity that their dispute covered the legal bases on which a delimitation line should be drawn in accordance with international law, and consequently the actual drawing of that line.

199. The existence of a dispute is similarly not precluded by the fact that negotiations could theoretically continue. Where there is an obligation to negotiate it is well established as a matter of general international law that that obligation does not require the Parties to continue with negotiations which in advance show every sign of being unproductive.[21] Nor does the fact that a further round of negotiations had been fixed for February 2004 preclude Barbados from reasonably taking the view that negotiations to delimit the Parties' common maritime boundaries had already lasted long enough without a settlement having been reached, and that it was now appropriate to move to the initiation of the procedures of Part XV as required by Articles 74(2) and 83(2) of UNCLOS – provisions which, it is to be noted, subject the continuation of negotiations only to the temporal condition that an agreement be reached "within a reasonable period of time".

200. Given therefore that a dispute existed, and had not been settled within a reasonable period of time, the Parties were under an obligation under Articles 74 and 83 to resort to the procedures of Part XV.

> (i) Articles 279-280 of that Part recall the Parties' general obligation to settle their disputes by peaceful means, and their freedom to do so by means of their own choosing.
>
> (ii) Article 281 applies where Parties "have agreed" to seek settlement of their dispute by a peaceful means of their own choice. Since it appears that Article 282 applies where the Parties have a standing bilateral or multilateral dispute settlement agreement which could cover the UNCLOS dispute which has arisen between them, it would appear that Article 281 is intended primarily to cover the situation where the Parties have come to an *ad hoc* agreement as to the means to be adopted to settle the particular dispute which has arisen. Where they have done so, then their obligation to follow the procedures provided for in Part XV will arise where no settlement has been reached through recourse to the agreed means and where their agreement does not exclude any further procedure. In the present case the Parties have agreed in practice, although not by any formal agreement, to seek to settle their dispute through negotiations, which was in any event a course

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[21] See, e.g., *Mavrommatis Palestine Concessions Case (Jurisdiction)*, 1924 P.C.I.J. (Ser. A) No. 2, p. 13; *South West Africa Cases (Preliminary Objections)*, I.C.J. Reports 1962, p. 319, at pp. 345-346; *Applicability of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement of 26 June 1947*, I.C.J. Reports 1988, p. 12, at pp. 33-34, para. 55.

incumbent upon them by virtue of Articles 74(1) and 83(1). Since their *de facto* agreement did not exclude any further procedures, and since their chosen peaceful settlement procedure – negotiations – failed to result in a settlement of their dispute, then both by way of Articles 74(2) and 83(2) and by way of Article 281(1) the procedures of Part XV are applicable.

(iii) Article 282 applies where the Parties have agreed upon a binding dispute settlement procedure under a general, regional or bilateral agreement, but that is not the case here (other than, of course, their obligations under UNCLOS itself).

201. Recourse to Part XV brings into play the obligation under Article 283(1) to "proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means". The Tribunal must preface its consideration of Article 283 with the observation that that Article does not readily fit the circumstances to which Articles 74 and 83 give rise, nor does it sit easily alongside the realities of what is involved in "negotiations" which habitually cover not only the specific matter under negotiation but also consequential associated matters. The Tribunal notes that Article 283 is of general application to all provisions of UNCLOS and is designed for the situation where "a dispute arises", that is where the first step in the dispute settlement process is the bare fact of a dispute having arisen. Articles 74 and 83 involve a different process, in that they impose an obligation to agree upon delimitation, which necessarily involves negotiations between the Parties, and then takes the Parties to Part XV when those negotiations have failed to result in an agreement. In this situation Part XV – and thus Article 283 – is thus not the first step in the process, but one which follows the Parties' having already spent a "reasonable period of time" (in the present case several years) seeking to negotiate a solution to their delimitation problems.

202. The Tribunal consequently concludes that Article 283(1) cannot reasonably be interpreted to require that, when several years of negotiations have already failed to resolve a dispute, the Parties should embark upon further and separate exchanges of views regarding its settlement by negotiation. The requirement of Article 283(1) for settlement by negotiation is, in relation to Articles 74 and 83, subsumed within the negotiations which those Articles require to have already taken place.

203. Similarly, Article 283(1) cannot reasonably be interpreted to require that once negotiations have failed to result in an agreement, the Parties must then meet separately to hold "an exchange of views" about the settlement of the dispute by "other peaceful means". The required exchange of views is also inherent in the (failed) negotiations. Moreover, Article 283 applies more appropriately to procedures which require a joint discussion of the mechanics for instituting them (such as setting up a process of mediation or conciliation)

than to a situation in which Part XV itself gives a party to a dispute a unilateral right to invoke the procedure for arbitration prescribed in Annex VII.

204. That unilateral right would be negated if the States concerned had first to discuss the possibility of having recourse to that procedure, especially since in the case of a delimitation dispute the other State involved could make a declaration of the kind envisaged in Article 298(l)(a)(i) so as to opt out of the arbitration process. State practice in relation to Annex VII acknowledges that the risk of arbitration proceedings being instituted unilaterally against a State is an inherent part of the UNCLOS dispute settlement regime (just as a sudden submission of a declaration accepting the compulsory jurisdiction of the International Court of Justice is a risk for other States which have already made such an "optional clause" declaration and which have a current dispute with the State now making the sudden declaration).

205. The Tribunal reaches the same conclusion in respect of the possibility that the requirement to negotiate a settlement under Articles 74(1) and 83(1) could be regarded as a "procedure for settlement" which had been "terminated without a settlement" so as to bring paragraph 2 of Article 283 into play, and by that route require the Parties to "proceed expeditiously to an exchange of views" after the unsuccessful termination of their delimitation negotiations. To require such a further exchange of views (the purpose of which is not specified in Article 283(2)) is unrealistic.

206. In practice the only relevant obligation upon the Parties under Section 1 of Part XV is to seek to settle their dispute by recourse to negotiations, an obligation which in the case of delimitation disputes overlaps with the obligation to reach agreement upon delimitation imposed by Articles 74 and 83. Upon the failure of the Parties to settle their dispute by recourse to Section 1, *i.e.* to settle it by negotiations, Article 287 entitles one of the Parties unilaterally to refer the dispute to arbitration.

207. This unilateral right to invoke the UNCLOS arbitration procedure is expressly conferred by Article 287 which allows the unsettled dispute to be referred to arbitration "at the request of any party to the dispute"; it is reflected also in Article 1 of Annex VII. Consequently, Articles 74(2) and 83(2), which refer to "the States concerned" (in the plural) resorting to the procedures (stated generally) provided for in Part XV, must be understood as referring to those procedures in the terms in which they are set out in Part XV: where the procedures require joint action by the States in dispute they must be operated jointly, but where they are expressly stated to be unilateral their invocation on a unilateral basis cannot be regarded as inconsistent with any implied requirement for joint action which might be read into Articles 74(2) or 83(2).

208. For similar reasons, the unilateral invocation of the arbitration procedure cannot by itself be regarded as an abuse of right contrary to Article 300 of UNCLOS, or an abuse of right contrary to general international law. Article 286 confers a unilateral right, and its exercise unilaterally and without

discussion or agreement with the other Party is a straightforward exercise of the right conferred by the treaty, in the manner there envisaged. The situation is comparable to that which exists in the International Court of Justice with reference to the commencement of proceedings as between States both of which have made "optional clause" declarations under Article 36 of the Court's Statute.

209. Barbados in the present proceedings having chosen, in accordance with Article 287, to refer its dispute with Trinidad and Tobago to an arbitration tribunal constituted in accordance with Annex VII, the Tribunal, under Article 288, has jurisdiction over any dispute concerning the interpretation or application of UNCLOS which is submitted to it in accordance with Part XV. Paragraph 4 of that Article also provides that if there is a dispute as to whether the Tribunal has jurisdiction, the matter shall be settled by decision of that Tribunal.

210. The requirements regarding the submission of a dispute to the Tribunal are set out in Annex VII, which forms part of the scheme established by Part XV.

211. Article 1 of Annex VII allows any party to the dispute to submit the dispute to arbitration by written notification, which has to be accompanied by a statement of the claim and the grounds on which it is based. Barbados filed its written notification on 16 February 2004, accompanied by the required statement and grounds. Barbados accordingly complied with the requirements of UNCLOS for the submission of the dispute to arbitration under Annex VII.

212. Paragraph 2 of Barbados' Statement of Claim says that "[t]he dispute relates to the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago", and by way of relief sought states (in paragraph 15) that "Barbados claims a single maritime boundary line, delimiting the exclusive economic zone and continental shelf between it and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS".

213. There was some difference between the Parties as to the scope of the matters which constituted the dispute with which the Tribunal was required to deal, particularly as regards what the Parties referred to as "the extended continental shelf", by which they meant that part of the continental shelf lying beyond 200 nm. Trinidad and Tobago submitted that that matter was part of the dispute submitted to the Tribunal, while Barbados submitted that it was excluded by the terms of its written notification instituting the arbitration, particularly its description of the dispute and the statement of the relief sought. The Tribunal considers that the dispute to be dealt with by the Tribunal includes the outer continental shelf, since (i) it either forms part of, or is sufficiently closely related to, the dispute submitted by Barbados, (ii) the record of the negotiations shows that it was part of the subject-matter on the table during those negotiations, and (iii) in any event there is in law only a

single "continental shelf" rather than an inner continental shelf and a separate extended or outer continental shelf.

214. Since the outer continental shelf is, in the Tribunal's view, included within the scope of the dispute submitted to arbitration, the Tribunal does not consider that there is any requirement (as there might have been in the case of something more in the nature of a counterclaim) for the procedural requirements of Section 1 of Part XV, particularly those of Article 283, to be separately satisfied in respect of the outer continental shelf.

215. The dispute submitted to arbitration by Barbados, and the relief sought, relate respectively to "the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago", and to the determination of "a single maritime boundary line, delimiting the exclusive economic zone and continental shelf between [Barbados] and the Republic of Trinidad and Tobago, as provided under Articles 74 and 83 of UNCLOS". Although the alleged existence of Barbadian fishing rights in the waters affected by the delimitation was argued to be a relevant circumstance which could modify the delimitation line which might otherwise be adopted (an aspect of the matter which is addressed by the Tribunal in its consideration of the merits), the dispute submitted to arbitration does not give it the jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of Trinidad and Tobago's EEZ: nor did Barbados seek from the Tribunal the elaboration of such a fisheries regime. Such a regime would involve separate and discrete questions of substance which neither form part of the delimitation dispute referred to arbitration, nor can be regarded as a lesser form of relief to be regarded as falling within the scope of the relief requested (which was limited to the drawing of a single line of maritime delimitation).

216. Moreover, as is explained in paragraphs 276-283 below, the question of jurisdiction over an access claim is determined by Article 297(3) of UNCLOS.

217. For the foregoing reasons the Tribunal decides that:

> (i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;
>
> (ii) its jurisdiction in that respect includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm; and
>
> (iii) while it has jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity in waters affected by the delimitation, it has no jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply

in waters which may be determined to form part of Trinidad and Tobago's EEZ.

218. The Tribunal wishes to emphasise that its jurisdiction is limited to the dispute concerning the delimitation of maritime zones as between Barbados and Trinidad and Tobago. The Tribunal has no jurisdiction in respect of maritime boundaries between either of the Parties and any third State, and the Tribunal's award does not prejudice the position of any State in respect of any such boundary.

Chapter V

MARITIME DELIMITATION: GENERAL CONSIDERATIONS

219. The Tribunal will now set out the general considerations that will guide its examination of the issues concerning maritime delimitation that the Parties have put forth in their claims and allegations.

A. APPLICABLE LAW

220. Article 293 of UNCLOS provides:

> *Applicable Law*
>
> 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
>
> 2. Paragraph 1 does not prejudice the power of the court or Tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.

221. Articles 74(1) and 83(1) of UNCLOS lay down the law applicable to the delimitation of the exclusive economic zone and the continental shelf, respectively. In the case of States with either opposite or adjacent coasts, the delimitation of such maritime areas "shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

222. This apparently simple and imprecise formula allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.

223. As noted above, both Barbados and Trinidad and Tobago are parties to UNCLOS, the principal multilateral convention concerning not only

questions of delimitation strictly speaking but also the role of a number of other factors that might have relevance in effecting the delimitation. Bilateral treaties between the parties and between each party and third States might also have a degree of influence in the delimitation. In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation.

B. THE DELIMITATION PROCESS

224. As a result of the development in the law noted above, it is today well established that the starting point of any delimitation is the entitlement of a State to a given maritime area, in this case both to an exclusive economic zone and to a continental shelf. At the time when the continental shelf was the principal national maritime area beyond the territorial sea, such entitlement found its basis in the concept of natural prolongation (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4). However, the subsequent emergence and consolidation of the EEZ meant that a new approach was introduced, based upon distance from the coast.

225. In fact, the concept of distance as the basis of entitlement became increasingly intertwined with that of natural prolongation. Such a close interconnection was paramount in the definition of the continental shelf under UNCLOS Article 76, where the two concepts were assigned complementary roles. That same interconnection became evident in the regime of the EEZ under UNCLOS Article 56, distance being the sole basis of the coastal State's entitlement to both the sea-bed and subsoil and the superjacent waters.

226. In spite of some early doubt about the continuing existence of the concept of the continental shelf within an area appertaining to the coastal state by virtue of its entitlement to an EEZ, it became clear that the latter did not absorb the former and that both coexisted with significant elements in common arising from the fact that within 200 nm from a State's baselines distance is the basis for the entitlement to each of them (*Libya/Malta*, I.C.J. Reports 1985, p. 13).

227. The trend toward harmonization of legal regimes inevitably led to one other development, the establishment for considerations of convenience and of the need to avoid practical difficulties of a single maritime boundary between States whose entitlements overlap.

228. The step that followed in the process of searching for a legal approach to maritime delimitation was more complex as it dealt with the specific criteria applicable to effect delimitation. This was so, at first because there was a natural reluctance on the part of courts and tribunals to give preference to those elements more closely connected to the continental shelf over those more closely related to the EEZ or *vice versa*. The quest for neutral criteria of a geographical character prevailed in the end over area-specific

criteria such as geomorphological aspects or resource-specific criteria such as the distribution of fish stocks, with a very few exceptions (notably *Jan Mayen*, I.C.J. Reports 1993, p. 38).

229. There was also another source of complexity in the search for a generally acceptable legal approach to maritime delimitation. Since the very outset, courts and tribunals have taken into consideration elements of equity in reaching a determination of a boundary line over maritime areas. This is also the approach stipulated by UNCLOS Articles 74 and 83, in conjunction with the broad reference to international law explained above.

230. Equitable considerations *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process. Some early attempts by international courts and tribunals to define the role of equity resulted in distancing the outcome from the role of law and thus led to a state of confusion in the matter (*Tunisia/Libya*, I.C.J. Reports 1982, p. 18). The search for predictable, objectively-determined criteria for delimitation, as opposed to subjective findings lacking precise legal or methodological bases, emphasized that the role of equity lies within and not beyond the law (*Libya/Malta*, I.C.J. Reports 1985, p. 13).

231. The identification of the relevant coasts abutting upon the areas to be delimited is one such objective criterion, relating to the very source of entitlement to maritime areas. The principle of equidistance as a method of delimitation applicable in certain geographical circumstances was another such objective determination.

232. The search for an approach that would accommodate both the need for predictability and stability within the rule of law and the need for flexibility in the outcome that could meet the requirements of equity resulted in the identification of a variety of criteria and methods of delimitation. The principle that delimitation should avoid the encroachment by one party on the natural prolongation of the other or its equivalent in respect of the EEZ (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4; *Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Libya/Malta*, I.C.J. Reports 1985, p. 13), the avoidance to the extent possible of the interruption of the maritime projection of the relevant coastlines (*Gulf of Maine*, I.C.J. Reports 1984, p. 246) and considerations ensuring that a disproportionate outcome should be corrected (*Libya/Malta*, I.C.J. Reports 1985, p. 13), are all criteria that have emerged in this context.

233. These varied criteria might or might not be appropriate to effect delimitation in the light of the specific circumstances of each case. The identification of the relevant circumstances becomes accordingly a necessary step in determining the approach to delimitation. That determination has increasingly been attached to geographical considerations, with particular reference to the length and the configuration of the respective coastlines and their characterization as being opposite, adjacent or in some other relationship (*Gulf of Maine*, I.C.J. Reports 1984, p. 246). That does not mean that criteria

pertinent to the continental shelf have been abandoned, as both the continental shelf and the EEZ are relevant constitutive elements integrated in the process of delimitation as a whole, particularly where it entails the determination of a single maritime boundary.

234. In fact, the continental shelf and the EEZ coexist as separate institutions, as the latter has not absorbed the former (*Libya/Malta*, I.C.J. Reports 1985, p. 13) and as the former does not displace the latter. Trinidad and Tobago has correctly noted in its argument that the decisions of courts and tribunals on the determination of a single boundary line have been based on the agreement of the parties. As the International Court of Justice held in *Qatar v. Bahrain*,

> The Court observes that the concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and that it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them (I.C.J. Reports 2001, p. 40, at p. 93, para. 173).

235. Yet it is evident that State practice with very few exceptions (most notably, with respect to the Torres Strait) has overwhelmingly resorted to the establishment of single maritime boundary lines and that courts and tribunals have endorsed this practice either by means of the determination of a single boundary line (*Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Guinea/Guinea-Bissau*, 77 I.L.R. p. 635; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40) or by the determination of lines that are theoretically separate but in fact coincident (*Jan Mayen*, I.C.J. Reports 1993, p. 38).

236. The question of coastal length has come to have a particular significance in the process of delimitation. This is not, however, because the ratio of the parties' relative coastal lengths might require that the determination of the line of delimitation should be based on that ratio or on some other mathematical calculation of the boundary line, as has on occasion been argued.

237. In fact, decisions of international courts and tribunals have on various occasions considered the influence of coastal frontages and lengths in maritime delimitation and it is well accepted that disparities in coastal lengths can be taken into account to this end, particularly if such disparities are significant. Yet, as the International Court of Justice clarified in the *Jan Mayen* case, this is not "a question of determining the equitable nature of a delimitation as a function of the ratio of the lengths of the coasts in comparison with that of the areas generated by the maritime projection of the points of the coast" (I.C.J. Reports 1993, p. 38, at p. 68, para. 68, with reference to *Libya/Malta*, I.C.J. Reports 1985, p. 13, at p. 46, para. 59). Nor, as the Court held in the *North Sea Continental Shelf* cases, is it a question of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline" (I.C.J. Reports 1969, p. 4, at p. 50, para. 91).

238. The Tribunal also notes that in applying proportionality as a relevant circumstance, the decisions of the International Court of Justice cited above kept well away from a purely mathematical application of the relationship between coastal lengths and that proportionality rather has been used as a final check upon the equity of a tentative delimitation to ensure that the result is not tainted by some form of gross disproportion.

239. The reason for coastal length having a decided influence on delimitation is that it is the coast that is the basis of entitlement over maritime areas and hence constitutes a relevant circumstance that must be considered in the light of equitable criteria. To the extent that a coast is abutting on the area of overlapping claims, it is bound to have a strong influence on the delimitation, an influence which results not only from the general direction of the coast but also from its radial projection in the area in question.

240. Thus the real role of proportionality is one in which the presence of different lengths of coastlines needs to be taken into account so as to prevent an end result that might be "disproportionate" and hence inequitable. In this context, proportionality becomes the last stage of the test of the equity of a delimitation. It serves to check the line of delimitation that might have been arrived at in consideration of various other factors, so as to ensure that the end result is equitable and thus in accordance with the applicable law under UNCLOS.

241. Resource-related criteria have been treated more cautiously by the decisions of international courts and tribunals, which have not generally applied this factor as a relevant circumstance. As noted above, the *Jan Mayen* decision is most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute. However, as the question of fisheries might underlie a number of delimitation disputes, courts and tribunals have not altogether excluded the role of this factor but, as in the *Gulf of Maine*, have restricted its application to circumstances in which catastrophic results might follow from the adoption of a particular delimitation line. In the *Gulf of Maine* case the Chamber held:

> It is, therefore, in the Chamber's view, evident that the respective scale of activities connected with fishing – or navigation, defence or, for that matter, petroleum exploration and exploitation – cannot be taken into account as a relevant circumstance or, if the term is preferred, as an equitable criterion to be applied in determining the delimitation line. What the Chamber would regard as a legitimate scruple lies rather in concern lest the overall result, even though achieved through the application of equitable criteria and the use of appropriate methods for giving them concrete effect, should unexpectedly be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned (I.C.J. Reports 1984, p. 246, at p. 342, para. 237).

242. The determination of the line of delimitation thus normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point,

equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional equidistance line in order to achieve an equitable result (*Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303; Prosper Weil, *Perspectives du droit de la délimitation maritime* p. 223 (1988)). This approach is usually referred to as the "equidistance/relevant circumstances" principle (*Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40; *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303). Certainty is thus combined with the need for an equitable result.

243. The process of achieving an equitable result is thus constrained by legal principle, in particular in respect of the factors that may be taken into account. It is furthermore necessary that the delimitation be consistent with legal principle as established in decided cases, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.

244. Within those constraints imposed by law, the Tribunal considers that it has both the right and the duty to exercise judicial discretion in order to achieve an equitable result. There will rarely, if ever, be a single line that is uniquely equitable. The Tribunal must exercise its judgment in order to decide upon a line that is, in its view, both equitable and as practically satisfactory as possible, while at the same time in keeping with the requirement of achieving a stable legal outcome. Certainty, equity, and stability are thus integral parts of the process of delimitation.

245. This is the process of delimitation that the Tribunal will now undertake in respect of the dispute submitted to it and the respective claims of the Parties. A chart, Map IV, facing,[*] depicts the claim line of Barbados, the claim line of Trinidad and Tobago, and the segment of the equidistance line that is agreed between them.

Chapter VI

DELIMITATION IN THE WEST

A. THE FLYINGFISH FISHERY AND BARBADOS' CLAIM TO ADJUST THE EQUIDISTANCE LINE

1. The Positions of the Parties

246. It is common ground between the Parties that the line of delimitation in the west is provisionally to be found in the equidistance line

[*] Secretariat note: See map No. IV in the back pocket of this volume.

between their coasts, coasts which both Parties accept here to be opposite. Trinidad and Tobago maintains that that provisional equidistance line in the west should be the line of delimitation to be laid down by this Tribunal. Barbados maintains that that provisional line should be subjected to the very major adjustment depicted and described in paragraphs 59-61 above.

247. Barbados submits that the requisite equitable solution is to be achieved by application of the "equidistance/special circumstances rule". It contends that the governing "special circumstance" is "the fact that Barbados fisherfolk have traditionally fished by artisanal methods in the waters off the northwest, north and northeast coasts of the island of Tobago", principally for "flyingfish, a species of pelagic fish that moves seasonally to the waters off Tobago. The flyingfish is a staple component of the Barbados diet and an important part of the history, economy, and culture of Barbados. Barbadians have continuously fished off Tobago during the fishing season to catch the flying fish…" Barbados maintains that, as early as the 17th century, Barbados employed a fleet of long-range vessels which engaged in fishing for pelagic species, that the flyingfish fishery has for centuries made up a significant component of the Barbados' fishing sector, that the flyingfish is the mainstay of a large part of the Barbadian population and its most popular food, that flyingfish makes up almost two-thirds of the annual Barbadian fish catch by weight, and that throughout the flyingfish season, from November to February and from June to July, large numbers of Barbadian fisherfolk have traditionally followed the movement of flyingfish to an area off the northwest, north and northeast coasts of Tobago. It contends that over 90% of Barbados' 2,200 fisherfolk and 500 fish vendors are directly reliant upon the flyingfish fishery for their livelihoods. Barbados argues that the earliest records of Barbadian fishing off Tobago date to the first half of the 18th century and it cites records in support of that contention. It observes that, from the time when Great Britain finally acquired Tobago definitively in 1814, the maritime area bounded by Grenada, St. Vincent and the Grenadines, St. Lucia, Barbados, and Tobago became, in effect, a British lake, governed as a single colonial unit from Barbados. The question of which British subject was fishing where in this British lake became unimportant. "Although there can be no doubt that fishermen from Barbados have fished off Tobago for centuries, there is a dearth of direct evidence to this effect for the period from the early 19th century to the mid-20th century. One must therefore rely on other evidence and the oral tradition that has passed down through the generations." Barbados submits fifteen affidavits of contemporary fisherfolk attesting that they, and their forebears, habitually fished off Tobago. For example, the affidavit of Joseph Knight states that, "I do most of my fishing off the coast of Tobago…I have been fishing there for all of my life. As far as I know from stories I hear from fisherfolk, this has always been the way for Barbadian fisherfolk…Fishing off the coast of Tobago is also very important to my survival. I depend on it…I would say that the majority of my income comes from the fish that I catch off the coast of Tobago". Some of the witnesses testify to having fished off Tobago around 20-25 years ago, *i.e.* perhaps as

long ago as 1979-80; but none of the witnesses testifies that he himself fished off Tobago prior to that time. Angela Watson, President of the Barbados National Union of Fisherfolk Organisations, submitted a sixteenth affidavit. She says that, "Barbadians have fished off the northwest, north and northeast coasts of Tobago for many years and I understand that this has been going on for generations. This is certainly the history as you hear it in the fishing communities". She says that Barbadian fisherfolk fished off Tobago until 1988 with no interference from the Trinidad and Tobago authorities.

248. The modern-day boats from Barbados that fish in the waters off Tobago are "ice boats", about 190 in number, small craft which, since the 1970s, have been used to transport catch back to Barbados on ice. Barbados asserts that there is evidence of the use of ice on Barbadian craft in the waters in question prior to the introduction of the ice boats, since 1942; in other words, there has been fishing there by Barbadian fisherfolk for more than two generations. Barbados maintains that in earlier times Barbadian fisherfolk used other preservation methods to transport their catches home, such as salting and pickling (see paragraphs 126-127 above). In addition, Barbados infers from the fact that it is clearly established that Barbadian fisherfolk were fishing off Tobago, where they had followed the migrating flyingfish, at the time of independence in 1962, that "it is inconceivable that Barbadians were not involved in any way in fishing in the traditional fishing grounds off Tobago during the long period of unified colonial jurisdiction and governance". It also points to the evidence of fishing for snapper by Barbadian schooners off Brazil in the early 20th century and says that "it would have been remarkable for Barbadians to be fishing so far from home for fish of unsubstantial demand in Barbados whilst at the same time leaving completely unfished the rich flyingfish fishing grounds off Tobago, fishing grounds that had been known to Barbadians for centuries".

249. Barbados contends that, so important is Barbadian fishing for flyingfish off Tobago that, were it to be indefinitely debarred from fishing there, the results for Barbadian fisherfolk and their families, and for the economy of Barbados at large, would be "catastrophic".[22] At the same time, it contends that the flyingfish fishery of the fisherfolk of Tobago, such as it is, is inshore, within the territorial sea of Tobago; hence Barbadian fishing in waters adjacent to that territorial sea does not affect the livelihoods of fisherfolk of Tobago. The affidavits submitted by Barbadian fisherfolk support both of these contentions.

250. Thus, as was noted in paragraph 125 of this Award, Barbados bases its claim on "three core factual submissions": (1) there is a centuries-old history of Barbadian artisanal fishing in the waters off Tobago; (2) Barbadian fisherfolk are critically dependent on the maintenance of access to that fishery

[22] See the quotation from the *Gulf of Maine* case which refers to "catastrophic circumstances", para. 241 above.

and (3) the fisherfolk of Trinidad and Tobago do not fish in those waters for flyingfish and hence do not depend upon that fishery for their livelihoods.

251. To these factual contentions, Barbados adds a further contention of fact and law: that the refusal by Trinidad and Tobago to conclude an agreement according renewed and continuing access for Barbadian fisherfolk to the waters off Tobago justifies adjusting the maritime boundary so as to place the waters in dispute within the EEZ not of Trinidad and Tobago but of Barbados.

252. Barbados applies to the foregoing portrayal of the essential facts its view of the law which is summarized in paragraphs 133-142 of this Award.

253. Trinidad and Tobago contests virtually every element of Barbados' factual and legal positions.

254. In respect of the first of Barbados' core factual arguments about the reality of traditional artisanal fishing by Barbadian fisherfolk in waters off Tobago, Trinidad and Tobago contends that it is "fiction". Trinidad and Tobago describes Barbadian fishing in the waters off Tobago as "of recent origin and highly commercial". The closest distance of the waters of Tobago at issue is 58 nm from Barbados. Trinidad and Tobago argues that, far from being able to fish for flyingfish in those waters across the centuries, Barbadian fisherfolk could not feasibly have reached waters off Tobago with small sailing craft and returned to Barbados with preserved catch. On the contrary, the evidence, as set out in authoritative Barbadian sources quoted by Trinidad and Tobago, a salient example of which appears below, is that, up to the 1940s, the traditional Barbadian flyingfish sailboat fishery took place solely three to four miles off Barbados. In the 1950s, Barbadian fisherfolk converted to diesel-powered vessels that made one-day fishing trips to fishing grounds within 40 miles of Barbados. In the late 1970s, Barbadian vessels designed to stay at sea for up to ten days began fishing in waters off Tobago. As from 1978, long-range vessels, ice boats of eight ton capacity, came into use and took over the fleet by the mid-1980s. Trinidad and Tobago argues that in truth Barbados seeks not protection of a traditional, artisanal flyingfish fishery but an ice boat fleet which, Trinidad and Tobago claims, engaged in large-scale semi-industrial operations as from the late 1970s. Trinidad and Tobago quotes from the 1992 and 2001 reports of officials of Barbados, as well as an FAO report, in support of the foregoing analysis. A report made in 2001 by Christopher Parker of the Fisheries Division of the Ministry of Agriculture and Rural Development of Barbados states that:

> The vessels used in the flying fish fishery during the first half of the century were small open sail boats ranging in size between 18' to 25'…The boats carried no ice onboard to preserve the catch thus the time between taking the fish onboard and returning to shore to sell them was limited. The difficulty in manoeuvring and the comparatively slow speed of the vessels together effectively narrowed the fishing range to within approximately 4-5 miles from shore…

> In the 1970's 80-180 H.P. engines became common allowing a further extension of the fishing range to 40 miles from shore…but these vessels generally fished within 30 nautical miles from shore…
>
> It was not until 1978 that the first truly commercial ice-boat entered the fleet…The increased efficiency of the iceboat is a product of ability to stay at sea fishing for longer periods (up to around two weeks) and to fish further from Barbados in areas of potentially higher fish densities without fear of the catch spoiling.

255. Trinidad and Tobago's counsel in oral argument concluded that: "the evidence could not be stronger, there was no fishing off Tobago prior to the late 1970s. Barbadian fishermen had no means of getting to ranges from 58 to 147 nm from Barbados until the very late 1970s. They had no means of storing fish on board until the introduction of ice boats in the late 1970s. Since the late 1970s there has been an explosion in the number of ice boats from one or two…to [currently] 190. Hence the extraordinary pressure for Barbados to try and expand into an entirely new fishing area". By contrast with the weight to be attached to official reports of Barbados, Trinidad and Tobago dismisses the affidavits of Barbadian fisherfolk as "utterly worthless". For all these reasons, it concludes that the first core factual submission of Barbados is unsustainable. Far from Barbados' flyingfish fishery off Tobago being traditional, it actually subsisted for just six or eight years between the introduction of ice boats and the proclamation of Trinidad and Tobago's EEZ in 1986.

256. As to the second core factual submission, Trinidad and Tobago maintains that, in fact, Barbadians are not critically dependent on fishing for flyingfish off Tobago, most notably because their inability to do so in recent years demonstrably has not produced catastrophic consequences. No evidence of such consequences has been proffered. Trinidad and Tobago argues that fisheries represent less than one percent of the gross national product of Barbados, of which the flyingfish sector is only a part and the flyingfish harvested off Tobago an even smaller part.

257. As to the third of the core factual submissions of Barbados, Trinidad and Tobago submits evidence showing that its fisherfolk do fish for flyingfish off Tobago and that that fishery is of "significant commercial importance" (S. Samlasingh, E. Pandohee & E. Caesar, "The Flyingfish Fishery of Trinidad and Tobago", in *Biology and Management Options for Flying Fish in the Eastern Caribbean* p. 46 (H.A. Oxenford et al. eds., Biology Dept. of the University of the West Indies and Bellairs Research Institute of McGill University, Barbados, W.I. 1992)). Trinidad and Tobago acknowledges that the Barbadian ice boat fleet was first in the field but it maintains that that is not sufficient reason to deprive fisherfolk of Tobago of the opportunity of increased fishing off Tobago for a resource that must be guarded against overfishing.

258. Trinidad and Tobago also denies that it has refused to accord renewed and continuing access to the waters off Tobago to Barbadian fisherfolk. It argues that, on the contrary, it is Barbados that brought negotiations on a fishing agreement to an end, a few weeks after officially acknowledging the progress made towards its conclusion. It refers to Trinidad and Tobago's Cabinet Note of 17 February 2004 in which it is recorded that the Prime Minister of Trinidad and Tobago emphasized to the Prime Minister of Barbados that it was the view of the former's Government "that the issue of access by Barbados boats to the fishery resources of Trinidad and Tobago was eminently solvable". Trinidad and Tobago maintains that the argument of Barbados that it is entitled to radical boundary adjustment because Trinidad and Tobago refused fishing access not only is factually baseless but is devoid of any legal rationale or support. Nor, in its view, is there room for the Tribunal to entertain indications from Barbados, not found in its Statement of Claim, that, if the maritime boundary is not adjusted to meet its claims, Barbados should be granted fishing access to the EEZ of Trinidad and Tobago. So doing would be beyond the jurisdiction of the Tribunal by virtue of the terms of Article 297(3)(a) of UNCLOS.

259. Trinidad and Tobago also emphasizes that adjustment of the equidistance line to meet the claims of Barbados would involve transfer not only of fishery resources but potentially significant oil and gas resources that may be found in the seabed and subsoil of its EEZ.

260. Trinidad and Tobago further contends that, before the onset of this arbitration, Barbados had repeatedly officially recognized that the waters in question were part of the EEZ of Trinidad and Tobago. It recalls that the 1990 Fishing Agreement contains the preambular provision:

> Acknowledging the desire of Barbados fishermen to engage in harvesting flying fish and associated pelagic species in the fishing area within the Exclusive Economic Zone of Trinidad and Tobago…

261. Article II of the 1990 Fishing Agreement provides, under the caption "Access to the Exclusive Economic Zone of Trinidad and Tobago":

> 1. The Government of the Republic of Trinidad and Tobago in the exercise of its sovereign rights and jurisdiction shall, for the purpose of harvesting flying fish and associated pelagic species, afford access to its Exclusive Economic Zone…to not more than forty (40) fishing vessels which fly the flag of Barbados and which are duly authorized by the Government of Barbados, through the issuance of a maximum of forty (40) licenses […]
>
> 2. The access to which paragraph 1 of this Article refers shall be subject to the terms and conditions set out in the Agreement […]
>
> 3. The fishing vessels which are accorded access to the Exclusive Economic Zone of the Republic of Trinidad and Tobago in accordance with the provisions of the present Agreement shall not engage in activities other than fishing.

262. The Agreement goes on to specify the locus and methods of authorized fishing of Barbadian vessels, provides that Barbados shall submit to Trinidad and Tobago a list of vessels eligible for licensing, and further provides for payment to Trinidad and Tobago for fishing licenses. It specifies that authorized Barbadian fishing vessels shall comply strictly with the fisheries laws and regulations of Trinidad and Tobago "while engaged in fishing activities in the waters under the jurisdiction of the Republic of Trinidad and Tobago" (Article IX). Article XI provides that,

> Nothing in this Agreement is to be considered as a diminution or limitation of the rights which either Contracting Party enjoys in respect of its…Exclusive Economic Zone nor shall anything contained in this Agreement in respect of fishing in the marine areas of either Contracting Party be invoked or claimed as a precedent.

263. Trinidad and Tobago further cites a press release of Barbados of 1992 advising Barbados fishermen not to go beyond the equidistance line, the point at which Barbadian waters ended. It points out that, when fishing vessels of Barbadian registry were arrested in the EEZ of Trinidad and Tobago, Barbados did not allege that those vessels were illegally apprehended in waters appertaining to Barbados. Indeed the High Commissioner of Barbados acknowledged that sanctions imposed on Barbados vessels by Trinidad and Tobago for fishing in the latter's EEZ were legally permissible.

2. The Conclusions of the Tribunal

264. Having regard to the factual and legal contentions of the Parties that are set out in this Award and in the written and oral pleadings of the Parties, and having given those contentions the most careful consideration, the Tribunal has arrived at the following conclusions in respect of the line of delimitation in the west.

265. A provisionally drawn equidistance line is, in principle, subject to adjustment to take account of relevant circumstances, a proposition encapsulated in the "equidistance/special circumstances rule" which is elaborated above at paragraphs 224-244. Whether the circumstances pleaded by Barbados, if proved, are of the requisite character need not be decided, because the Tribunal finds that it is unable to conclude that any of the three core factual circumstances invoked by Barbados have been proved.

266. As to the first core contention of Barbados, the weight of evidence – and the Tribunal has considered the full range of evidence presented by Barbados – does not sustain its contention that its fisherfolk have traditionally fished for flyingfish off Tobago for centuries. Evidence supporting that contention is, if understandably, nevertheless distinctly, fragmentary and inconclusive. The documentary record prior to the 1980s is thin. The Tribunal is aware of the risk of giving undue weight to written reports which may represent no more than a record of hearsay evidence and oral tradition. Nonetheless, those reports, especially reports of Barbadian officials, that were

written more or less contemporaneously with the events that they describe must be given substantial weight, and more weight than affidavits written after this dispute arose and for litigious purposes. Those contemporaneous reports indicate that the practice of long-range Barbadian fishing for flyingfish, in waters which then were the high seas, essentially began with the introduction of ice boats in the period 1978-1980, that is, some six to eight years before Trinidad and Tobago in 1986 enacted its Archipelagic Waters Act. Indeed, that appears to be consistent with the direct evidence in the affidavits of the Barbadian fisherfolk, none of whom testifies that they themselves fished off Tobago prior to that time. Those short years are not sufficient to give rise to a tradition. Once the EEZ of Trinidad and Tobago was established, fishing in it by Barbados fisherfolk, whether authorized by agreement with Barbados or not, could not give rise either to a non-exclusive fishing right of Barbados fisherfolk or, *a fortiori*, to entitlement of Barbados to adjustment of the equidistance line.

267. As to the second core contention of Barbados, Barbados has not succeeded in demonstrating that the results of past or continuing lack of access by Barbados fisherfolk to the waters in issue will be catastrophic. The Tribunal accepts that communities in Barbados are heavily dependent upon fishing, and that the flyingfish fishery is central to that dependence. The Tribunal recognizes that some 190 ice boats owned and manned by Barbados nationals currently cannot fish off Tobago as they had done previously, that this deprivation is profoundly significant for them, their families, and their livelihoods, and that its deleterious effects are felt in the economy of Barbados. But injury does not equate with catastrophe. Nor is injury in the course of international economic relations treated as sufficient legal ground for border adjustment. Whether it is sufficient ground for access of Barbados fisherfolk to the EEZ of Trinidad and Tobago is addressed elsewhere in this Award.

268. As to the third core contention of Barbados, while there is evidence that fisherfolk of Trinidad and Tobago have preferred inshore fishing to fishing in the waters off Tobago favored by fisherfolk of Barbados, that evidence is not conclusive and, in any event, it does not justify the grant to Barbadian fisherfolk of a right of access to flyingfish in the EEZ of Trinidad and Tobago seaward of those inshore waters.

269. While the foregoing findings of fact are dispositive and support the decision not to adjust the equidistance line in the west, the Tribunal feels bound to add that, even if Barbados had succeeded in establishing one or all of its core factual contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive. Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J.

Reports 1993, p. 38). That is insufficient to establish a rule of international law.

270. The Tribunal finds further confirmation of its conclusions in the undoubted, repeated recognition by Barbados that its fisherfolk were fishing in waters of the EEZ of Trinidad and Tobago, and that, insofar as they so fished without the licensed permission of Trinidad and Tobago, they were subject to lawful arrest. It is not persuaded by the argument of Barbados that the 1990 Fishing Agreement was a mere *modus vivendi*, entered into in exigent circumstances which permit its recognition of the EEZ of Trinidad and Tobago to be discounted. The Tribunal further observes that the fishing agreement under negotiation on the eve of the initiation of these arbitral proceedings, based on a draft prepared by Barbados, likewise embodied recognition by Barbados of the EEZ of Trinidad and Tobago.

271. In the light of the foregoing analysis, the Tribunal concludes that the equidistance line in the west shall be the line of delimitation between Barbados and Trinidad and Tobago.

B. BARBADOS' CLAIM TO A RIGHT OF ACCESS TO THE FLYINGFISH FISHERY WITHIN THE EEZ OF TRINIDAD AND TOBAGO

272. The Tribunal has decided that the pattern of fishing activity in the waters off Trinidad and Tobago was not of such a nature as to warrant the adjustment of the maritime boundary. This does not, however, mean that the argument based upon fishing activities is either without factual foundation or without legal consequences.

273. Barbados argues that if the Tribunal does not adjust the equidistance line, it may nevertheless order that Barbadian fishermen be allowed access to the stocks of flyingfish while they are within the waters of Trinidad and Tobago.

274. The jurisdiction of the Tribunal to determine that issue depends upon the provisions of UNCLOS and upon the Statement of Claim that initiated these proceedings.

275. The Statement of Claim stipulated, in paragraph 2, that "the dispute relates to the delimitation of the exclusive economic zone and continental shelf between Barbados and the Republic of Trinidad and Tobago". The final chapter of Barbados' Memorial, headed "Barbados' Conclusion and Submission", is similarly confined. It states in paragraph 141 that Barbados "requests the Tribunal to determine a single maritime boundary between the EEZs and CSs of the parties that follows the line described below and is illustrated on Map 3". In its Reply, Barbados "affirms its claims as expressed in its Memorial and repeats its request that the Tribunal determine a single

maritime boundary between the EEZs and CSs of the Parties that follows the line there described."[23]

276. The pattern of Barbadian fishing activity is relevant to the task of delimitation as a relevant circumstance affecting the course of the boundary, and as such it is plainly a matter that must be considered by the Tribunal. Taking fishing activity into account in order to determine the course of the boundary is, however, not at all the same thing as considering fishing activity in order to rule upon the rights and duties of the Parties in relation to fisheries within waters that fall, as a result of the drawing of that boundary, into the EEZ of one or other Party. Disputes over such rights and duties fall outside the jurisdiction of this Tribunal because Article 297(3)(a) stipulates that a coastal State is not obliged to submit to the jurisdiction of an Annex VII Tribunal "any dispute relating to [the coastal State's] sovereign rights with respect to the living resources in the exclusive economic zone", and Trinidad and Tobago has made plain that it does not consent to the decision of such a dispute by this Tribunal.

277. Furthermore, no dispute of that kind was put as such before the Tribunal; neither were the pleadings of the Parties directed to a dispute over their respective rights and duties in respect of the fisheries in the EEZ of Trinidad and Tobago. Barbados stated clearly that its submissions in respect of its claim to a right to fish within the EEZ of Trinidad and Tobago were made on the basis that such a right could be awarded by the Tribunal as a remedy *infra petita* in the dispute concerning the course of the maritime boundary.

278. In the "Response of Barbados to Questions posed by Professor Orrego Vicuña and Professor Lowe on 21 October 2005 (Day 4) and 24 October 2005 (Day 5)", Barbados cited a number of cases in support of its claim that an order regarding fishery access would be a remedy *infra petita* in this case.[24]

279. The Tribunal does not consider that those cases support Barbados' submission. The first decision cited was the award in Phase I of the *Eritrea/Yemen* case (114 I.L.R. p. 1). In that case the Tribunal was instructed by the agreed compromis (a) to decide "territorial sovereignty…on the basis, in particular, of historic titles" and (b) to "decide on the definition of the scope of the dispute". Given the range in the content of historic titles,[25] and the Tribunal's power to decide on the scope of the dispute, it is readily

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[23] *Cf.* the closing submissions made on behalf of Barbados: Trans. Day 6, pp. 74-75.

[24] See *Eritrea/Yemen I and II*, 114 I.L.R. p. 1 and 119 I.L.R. p. 417; *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, I.C.J. Reports 1974, p. 3; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40; *Western Sahara*, I.C.J. Reports 1975, p. 18; *Eritrea-Ethiopia Boundary Commission* (*Determinations*, 7 November 2002), PCA Archives, *available at* http://www.pca-cpa.org; and *Right of Passage (Right of Passage over Indian Territory (Portugal v. India)*), I.C.J. Reports 1960, p. 6.

[25] See *Tunisia/Libya*, I.C.J. Reports 1982, p. 18, at pp. 73-75, paras. 100-102.

understandable that the Tribunal in that case should make plain that its finding on sovereignty, based on historic title, did not extinguish a pre-existent traditional fishing regime in the region which included a right of access. That is very different from saying that a Tribunal has an inherent power to *create* a right of access by way of a remedy in a delimitation dispute.

280. In the *Fisheries Jurisdiction Case* (I.C.J. Reports 1974, p. 3) the question was the validity of a claim to exercise fisheries jurisdiction over an area viewed by the United Kingdom as beyond the exclusive fisheries jurisdiction of Iceland. The *dispositif* did not create a right for Iceland or for the United Kingdom; it merely indicated factors to be taken into account in negotiating an equitable solution of the differences between the two States in respect of their right to fish in an area to which each of them had a right of access. Furthermore, the compromissory clause in that case gave the International Court of Justice jurisdiction over "a dispute *in relation to*" an "extension of fisheries jurisdiction around Iceland", and it was (as Barbados points out in paragraph 20 of the "Response of Barbados to Questions posed by Professor Orrego Vicuña and Professor Lowe on 21 October 2005 (Day 4) and 24 October 2005 (Day 5)") the interpretation of that specific provision that led the Court to proceed to comment on the factors to be taken into account in negotiations.

281. The other cases are also distinguishable from that before this Tribunal. The *Western Sahara* case (I.C.J. Reports 1975, p. 18) was an Advisory Opinion given by the International Court of Justice to the General Assembly, in which no question of prescribing a remedy could arise. The Determinations of the Commission in the *Eritrea-Ethiopia Boundary Commission* case cited by Barbados were explicitly tied to its power to take decisions "on any matter it finds necessary for the performance of its mandate to delimit and demarcate the boundary". The analogy in the present case would be with the consideration of fisheries activities in order to determine whether an adjustment to the provisional equidistance line is needed. There is no "necessity" for any action on fisheries access in order to implement the boundary that the Tribunal has decided upon. The relevance of the *Right of Passage* case (I.C.J. Reports 1960, p. 6) appears to be that the International Court of Justice there gave a decision other than that sought by the Applicant State, because the Applicant claimed a general right of passage over Indian territory and the Court found that the right of passage was confined to "civilian" traffic. That is, however, a case of the Court making a declaration of the rights claimed by the Applicant in terms more limited than those in which the claim had been presented: it is not at all of the same kind as the difference between declaring what the boundary line is and declaring that a right of access to fisheries within the EEZ of one of the parties exists. *Right of Passage* (I.C.J. Reports 1960, p. 6) is a true instance of a ruling *infra petita*.

282. That leaves the *Qatar v. Bahrain* case (I.C.J. Reports 2001, p. 40). In that case, the International Court of Justice did not award any relevant

remedy: it merely drew attention to legal provisions relevant to the position of the Parties as that position resulted from the boundary line drawn by the Court.

283. The Tribunal accordingly considers that it does not have jurisdiction to make an award establishing a right of access for Barbadian fishermen to flyingfish within the EEZ of Trinidad and Tobago, because that award is outside its jurisdiction by virtue of the limitation set out in UNCLOS Article 297(3)(a) and because, viewed in the context of the dispute over which the Tribunal does have jurisdiction, such an award would be *ultra petita*. Nonetheless, both Parties have requested that the Tribunal express a view on the question of Barbadian fishing within the EEZ of Trinidad and Tobago. Barbados has done so by requesting that the Tribunal "order a regime for non-exclusive fishing use". Trinidad and Tobago has done so by requesting the Tribunal "to find that there was no fishing by Barbados in the area claimed prior to the late 1970s".

284. In these circumstances the Tribunal believes that it is appropriate, nd will be helpful to the Parties, to follow the approach of the International Court of Justice in the *Qatar v. Bahrain* case (I.C.J. Reports 2001, pp. 112-113, para. 236 *et seq.*) and to draw attention to certain matters that are necessarily entailed by the boundary line that it has drawn.

285. It is common ground between the Parties that the flyingfish migrate through the waters of both Barbados and Trinidad and Tobago. UNCLOS Article 63(1) stipulates that:

> Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

286. It necessarily follows that Trinidad and Tobago and Barbados are under a duty "to agree upon the measures necessary to co-ordinate and ensure the conservation and development" of the flyingfish stocks.

287. Both Barbados and Trinidad and Tobago emphasised before the Tribunal their willingness to find a reasonable solution to the dispute over access to flyingfish stocks. The Deputy Prime Minister and Attorney-General for Barbados spoke at the opening of the hearing of Barbados' foreign policy being marked by an "assiduous pursuit of negotiated agreement". She said also that "Barbados indeed is looking within the framework of a maritime delimitation for a guarantee of continuing access" to flyingfish stocks in the waters off Tobago; and she drew attention to the dislocation that Barbadian fisherfolk and those dependent upon them would suffer if access ceased.

288. Trinidad and Tobago emphasised before the Tribunal its readiness to negotiate an access agreement with Barbados. The Attorney-General for Trinidad and Tobago said on the last day of the hearing:

> I say again in peremptory fashion that we are still prepared to negotiate a fisheries access agreement with Barbados. In the meantime, individuals, Barbadians and others, who wish to apply for individual licences under our archipelagic waters and exclusive economic zone legislation will be entitled to have their application considered on the merits.

289. The question whether the Barbadian fishing activity is artisanal in nature, and the question of the degree of dependence of Barbados upon fishing for flyingfish, are not material to the making or existence of these commitments, and it is unnecessary to comment upon those questions.

290. The Tribunal notes and places on record the commitments referred to in paragraphs 258, 287, and 288 above.

291. It is well established that commitments made by Agents of States before international tribunals bind the State, which is thenceforth under a legal obligation to act in conformity with the commitment so made.[26] This follows from the role of the Agent as the intermediary between the State and the tribunal.[27]

292. Accordingly, Trinidad and Tobago has assumed an obligation in the terms stated above. It is obliged to negotiate in good faith an agreement with Barbados that would give Barbados access to fisheries within the EEZ of Trinidad and Tobago, subject to the limitations and conditions spelled out in that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources within its jurisdiction. In these circumstances, the observations of the Tribunal in the *Lac Lanoux* case as to the reality and nature of an obligation to negotiate an agreement[28] are applicable.

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[26] See, e.g., *Dispute Concerning Filleting within the Gulf of St Lawrence* ("La Bretagne"), 82 I.L R. p. 591 (1986), at p. 637, para. 63(2); *Southern Bluefin Tuna*, ITLOS, Order of 27 August 1999, *Reports of Judgments, Advisory Opinions and Orders, Vol. 3* (1999), at paras. 83-84; *The MOX Plant Case*, ITLOS, Order of 3 December 2001, *Reports of Judgments, Advisory Opinions and Orders, Vol. 5* (2001), at paras. 78-80; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor*, Order of 8 October 2003, *Reports of Judgments, Advisory Opinions and Orders, Vol. 7* (2003), at paras. 76-81. See *Mavrommatis Jerusalem Concessions*, 1925 P.C.I.J. (Ser. A) No. 5, p. 37. See also the jurisprudence of the ICJ on unilateral declarations: *Nuclear Tests*, I.C.J. Reports 1974, p. 253, at pp. 267-270, paras. 42-52; *Frontier Dispute*, I.C.J. Reports 1986, p. 554, at p. 574, para. 40.

[27] See *Affaire des navires "Cape Horn Pigeon", "James Hamilton Lewis", "C.H. White" et "Kate and Anna" (Etats-Unis d'Amérique contre Russie), Sentence préparatoire, reprinted in* IX United Nations Reports of International Arbitral Awards (RIAA) p. 59, at pp. 60-61; *Georges Pinson (France) v. United Mexican States* (1928), *reprinted in* V RIAA p. 327, at pp. 355-356; Convention for the Pacific Settlement of International Disputes, The Hague (1907), art. 62.

[28] *Lac Lanoux Arbitration* (France v. Spain), 24 I.L.R. p. 101 (1957), at p. 128: "one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusal to take into consideration

293. The willingness of Trinidad and Tobago to negotiate an agreement on access to fisheries within its EEZ is consistent with its duties under UNCLOS as described above. The Tribunal expresses its hope that as a result of negotiations between Barbados and Trinidad and Tobago a satisfactory solution to the dispute over access to fisheries in the EEZ of Trinidad and Tobago, consonant with the principles set out in UNCLOS in relation to fisheries and to relations between neighbouring States, will quickly be found. It was said that the fisherfolk of Barbados and Trinidad and Tobago are not in competition because they fish in different areas and for different species: in such circumstances, it should be the more possible to find an agreed solution from which both States will benefit, without the gains of one being at the expense of the other.

Chapter VII

CENTRAL SEGMENT OF THE LINE: EQUIDISTANCE NOT DISPUTED

294. Following the western segment of the delimitation line, there is a central segment that extends from Point D of Barbados' claim to Point A of Trinidad and Tobago's claim. In this short segment of approximately 16 nm, the Parties do not argue for any adjustment of the provisional equidistance line in the light of any relevant circumstance. The equidistance line is accordingly agreed to in this segment, short as it may be.

Chapter VIII

DELIMITATION IN THE EAST

A. THE ENTITLEMENT TO MARITIME AREAS AND THE NATURE OF THE MARITIME BOUNDARY

295. It is not disputed that both Barbados and Trinidad and Tobago have a legal entitlement to a continental shelf and an EEZ in the east as a consequence of having coasts abutting upon those areas. The claims put forth by the Parties significantly overlap.

296. The Parties, however, disagree about the nature of the maritime boundary that will come to separate the areas which overlap. Barbados has requested the Tribunal to determine a single maritime boundary for the exclusive economic zones and continental shelves of the Parties. Trinidad and

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adverse proposals or interests, and, more generally, in cases of the violation of the rules of good faith".

Tobago objects to this request on the basis that the continental shelf and the EEZ are separate and distinct institutions, that there may therefore be different lines of delimitation for each, and that the Parties have not agreed to request delimitation by means of a single maritime boundary, as in its view is required.

297. In the present case, the question is largely theoretical because Trinidad and Tobago accepts that there is in fact no reason for the Tribunal to draw different boundary lines for the EEZ and the continental shelf within 200 nm of its own baselines. The Tribunal notes furthermore that the equidistance line running through the first and second segments described above is in fact a single maritime boundary that Trinidad and Tobago accepts in spite of its conceptual reservations. In Trinidad and Tobago's submissions, the need for a separate boundary line appears to be associated with its claim over the outer continental shelf beyond its 200-mile area. For reasons explained below, however, this last claim will be dealt with by the Tribunal in the context of the boundary line determined for the respective 200-mile areas of entitlement in respect of both the EEZ and the continental shelf.

298. The Tribunal will accordingly determine a single boundary line for the delimitation of both the continental shelf and the EEZ to the extent of the overlapping claims, without prejudice to the question of the separate legal existence of the EEZ and the continental shelf.

B. CRITERIA GOVERNING DELIMITATION: EQUIDISTANCE/RELEVANT CIRCUMSTANCES

299. Barbados and Trinidad and Tobago, as Parties to UNCLOS, both agree that Article 74(1) and Article 83(1) are the relevant provisions of UNCLOS governing the delimitation of the EEZ and the continental shelf, respectively (see footnotes 9 and 10 above).

300. The Parties further agree that delimitation is to be effected by resort to the equidistance/relevant circumstances method. The Parties also agree that the Tribunal should move from the hypothesis of a provisional equidistance line to a consideration of the question whether there are relevant circumstances that make departures from an equidistance line necessary to attain an equitable solution.

301. The Parties do, however, have differences about how the principles of delimitation should be applied in the present case. While Barbados asserts that the equidistance/relevant circumstances method is the proper method prescribed by international law, occasionally describing it as a rule, Trinidad and Tobago emphasizes that equidistance is not a compulsory method of delimitation and that there is no presumption that equidistance is a governing principle. The Tribunal considers that there are many different ways of applying the settled approach to delimitation described above. It is thus not surprising that while both Parties agree that the end result must be equitable, there are fundamental differences between them about what the relevant

circumstances are and about the extent and location of any adjustments that such circumstances may require.

302. These different approaches of the Parties are evident in the terms of the domestic legislation of the two States. Barbados' Marine Boundaries and Jurisdiction Act 1978 provided that, in the absence of an agreement with another State, "the outer boundary limit shall be the median line" (Section 3(3)). Trinidad and Tobago's Archipelagic Waters Act provided that delimitation "shall be determined by agreement between Trinidad and Tobago and the states concerned on the basis of international law in order to achieve an equitable solution" (Section 15).

303. The difference was marked by a 1992 Diplomatic Note to Barbados, in which Trinidad and Tobago affirmed that "it does not recognize the equidistance method of delimitation as being an obligatory method of delimitation and consequently rejects its applicability, save by express agreement, to a maritime boundary delimitation between Trinidad and Tobago and Barbados…in the Caribbean Sea and Atlantic Ocean".

304. As noted above, the equidistance/relevant circumstances method is the method normally applied by international courts and tribunals in the determination of a maritime boundary. The two-step approach described in paragraph 242 above results in the drawing of a provisional equidistance line and the consideration of a subsequent adjustment, a process the International Court of Justice explained as follows:

> The most logical and widely practised approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances (*Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40, at p. 94, para. 176).

305. While occasionally there has been a distinction made between the equidistance/relevant circumstances method applied to the delimitation of the territorial sea and the approaches characterising the delimitation of the EEZ and the continental shelf under the UNCLOS Articles 74 and 83, which rely more explicitly on equitable principles and the role of relevant circumstances in their identification, in the end, as concluded by the International Court of Justice, they are both very similar processes, in view of the common need to ensure an equitable result (*Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303, at p. 441, para. 288).

306. The Tribunal notes that while no method of delimitation can be considered of and by itself compulsory, and no court or tribunal has so held, the need to avoid subjective determinations requires that the method used start with a measure of certainty that equidistance positively ensures, subject to its subsequent correction if justified. A different method would require a well-founded justification and neither of the Parties has asked for an alternative method. As a domestic tribunal applying international law has explained,

> In the context of opposite coasts and latterly adjacent coasts as well, it has become normal to begin by considering the equidistance line and possible adjustments, and to adopt some other method of delimitation only if the circumstances justify it. (*Newfoundland v. Nova Scotia*, Award of the Tribunal in the Second Phase, 26 March 2002, para. 2.28.)

307. The Tribunal is therefore satisfied that the delimitation method discussed ensures both the need for certainty and the consideration of such circumstances that might be relevant for an equitable solution. Technical experts of the Parties have also been in agreement about the identification of the appropriate base points and the methodology to be used to this effect.

C. DIFFERENT SECTORS AND RELEVANT COASTS DISTINGUISHED

308. Trinidad and Tobago maintains that to effect the delimitation in this dispute it is necessary to distinguish between two different geographical areas. The first is described as the "Caribbean sector" and the second as the "Atlantic sector". The former lies between the islands of Barbados and Tobago and extends from the tri-point where the boundaries of the Parties meet with that of Saint Vincent and the Grenadines to Point A, which serves in Trinidad and Tobago's claim as the appropriate turning point of the equidistance line. The "Atlantic sector" is that facing the broad Atlantic Ocean.

309. In Trinidad and Tobago's view, the "Caribbean sector" is characterized by short coastlines of the Parties that are opposite to each other, while the "Atlantic sector" involves a vast open ocean where the coasts of the Parties are in a situation of adjacency rather than oppositeness. According to this argument, different criteria should apply to the delimitation of each sector, equidistance being the appropriate method only in the Caribbean sector. Trinidad and Tobago, however, had not made this distinction in the diplomatic Note referred to above, which opposed equidistance, both in the Caribbean Sea and the Atlantic Ocean.

310. Trinidad and Tobago invokes in justification of its approach the decisions of international courts and tribunals distinguishing between different sectors of the relevant waters in the cases before them for the purpose of delimitation (*North Sea Continental Shelf* cases, I.C.J. Reports 1969, p. 4; *Anglo-French* arbitration, 54 I.L.R. p. 6; *Gulf of Maine*, I.C.J. Reports 1984, p. 246; *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40), as well as a report of the International Hydrographic Organization describing the eastern limit of the Caribbean Sea (*Limits of Oceans and Seas* (International Hydrographic Organization, 3rd ed. 1953)).

311. Barbados argues that, on the contrary, the relevant coasts of the two States are at all times in a situation of oppositeness and that there is no justification for making a distinction between Caribbean and Atlantic sectors. It is further asserted that the principle of equidistance is applicable to the

drawing of the whole of the delimitation line, and that all of the relevant basepoints in Trinidad and Tobago lie on the coast of Tobago, so that the island of Trinidad has no influence on the course of the delimitation.

312. In Barbados' view, adjacency is associated with the idea of proximity and this finds no support in the geographical context of this dispute, where Barbados lies almost 116 nm from Tobago. So too, Barbados argues, the decisions of international courts and tribunals invoked by Trinidad and Tobago are entirely distinguishable from this dispute as the parties in those cases were separated by rather narrow waters or other geographical features that opened to the vast ocean beyond a certain point, a situation not obtaining in this case where waters are at all times open. Nor, it is further asserted, does the report of the International Hydrographic Organization on the nomenclature of waters in the region have legal relevance.

313. The Tribunal does not find the distinction between the "Caribbean sector" and the "Atlantic sector" persuasive in the light of the geographical characteristics of the disputed area. There are no waters that could be described as a narrow strip, a corridor or a channel, nor is there a bay that at some point opens up to the ocean. In this respect, the geographical features of the area in dispute in this case are very different from the confined area where delimitation was effected in the North Sea, as they are also different from the spatial relationship between the English Channel and the Western Approaches or the narrow waters involved in a sector of the *Qatar v. Bahrain* dispute (I.C.J. Reports 2001, p. 40). The geographical features in the present case are also very different from those in the Gulf of Maine and its opening towards the Atlantic, and the spatial relationship between the Parties' coasts is not interrupted by any narrowness or cape or protuberance.

314. Nor does the report by the International Hydrographic Organization constitute a convincing reason for distinguishing between maritime sectors based upon its definitions of the "Caribbean" and the "Atlantic". This report was not intended to be used as a basis for delimitation or for any specific attribution of rights; it was simply an effort to identify broad geographical denominations, no more precise than the distinctions between the Eastern, Central and Western Pacific.

315. The Tribunal notes, moreover, that the applicable law under UNCLOS is the same in either case: Articles 74 and 83 do not distinguish between opposite and adjacent coasts. It follows that there is no justification to approach the process of delimitation from the perspective of a distinction between opposite and adjacent coasts and apply different criteria to each, which in essence is the purpose of the two sectors argument.

316. It is quite true, as Trinidad and Tobago has argued, that the further out in the Atlantic one goes, the more the waters in dispute appear to be in a lateral position, but what governs the delimitation essentially are the geographical elements which are at its origin, close to land, and not at its end, except where, as in the Gulf of Maine, the delimitation line might be affected

by a major geographical feature further towards the open sea. Otherwise there would be no delimitation that could withstand the effect of distance and, as the *Gulf of Maine* Chamber noted in connection with a comparable argument made in that case, the continuity of the line is the inevitable expression of the principle that the "land dominates the sea" (I.C.J. Reports 1984, p. 246, at p. 338, para. 226). This is why the distinction between opposite and adjacent coasts, while relevant in limited geographical circumstances, has no weight where the delimitation is concerned with vast ocean areas.

317. This finding of the Tribunal does not mean however that the equidistance line is an absolute line that is not subject to adjustment. As explained above, the essence of the method normally followed in international practice is that the equidistance line is only a provisional line which serves as the starting point for the consideration of relevant circumstances that might require its adjustment in order to achieve the equitable solution that the law requires. The maritime boundary is the outcome of various checks made in connection with the provisional line in the light of the specific circumstances that are relevant to the disposition of the dispute.

318. Several issues raised by Trinidad and Tobago in connection with the distinction between the two sectors that it proposes are in fact matters to be examined in the light of those specific circumstances, with particular reference to the question of the relevant coasts to be considered and the basepoints to be used in the delimitation. These the Tribunal addresses below.

D. TRINIDAD AND TOBAGO'S CLAIM IN THE EAST

319. The provisional equidistance line of delimitation extends in the east from Point A of Trinidad and Tobago's claim to Point E of Barbados' claim, where it ends. This is the area where Trinidad and Tobago claims a major adjustment of the equidistance line to the north as from Point A.

320. Trinidad and Tobago invokes three principal relevant circumstances that in its view justify the adjustment of the equidistance line it claims in the east: the projection of the relevant coasts and the avoidance of any cut-off effect or encroachment; the proportionality of relevant coastal lengths; and the regional implications of the delimitation. The Tribunal will examine these circumstances in turn.

1. The Relevant Coasts and Their Projection

321. Trinidad and Tobago argues that to effect delimitation, coasts should be taken to project frontally in the direction in which they face, as held by the arbitration tribunal in the case of *St. Pierre et Miquelon* (95 I.L.R. p. 645). The line delimiting the competing claims, it is further argued, should be drawn so far as possible so as to avoid "cutting-off" any State from its maritime projection under the principle of non-encroachment, applied by international courts and tribunals on several occasions (*North Sea Continental*

Shelf cases, I.C.J. Reports 1969, p. 4; *Libya/Malta*, I.C.J. Reports 1985, p. 1; *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 303).

322. The fact that, on its view, its coasts project eastward into the Atlantic leads Trinidad and Tobago to conclude that this constitutes a relevant circumstance strong enough to alter the direction of the provisional equidistance line as from Point A, because an equidistance line would result in the cut-off effects that the delimitation should avoid as far as possible.

323. Barbados, while accepting the need to identify relevant coasts in order to effect delimitation, argues that the geographical situation does not support Trinidad and Tobago's conclusions. The coasts invoked by Trinidad and Tobago, except for those contributing basepoints to the drawing of the equidistance line, do not in Barbados' view abut upon the disputed area because they all face in a southeasterly direction actually pointing away from the overlapping area in dispute.

324. In any event, Barbados asserts that the equidistance line would in no way result in a cut-off effect on the continental shelf and EEZ of Trinidad and Tobago, which would extend more than 190 nm until their terminus at the tri-point with Guyana. If every coastal frontage were necessarily to be given unobstructed access to the open ocean, Barbados also argues, this would result in delimitation ignoring the entitlements of other States and therefore the configuration of coasts would become irrelevant.

325. The Parties also disagree about the role of basepoints in effecting delimitation in this case. Barbados argues that the relevant basepoints are those coastal points that contribute to the equidistance line, and that the coastline to be taken into account in considering matters such as the respective coastal lengths of the Parties is only that part of the coastline on which the relevant basepoints lie. Trinidad and Tobago, on the other hand, is of the view that a broader concept of relevant coastlines ought to be applied in considering matters such as the respective coastal lengths of the Parties.

326. In Trinidad and Tobago's view, five miles of opposite coasts between the Parties cannot determine the fate of hundreds of miles of maritime boundary. Trinidad and Tobago measures its eastward-facing coastal frontage as 74.9 nm and that of Barbados as 9.2 nm, resulting in a ratio of 8.2:1. Barbados, while contesting these measurements, for its part asserts that Trinidad and Tobago cannot purport to use its archipelagic baselines to support entitlement to the areas in question or to buttress arguments concerning the disparity of the respective coastal frontages.

327. The Tribunal finds no difficulty in concluding that coastal frontages are a circumstance relevant to delimitation and that their relative lengths may require an adjustment of the provisional equidistance line. The International Court of Justice held in *Jan Mayen* that "the differences in length of the respective coasts of the Parties are so significant that this feature must be taken into account during the delimitation operation…" (I.C.J. Reports 1993,

p. 38, at p. 68, para. 68). Adjustments have also been allowed in accordance with this principle in other decisions, notably the *Gulf of Maine* (I.C.J. Reports 1984, p. 246) and *Libya/Malta* (I.C.J. Reports 1985, p. 13), albeit to a limited extent.

328. However, as was observed above (paragraph 236) this does not require the drawing of a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines. Although mathematically certain, this would in many cases lead to an inequitable result. Delimitation rather requires the consideration of the relative lengths of coastal frontages as one element in the process of delimitation taken as a whole. The degree of adjustment called for by any given disparity in coastal lengths is a matter for the Tribunal's judgment in the light of all the circumstances of the case.

329. The Tribunal is not persuaded by arguments that would give basepoints a determinative role in determining what the relevant coastal frontages are. Basepoints contributing to the calculation of the equidistance line are technically identifiable and have been identified in this case. To this extent, such basepoints have a role in effecting the delimitation and in the drawing of the provisional equidistance line. But relevant coastal frontages are not strictly a function of the location of basepoints, because the influence of coastlines upon delimitation results not from the mathematical ratios discussed above or from their contribution of basepoints to the drawing of an equidistance line, but from their significance in attaining an equitable and reasonable outcome, which is a much broader consideration.

330. Barbados has argued that, except for those basepoints affecting the equidistance line, Trinidad and Tobago's coastline has for the most part a southeasterly orientation facing away from the disputed area, and that this coastline could not be taken into account without refashioning nature and disregarding the actual geographical orientation of the whole territory of Trinidad and Tobago. Such coastlines, in Barbados' view, do not meet the requirements of a coastal frontage relevant to delimitation.

331. However, if coastal frontages are viewed in the broader context referred to above, what matters is whether they abut as a whole upon the disputed area by a radial or directional presence relevant to the delimitation, not whether they contribute basepoints to the drawing of an equidistance line. In this connection, the island of Trinidad has a not insignificant coastal frontage which clearly abuts upon the disputed area, and this is also true of the coastline of the island of Tobago. Some of these coastal frontages even have a clearly easterly orientation. These frontages are indeed a relevant circumstance to be taken into account in the adjustment of the equidistance line.

332. The Tribunal must also note that the differences between the Parties in respect of coastal orientation and its influence on the delimitation seem to stem to a large extent from the fact that each is envisaging a different

geographical element as the basis of its conclusion. Barbados examines the orientation arising from Trinidad and Tobago's archipelagic baselines and in this perspective the orientation is indeed a southeasterly one. Trinidad and Tobago relies on the actual presence of the bulk of its coastline, irrespective of the archipelagic baselines.

333. The Parties have quite naturally shaped their arguments to support their respective claims but in doing so, contradictions become apparent. Barbados asserts that archipelagic basepoints cannot be used for calculating the equidistance line, yet archipelagic baselines are used by it for concluding that Trinidad and Tobago's coastal frontages are orientated towards the southeast. Trinidad and Tobago claims to the contrary that its archipelagic baselines can be counted as basepoints for the drawing of the equidistance line and other effects, but that such baselines are not to be used for determining the coastal orientation.

334. The Tribunal's conclusion in this connection is that the orientation of coastlines is determined by the coasts and not by baselines, which are only a method to facilitate the determination of the outer limit of the maritime zones in areas where the particular geographical features justify the resort to straight baselines, archipelagic or otherwise. In this perspective, the Tribunal must also conclude that broad coastal frontages of the island of Trinidad and of the island of Tobago as well as the resulting disparity in coastal lengths between the Parties, are relevant circumstances to be taken into account in effecting the delimitation as these frontages are clearly abutting upon the disputed area of overlapping claims.

2. Proportionality as a Relevant Circumstance

335. The second circumstance invoked by Trinidad and Tobago as relevant to the adjustment of the equidistance line is proportionality. According to Trinidad and Tobago's estimates, the adjustment claimed by it leads to 49% of the overlapping EEZ entitlements being attributed to Barbados and 51% attributed to Trinidad and Tobago, a result that it considers equitable in the light of the test of proportionality and thus consistent with UNCLOS Article 74. Proportionality in this argument is related to and is a function of the coastal lengths and relevant frontages discussed above, as these frontages are those producing entitlement to the areas to be attributed.

336. In Barbados' view, the fact that a delimitation line might be found to be inequitable because it results in a disproportionate division of the disputed area does not mean that proportionality can be used as an independent method of delimitation and hence it cannot by itself produce a boundary line or require a proportional division of the area where claims overlap. As has been noted, Barbados also opposes Trinidad and Tobago's identification of the relevant coastal frontages and the relevance of coastal lengths to effect delimitation, thus also disagreeing about their eventual role in the test of proportionality.

337 The Tribunal has explained above the meaning that the principle of proportionality has in maritime delimitation as developed by the decisions of international courts and tribunals. In the light of such considerations, the Tribunal concludes that proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determinations in the attribution of maritime areas. The role of proportionality, as noted, is to examine the final outcome of the delimitation effected, as the final test to ensure that equitableness is not contradicted by a disproportionate result.

338. The Tribunal will thus not resort to any form of "splitting the difference" or other mathematical approaches or use ratio methodologies that would entail attributing to one Party what as a matter of law might belong to the other. It will review the effects of the line of delimitation in the light of proportionality as a function of equity after having taken into account any other relevant circumstance, most notably the influence of coastal frontages on the delimitation line.

3. Regional Considerations as a Relevant Circumstance

339. The third circumstance invoked by Trinidad and Tobago as relevant to the justification of its claim is the effect of the delimitation for the region as a whole.

340. Just as the tribunal in *Guinea/Guinea-Bissau* held that an equitable delimitation cannot ignore other delimitations already made or still to be made in the region (*Guinea/Guinea-Bissau*, 77 I.L.R. p. 635, at p. 682, para. 104), so too, Trinidad and Tobago asserts, the delimitation between Trinidad and Tobago and Venezuela in the region south of Barbados and that between France (Guadeloupe and Martinique) and Dominica in the region north of Barbados need to be considered in this dispute as they entail a recognition of a departure from the equidistance line in order to avoid a cut-off effect.

341. Trinidad and Tobago explains that one purpose of the 1990 Trinidad-Venezuela Agreement is to allow Venezuela access to the Atlantic *("salida al Atlántico")*, an access that would be impeded by an equidistance line delimitation between Trinidad and Tobago and Barbados in that area. Trinidad and Tobago further explains that Point A on the delimitation line it proposes in the present case, and the vector it claims in respect of delimitation with Barbados, discussed below, also find a justification in the contribution that they make to facilitation of the *"salida al Atlántico"*.

342. Trinidad and Tobago also invokes to this effect the Agreement of 7 September 1987 between France (Guadeloupe and Martinique) and Dominica where a tentative equidistance line was adjusted to avoid a cut-off effect and prevent Dominica and Martinique being deprived of an outlet to the Atlantic.

343. Barbados argues, to the contrary, that the *Guinea/Guinea-Bissau* decision (77 I.L.R. p. 635) has a different significance since it concerned geographical and historical circumstances entirely different from those relevant to this dispute. Yet, not even in that different context did the arbitral tribunal purport to formulate a rule of delimitation requiring that "regional implications" be taken into account. Nor does the France (Guadeloupe and Martinique) agreement with Dominica have any relevance, Barbados further argues, since the EEZ of Dominica resulting from the adjustment is still encircled by that of France and does not extend as far as the open Atlantic. Similarly, Barbados asserts, the 1990 Trinidad-Venezuela Agreement cannot validly provide Venezuela with a corridor out to the Atlantic as such a corridor would impinge upon the maritime entitlements of third countries.

344. The Tribunal must in the first place rule out any effect, influence, or relevance of the agreement between France (Guadeloupe and Martinique) and Dominica. It has no connection at all to the present dispute, direct or indirect.

345. The position in respect of the 1990 Trinidad-Venezuela Agreement is different. This treaty, while not binding on Barbados, does establish the southern limit of Trinidad and Tobago's entitlement to maritime areas. Trinidad and Tobago has so argued before the Tribunal and various maps it has introduced in evidence clearly indicate the Trinidad and Tobago-Venezuela delimitation line as the agreed maritime boundary between the two countries (*i.e.* Trinidad and Tobago's claim line, illustrated in Figure 7.5 of Trinidad and Tobago's Counter-Memorial, reproduced as Map II and referred to above at paragraph 64). Trinidad and Tobago has described this delimitation line as one that "involved a northwards shift in the median line between Trinidad and Tobago and Venezuela" (*i.e*. a shift which was adverse to Trinidad and Tobago).

346. The Tribunal is not concerned with the political considerations that might have led the Parties to conclude the 1990 Trinidad-Venezuela Agreement, and certainly Barbados cannot be required to "compensate" Trinidad and Tobago for the agreements it has made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago. By its very terms, the treaty does not affect the rights of third parties. Article II(2) of the treaty states in fact that "no provision of the present Treaty shall in any way prejudice or limit…the rights of third parties". The treaty is quite evidently *res inter alios acta* in respect of Barbados and every other country.

347. The Tribunal, however, is bound to take into account this treaty, not as opposed in any way to Barbados or any other third country, but in so far as it determines what the maritime claims of Trinidad and Tobago might be. The maritime areas which Trinidad and Tobago has, in the 1990 Trinidad-Venezuela Agreement, given up in favour of Venezuela do not any longer appertain to Trinidad and Tobago and thus the Tribunal could not draw a delimitation line the effect of which would be to attribute to Trinidad and

Tobago areas it no longer claims. Nor has this been requested by Trinidad and Tobago.

348. It follows that the maximum extent of overlapping areas between the Parties is determined in part by the treaty between Trinidad and Tobago and Venezuela, in so far as far as Trinidad and Tobago's claim is concerned. This the Tribunal will take into account in determining the delimitation line.

349. Barbados has also invoked the Barbados/Guyana Joint Cooperation Zone Treaty as a relevant circumstance influencing the delimitation between Barbados and Trinidad and Tobago. This other treaty, however, is also *res inter alios acta* in respect of Trinidad and Tobago and as such could not influence the delimitation in the present dispute, except in so far as it would reflect the limits of Barbados' maritime claim.

E. THE ADJUSTMENT OF THE EQUIDISTANCE LINE: TRINIDAD AND TOBAGO'S CLAIMED TURNING POINT

350. The Tribunal has concluded above that there are in this case relevant circumstances that justify the adjustment of the equidistance line and has identified their meaning. The disparity of the Parties' coastal lengths resulting in the coastal frontages abutting upon the area of overlapping claims is sufficiently great to justify an adjustment. Whether this adjustment should be a major one or a limited one is the question the Tribunal must now address.

351. Trinidad and Tobago has identified Point A of its claim as the turning point for the adjustment claimed, in the belief that all the circumstances it has argued as relevant to the delimitation justify a major adjustment as from that point.

352. Trinidad and Tobago explains that the rationale for Point A is that it is the "last point on the equidistance line which is controlled by points on the south-west coast of Barbados". In Trinidad and Tobago's view, Point A is thus the appropriate turning point as it separates the area in which delimitation is between opposite coasts from that where coasts are adjacent. To the east of that point, it says, only the adjacent eastern coastal frontages of the Parties influence the line; and those frontages generate a ratio of coastline lengths of 8.2:1 in favour of Trinidad and Tobago.

353. The adjusted line claimed by Trinidad and Tobago then proceeds along a constant azimuth of 88° from Point A to the outer limit of the EEZ of Trinidad and Tobago (Point B).

354. Barbados is of the view that no adjustment of the equidistance line is necessary and that in particular, Point A has been calculated by a reference to basepoints that has no justification, as there is no coastal adjacency involved in this case. But even if there were a situation of adjacency,

Barbados asserts, any necessary adjustment would turn the equidistance line south, not north.

355. The Tribunal has found above that there is no justification for distinguishing between opposite and adjacent coasts as the equidistance line moves outward but that a deviation from that line might be justified at some point in the light of the relevant circumstances.

356. Point A has been described by Trinidad and Tobago as being "not far north of the most northerly point of the territorial sea around Tobago". The Tribunal finds in this respect that the territorial sea, or for that matter baselines, have no role in the determination of what is a relevant coast, and the Tribunal does not consider that the relationship of Point A to the territorial sea around Tobago is a sufficient reason for using Point A as a turning point for an adjustment of the delimitation line.

357. Moreover, geography does not support this contention as Point A is situated far north of any relevant coastal frontage. The projection of the coastal frontages of the island of Trinidad and of the island of Tobago comes nowhere near Point A and only becomes relevant to the delimitation much further southeast.

358. Trinidad and Tobago's argument is inextricably linked to the method it uses to determine its relevant frontage. To this end, Trinidad and Tobago has constructed a north-south vector of 69.1 nm in length along what it considers to be its east-facing coastal frontage. This vector is then placed at the outer limit of the claimed EEZ (Point B), which lies 68.3 nm from the intersection of Trinidad and Tobago's EEZ with the Barbados-Guyana equidistance line. As the two distances are comparable, Trinidad and Tobago argues, the vector gives full effect to the claimed coastal frontage using Point A as the turning point.

359. Barbados has argued that the vector used in this way by Trinidad and Tobago does not follow the actual orientation of Trinidad and Tobago's coastline but is drawn on a north-south axis, and that to transpose this north-south vector to the outer limit of the EEZ results in a maximalist claim that has no justification.

360. The Tribunal concludes on this question not only that the "relevant circumstances" provide no justification for the use of Point A as a turning point, but also that the vector approach itself is untenable as a matter of law and method. In fact, such an approach entails projecting straight out the whole coastline, while at the same time moving the projection northwards, without regard to the geographical circumstances the Tribunal considers relevant, and then using the northern limit of that projection as the delimitation line with Barbados. Equidistance and relevant circumstances are simply discarded so as to favour a wholly artificial construction.

F. ACQUIESCENCE AND ESTOPPEL NORTH OF THE EQUIDISTANCE LINE

361. Barbados contends that Trinidad and Tobago is prevented from claiming an adjustment of the equidistance line to the north because Trinidad and Tobago has consistently recognised and acquiesced in Barbados' exercise of sovereignty in the area. Barbados asserts that it has conducted hydrocarbon activities in the area since 1978, particularly in the form of seismic surveys and oil concessions, and that the area has been regularly patrolled by its Coast Guard, and that at no time before 2001 did Trinidad and Tobago protest against these activities.

362. Trinidad and Tobago asserts on its part that no significant activities have been conducted by Barbados in the area north of the equidistance line in the Atlantic, and that such activity as has taken place has been concentrated in the vicinity of Barbados' land territory. In Trinidad and Tobago's view, if there has been any activity at all, it has certainly not been on the scale of the extensive exploration that Barbados suggests. In any event, it is further argued, the equidistance method of delimitation, as noted above, was objected to by Trinidad and Tobago by Diplomatic Note of 1992, which was followed in 2001 by Notes specifically protesting the actual or potential grant of concessions in this area by Barbados. Trinidad and Tobago also claims to have exercised jurisdiction north of the equidistance line in connection with a proposed seismic shoot in 2003.

363. In examining the record of this case, the Tribunal does not find activity of determinative legal significance by Barbados in the area claimed by Trinidad and Tobago north of the equidistance line. Seismic surveys sporadically authorised, oil concessions in the area and patrolling, while relevant do not offer sufficient evidence to establish estoppel or acquiescence on the part of Trinidad and Tobago. Nor, on the other hand, is there proof of any significant activity by Trinidad and Tobago relevant to the exercise of its own claimed jurisdiction north of the equidistance line.

364. Moreover, Trinidad and Tobago's argument to the effect that, as held by the International Court of Justice in *Cameroon v. Nigeria* (I.C.J. Reports 2002, p. 303), oil wells are not in themselves to be considered as relevant circumstances, unless based on express or tacit agreement between the parties, finds application in this context. While the issue of seismic activity was regarded as significant by the International Court of Justice in the *Aegean Sea* case (I.C.J. Reports 1976, p. 3), the context of that decision on an application for provisional measures is not pertinent to the definitive determination of a maritime boundary.

365. The fact that in 1978 Barbados enacted legislation providing that in the absence of agreement with a neighboring State the boundary of its EEZ would be the equidistance line does not result in any form of recognition of, or

acquiescence in, the equidistance line as a definitive boundary by any neighbouring State.

366. The Tribunal accordingly does not consider that the activities of either Party, or the responses of each Party to the activities of the other, themselves constitute a factor that must be taken into account in the drawing of an equitable delimitation line.

G. TRINIDAD AND TOBAGO'S CLAIM TO AN OUTER CONTINENTAL SHELF

367. Trinidad and Tobago principally justifies its claim to the adjustment of the equidistance line on the ground of an entitlement to a continental shelf out to the continental margin defined in accordance with UNCLOS Article 76(4)-(6). To this end, Trinidad and Tobago argues that its continental shelf extends to an area beyond 200 nm from its own baselines that lie within, and beyond, Barbados' 200 nm EEZ so as to follow on uninterruptedly to the outer limit of the continental margin. Trinidad and Tobago asserts that its rights to the continental shelf cannot be trumped by Barbados' EEZ.

368. The Tribunal has concluded above that it has jurisdiction to decide upon the delimitation of a maritime boundary in relation to that part of the continental shelf extending beyond 200 nm. As will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nm. The problems posed by the relationship in that maritime area of CS and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.

H. THE ADJUSTMENT OF THE EQUIDISTANCE LINE

369. Because the Tribunal has found that there should be no adjustment of the equidistance line at Point A of Trinidad and Tobago's claim, the equidistance line continues unbent in its southeasterly direction further out to the ocean. This does not mean, however, that the line will not be subject to an adjustment further out.

370. The Tribunal has found above that the provisional equidistance line needs to be examined in the light of the circumstances that might be relevant to attain the equitable solution called for by UNCLOS Articles 74 and 83.

371. While the Tribunal has found that regional circumstances do not have a role to play in this delimitation, except to the extent that the area to which one party maintains a claim is determined by agreements it has made with a third country in the region, there is one relevant circumstance invoked

by Trinidad and Tobago that does indeed have such a role and which needs to be taken into consideration in order to determine whether it is necessary to adjust the equidistance line and, if so, where and to what extent.

372. This relevant circumstance is the existence of the significant coastal frontage of Trinidad and Tobago described above. This particular coastal frontage abuts directly upon the area subject to delimitation and it would be inequitable to ignore its existence. Just as opposite coasts have influenced the orientation of the line from its starting point for a significant distance out to the sea, so too a lengthy coastal frontage abutting directly upon such area is to be given a meaningful influence in the delimitation to be effected. The mandate of UNCLOS Articles 74 and 83 to achieve an equitable result can only be satisfied in this case by the adjustment of the equidistance line.

373. There is next the question of where precisely the adjustment should take place. There are no magic formulas for making such a determination and it is here that the Tribunal's discretion must be exercised within the limits set out by the applicable law. The Tribunal concludes that the appropriate point of deflection of the equidistance line is located where the provisional equidistance line meets the geodetic line that joins (a) the archipelagic baseline turning point on Little Tobago Island with (b) the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal's delimitation line as "10", is situated at 11° 03.70'N, 57° 58.72'W. This point gives effect to the presence of the coastal frontages of both the islands of Trinidad and of Tobago thus taking into account a circumstance which would otherwise be ignored by an unadjusted equidistance line.

374. The delimitation line is then drawn from this point in a straight line in the direction of its terminal point, which is located at the point of intersection of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit. This point, described in the Tribunal's delimitation line as "11", has an approximate geographic coordinate of 10° 58.59'N, 57° 07.05'W. The terminal point is where the delimitation line intersects the Trinidad and Tobago-Venezuela agreed maritime boundary, which as noted establishes the southernmost limit of the area claimed by Trinidad and Tobago. This terminal point marks the end of the single maritime boundary between Barbados and Trinidad and Tobago and of the overlapping maritime areas between the Parties.

375. In effecting this adjustment the Tribunal has been mindful that, as far as possible, there should be no cut-off effects arising from the delimitation and that the line as drawn by the Tribunal avoids the encroachment that would result from an unadjusted equidistance line.

376. The Tribunal having drawn the delimitation line described above, it remains to examine the outcome in the light of proportionality, as the ultimate test of the equitableness of the solution. As has been explained,

proportionality is not a mathematical exercise that results in the attribution of maritime areas as a function of the length of the coasts of the Parties or other such ratio calculations, an approach that instead of leading to an equitable result could itself produce inequity. Proportionality is a broader concept, it is a sense of proportionality, against which the Tribunal can test the position resulting from the provisional application of the line that it has drawn, so as so[*] avoid gross disproportion in the outcome of the delimitation.

377. In reaching this conclusion the Tribunal is mindful of the observation of the Chamber of the International Court of Justice in the *Gulf of Maine* case that "maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction" (I.C.J. Reports 1984, p. 323, at para. 185).

378. In examining the provisional equidistance line in the light of that sense of proportionality, the Tribunal finds that a provisional equidistance line influenced exclusively by short stretches of coasts that are opposite to each other cannot ignore the influence of a much larger relevant coastline constituting coastal frontages that are also abutting upon the area of delimitation. While not a question of the ratio of coastal lengths, it would be disproportionate to rely on the one and overlook the other as if it did not exist. Equity calls for the adjustment of the equidistance line on this basis as well.

379. The Tribunal is also satisfied that the deflection effected does not result in giving effect to the relevant coastal frontages in a manner that could itself be considered disproportionate, as would be the case if the coastal frontages in question were projected straight out to the east. The bending of the equidistance line reflects a reasonable influence of the coastal frontages on the overall area of delimitation, with a view to avoiding reciprocal encroachments which would otherwise result in some form of inequity.

380. In the light of the foregoing analysis, the Tribunal concludes that the maritime boundary between Barbados and Trinidad and Tobago shall run as depicted in the map on the facing page. Map V[*] is illustrative of the line of maritime delimitation; the precise, governing coordinates are set forth below and are explicated in the Appendix to the Award.

381. The verbal description of the maritime boundary is as follows. The delimitation shall extend from the junction of the line that is equidistant from the low water line of Barbados and from the nearest turning point of the

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[*] Secretariat note: [*sic*]

[*] Secretariat note: See map V in the back pocket of this volume.

archipelagic baselines of Trinidad and Tobago with the maritime zone of a third State that is to the west of Trinidad and Tobago and Barbados. The line of delimitation then proceeds generally south-easterly as a series of geodetic line segments, each turning point being equidistant from the low water line of Barbados and from the nearest turning point or points of the archipelagic baselines of Trinidad and Tobago until the delimitation line meets the geodetic line that joins the archipelagic baseline turning point on Little Tobago Island with the point of intersection of Trinidad and Tobago's southern maritime boundary, as referred to in paragraph 374 above, with its 200 nm EEZ limit. The boundary then continues along that geodetic line to the point of intersection just described.

382. The coordinates of the delimitation line are as follows.

1. The delimitation line is a series of geodetic lines joining the points in the order listed:

2. 12° 19.56'N, 60° 16.55'W
3. 12° 10.95'N, 59° 59.53'W
4. 12° 09.20'N, 59°56.11'W
5. 12° 07.32'N, 59° 52.76'W
6. 11° 45.80'N, 59° 14.94'W
7. 11° 43.65'N, 59° 11.19'W
8. 11° 32.89'N, 58°51.43'W
9. 11° 08.62'N, 58° 07.57'W
10. 11° 03.70'N, 57° 58.72'W
11. Point #11 is the junction of Trinidad and Tobago's southern maritime boundary with its 200 nm EEZ limit, which has an approximate geographic coordinate of: 10° 58.59'N, 57° 07.05'W (reference is made to paragraph 13 of the attached Technical Report of the Tribunal's Hydrographer).

2. The delimitation line extends from Point #2 listed above, along the geodetic line with an initial azimuth of 297° 33'09" until it meets the junction with the maritime zone of a third State, that junction point being Point #1 of this Decision.

3. The geographic coordinates and azimuths are related to the World Geodetic System 1984 (WGS-84) geodetic datum.

4. Geographic coordinate values have been rounded off to 0.01 minutes at the request of the Parties to reflect the accuracy of the points along the low water line and of the turning points of the archipelagic baselines.

383. For the sake of a fuller understanding of the import of the Tribunal's Award, the map facing (Map VI)* shows the relevant lines, including that of the southern maritime boundary of Trinidad and Tobago as described in paragraph 6 of the Technical Report accompanying this Award.

DISPOSITIF

384. For the reasons stated in paragraphs 188-218 of this Award, the Tribunal holds that it has jurisdiction in these terms:

> (i) it has jurisdiction to delimit, by the drawing of a single maritime boundary, the continental shelf and EEZ appertaining to each of the Parties in the waters where their claims to these maritime zones overlap;
>
> (ii) its jurisdiction in that respect includes the delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm; and
>
> (iii) while it has jurisdiction to consider the possible impact upon a prospective delimitation line of Barbadian fishing activity in waters affected by the delimitation, it has no jurisdiction to render a substantive decision as to an appropriate fisheries regime to apply in waters which may be determined to form part of the Trinidad and Tobago's EEZ.

385. Accordingly, taking into account the foregoing considerations and reasons,

> THE TRIBUNAL UNANIMOUSLY FINDS THAT
>
> 1. The International Maritime Boundary between Barbados and the Republic of Trinidad and Tobago is a series of geodetic lines joining the points in the order listed as set forth in paragraph 382 of this Award;
>
> 2. Claims of the Parties inconsistent with this Boundary are not accepted; and
>
> 3. Trinidad and Tobago and Barbados are under a duty to agree upon the measures necessary to co-ordinate and ensure the conservation and development of flyingfish stocks, and to negotiate in good faith and conclude an agreement that will accord fisherfolk of Barbados access to fisheries within the Exclusive Economic

* Secretariat note: See map VI in the back pocket of this volume.

Zone of Trinidad and Tobago, subject to the limitations and conditions of that agreement and to the right and duty of Trinidad and Tobago to conserve and manage the living resources of waters within its jurisdiction.

Done at The Hague, this 11th day of April 2006,

(*Signed)* Judge Stephen M. Schwebel
President

(*Signed)* Mr Ian Brownlie CBE QC

(*Signed)* Prof. Vaughan Lowe

(*Signed)* Prof. Francisco Orrego Vicuña

(*Signed)* Sir Arthur Watts
KCMG QC

(*Signed)* Ms. Anne Joyce
Registrar

APPENDIX

Technical Report of the Tribunal's Hydrographer
David H. Gray, M.A.Sc., P. Eng., C.L.S.

1. The geographic coordinates of the pertinent points along the Low Water Line of the coast of Barbados are:

Barbados 1	Bl	13° 04' 41.24542"N,	59° 36' 48.90963"W
Barbados 2	B2	13° 04' 31.57388"N,	59° 36' 25.42871"W
Barbados 3	B3	13° 02' 46.75981"N,	59° 31' 55.69412"W
Barbados 4	B4	13° 02' 40.24680"N,	59° 31' 37.86967"W
Barbados 5	B5	13° 02' 40.05335"N,	59° 31' 37.24482"W
Barbados 6	B6	13° 02' 40.21456"N,	59° 31' 36.25823"W
Barbados 7	B7	13° 02' 46.21169"N,	59° 31' 07.18662"W
Barbados 8	B8	13° 03' 08.29753"N,	59° 30' 14.79852"W
Barbados 9	B9	13° 03' 08.78115"N,	59° 30' 14.10790"W
Barbados 10	B10	13° 05' 00.20132"N,	59° 27' 47.69746"W
Barbados 11	B11	13° 05' 11.90349"N,	59° 27' 34.34557"W

These geographic coordinates were provided by the Parties, with agreement, and were stated to be related to World Geodetic System 1984 (WGS-84).

2. The geographic coordinates of the pertinent turning points of the Trinidad and Tobago archipelagic baseline system are:

Trinidad 1	T1	11° 17' 45.49028"N,	60° 29' 33.99944"W
Trinidad 2	T2	11° 21' 34.49088"N,	60° 30' 46.02075"W
Trinidad 3	T3	11° 21' 45.49173"N,	60° 31' 31.00940"W
Trinidad 4	T4	11° 20' 03.49398"N,	60° 38' 36.00089"W

These geographic coordinates were provided by the Parties, with agreement, and were stated to be related to World Geodetic System 1984 (WGS-84).

3. The turning points along the equidistance line between Bardados and Trinidad and Tobago are:

Point	From	From	From	Latitude	Longitude
A.	T4	T3	Bl	12° 38’ 53.80651”N,	60° 54’ 22.44157”W
B.	T3	T2	Bl	12° 19’ 33.70864”N,	60° 16’ 33.00194”W
C.	T2	Bl		12° 13’ 09.28660”N,	60° 03’ 52.68858”W
D.	T2	Bl	B2	12° 10’ 57.11540”N,	59° 59’ 31.68810”W
E.	T2	B2	B3	12° 09’ 12.13386”N,	59° 56’ 06.33455”W
F.	T2	B3	B4	12° 07’ 19.07138”N,	59° 52’ 45.59547”W
G.	T2	B4	B5	12° 05’ 41.88429”N,	59° 49’ 54.18423”W
H.	T2	B5	B6	11° 48’ 07.35321”N,	59° 19’ 00.16556”W
I.	T2	B6	B7	11° 45’ 48.23439”N,	59° 14’ 56.37611”W
J.	T2	Tl	B7	11° 43’ 38.75334”N,	59° 11’ 11.23435”W
K.	Tl	B7	B8	11° 32’ 53.69120”N,	58° 51’ 26.05872”W
L.	Tl	B8	B9	11° 08’ 37.26750”N,	58° 07’ 34.14883”W
M.	Tl	B9	B10	10° 59’ 42.54270”N,	57° 51’ 32.71969”W

4. Since Point “C” is on the geodetic line between Points “B” and “D”, Point “C” can be excluded as a turning point of the delimitation line. Similarly, since Points “G” and “H” are within 1 metre of the geodetic line between Points “F” and “I”, Points “G” and “H” can be excluded as turning points of the delimitation line.

5. The geodetic azimuth from Point “B” towards Point “A” is 297° 33’ 08.97”.

6. The Trinidad and Tobago/Venezuela Agreement establishing the maritime boundary between the two countries defines geographic coordinates in terms of the 1956 Provisional South American Datum.[29] Points 1 through 22 are described by latitudes and longitudes on that datum. However Point “21-a” is defined as being on an azimuth of 67° from Point 21 and on the outer limit of the Exclusive Economic Zone. Geodetic azimuth is assumed, since all lines are described as being geodesies. The Agreement does not state which State’s EEZ is being referred to in the definition of point “21-a”.

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[29] Treaty between the Republic of Trinidad and Tobago and the Republic of Venezuela on the delimitation of marine and submarine areas, 18 April 1990, *reprinted in The Law of the Sea–Maritime Boundary Agreements (1985-1991)* pp. 25-29 (Office for Ocean Affairs and the Law of the Sea, United Nations, New York 1992).

7. The conversion of the geographic coordinates of Points 21 and 22 from 1956 Provisional South American Datum to WGS 84 was done using the mathematical constants for the standard Molodensky formulae given by the "Users' Handbook on Datum Transformations Involving WGS-84".[30] The 1956 Provisional South American Datum coordinates and the resulting transformed coordinates are:

21.	10° 16' 01"N,	58° 49' 12"W	1956 PSAD
22.	11° 24' 00"N,	56° 06' 30"W	1956 PSAD
21.	10° 15' 49.82297"N,	58° 49' 17.35061"W	WGS 84
22.	11° 23' 48.99715"N,	56° 06' 34.89543"W	WGS 84

8. The approximate location of the relevant point on the Venezuela low water line, taken from British Admiralty chart 517,[31] which is based on WGS 84, that is used to construct the EEZ of Venezuela in the vicinity of the Trinidad and Tobago/Venezuela Agreement Line is 8° 31'N, 59° 58'W.

9. The intersection of the EEZ of Venezuela and the geodetic line from Point 21 which has an initial azimuth of 67° is at:

Point 21-a 10° 48' 43.05918"N, 57° 30' 32.28158"W.

10. The geodetic azimuth from Point 21-a to 22 is 66° 55' 25.876".

11. The intersection of the 200 nautical mile EEZ limit of Trinidad and Tobago and the geodetic line from Point 21-a which has an initial geodetic azimuth of 66° 55' 25.876" is at:

T 10° 58' 35.53602"N, 57° 07' 02.73864"W.

12. The point of intersection of the geodetic line from Point "T" to the archipelagic baseline turning point on Little Tobago Island (Point Tl in paragraph 2, above) which is equidistant from the low water line of Barbados and from the archipelagic baseline turning point on Little Tobago Island is at:

S 11° 03' 42.14967"N, 57° 58' 43.22048"W.

13. Because Trinidad and Tobago's southern maritime boundary lacks a precise technical definition, the inexactitude of the mathematical conversion from 1956 Provisional South American Datum to WGS-84 particularly offshore, and limited precision of a small-scale nautical chart, the geographic coordinate of Point "T" must be regarded as approximate until such definition is precisely established.

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[30] *Users' Handbook on Datum Transformations Involving WGS 84*, International Hydrographic Organization, Special Publication No. 60 (Monaco, 3rd ed. July 2003).

[31] British Admiralty Chart 517, "Trinidad to Cayenne", Scale 1:1,500,000, Taunton, UK, 6 March 2003, corrected for Notices to Mariners up to 4715/05.

14. Because the Parties asked that the coordinates used in the Dispositif be expressed in 0.01 minutes of arc of Latitude and Longitude, and because selected points have now been omitted, the correlation of points in this Technical Report and the Dispositif are interrelated in the following table:

Decision Point	Technical Report Pt.	Latitude	Longitude
2.	B	12° 19.56'N	60° 16.55'W
3.	D	12° 10.95'N	59° 59.53'W
4.	E	12° 09.20'N	59° 56.11'W
5.	F	12° 07.32'N	59° 52.76'W
6.	I	11° 45.80'N	59° 14.94'W
7.	J	11° 43.65'N	59° 11.19'W
8.	K	11° 32.89'N	58° 51.43'W
9.	L	11° 08.62'N	58° 07.57'W
10.	S	11° 03.70'N	57° 58.72'W
11.	T	10° 58.59'N (approx.)	57° 07.05'W (approx.)

See also Map VII, facing.*

* Secretariat note: See map VII in the back pocket of this volume.