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[***] The maps relating to this decision are contained in the back pocket of this volume.

[****] Les cartes qui ont trait à cette décision sont classées dans la pochette au dos de la dernière page de couverture de ce volume.

FOREWORD

The present volume is made up of four cases, namely, the report and recommendations to the governments of Iceland and Norway of the Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, the award in the case of the Iron Rhine Railway between Belgium and the Netherlands and the interpretation thereof by the Tribunal; the award and the settlement agreement of the Parties annexed thereto in the dispute concerning the Straits of Johor between Malaysia and Singapore; and the award in the case concerning the delimitation of the maritime boundary between Barbados and Trinidad and Tobago.

In accordance with the practice followed in this series, awards in English or French are published in the original language. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat of the United Nations.

This volume, like volumes IV to XXVI, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le présent volume réunit quatre affaires soumises à l'arbitrage, à savoir, le rapport et recommandations aux gouvernements de l'Islande et de la Norvège de la Commission de conciliation sur le plateau continental entre l'Islande et Jan Mayen, la sentence dans l'affaire du chemin de fer « Iron Rhine » entre la Belgique et les Pays-Bas ainsi que son interprétation rendue par le même Tribunal; la sentence et la transaction conclue entre les Parties sur le différend portant sur les détroits de Johor entre la Malaisie et Singapour; et la sentence dans l'affaire de la délimitation de la frontière maritime entre la Barbade et Trinité-et-Tobago.

Conformément à la pratique du *Recueil*, les sentences rendues en anglais ou en français sont publiées dans la langue originale. Celles qui ont été rendues dans ces deux langues sont publiées dans l'une ou l'autre des deux langues. Les sentences rendues dans d'autres langues sont publiées en anglais. Lorsque le texte reproduit est une traduction du Secrétariat de l'Organisation des Nations Unies, il en est fait mention dans une note de bas de page.

Le présent volume, à l'instar des volumes IV à XXVI, a été préparé par la Division de la codification du Bureau des affaires juridiques.

PART I

Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the governments of Iceland and Norway

Decision of June 1981

Commission de conciliation sur le plateau continental entre l'Islande et Jan Mayen: Rapport et recommandations aux gouvernements de l'Islande et de la Norvège

Décision de juin 1981

CONCILIATION COMMISSION ON THE CONTINENTAL SHELF AREA BETWEEN ICELAND AND JAN MAYEN: REPORT AND RECOMMENDATIONS TO THE GOVERNMENTS OF ICELAND AND NORWAY, DECISION OF JUNE 1981

COMMISSION DE CONCILIATION SUR LE PLATEAU CONTINENTAL ENTRE L'ISLANDE ET JAN MAYEN: RAPPORT ET RECOMMANDATIONS AUX GOUVERNEMENTS DE L'ISLANDE ET DE LA NORVÈGE, DÉCISION DE JUIN 1981

Mandate of the Commission–article 9 of the Agreement between Iceland and Norway of May 28, 1980, concerning fishery and continental shelf questions–to make recommendations with regard to the dividing line for the continental shelf area–claim by one Party to a continental shelf area extending beyond the 200-mile economic zone–to take into account the Party's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances–recommendations must be unanimous and are not binding on the Parties–reasonable regard to be paid by the Parties to recommendations as a useful basis for the resolution of the outstanding issues during the negotiation following the conciliation.

Rules of procedure–Commission adopts its own rules of procedure–unanimous non-binding recommendations to be presented to the Parties within five months of the appointment of the Commission–request of written and/or oral pleadings from the two Parties in case of unanimous recommendations by the Commission would not serve a useful purpose since the two national members of the Commission had participated in all previous negotiations.

Applicable law–Commission shall not act as a court of law–examination by the Commission of State practice and court decisions so as to ascertain possible guidelines for the practicable and equitable solution of the questions concerned–taking into account the provisions of the draft Convention on the Law of the Sea–draft texts influenced by the decisions of the International Court of Justice (ICJ) in the *North Sea Continental Shelf* cases.

Status of Islands–reference to the draft Convention on the Law of the Sea–article 121 of the draft Convention reflecting the present status of international law on the subject in the opinion of the Commission–Island entitled to a territorial sea, an economic zone and a continental shelf–applicability of the provisions of the draft Convention concerning delimitation of the exclusive economic zone (article 74) and of the continental shelf (article 83) between States with opposite or adjacent coasts.

Delimitation–to be effected by agreement between the Parties in conformity with international law: in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned–agreement of May 28, 1980, implicitly recognizing that Iceland shall have a full economic zone of 200 nautical miles in areas where the distance between Iceland and Jan Mayen is less than 400 miles.

Methods of delimitation of the dividing line for the shelf area–vary in accordance with the circumstances of the case–inapplicability of the natural prolongation concept to the present case–determination of a certain proportionality by dividing the area concerned between the Parties on the basis of distance and other relevant factors–wide variety of

solutions used in State practice in regard to drawing boundary lines–frequent use of median line as an equitable solution–account to be taken of special circumstances in order to accommodate the relevant factors of each case–possibility of a "trade-off" by ignoring the islands on both sides when both coastal States have islands along their coasts–application of the "enclave principle" to islands situated within the 200-mile economic zone of another State in order to give them territorial seas–use of agreements for joint development and cooperation in overlapping areas of continental shelves between neighboring countries.

Special circumstances–dependency of the Party on imports of hydrocarbon products–shelf surrounding the Party having very low hydrocarbon potential–existence of a high geological risk in the relevant area–difficulties for exploration and commercial use.

Approach to be used by the Commission in formulating relevant recommendations–promotion of cooperation and friendly relations between the Parties–taking into account both the fact that the bilateral agreement on the Party's 200-mile economic zone has already given the Party a considerable area beyond the median line and the fact that the uncertainties with respect to the resource potential of the area create a need for further research and exploration–proposition of the adoption of a joint development agreement covering substantially all of the area defined by the Commission and offering any significant prospect of hydrocarbon production, based on the principles recommended by the Commission.

Mandat de la Commission–article 9 de l'Accord du 28 mai 1980 entre l'Islande et la Norvège relatif à la controverse sur la pêcherie et le plateau continental–faire des recommandations à propos de la ligne de division de la zone du plateau continental–réclamation par l'une des Parties d'un plateau continental s'étendant au-delà de la zone économique de 200 miles nautiques–prise en compte des intérêts économiques importants de l'une des Parties dans ces zones maritimes, des facteurs géographiques et géologiques ainsi que des autres circonstances spéciales–recommandations devant être prises à l'unanimité mais non contraignantes pour les Parties–Parties devant raisonnablement tenir compte de ces recommandations comme base utile à la résolution des problèmes en suspens lors de la négociation ayant lieu après la conciliation.

Règles de procédure–la Commission adopte ses propres règles de procédure–des recommandations non contraignantes prises à l'unanimité doivent être présentées aux Parties dans les cinq mois suivant l'établissement de la Commission–inutilité de demander des plaidoiries écrites et/ou orales aux deux Parties en cas de recommandations unanimes de la part de la Commission, du fait de la participation des membres nationaux de la Commission à toutes les négociations antérieures.

Droit applicable–la Commission ne doit pas agir comme une cour de justice–examen par la Commission de la pratique étatique et des décisions judiciaires afin de déterminer les grandes lignes d'une solution pratique et équitable aux problèmes en question–prise en compte du projet de Convention sur le droit de la mer–projet de texte influencé par les décisions de la Cour internationale de Justice (CIJ) dans les affaires relatives au *Plateau continental de la Mer du Nord.*

Statut des îles–référence au projet de Convention sur le droit de la mer–article 121 du projet de Convention reflétant le statut contemporain du droit international sur le sujet, selon la Commission–Iles ayant droit à une mer territoriale, une zone économique et un plateau continental–applicabilité des dispositions du projet de Convention relatives à la délimitation de la zone économique exclusive (article 74) et du plateau continental (article 83) entre les États ayant des côtes opposées ou adjacentes.

Délimitation–devant être effectuée par accord entre les Parties conformément au droit international : selon des principes équitables, en employant la ligne médiane ou équidistante, lorsqu'approprié, et prenant en compte toutes les circonstances prévalant dans la zone concernée–accord du 28 mai 1980 reconnaissant implicitement que l'Islande devrait avoir une zone économique intégrale de 200 miles nautiques dans les régions où la distance entre l'Islande et Jan Mayen est inférieure à 400 miles nautiques.

Méthodes de délimitation de la ligne de démarcation du plateau continental–variation selon les circonstances de l'espèce–inapplicabilité du concept de prolongement naturel dans le cas présent–détermination d'une certaine proportionnalité en divisant la zone concernée entre les Parties sur la base de la distance et d'autres facteurs pertinents–grande variété de solutions utilisées dans la pratique des États pour tracer les lignes frontières–recours fréquent à la ligne médiane comme solution équitable–prise en compte des circonstances spéciales afin de s'accommoder des facteurs pertinents à chaque cas–possibilité de compromis en ignorant les îles de chaque côté lorsque les deux États côtiers disposent d'îles le long de leurs côtes respectives–application du principe d'enclavement pour les îles situées dans les 200 miles de la zone économique exclusive d'un autre État afin de leur accorder une mer territoriale–recours à des accords pour la coopération et le développement conjoint dans les zones de chevauchement du plateau continental entre États voisins.

Circonstances spéciales–dépendance de l'une des Parties aux importations de produits hydrocarbures–plateau entourant l'une des Parties ayant très peu de potentiel en hydrocarbures–existence d'un très haut risque géologique dans la zone en question–difficultés d'exploration et d'utilisation commerciale.

Approche devant être employée par la Commission pour formuler les recommandations pertinentes–promotion de la coopération et des relations amicales entre les Parties–prise en compte du fait que l'accord bilatéral sur la zone économique de 200 miles de l'une des Parties a déjà accordé à cette Partie une zone considérable allant au-delà de la ligne médiane, ainsi que du fait que les incertitudes relatives au potentiel de ressources hydrocarbures de la zone entrainent un besoin pour des recherches et des explorations supplémentaires–proposition d'adopter un accord de développement conjoint couvrant substantiellement l'intégralité de la zone définie par la Commission et offrant quelque perspective significative de production hydrocarbure, et fondé sur les principes recommandés par la Commission.

* * * * *

REPORT AND RECOMMENDATIONS TO THE GOVERNMENTS OF ICELAND AND NORWAY OF THE CONCILIATION COMMISSION ON THE CONTINENTAL SHELF AREA BETWEEN ICELAND AND JAN MAYEN*

Commission

The Honorable Elliot L. Richardson, Chairman

H.E. Hans G. Andersen, Conciliator for Iceland

H.E. Jens Evensen, Conciliator for Norway

Washington, D.C

1981

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* Secretariat note: This text incorporates minor, non-substantive corrections in the text of the Report.

** Secretariat note: see Figure 1 in the front pocket of this volume.

*** Secretariat note: see Figure 2 in the front pocket of this volume.

**** Secretariat note: see Figure 3 in the front pocket of this volume.

Section I

BRIEF EXAMINATION OF THE AGREEMENT BETWEEN ICELAND AND NORWAY OF MAY 28, 1980.

On May 28, 1980 the Governments of Iceland and Norway concluded an Agreement concerning fishery and continental shelf questions. Articles 1-8 of this Agreement deal with fishery questions.

In the preamble of the Agreement it was recognized that Iceland should have an economic zone of 200 miles pursuant to the Icelandic Law on Territorial Sea, Continental Shelf and Economic Zone of June 1, 1979. The shortest distance between Iceland and Jan Mayen is about 290 nautical miles. During the negotiations of the aforementioned agreement the Icelandic Government advanced the view that Iceland was entitled to a continental shelf area extending beyond the 200-mile economic zone. Since no agreement was reached on this question during the negotiations, the parties agreed to refer it to a Conciliation Commission to be established in accordance with Article 9 of the agreement.

Article 9 reads:

> "The question of the dividing line for the shelf in the area between Iceland and Jan Mayen shall be the subject of continued negotiations.
>
> For this purpose the Parties agree to appoint at the earliest opportunity a Conciliation Commission composed of three members, of which each Party appoints one national member. The Chairman of the Commission shall be appointed by the Parties jointly.
>
> The Commission shall have as its mandate the submission of recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen. In preparing such recommendations the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances.
>
> The Commission shall adopt its own rules of procedure. The unanimous recommendations of the Commission shall be submitted to the two Governments at the earliest opportunity. The parties envisage the presentation of the recommendations within five months of the appointment of the Commission.
>
> These recommendations of the Commission are not binding on the Parties; but during their further negotiations the Parties will pay reasonable regard to them."

Section II

ESTABLISHMENT AND WORK OF THE CONCILIATION COMMISSION

In accordance with Article 9 of the Agreement the Government of Iceland appointed Ambassador Hans G. Andersen, Chairman of the Delegation of Iceland to the Third United Nations Conference of the Law of the Sea, as its national member. The Government of Norway appointed Ambasador Jens Evensen, Chairman of the Delegation of Norway to the Conference.

The parties agreed jointly to appoint Ambassador Elliot Richardson, then Chairman of the Delegation of the United States of America to the Conference on the Law of the Sea, as Chairman of the Icelandic-Norwegian Conciliation Commission.

The Commission was duly established on August 16, 1980.

The mandate of the Commission, according to Article 9, paragraph 3, is to make recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen. In preparing such recommendations the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances.

It follows from Article 9 that the recommendations of the Commission to be submitted to the two Governments must be unanimous. The recommendations of the Commission are not binding on the Parties. But the Agreement stipulates that during the negotiation following such recommendations the Parties "will pay reasonable regard to them." During its work the Conciliation Commission has discussed the various aspects of the problems involved. It is hoped that the recommendations submitted will serve as a useful basis for the solution of the outstanding questions.

The Conciliation Commission held a first informal meeting to plan its work in Geneva in the period August 19-27, 1980. The first formal meeting was convened in Washington in the period 27-29 October, 1980. In order to obtain the available information concerning the geology of the continental shelf areas in question, including the probability of mineral resources in the seabed, a meeting was convened at the Lamont-Doherty Geological Observatory of Columbia University, New York, in the period 8-10 December, 1980. Present at the meeting were international geologists and geophysicists who had conducted research in the area. The Commission held additional meetings in Washington, D.C. during 11-12 December, 1980.

The two national members of the Commission, Ambassadors Andersen and Evensen, met in Geneva in the period 8-15 February, 1981. Thereafter,

the Conciliation Commission had a meeting in London in the period 16-17 February, 1981.

Further meetings were held in the period: March 3-4, 1981 in New York.

At its first formal meeting in Washington in the period 27-29 October, 1980 the Commission decided that since the purpose of the Conciliation Commission was to submit unanimous recommendations and since the two national members had participated in all previous diplomatic negotiations, it would not serve a useful purpose to request written and/or oral pleadings from the two parties.

Section III

JAN MAYEN: GEOGRAPHY AND GEOLOGY

Jan Mayen is an island situated at the Northern end of the Jan Mayen Ridge between:

70° 49' N
71° 10' N
7° 53' W
9° 05' W

The island is elongated along a NE-SW axis. It is about 53 km long and has a maximum width in the Northern part of 15-20 km. Its area is 373 km^2 which is about the same size as Streymoy, the largest of the Faroe Islands.

Distances to other geographic locations are as follows:

Tromsø	1018 km	(550 n.m.)
Iceland	540 "	(292 ")
Greenland	455 "	(246 ")
Longyearbyen on Svalbard	966 "	(522 ")

The island is characterized by large mountains. The northern part includes the volcano Beerensburg, 2277 m, the highest mountain on the island. The central part is relatively flat with low elevations. The southern part is dominated by a mountain plateau with maximum elevation of 769 m (Rudolftoppen). The coast is rather steep, although there are areas of extensive flat shorelines with sand and gravel.

Jan Mayen is an entirely volcanic island. It was formed during the last 10 -12 million years. The rocks are lava (alkalibasalt) and other volcanic material. The island is volcanically active today, with frequent earthquakes. The most recent volcanic eruption was in 1970, when lava, ash, smoke and steam flowed out through a 6 km long fracture on the northeastern side of

Beerensburg. The lava flowed to the coast where a coastal terrace of 4 km^2 was built. Volcanic eruptions have also been reported by whalers in 1732 and 1818.

The Norwegian Meteorological Institute established a meteorological station on Jan Mayen in 1912. The station has been permanently staffed since that time except for one year when the Second World War broke out. Several other permanent stations have been added since that time for LORAN A and C, CONSOL, Coast-radio, etc. Most of these stations are under the administration of the Ministry of Defense. Between thirty and forty people live throughout the winter on the eastern coast in the central part of the island. This is also where the stations and the airport are located. Roads connect the installations and living quarters.

Section IV

STATUS OF ISLANDS

Article 121 of the Draft Convention on the Law of the Sea (Informal Text) of August 27, 1980 reads as follows:

Article 121

Regime of Islands

1. An island is a naturally formed area of land surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf.

In the opinion of the Conciliation Commission this article reflects the present status of international law on this subject. It follows from the brief description of Jan Mayen in Section III of this report that Jan Mayen must be considered as an island. Paragraphs 1 and 2 of Article 121 are thus applicable to it.

Therefore, Jan Mayen is entitled to a territorial sea, an economic zone and a continental shelf. On the other hand, it must be kept in mind that Articles 74 and 83 concerning delimitation are also applicable. The first paragraphs of these articles read as follows:

Article 74

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 in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.

Article 83

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 in conformity with international law. Such an agreement shall be in accordance with equitable principles, employing the median or equidistance line, where appropriate, and taking account of all circumstances prevailing in the area concerned.

According to these provisions such delimitation shall be effected *by agreement* between the parties in conformity with international law. The parties have concluded such agreement on May 28, 1980 implicitly recognizing that Iceland shall have a full economic zone of 200 nautical miles in areas where the distance between Iceland and Jan Mayen is less than 400 miles. The agreement also provides that Norway will establish a fishing zone around Jan Mayen. Such a zone of 200 nautical miles was established around Jan Mayen by Norwegian Royal Decree of May 23, 1980, with effect from May 29, 1980. The Royal Decree provides that the boundaries with neighboring countries shall be effected by agreement.

The Conciliation Commission will consider the continental shelf problems involved in the remaining sections of this report.

Section V

REPORT OF GEOLOGISTS OF 16 DECEMBER, 1980

As mentioned in Section II, the Conciliation Commission made arrangements to obtain a geological report regarding the continental shelf area between Jan Mayen and Iceland.

The Conciliation Commission considers it appropriate to reproduce the report in its entirety together with the maps prepared by the geological experts. The report follows.

THE AREA BETWEEN JAN MAYEN AND EASTERN ICELAND – A GEOLOGICAL REPORT

Prepared at a workshop held at Lamont-Doherty Geological Observatory, Palisades, New York, USA, December 8 to 10, 1980.

Workshop participants:

Dr. Manik Talwani (Lamont-Doherty Geological Observatory of Columbia University, USA)

Dr. Karl Hinz (Bundesanstalt für Geowissenschaften und Rohstoffe, Federal Republic of Germany)

Dr. Lucien Montadert (Institut Francais du Pétrole)

Dr. Olav Eldholm (University of Oslo, Norway)

Mr. E. Bergsager (Norwegian Petroleum Directorate)

Dr. Gudmundur Palmason (National Energy Authority, Iceland)

Dr. Lewis Alexander (Geographer of the United States) Dr. N. Terence Edgar (United States Geological Survey)

Mr. John Mutter, Rapporteur (Lamont-Doherty Geological Observatory of Columbia University, USA)

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THE AREA BETWEEN JAN MAYEN AND EASTERN ICELAND – A GEOLOGICAL REPORT

Abstract

This report has two principal purposes:

(1) to examine how the Jan Mayen Ridge, which is the most prominent feature in this region containing sedimentary rocks, is related morphologically and geologically to the island of Jan Mayen and to Iceland.

(2) to examine existing geological and geophysical data with a view toward obtaining the distribution of possible prospective areas for hydrocarbons in the region lying between Jan Mayen and eastern Iceland.

The Jan Mayen Ridge is a roughly north-south trending feature with water depths between 200 m and 1600 m (Figure 1). It is subdivided by a depression, situated between latitudes 68° and 69°N into a northern plateau-like area and a southern zone. Although the ridge is not continuous through the entire area lying between Jan Mayen and eastern Iceland, the region is referred to as the "Jan Mayen Ridge Area" in this report.

The concept of natural prolongation can be considered in two different senses, morphological and geological. Morphologically the northern part of Jan Mayen Ridge can be considered a southward extension from the shelf [1] of Jan Mayen. On the other hand, Jan Mayen Ridge cannot morphologically be considered an extension from the Icelandic shelf.

However, geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore the ridge is not considered a natural geological prolongation of either Jan Mayen or Iceland.

The hydrocarbon potential of the northern part of the Jan Mayen Ridge, situated north of the oblique depression (see Figure 1), is regarded as more favorable mainly because it has a larger areal extent than the southern part. It should be stated that the southern part is less understood and appears to be more complex than the northern part. However, considered in comparison with known oil-producing areas worldwide, the overall potential cannot be considered good, based on the existing fragmentary data. We emphasize that detailed further exploration could change this assessment.

[1] Shelf here defined in its usual scientific sense.

THE AREA BETWEEN JAN MAYEN AND EASTERN ICELAND–A GEOLOGICAL REPORT

Scope and Purpose of Report

This report has two principal purposes:

(1) to examine how the Jan Mayen Ridge, which is the most prominent feature in this region containing sedimentary rocks, is related morphologically and geologically to the island of Jan Mayen and Iceland.

(2) to examine existing geological and geophysical data with a view towards obtaining the distribution of possible prospective areas for hydrocarbons in the region lying between Jan Mayen and eastern Iceland.

Nomenclature Regarding Jan Mayen Ridge

The Jan Mayen Ridge is a roughly north-south trending feature with water depths between 200 m and 1600 m (Figure 1). It is subdivided by a depression, situated between latitudes 68° and 69°N into a northern plateau-like area and a southern zone. Although the ridge is not continuous through the entire area lying between Jan Mayen and eastern Iceland, the region is referred to as the "Jan Mayen Ridge Area" in this report.

Evolution and Subsurface Geology of the Jan Mayen Ridge Area

It is generally agreed that the Jan Mayen Ridge Area has, geologically speaking, evolved in a unique way. Both the island of Jan Mayen, which lies north of the Jan Mayen Ridge, and Iceland, which lies to the southwest, are composed of relatively young rocks of volcanic origin. Even though both are islands, thus lying above sea level, they came into existence during the opening of the Norwegian Sea and are considered oceanic structures. The Jan Mayen Ridge, on the other hand, lies below sea level but is considered largely a continental sliver and is believed to contain rocks whose age predates the opening of the Norwegian Sea.

Two important geological events are responsible for the present location and configuration of the Jan Mayen Ridge. The first was the opening of the Norway Basin (to the east of Jan Mayen Ridge) which represents the first stage in the opening of the Norwegian Sea by the splitting apart of Greenland and Norway. The split started in Early Eocene (about 55 m.y. before present) and continued until the Lower Oligocene (27 m.y. before present) and culminated in the opening of the Norway Basin. About 27 m.y. ago the axial ridge at which the opening was actively taking place became extinct and the axis of opening "jumped" westwards. The opening at the new ridge axis was effective in separating a thin, long sliver which was previously a part of Greenland away from it. This long sliver is the Jan Mayen Ridge. For reasons

that are not understood, this piece of continent did not stay above sea level. (It is in fact quite likely that for most of its history it was below sea level. In Mesozoic times it was part of a shallow sedimentary basin and later in the Early Tertiary a part of Greenland's continental margin.) At any rate, after being split away from Greenland it subsided and did so in somewhat irregular fashion. The northern part subsided less and stayed relatively shallow; it also remained a single block-like feature while the deeper southern part broke into several fragments that subsided more deeply.

Sedimentary patterns changed after each episode of opening giving rise to "break up unconformities" which can be detected by seismic reflection profiling. Two important unconformities are readily seen in the seismic records. The lower one, termed "O", is believed to be associated with the first episode of opening (that started 55 m.y., ago). It has not been reached by drilling, and the estimate of its age is based in part on the velocities of seismic waves in the underlying rocks and partly on its juxtaposition with basalt outpourings associated with early opening. The second unconformity termed "A" is believed to be associated with the second episode of opening (that started about 27 m.y. ago). It has been reached by drilling. Rocks above the unconformity are Miocene and younger (less than 15 m.y.) in age and below it are Oligocene-Eocene (35 to 50 m. yrs.) in age.

The rocks below "O" are "pre-opening" in age and for this reason have been used to characterize and define the continental character of the Jan Mayen Ridge. We note, however, that these rocks are unsampled and so there is no direct evidence of continental rocks. Horizon "O" can, however, be identified on seismic reflection profiles. In Figure 2 areas where horizon "O" forms a ridge are colored yellow, and where they form a depression or a ridge which does not rise above the seafloor are show in orange.

The process of initial openings (first phase as well as the second phase) was assocated with the extrusion of large amounts of lava. The lava flows covered the newly created ocean floor, but in some cases they may also have covered the foundered continental fragments. Thus there is some uncertainty in the areas covered by lava flows (which solidify to form basaltic rocks) whether the underlying rocks are oceanic or continental. Where independent evidence from lineated magnetic anomalies[2] assures us that the areas are oceanic, the map has been colored red; the areas where there is uncertainty about the underlying rocks have been colored blue or purple. The purple areas represent lava flows associated with the first phase of opening. The surface of these flows is relatively rugged, and they lie deeper than the lava flows emplaced during the second stage of opening which generally have a smoother surface, and the corresponding areas of the map have been colored blue. Lava flows in both areas (where the underlying rocks are uncertain in character) as well as in the region of demonstrated oceanic crust appear as a

[2] Such anomalies are known to be created during the active seafloor spreading phase of an ocean basin.

near ubiquitous seismically "opaque" layer. This layer is found everywhere except in the area where the continental fragments clearly interrupt this layer. (That the seismically "opaque" layer in this area is indeed basalt has been unequivocably demonstrated by the recovering of core samples by drilling.)

It is particularly difficult to define the total sediment thickness in the Jan Mayen Ridge Area. There are two main reasons for the difficulty. One is that sediments might exist below the extensive basalt flows in the area – seismic methods used to date have not penetrated below the basalt (as stated earlier basalt flows might in places cover sedimentary rocks near the edges of the continental blocks). Secondly, the base of the sedimentary column has not been reached by seismic reflection work even in areas not covered by basalt. The uncertainties in sediment thickness, therefore, mainly pertain below horizon "O" and the basalts. Only in a small area beneath the eastern flank of the Jan Mayen Ridge has a mappable stratified sequence been recognized below "O" on seismic profiles. The thickness of sediment lying above "O" and the basalts is on the other hand relatively well mapped. Although the thickness of post-"O" and post-basalt sediment generally does not exceed about 2.5 km (Figure 2), in some areas, particularly on the east flank of the Jan Mayen Ridge, the thickness might be as much as 4 km.

In summary, the Jan Mayen Ridge Area is geologically complex, consisting of (Figure 2):

Areas underlain by crust that is demonstrably oceanic (red),

Areas that contain, at depth, rocks believed to be continental in origin (yellow and orange), and

Areas where the lava flows obscure the nature of the underlying rocks (blue and purple).

Areas where seismic data are very sparse or for other reasons do not provide information to place them in one of the above groups are left white.

While the above description of the Jan Mayen Ridge Area is agreed to represent the consensus of geologic opinion, we note that some scientists who have made surveys in the region consider that a much greater area of the seafloor in the region is of continental origin.

Jan Mayen Ridge as a "Natural Prolongation" of Jan Mayen or Iceland

The concept of natural prolongation can be considered in two different senses, morphological and geological. Morphologically the northern part of Jan Mayen Ridge can be considered a southward extension from the shelf [3] of Jan Mayen. On the other hand, Jan Mayen. Ridge cannot morphologically be considered an extension from the Icelandic shelf.

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[3] Shelf here defined in its ususal scientific sense.

However, geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore the ridge is not considered a natural geological prolongation of either Jan Mayen or Iceland.

Resource Potential of the Jan Mayen Ridge Area

We take into consideration here only the possible potential for hydrocarbons. The present knowledge does not indicate other resources. No indication for the generation of metalliferous deposits or manganese nodules has been reported yet from the active or extinct oceanic ridges or fracture zones (Figure 1), but we will not completely rule out the possibility of the generation of such deposits in the above-mentioned areas.

In the Jan Mayen Ridge Area the geophysical surveys have only been of a reconnaissance nature-they have not been of the detailed nature carried out for pinpointing structures for the purpose of drilling for oil or gas. Furthermore, drilling in this area has been carried out only for scientific purposes. The number of drill holes is very few, and they have not been extended to depths where oil-bearing horizons might possibly exist.

JOIDES/DSDP scientific drilling has been carried out at four sites – 346, 347, 349, and 350 in the Jan Mayen Ridge Area. At sites 346, 347, and 349 the drill penetrated through the horizon A (which is the upper one of the two major unconformities in the Jan Mayen Ridge Area). The sediments lying above "A" are Miocene or younger in age, and are believed to have been deposited after the initiation of the second stage of opening. The sediments below "A" are Oligocene or older; they are believed to have been deposited when Jan Mayen Ridge was still attached to Greenland and formed part of its eastern margin. The sediments have a larger terrigenous component than the post-"A" sediments, but none of the sediments reached in these holes indicated the presence of hydrocarbons. Horizon "O" and the rocks below it lie far below the depth reached by the drill.

Hole 350 was drilled to the seismically opaque layer which was determined to be basalt of Eocene (?)[*] age. It is uncertain what lies below the basalt layer – Jan Mayen Ridge type continental crust or oceanic crust.

Holes 348 and 337 in areas of lineated magnetic anomalies respectively west and east of the Jan Mayen Ridge reached basalt of appropriate age and confirmed the oceanic nature of these areas.

Thus, our deductions about the hydrocarbon potential are based on fragmentary data. At the present state of knowledge they allow us to deduce areas that almost certainly can be excluded as prospective areas for hydrocarbon exploration. Whether the remaining areas which could contain hydrocarbons actually do so can be determined only after much more detailed

[*] Secretariat note: [*sic*]

geophysical work and intensive exploratory drilling carried down to great depths.

The area of demonstrably oceanic crust colored red in Figure 2 can almost certainly be excluded as a prospective region for hydrocarbon exploration mainly for the following reasons: insufficient thickness of sediments overlying oceanic crust, poor likelihood of high content of organic material within these sediments, unfavorable structural and trapping conditions. Similar remarks apply to the oceanic area west of the Jan Mayen Ridge. For these reasons the oceanic areas can almost certainly be excluded from considerations of prospecting for hydrocarbons. This also applies to the area adjacent to the north of Jan Mayen.

The areas which have been shaded blue and purple on the map are also considered very unlikely prospects for petroleum exploration, although less so than the oceanic areas shaded in red. Sediments above the basalt generally are quite thin, and their petroleum potential is considered very low for the same reasons described above for the oceanic areas. An area containing a very thick (greater than 2.5 km) section of post-“O” and post-basalt sediments on the eastern flank of the Jan Mayen Ridge is indicated in Figure 2. This area extends on either side of the boundary between the yellow and the purple areas. Because of the large thickness this section could by itself provide the source and reservoirs for hydrocarbon accumulation. This part of the purple area is an exception to the general statement of low prospectivity. The presence of sediment below the basalt cannot be excluded in this area as it is in the oceanic areas, but the lack of direct evidence of such presents a problem in the evaluation of the petroleum potential. If substantial thicknesses of sediment lie below the basalt, they could constitute an important hydrocarbon prospect.

The boundary between the blue/purple region and the yellow/orange region is uncertain and discussion of the yellow/orange region may, in general, apply to the sediments that may lie below the basalt as described above. The yellow/orange area is characterized by two major rock units of hydrocarbon potential separated by a prominent seismic reflector “O”. This reflector may represent the top of a basalt layer, but it is generally considered to be an unconformity or a surface that characterizes a gap in the sedimentation process caused by the separation of Greenland from Norway 55 million years ago. The presence of sedimentary rocks below reflector “O” can be documented by seismic surveys in only very limited areas. Rocks of equivalent age on Greenland and Norway include source and reservoir rocks, two fundamental elements required for petroleum generation and accumulation. Petroleum has been discovered from rocks of equivalent age in Norway demonstrating that the other requirements for petroleum generation, maturation, migration, and accumulation have been met in that region, but because of the unique subsequent geologic history of the ridge, it is not possible at this time to make such a statement for the Jan Mayen Ridge Area.

Under the assumption that the older rocks of Jan Mayen Ridge are similar to the favorable rocks of the Norwegian and Greenland sequences they may contain accumulations of hydrocarbons or serve as source rocks. The sediments lying above reflector "O" are sufficiently thick in some areas to generate oil if source rocks are contained within them, independent of the older rocks below reflector "O".

The hydrocarbon potential of the northern part of the Jan Mayen Ridge, situated north of the oblique depression (see Figure 1), is regarded as more favorable mainly because it has a larger areal extent than the southern part. It should be stated that the southern part is less understood and appears to be more complex than the northern part.

A site survey carried out by Soviet scientists on the southern part of the Jan Mayen Ridge Area for the location of scientific drill holes, carried out sediment sampling operations. They reported the discovery of sediments with traces of petroleum gases in an area near 9°W 67°N. Because of the inconclusive nature of this data we have not attached much weight to the reported discovery.

In the above discussion we have emphasized the relative potential for hydrocarbons of different zones within the Jan Mayen Ridge Area. However, considered in comparison with known oil-producing areas worldwide, the overall potential cannot be considered good, based on the existing fragmentary data. We emphasize that detailed further exploration could change this assessment.

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Sources of Data

LAMONT-DOHERTY GEOLOGICAL SURVEY (LDGO on Figure 2):

Approximately 2000 km MCS lines from 1978 cruise RC21-14. Single-channel seismics, gravity, and magnetics from several research cruises of the R/V VEMA collected over a period of more than ten years. Sonobuoy reflection/refraction data from both MCS and single-channel seismic investigations. Two-ship MCS Expanded Spread and Constant Offset Profiles collected in collaboration with Universities of Bergen and Oslo, Norway, in 1978.

BGR, FEDERAL REPUBLIC OF GERMANY (BGR - 75 & 76 on Figure 2):

1969: Refraction seismic station line III, PLANET cruise 1969

1972: METEOR cruise no. 28, single-channel reflection seismic profilling

1975: 48 multichannel reflection seismics, 635 km, BGR-North Atlantic cruise 1975

1976: 48 multichannel reflection seismics, 694 km, BGR-North Atlantic cruise 1976

CNEXO/IFP, France (CNEXO - 75 on Figure 2):

1975: CEPAN 1 survey, 24 multichannel reflection seismics, 2500 km

UNIVERSITY OF BERGEN, NORWAY (Norway (University of Bergen) on Figure 2):

1978: MCS 400 km 20-channel; sonobuoy refraction

NORWEGIAN PETROLEUM DIRECTORATE (Oljedirektorate - 79 on Figure 2):

1979: 950 km, multichannel seismic reflection profiling, sonobuoy stations

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As their report makes clear, the experts have carefully considered the petroleum potential of the areas concerned. In their opinion this potential is not encouraging. The areas shown in red on the map reproduced in Figure 2 “can almost certainly be excluded as a prospective region for hydrocarbon exploration.” The areas which have been shaded blue and purple on the map “are also considered very unlikely prospects for petroleum exploration although less so than the oceanic areas shaded in red.”

This leaves – in the experts' opinion – the Jan Mayen ridge as the area where oil potential may exist. These areas are shaded yellow and orange on the Figure 2 map. In addition, the experts described an area on the Eastern flank of the Jan Mayen Ridge which "extends on either side of the boundary between the yellow and the purple areas. Because of the large thickness this section could by itself provide the source and reservoir for hydrocarbon accumulation." This area is shaded dark purple on the map.

The experts further conclude that "the hydrocarbon potential of the Northern part of the Jan Mayen Ridge, situated north of the oblique depression, is regarded as more favorable mainly because it has a larger extent than the Southern part. It should be stated that the Southern part is less understood and appears to be more complex than the Northern part."

However, the conclusions of the experts are the following:

> "In the above discussion we have emphasized the relative potential for hydrocarbons of different zones within the Jan Mayen Ridge Area. However, considered in comparison with known oil-producing areas world-wide, the overall potential cannot be considered good, based on the existing fragmentary data. We emphasize that detailed further exploration could change this assessment."

Section VI

POSSIBLE METHODS AND APPROACHES

As stated by the geological experts in their report:

> "The concept of natural prolongation can be considered in two different senses, morphological and geological. Morphologically the Northern part of the Jan Mayen Ridge can be considered a southward extension from the shelf of Jan Mayen. On the other hand, Jan Mayen Ridge cannot morphologically be considered an extension from the Icelandic shelf."

Geologically, the experts consider that the Jan Mayen Ridge is neither a prolongation of Jan Mayen nor of Iceland. They express this opinion as follows:

> "However, geologically Jan Mayen Ridge is a microcontinent that predates both Jan Mayen and Iceland which are composed of younger volcanics; therefore the ridge is not considered a natural geological prolongation of either Jan Mayen or Iceland."

In the light of these findings, the Conciliation Commission is of the opinion that the concept of natural prolongation would not form a suitable basis for the solution of the outstanding issues.

In this context the Commission reverts to the wording of its mandate: "In preparing recommendations with regard to the dividing line for the shelf

area between Iceland and Jan Mayen, the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances." In order to submit recommendations to the two governments, such recommendations must be unanimously agreed upon by the Conciliation Commission. It follows from the mandate that the Conciliation Commission shall not act as a court of law. Its function is to make recommendations to the two governments which in the unanimous opinion of the Commission will lead to acceptable and equitable solutions of the problems involved.

Although not a court of law, the Commission has thoroughly examined state practice and court decisions in order to ascertain possible guidelines for the practicable and equitable solution of the questions concerned.

Although, the Commission deems it inappropriate to deal at any length with such state practice and court decisions, account should, however, be taken *inter alia* of the provisions on delimitation of continental shelves contained in Article 83 of the Draft Convention on the Law of the Sea. (see page 9 above.)[*] It seems that these draft texts have at least to some extent been influenced by the decisions rendered on February 20, 1969 by the International Court of Justice in the North Sea Continental Shelf Cases.

State practice has many examples of dividing lines which vary in accordance with the circumstances of the case.

One approach is to consider whether the natural prolongation concept is applicable. In the light of the geological report, the Commission felt, as noted above, that the natural prolongation concept would not be helpful in finding an acceptable solution to the problems.

Other approaches seek to determine a certain proportionality by dividing the area concerned between the parties on the basis of distance and other relevant factors. As mentioned in Section IV, Jan Mayen, as an island, is in principle entitled to its own territorial sea, contiguous zone, exclusive economic zone and continental shelf (Article 121 of the Draft Convention). On the other hand, where boundary questions arise with neighboring states, the principles pertaining to delimitation are applicable to Jan Mayen (Articles 15, 74, and 83 of the Draft Convention).

In state practice a wide variety of solutions have been used in regard to drawing boundary lines. Frequently the median line has been chosen as providing an equitable solution. In other cases account has been taken of special circumstances leading to a great diversity of solutions in order to accommodate the relevant factors of each case.

Islands belonging to a state and lying in the vicinity of its coasts are ordinarily, given full weight for delimitation purposes. Where both coastal

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[*] Secretariat note: Page 11 in the present volume.

states have islands along their coasts, examples are found where a "trade-off" takes place by ignoring the islands on both sides when drawing the boundary line. Where islands are situated within the 200-mile economic zone of another state, the "enclave principle" has sometimes been utilized to give them territorial seas. There are other examples in which islands have been given limited weight, particularly in straits and other narrow areas.

Finally, there are examples of agreements for joint development and cooperation in overlapping areas of continental shelves between neighboring countries.

In its judgment of February 20, 1969 in the North Sea Continental Shelf Case, the International Court of Justice emphasized the wide variety of situations as follows:

> "93. In fact there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case." (I.C.J. Reports 1969 p.51.)

Having in view the broad scope of the considerations that may appropriately be recognized in formulating its recommendations, the Commission concluded that an approach should be used which takes into account both the fact that agreement by Iceland and Norway on Iceland's 200-mile economic zone has already given Iceland a considerable area beyond the median line and the fact that the uncertainties with respect to the resource potential of the area create a need for further research and exploration. Rather, therefore, than propose a demarcation line for the continental shelf different from the economic zone line, the Commission recommends adoption of a joint development agreement covering substantially all of the area offering any significant prospect of hydrocarbon production. The Commission's reasons for this recommendation include the desire to further promote cooperation and friendly relations between Iceland and Norway. Special consideration has also been given, to the following factors:

(a) Iceland is totally dependent on imports of hydrocarbon products.

(b) The shelf surrounding Iceland is considered by scientists to have very low hydrocarbon potential.

(c) The Jan Mayen Ridge between Jan Mayen and the 200-mile economic zone of Iceland is the only area which is considered to have the possibility of finding hydrocarbons. The experts consider, however, the whole area to be a high geological risk.

(d) The water depths overlying the Jan Mayen Ridge are too great to permit exploration using present technology. The distances from the natural markets for hydrocarbons – especially gas – are great.

Consequently, very large hydrocarbon discoveries would seem necessary in order to make such finds commercial.

The recommended joint development agreement should be based on the following main principles:

First, given the opinion of the geological experts that the area of interest for potential hydrocarbon deposits is the Jan Mayen Ridge extending southward from Jan Mayen towards Iceland, the Commmission proposes that the area subject to joint development be defined by the following coordinates:

$70^{\frac{35}{}\circ}$ N. Lat.

68° N. Lat.

$10^{\frac{30}{}\circ}$ Long.

$6^{\frac{30}{}\circ}$ Long.[4]

This area comprises some 45,475 km^2. It includes the major part of the Jan Mayen Ridge and refers to the areas which the scientists who met at Lamont-Doherty Observatory on December 8-10, 1980 consider to have some hydrocarbon potential. The area south of the 200-mile economic zone of Iceland comprises some 12,725 km^2. The area lying north of the 200-mile zone of Iceland comprises some 32,750 km^2.

The activities in the area may be divided into three stages:

(a) Pre-drilling stage,

(b) Drilling stage,

(c) Development stage.

These will be described in turn.

PRE-DRILLING STAGE

This marks the early stage of systematic geological mapping. The prime tools of this stage are seismic surveys, although magnetic surveys may also be used.

The pre-drilling stage is normally preceded by earlier "academic" investigations which define the more basic geological elements. The results of these "academic" activities are often published in scientific publications. The area under consideration here has been the subject of considerable academic interest. The report of the geological experts is based on such investigations. The more systematic petroleum-oriented mapping of the area has not, however, been started.

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[4] See Figure 3 […] [in the front pocket of this volume]

The pre-drilling stage may in practice be subdivided into two phases, the first of which aims at defining the main geological elements, while the second aims at defining the geological elements in further detail and at establishing drilling locations.

Both phases are based mainly on the seismic profiles obtained from the seismic surveys. The main difference between the two phases is that during the first phase the grid distance between the seismic profiles averages 4-6 km or more. In the second phase the seismic survey is considerably more detailed, and the grid distance is about 1 km or, in some cases, even less.

On the Norwegian Continental Shelf the Norwegian Petroleum Directorate (PD) carries out the first phase with funds appropriated from the State Budget on a yearly basis. On the basis of these surveys, areas of the Norwegian Continental Shelf may be opened for further surveys by petroleum companies on the basis of "exploration" licenses. The relevant data thus obtained are available to interested companies at a reasonable price. The companies then undertake their own detailed surveys. Each company does its own interpretation and has the capacity to acquire detailed seismic data in a manner reflecting its own school of geological thought. The companies often differ substantially as to the prospectivity of different structures. This is particularly true in the case of "new" areas like the Jan Mayen Ridge.

The Commission believes that it would be important to assess the possible hydrocarbon potential of the area concerned at an early date. The Commission accordingly suggests that the first-phase seismic surveys should be undertaken as a joint venture between the Norwegian Petroleum Directorate and an equivalent or similar government organization of Iceland. These surveys should to a reasonable extent cover the specified area both north and south of the 200-mile boundary of Iceland's economic zone as it is desirable that a scientific hydrocarbon-oriented assessment of the area be based on an adequate knowledge of the Ridge as a whole.

In preparing such a survey, the two governments should cooperate and coordinate their efforts to draw up a general plan for the seismic exploration work. It is, however, apparent that the costs of such seismic surveys would be high – certainly on the order of millions of dollars – and that the conclusions to be anticipated therefrom are conjectural. The execution of such surveys also requires considerable expertise and experience. For these and other reasons the Commission proposes that the recommended seismic surveys should be undertaken by the Norwegian Petroleum Directorate in accordance with plans elaborated by the two governments jointly. The costs of such surveys should be borne by Norway unless otherwise agreed by the parties.

Icelandic and Norwegian scientists and experts should have the opportunity to participate in the seismic surveys on an equal footing. If the survey data are promising, the seismic surveys could be made available for sale to oil companies at adequate prices. In that case the cost of the surveys

could be recovered from the proceeds of such sales. The Commission proposes that any net profit after the recovery of costs should be shared between the two countries on a basis to be negotiated by them.

The second phase of the pre-drilling stage would entail the opening up of areas for general exploration permits to petroleum companies, if the conclusions to be drawn from the first seismic phase were sufficiently positive.

The time required for the pre-drilling stage is likely to be 5-9 years in all: 3-5 years for the first phase and 2-4 years for the second phase.

DRILLING STAGE

If the conclusions drawn from the pre-drilling stages so warrant, the next stage will be the drilling stage. This stage begins after negotiations – often protracted and difficult – between the companies and the government concerned. After the successful conclusion of such negotiations, exploitation licenses will be issued by the authorities concerned giving the licensee the rights in a specified area to carry out further exploration and to drill for hydrocarbons.

Under Norwegian petroleum legislation the drilling stage can also be subdivided into two phases. The first is a 6-year period in which the licensee must comply with a strict work program imposing an obligation to drill a certain number of wells. If within the stipulated 6-year period the licensee has fulfilled his work obligations and other obligations such as the observance of safety and environmental regulations, the exploitation license will be extended for a period of 30 years. However, after the expiry of the 6-year period half of the license area must be relinquished, and during the remaining period the area-fees increase substantially and progressively with time.

DEVELOPMENT STAGE

The initiation of this stage will depend on positive drilling results. The development stage will ordinarily be the most expensive, but also the most rewarding because it is based on an assessment that the hydrocarbon finds are commercial; the investments in this stage are consequently the least risky.

As is apparent from the foregoing discussion, the investments and economic risks differ substantially between the three stages. This has to be taken into consideration when agreements concerning joint cooperation are being worked out.

Forms of Joint Cooperation Agreements: Funding and Risk Capital

There are several possible types of joint cooperation agreements, giving various alternatives with regard to performance and control, ownership of the hydrocarbons found, and approaches to funding and risk capital. At least the following four main categories of joint cooperation agreements are commonly used today.

(*a*) Concession contracts with joint-venture arrangements

The contents of such contracts vary widely. Recent versions provide for a specified percentage of state-participation, ordinarily between 50-75 percent. Such recent state-participation arrangements ordinarily contain provisions for "carried interest." Under a "carried interest" contract the expenses for the government's share of exploration and drilling activities is borne by the private company or companies concerned up to the time when a commercial find has been made. If the results are negative, the companies absorb the entire cost, including the state's percentage in the joint venture. The usual carried-interest contract also provides that if a commercial find is made the companies will be reimbursed over a period of time for the state's share of the costs of exploration and drilling from the proceeds of production.

In the Commission's opinion, a joint-venture arrangement of this type with participation by Norway, Iceland and chosen oil companies may offer a viable solution to hydrocarbon activities in the area concerned.

(*b*-*d*) Service contracts, Production-sharing contracts and entrepreneur contracts are other examples of joint-cooperation arrangements between a state and private oil companies. *Service contracts* and *production sharing contracts* have many common features. The main such feature is that the state concerned formally retains its ownership of the area as well as of any hydrocarbon finds made. The private oil company (companies) carries all financial risk at least up to the time when a commercial find has been made. The company thereafter has the right to buy a certain percentage of the oil or gas produced at agreed prices (service contracts) or to obtain a certain percentage of the oil or gas produced in kind over a period of years (production-sharing contracts). Whether and to what extent the company will be reimbursed for its expenses after a commercial find has been made varies from contract to contract. These two types of contracts may also be categorized as "risk contracts."

Entrepreneur contracts in the strict sense of the term imply that a contractor undertakes to perform certain tasks in relation to petroleum activities and is paid for his services according to the terms of the contract. This type of contract is not a risk contract in the ordinary sense.

As previously stated, the Commission regards joint-venture agreements as the most viable solution to the cooperation between the two parties foreseen in the specified area.

Various methods of obtaining the funding and risk capital necessary for such joint ventures could be used.

Under one method the two countries could at the drilling stage appropriate the necessary capital in their state budgets or otherwise in proportion to each country's share of the joint venture. A state company (or state companies) would then carry out all drilling-stage activities. The Commission cannot, however, recommend this type of financing. Hydrocarbon exploration and exploitation are in general financially high risk activities, especially in unknown areas. In the specified area the geological risks, the great water depths and other environmental circumstances combine to make the financial risks very large. Consequently, and particularly at the outset, it seems advisable for economic as well as for technological reasons to bring into the joint venture (ventures) oil companies with deep-water experience.

Thus the Commission recommends that in a first period during which the area concerned is unknown as far as hydrocarbon potential and geological and technological features and obstacles are concerned, the necessary risk capital should – to the extent possible – be invested by oil companies as participants in the joint venture. The oil companies must be willing – again to the extent possible – to carry both the Norwegian and the Icelandic shares of the costs through the drilling stage until a commercial find has been made. This principle has been applied to the Continental Shelf of mainland Norway. Important experience and valuable results have been obtained from this approach. However, the difficulties with such an approach in the present case should not be minimized. The combined Norwegian-Icelandic state participation should be at least 50 percent. The areas are unknown and the available information of the geology thereof not very encouraging. Consequently, the Conciliation Commission could not form any opinion as to whether it would be possible to obtain the necessary risk capital from private sources.

Negotiations for the establishment of effective joint-venture groups are necessarily complicated. Various considerations affect the possibility of forming a group possessing the optimal combination of assets for the task. Among such considerations are: experience in deep-water technologies; experience with high-pressure formations; capital and rig availability; geological expertise; differences of view on work programs, etc. In most cases it is a combination of a number of factors which produces the optimal results.

The areas north and south of the northern demarcation line of the Icelandic 200-mile economic zone

The part of the specified area south of the Icelandic 200-mile economic would as mentioned above consist of an area of about 12,725 km^2. The part north of the 200-mile line would measure about 32,750 km^2.

(*a*) The area north of the Icelandic 200-mile economic zone

Recognizing Iceland's need for hydrocarbons, the Commission proposes that Iceland should obtain an interest in all licensee groups north of its 200-mile line. In the case of the Norwegian continental shelf, where exploration and exploitation activities have already taken place, it is the practice to form joint-venture groups for each license area. In the case of the specified area, Iceland would be entitled to join each joint venture with an option to acquire a fixed percentage of 25% (or less if Iceland so wishes). Iceland would have the opportunity to participate in all joint-venture negotiations with the private companies. If the Norwegian licensing system is changed to permit other contract forms such as "service contracts" or "production sharing" contracts, Iceland would have the right to participate in such arrangements with the same percentage.

Norwegian legislation, oil policy and control, safety and environmental regulations, and administration would apply to the activities in question. In negotiations with oil companies for "carried interest," it must be assumed that both Norwegian and Icelandic state participation will so far as possible be carried up to the moment a commercial find has been declared. The extent to which the oil companies should be reimbursed for the governments' share of costs incurred by the companies up to the time a commercial find has been made, would depend on the terms of the joint-venture contract. Frequently the governments' share of such costs is reimbursed through payments in kind from the production over a period of years. In more recent cases Norway has been able to obtain a few contracts where such expenses are not reimbursed.

Certain difficulties will arise if it proves impossible to obtain joint-venture contracts under which the petroleum companies undertake to carry the costs of the two governments as envisaged above. In that case two possibilities may be foreseen: (a) the companies may be willing to carry a part of the expenses of the two states; (b) the companies may not be willing to undertake any amount of carried interest.

In these circumstances the two governments must decide whether they are willing to undertake the venture, either on their own or in conjunction with oil companies. In the event that the Norwegian Government decides to go forward with the project either on its own or in a joint venture, but Iceland decides that it will not participate due to the added risk, the question arises as to what should be the status of Iceland.

If the results are negative and no commercial finds are made, Norway has taken a risk and must carry the loss. In case a commercial find is made, the situation is less obvious. The Commission recommends, however, that in such a case Iceland should be allowed to acquire its share of participation in the development phase, provided that within a reasonable time it reimburses Norway for its share of the exploration and drilling costs incurred before that phase.

When a find has been declared commercial, a new phase – the development phase – will be entered. Although the cost in the drilling stage is substantial (some 100-150 million N.kr. per well), it is in the development phase that the really large investments are required. These may amount to billions of N.kr. The state participation is not carried in this phase. Statoil – the Norwegian state-owned petroleum company – pays its share of such investments in proportion to Norway's participation in the license area concerned. The same principle must apply in the northern part of the Jan Mayen Ridge area. Statoil will then pay its share according to Norwegian state participation, and Iceland, presumably through its own state company, should likewise pay its share of the costs of development in the case of a commercial find.

(*b*) The area south of the northern demarcation line of the Icelandic 200-mile economic zone

In this part of the specified area Icelandic oil legislation, oil policy and control, safety and environmental regulations and administration would apply. Norway should be allowed to participate in negotiations with oil companies and have an option to acquire a 25 percent interest in joint-venture arrangements. However, it should not be expected that Iceland should accommodate Norway with a carried interest arrangement in the same manner as has been proposed that Norway should do in regard to Iceland in the Norwegian part of the specified area.

The Conciliation Commission has considered the problems which may arise if a petroleum deposit extends on both sides of the demarcation line of the specified area or extends both north and south of the Icelandic 200-mile economic zone line.

The Conciliation Commission recommends the following solutions of these problems:

If a hydrocarbon deposit is situated both north and south of the Icelandic 200-mile economic zone line, the usual unitization, exploitation, and distribution procedures for the petroleum deposits should be agreed upon.

If a hydrocarbon deposit is situated on both sides of the demarcation line of the specified area south of the Icelandic 200-mile economic zone line, the same utilization approach would be applicable (i.e., the deposit should be divided in accordance with a fair expert assessment and unitized exploitation procedures).

If a hydrocarbon deposit is situated on both sides of the demarcation line of the specified area north of the Icelandic 200-mile zone line, the whole deposit should be considered as lying inside the specific area where the rights and obligations of the two states are concerned.

OTHER FIELDS OF COOPERATION

The Conciliation Commission has considered – in the course of its deliberations – whether other possible fields of cooperation should be contemplated in connection with the proposed cooperation arrangements. Such additional fields of cooperation could be directly or indirectly related to hydrocarbon activities or pertain to other possible spheres of activity not involving hydrocarbons. Examples of such cooperation would be access to and transfer of technology and data in the hydrocarbon sector, conclusion of long-term agreements which might secure petroleum supplies to Iceland at reasonable prices, and access to scientific and practical training in the petroleum sector. The Commission felt, however, that such proposals may lie outside its mandate.

Section VII

SUMMARY OF RECOMMENDATIONS

1. For the purpose of these recommendations the Commission proposes a specified area defined by the following coordinates:

$70^{35}{}^{\circ}$ N. Lat.

68° N. Lat.

$10^{30}{}^{\circ}$ W. Long.

$6^{30}{}^{\circ}$ W. Long.[5]

2. Taking the demarcation line between the 200-mile economic zone and the Norwegian fisheries zone as a dividing line, the specified area has two parts: the part north of the demarcation line comprises some 32,750 km^2. The area south of this line comprises some 12,725 km^2.

3. The Commission proposes a joint cooperation arrangement for the area so defined.

4. In the pre-drilling stage, which includes a systematic geological mapping of the specified area mainly by seismic surveys, the Commission

[5] See Figure 3 […] [in the front pocket of this volume]

recommends that such surveys should be undertaken jointly by the Norwegian Petroleum Directorate and the equivalent government organization of Iceland. These seismic surveys should be carried out by the Norwegian Petroleum Directorate according to plans elaborated by the two governments jointly. The costs of such surveys should be borne by Norway unless otherwise agreed by the parties. Icelandic and Norwegian experts should have the opportunity to participate in the seismic surveys on an equal footing. The results and evaluations of the surveys should be equally available to both parties.

If any profits accrue from the sale of the seismic surveys to interested companies or organizations, such profits should be shared by the two countries on a basis to be negotiated.

5. If the surveys justify further exploration, drilling and possible exploitation activities, the Commission proposes that concession contracts with joint-venture arrangements between the two parties and oil companies be negotiated.

6. In the part of the specified area north of the Icelandic 200-mile economic zone Iceland should have the opportunity to acquire a 25 percent interest in any joint-venture arrangement. In negotiations with oil companies an effort should be made to assure that the costs of both Norwegian and Icelandic state participation are "carried" by the oil companies up to the moment when a commercial find has been declared.

Should the oil companies refuse to "carry" the state Participation wholly or in part, the Conciliation Commission refers to its proposals made for such event in the foregoing Section VI.

Norwegian legislation, oil policy and control, safety and environmental regulations and administration would apply to the activities in this part of the specified area.

7. In the part of the specified area south of the northern demarcation line of the Icelandic 200-mile economic zone, Norway should have an option to acquire a 25 percent interest in any joint-venture arrangement. However, it should not be expected that Iceland will accommodate Norway with a carried-interest arrangement in the same manner and to the same extent proposed for the Norwegian part of the specified area. However, Norway should be allowed to participate in the negotiations with the oil companies.

Icelandic legislation, oil policy control, safety and environmental regulations and administration would apply to the activities in this part of the specified area.

8. In the development phase in any part of the specified area it is understood that each of the two states parties would carry a share of the development costs proportional to its share of state participation.

9. The Commission at the end of Section VI has made certain recommendations for dealing with deposits on both sides of the 200-mile demarcation line or overlapping some part of the specified-area boundary and refers to its proposals in this respect and considers them included among the present recommendations.

(*Signed*) Elliot L. Richardson
Chairman

(*Signed*) Hans G. Andersen,
Conciliator for Iceland

(*Signed*) Jens Evensen
Conciliator for Norway

PART II

Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands

Decision of 24 May 2005

Sentence arbitrale relative au chemin de fer dit Iron Rhine ("Ijzeren Rijn") entre le Royaume de Belgique et le Royaume des Pays-Bas

Décision du 24 mai 2005

AWARD IN THE ARBITRATION REGARDING THE IRON RHINE ("IJZEREN RIJN") RAILWAY BETWEEN THE KINGDOM OF BELGIUM AND THE KINGDOM OF THE NETHERLANDS, DECISION OF 24 MAY 2005

SENTENCE ARBITRALE RELATIVE AU CHEMIN DE FER DIT IRON RHINE ("IJZEREN RIJN") ENTRE LE ROYAUME DE BELGIQUE ET LE ROYAUME DES PAYS-BAS, DÉCISION DU 24 MAI 2005

Treaty interpretation–1839 Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories–respective obligations of the Parties under international law and under the Treaty.

Principles of treaty interpretation–restrictive use of intertemporal rule–preference of the Tribunal for dynamic and evolutive interpretation, moreover supported by the doctrine–evolutionary nature of conceptual terms–presumption of evolution of the meaning of generic terms following evolution of the law–openness of the 1839 Treaty to emerging norms of international law–customary status of the principles of treaty interpretation laid down in the 1969 Convention on the Law of Treaties–interpretation of terms taken in context and having regard to object and purpose of the treaty–principle of good faith–principle of effectiveness (*ut res magis valeat quam pereat*) with regard to the object and purpose of the treaty–importance of the context of the meaning of a term–possible departure of the meaning of a term from the common sense in view of other provisions of the treaty–sovereign rights must be determined in view of treaty obligations undertaken.

Determination of the status of an international agreement–necessity to examine the intention of the parties for distinguishing a non-legally binding instrument from a treaty–intention revealed by the review of the circumstances preceding the signature of the instrument, the content and its legal significance, and the circumstances following the signature–non-legally binding nature of the 2000 Memorandum of Understanding–requirement to interpret and to implement in good faith the principles and procedures laid down in a non-binding instrument.

Jurisdiction of the Arbitral Tribunal–limitation by European law and article 292 of the 1997 European Community Treaty (obligation for Member States to submit a dispute concerning the interpretation or application of the 1997 Treaty to the Court of Justice of the European Communities (CJEC))–analogy between the position of the Tribunal with respect to the CJEC and the position of national jurisdictions–mandatory submission to the CJEC of any relevant question of interpretation of European legislation–no automatic duty to refer to CJEC every mention of European law, especially provisions not relevant to the award–compliance of the Tribunal and the Parties with article 292 provisions.

Relevance of European law–provisions affecting the outcome of the case–no critical relevance of European law in the present dispute–no creation of rights or obligations for the Parties beyond 1839 Treaty provisions arising from the inclusion of the Iron Rhine Railway in European Community list of priority projects.

Environmental measures–relevance of international environmental law to the relation between the Parties–obligation to take into account environmental emerging principles under international law despite their imprecise current status: conservation, management, prevention and sustainable development, protection for future generations–interrelation

between development law and environmental law mutually reinforcing themselves: concept of sustainable development–prevention of significant harm to the environment considered as current principle of general international law–reactivation of railway not isolated from environmental protection measures required by its intended intensive use–compatibility between the right of transit of Belgium and the environmental measures under Dutch national law not imposing unreasonable difficulties for the exercise of this right–legitimate exercise of sovereignty by the Netherlands–not a task of the Arbitral Tribunal to investigate questions of considerable scientific complexity as to the necessity and forms of the most adequate environmental measures.

Right of transit of Belgium over Dutch territory–exercise of a right guaranteed by an international treaty of one State in the territory of another State–question of the possible impact of this exercise on the territory–prevalence of rights granted by treaty, or held under international law, restricting the exercise of sovereign rights of another State on its own territory–designation of protected areas along the historic route not to be regarded as a limitation of the right of transit–no legal obligation for the Netherlands to consult Belgium prior to the designation of the natural park.

Sovereign rights–question of the limitation of sovereign rights of the Netherlands over the area where Belgium is entitled under the 1839 Treaty to exercise its right of transit–limitation of Dutch sovereign rights flowing from the 1839 Treaty–entitlement of the Netherlands to exercise its rights of sovereignty as long as the right of transit of Belgium is neither denied nor rendered unreasonably difficult to exercise–duty to exercise sovereign rights in good faith and in a reasonable manner–declaration of the area as a natural park considered as a legitimate exercise of territorial sovereignty–financial implication for the Netherlands arising from such a declaration.

Reactivation of a dormant railway–affirmation of the continued existence of an "historic route" and the rights of Belgium in relation thereto–revival of and considerable upgrading and modernisation of a railway not to be considered as a request for a new line–adaptation regulated under provisions of 1839 Treaty–requirement of the mutual agreement of the Parties to the overall plan of reactivation–Netherlands not entitled to withhold its consent where that would amount to a denial of the right of transit of Belgium–absence of a more favourable treatment entitlement for Belgium in respect of the implementation of Dutch legislation on railways–Dutch safety and environmental requirements not to be considered as a denial of right of transit–consent of Belgium required for any deviation from the historic route.

Allocation of costs–link between financial risks and costs–financial obligations of Parties subject to careful balancing–contribution of the Netherlands to the total cost of the reactivation to the extent that those measures represent particular quantifiable benefits to the Netherlands–identification of the principles of apportionment of the costs by the Arbitration Tribunal but no precise calculation of amounts.

Interprétation des traités–Traité de 1839 entre la Belgique et les Pays-Bas relatif à la séparation des leurs territoires respectifs–obligations respectives des Parties en droit international et en vertu du Traité de 1839.

Principes d'interprétation des traités– recours restreint à la règle de l'inter-temporalité –préférence du Tribunal pour une interprétation évolutive et dynamique, qui plus est soutenue par la doctrine–nature évolutive des termes conceptuels–présomption en faveur de l'évolution du sens des termes communs suivant l'évolution du droit–ouverture du Traité de 1839 aux normes émergentes du droit international–statut coutumier des principes

d’interprétation conventionnelle établis dans la Convention sur le droit des traités de 1969–interprétation des termes pris dans leur contexte et à la lumière de l’objet et du but du traité –principe de la bonne foi–principe de l’efficacité (*ut res magis valeat quam pereat*) en relation avec l’objet et le but du traité–importance du contexte de l’expression–sens spécifique d’un terme divergeant du sens commun au vu des autres dispositions du traité.

Détermination du statut d’un accord international–nécessité d’examiner les intentions des parties pour différencier un instrument non contraignant d’un traité–intention révélée par l’analyse des circonstances antérieures à la signature de l’accord, son contenu et sa signification juridique, ainsi que les circonstances postérieures à la signature–nature non contraignante du Mémorandum d’entente de 2000–obligation d’interpréter et de mettre en œuvre de bonne foi les principes et les procédures établis dans un instrument non contraignant.

Compétence du Tribunal arbitral–limitation par le droit européen et particulièrement l’article 292 du Traité européen de 1997 (obligation pour les États membres de soumettre à la Cour de Justice des Communautés Européennes (CJCE) tout différend portant sur l’interprétation ou l’application des Traités communautaires)–analogie entre la position du Tribunal vis-à-vis de la CJCE et celle des juridictions nationales–soumission obligatoire à la CJCE de tout question pertinente d’interprétation de la législation communautaire–absence de renvoi automatique obligatoire pour toute référence au droit communautaire, particulièrement en ce qui concerne les dispositions non pertinentes pour l’affaire–respect des dispositions de l’article 292 par le Tribunal et les Parties.

Pertinence du droit communautaire–dispositions déterminantes pour la décision–absence de portée cruciale des dispositions communautaires dans le différend actuel–aucun droit ou obligation additionnels par rapport aux dispositions du Traité de 1839 créés pour les Parties du fait de l’inclusion du chemin de fer « Iron Rhine » dans la liste des projets prioritaires de la Communauté européenne.

Mesures environnementales–obligation de prendre en compte les principes environnementaux émergents en droit international malgré leur statut actuel imprécis: conservation, management, prévention et développement durable, sauvegarde des générations futures–interrelation entre le droit du développement et le droit de l’environnement qui se renforcent mutuellement : concept de développement durable–prévention des dommages significatifs à l’environnement considérée comme un principe général de droit international–pertinence du droit international de l’environnement dans les relations entre les Parties–réactivation d’une voie ferrée non affranchie des mesures protectrices de l’environnement requises par l’utilisation intensive qui en est prévue–compatibilité entre le droit de passage de la Belgique et les mesures environnementales du droit hollandais qui n’impliquent pas des difficultés irraisonnables pour l’exercice de ce droit–exercice légitime de sa souveraineté par les Pays-Bas–non une fonction du Tribunal que d’enquêter sur les questions scientifiques éminemment complexes telles que la nécessité et les formes des mesures environnementales les plus adéquates.

Droit de passage de la Belgique sur le territoire hollandais–exercice du droit d’un État garanti par un traité international sur le territoire d’un autre État–question de l’effet éventuel de cet exercice sur le territoire–prévalence sur la souveraineté elle-même des droits restreignant l’exercice des droits souverains d’un autre État sur son propre territoire, garantis par traité ou en vertu du droit international–le fait de désigner des zones protégées le long de la route historique non considéré comme une limitation du droit de passage–aucune obligation juridique pour les Pays-Bas de consulter la Belgique avant la classification du parc naturel.

Droits souverains–question de la restriction des droits souverains des Pays-Bas sur la zone dans laquelle la Belgique est titulaire d'un droit de passage garanti par traité–restriction des droits souverains des Pays-Bas résultant du Traité de 1839–exercice de ses droit souverains par les Pays-Bas autorisé tant que le droit de passage de la Belgique n'est pas dénié ou son exercice compliqué au-delà du raisonnable–devoir d'exercer ses droits souverains en bonne foi et d'une manière raisonnable–déclaration de la zone comme parc naturel considérée comme un exercice légitime de la souveraineté territoriale–implication financière pour les Pays-Bas résultant d'une telle déclaration.

Réactivation d'un chemin de fer inactif–affirmation de l'existence ininterrompue d'une « route historique » et des droits de la Belgique y afférent–la relance, l'extension et la modernisation considérable de la voie ferrée non considérées comme une requête pour une nouvelle ligne–adaptation réglementée par les dispositions du Traité de 1839–nécessité d'un accord mutuel des Parties à propos du plan global de réactivation–les Pays-Bas non en droit de refuser leur consentement si cela équivaut à un déni du droit de passage pour la Belgique –absence de droit à un traitement plus favorable de la Belgique en ce qui concerne la mise en œuvre de la législation hollandaise sur les chemins de fer–les exigences hollandaises en matière d'environnement et de sécurité non considérées comme un déni du droit de passage –exigence du consentement de la Belgique pour toute déviation de la route historique.

Répartition des coûts–liaison entre les risques financiers et les coûts–répartition des obligations financières des Parties sujet à un équilibre attentif–contribution des Pays-Bas au coût total de la réactivation proportionnelle aux bénéfices particuliers et quantifiables y afférent retirés par cet État–identification des principes de répartition des coûts par le Tribunal arbitral, mais absence de calcul précis des montants.

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IN THE ARBITRATION

REGARDING THE IRON RHINE

("IJZEREN RIJN") RAILWAY

BETWEEN:

THE KINGDOM OF BELGIUM

AND

THE KINGDOM OF THE NETHERLANDS

AWARD OF THE ARBITRAL TRIBUNAL

The Arbitral Tribunal:

Judge Rosalyn Higgins, President

Professor Guy Schrans

Judge Bruno Simma

Professor Alfred H.A. Soons

Judge Peter Tomka

The Hague, 24 May 2005

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Chapter I

PROCEDURAL HISTORY, BACKGROUND, AND SUBMISSIONS OF THE PARTIES

A. PROCEDURAL HISTORY

1. This Award is rendered pursuant to an Arbitration Agreement ("Arbitration Agreement") between the Kingdom of Belgium ("Belgium") and the Kingdom of the Netherlands ("the Netherlands") ("the Parties"). Its terms were agreed through an exchange of diplomatic notes dated 22 and 23 July 2003, which provided that the Arbitration Agreement would be provisionally applied pending completion of the constitutional formalities in both countries.

2. Under the Arbitration Agreement, the Parties agreed "to submit [their] dispute concerning the reactivation of the Iron Rhine to an arbitral tribunal they are to set up under the auspices of the Permanent Court of Arbitration in The Hague" and "to execute the Arbitral Tribunal's decision as soon as possible".

3. The Arbitration Agreement further posed specific Questions for the Arbitral Tribunal as follows:

> 1. To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory?
>
> 2. To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon? Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this? Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?
>
> 3. In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

4. In the Arbitration Agreement, the Parties requested that the Arbitral Tribunal "render its decision on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under article 292 of the EC Treaty".

5. In accordance with the Arbitration Agreement, the Parties subsequently agreed upon Rules of Procedure for the arbitration ("Rules of Procedure"),[1] which were based on the "Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States".

6. In conformity with Article 5, paragraph 1 of the Rules of Procedure, Belgium appointed as arbitrators Professor Guy Schrans and Judge Bruno Simma, and the Netherlands appointed Professor Alfred H.A. Soons and Judge Peter Tomka. The four arbitrators met on 22 September 2003, and, pursuant to Article 5, paragraph 2 of the Rules of Procedure, appointed Judge Rosalyn Higgins as President of the Arbitral Tribunal ("Tribunal").

7. Consistent with the Arbitration Agreement and the designation of the Permanent Court of Arbitration ("PCA") as Registry under Article 1, paragraph 3 of the Rules of Procedure, the Secretary-General of the PCA appointed Ms. Anne Joyce, Deputy General Counsel, to serve as Registrar to the Tribunal.

8. By letters dated 3 September 2003 and 9 September 2003, respectively, the Netherlands and Belgium each designated their Agents. The Agent appointed by the Netherlands was Professor Johan G. Lammers, and the Agent appointed by Belgium was Mr. Jan Devadder.

9. The Tribunal held a meeting with the Agents on 29 September 2003. At the meeting, the Tribunal and the Agents reached certain understandings regarding implementation of the Rules of Procedure and discussed other practical matters relating to the arbitration proceedings. The Rules of Procedure provide for the possibility of oral proceedings only in the event of a specific request of a Party (Article 13). However, it was agreed that should the Tribunal wish to seek additional information from the Parties following receipt of the written pleadings, the Tribunal would notify the Parties and consult with them as to whether such information would best be obtained through further written pleadings or through an oral proceeding. It was further agreed that, in the event of a hearing or an additional round of written pleadings, the time limits for issuance of the Award would commence following the date of the last submission or the closure of hearings, as the case may be.

10. The Parties filed their written pleadings in accordance with the timetable set forth in the Rules of Procedure. The pleadings consisted of Belgium's Memorial filed on 1 October 2003 ("BM"), the Netherlands'

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[1] The Rules of Procedure, as well as other documents related to the arbitration, are available at http://www.pca-cpa.org.

Counter-Memorial filed on 30 January 2004 ("NCM"), Belgium's Reply filed on 30 March 2004 ("BR"), and the Netherlands' Rejoinder filed on 1 June 2004 ("NR").

11. No request for an oral hearing was made by either Party or sought by the Tribunal.

12. In June 2004, it came to the attention of the Tribunal that approval of the Arbitration Agreement by the Netherlands Parliament was taking longer than anticipated, and that ratification was unlikely prior to the date envisaged under Article 18 of the Rules of Procedure (29 September 2004) for rendering the Tribunal's Award. In light of these developments, the Tribunal decided that it would not render the Award before completion by both Parties of their respective constitutional procedures required for the entry into force of the Arbitration Agreement. On 6 and 13 July 2004, the Tribunal received from Belgium copies of the relevant documents indicating that the constitutional procedures required in Belgium for the entry into force of the Arbitration Agreement had been completed. On 20 May 2005, the Tribunal was notified by the Netherlands that the constitutional procedures required in the Netherlands for entry into force of the Arbitration Agreement had been completed and copies of the relevant documents were provided. On 20 May 2005, the Parties informed the Tribunal that, although the Arbitration Agreement, on its terms, would not enter into force until 1 July 2005, the necessary ratification procedures in each country and the mutual notification thereof had been completed. They both wished to request that the Tribunal render its Award "as soon as possible prior to its formal entry into force". The Tribunal acceded to the Parties' request, and the Award has been rendered accordingly.

* * *

13. Neither Party has challenged the jurisdiction of the Tribunal to decide the dispute. Nevertheless, Belgium, in a section of its Reply with the heading "Jurisdiction", cites the requirement under Article 292 of the Treaty Establishing the European Community (1997 Official Journal of the European Communities ("O.J.") (C 340) 3) ("EC Treaty") pursuant to which "Member States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided therein", and states that, although both Belgium and the Netherlands had referred to EC law in their pleadings, such references do not constitute sufficient reason to conclude that Article 292 had been violated (BR, pp. 2, 4, paras. 3, 5).

14. In support of its view, Belgium distinguishes the ongoing *MOX Plant* case,[2] wherein Ireland has brought a dispute with the United Kingdom before an arbitral tribunal established pursuant to Annex VII to the United Nations Convention on the Law of the Sea (which proceedings that tribunal suspended), and the Commission of the European Communities ("European Commission") has instituted proceedings against Ireland before the Court of Justice of the European Communities ("European Court of Justice") for an alleged violation of Article 292 of the EC Treaty. Belgium states that, unlike the United Kingdom in the *MOX Plant* case, the Netherlands had not objected to Belgium's references to EC law in its Memorial. Belgium further argues that neither Party was contending that the other had violated EC law. Moreover, Belgium states, "issues where Community law comes into play in the present cases [sic] really boil down to the apportionment of costs, which is not a matter of Community law" (BR, p. 4, para. 6).

15. The Parties elaborated further on their view of applicable law and its relationship to EC law in a letter addressed to the Secretary-General of the European Commission, which was dated 26 August 2003, a copy being sent to the PCA. In the letter, the Parties stated:

> For both parties the core of the dispute relates to the interpretation of the bilateral Separation Treaty of 1839 and the interpretation of the obligations laid down in this treaty, i.e., questions of international law.

The letter concluded:

> Should the eventuality of an application or interpretation of community law arise in the course of the procedure, the Kingdom of Belgium and the Kingdom of the Netherlands commit themselves to take all necessary measures in order to comply with all the obligations resting with them under the EC Treaty, and in particular Article 292 thereof.

B. BACKGROUND

16. The Iron Rhine, or *"Ijzeren Rijn"* as it is known in Dutch, is a railway linking the port of Antwerp, Belgium, to the Rhine basin in Germany, via the Netherlands provinces of Noord-Brabant and Limburg.[3] The Iron Rhine has its origins in the negotiations surrounding the separation of Belgium from the Netherlands in the 1830s, and in particular in the Treaty between Belgium and the Netherlands relative to the Separation of their Respective Territories ("1839 Treaty of Separation") (Consolidated Treaty Series ("C.T.S."), 1838-1839, Vol. 88, p. 427).

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[2] For a description of the case and other related information, *see* http://www.pca-cpa.org/ENGLISH/ RPC/#Ireland v. United Kingdom ("MOX Plant Case").

[3] For a map of the Iron Rhine railway provided jointly by the Parties, *see* Annex [2].

17. Among other matters treated in the 1839 Treaty of Separation was the question of a communication link between Antwerp and Germany. In this connection, Article XII of the 1839 Treaty of Separation provides as follows:

> *Dans le cas où il aurait été construit en Belgique une nouvelle route, ou creuser un nouveau canal, qui aboutirait à la Meuse vis-à-vis le canton hollandais de Sittard, alors il serait loisible à la Belgique de demander à la Hollande, qui ne s'y refuserait pas dans cette supposition, que la dite route ou le dit canal fussent prolongés d'après le même plan, entièrement aux frais et dépens de la Belgique, par le canton de Sittard, jusqu'aux frontières de I'Allemagne.*[4] *Cette route ou ce canal, qui ne pourraient servir que de communication commerciale, seraient construits, au choix de la Hollande, soit par des ingénieurs et ouvriers que la Belgique obtiendrait l'autorisation d'employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers que la Hollande fournirait, et qui exécuteraient, aux frais de la Belgique, les travaux convenus, le tout sans charge aucune pour la Hollande, et sans préjudice de ses droits de souveraineté exclusifs sur le territoire que traverserait la route ou le canal en question. Les deux parties fixeraient, d'un commun accord, le montant et le mode de perception des droits et péages qui seraient prélevés sur cette même route ou canal.*[5]

18. The transit right conferred on Belgium by Article XII of the 1839 Treaty of Separation was further specified through treaties concluded in the nineteenth century, culminating in the Convention between Belgium and the Netherlands relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Netherlands Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg of 1873 ("Iron Rhine Treaty") (C.T.S., 1872-1873, Vol. 145, p. 447), pursuant to which the Iron Rhine railway was constructed across Netherlands territory. It was completed in 1879.

19. From 1879 until World War I, the Iron Rhine railway was used continuously. During this period, the legal status of the Iron Rhine railway remained essentially unchanged with one exception – namely, ownership of the track was transferred from the Belgian concessionaire "*Grand Central Belge*" to the Government of Belgium, and thence to the Government of the Netherlands pursuant to the Railway Convention between Belgium and the Netherlands of 23 April 1897 ("1897 Railway Convention") (C.T.S., 1896-

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[4] The Tribunal notes that Article XII speaks of *"l'Allemagne"* even though in 1839 Germany did not exist as a state under international law, but as a mere confederation *("Deutscher Bund")*. The new road or canal envisaged in the Treaty would thus have reached the borders of Prussia. At the time of the conclusion of the Iron Rhine Treaty in 1873 (*see* paragraph 18), Prussia and other German states had been united in the German Empire.

[5] *See* paragraph 32 below for the Tribunal's translation of Article XII. The text of the 1839 Treaty of Separation provided by the Netherlands to the Tribunal uses, in the French and English versions, Roman numerals; the text provided by Belgium uses Roman numerals in the English version and Arabic numerals in the French version. The Tribunal will use Roman numerals when referring to the 1839 Treaty of Separation.

1897, Vol. 184, p. 374). Use of the line then varied in intensity during the period 1914-1991. It is common ground that rail commercial transit traffic was halted during World War I. Belgium states that thereafter "twelve international freight trains a day travelled in both directions between Antwerp and the Ruhr area, between Rotterdam and the Ruhr area" (BM, p. 22, para. 18); whereas the Netherlands specifies the line was little used, with eight freight trains per 24-hour period passing in 1920, nine in 1921, and since 1922, only 1 or 2 per 24-hour period (and only rarely over the entire track) (NCM, p. 19, para. 2.11; NR, p. 29, paras. 115-117). The Netherlands explains this by referring to the access had by Belgium to the then recently constructed Hasselt-Montzen-Aken line and its economic advantages. Both agree that during World War II, the Iron Rhine track was destroyed and it was necessary to rebuild it. For a period thereafter it was used for military transportation. During the ensuing forty years only light use was made of the line. Since 1991, the Iron Rhine railway has not been used for through traffic between Belgium and Germany, although use of certain sections of the line in the Netherlands has continued (which use is not in issue between the Parties).

20. During the 1990s, a number of legal steps were taken by the Government of the Netherlands with respect to designation of nature reserves in the provinces of Noord-Brabant and Limburg, some of which lie across the route of the Iron Rhine railway. In 1987 and during the 1990s (thus beginning even prior to the cessation of through traffic in 1991), there were a number of communications, both oral and written, between government officials of Belgium and the Netherlands concerning possible reactivation of the Iron Rhine railway.

21. Formal inter-governmental discussions on the issue of use, restoration, adaptation and modernisation of the Iron Rhine railway were initiated by the Prime Minister of Belgium on 12 June 1998. (Hereinafter, the term "reactivation" will be used to denote the just-mentioned various activities.) These discussions led to the adoption, on 28 March 2000, of a Memorandum of Understanding ("March 2000 MoU") between the two Governments, which, among other things, provided for completion of certain environmental impact studies of the reactivation, as well as a timetable for phasing in renewed use of the line.

22. The environmental impact studies envisaged by the March 2000 MoU were completed in May 2001. However, further implementation of the March 2000 MoU, particularly with respect to the plans for so-called "temporary use" of the Iron Rhine railway, foundered on disagreements between the Parties concerning conditions to be attached to such use and allocation of costs necessary for making the line suitable for long-term use as requested by Belgium. The Parties have further disagreed as to whether this temporary use can occur in the absence of agreement on long-term use. Discussion between the Parties then turned to the possibility of submitting their dispute to arbitration and led to the Arbitration Agreement concluded between the Parties in July 2003.

23. In general, Belgium argues that the exercise of jurisdiction by the Netherlands over the Iron Rhine railway is limited by the Netherlands' obligations under international law and in particular the obligations of good faith and reasonableness. As applied to the transit right granted under the 1839 Treaty of Separation, Belgium argues, the Netherlands is obliged at a minimum to allow immediate – albeit modest – "temporary" use of the historic track and, for the long term, a major reactivation of the track. Exercise of its rights, Belgium asserts, must not be rendered "unreasonably difficult" by, among other things, the various "highly expensive" environmental protection measures the Netherlands seeks to impose in relation to any such reactivation.

24. Belgium also argues that, alternatively, and if such measures are nonetheless to be imposed, the Netherlands must ensure that Belgium's use of the Iron Rhine railway is not adversely affected by the resulting construction works, and bear the costs and financial risks. In support of this view, Belgium emphasizes that its obligations to bear costs under Article XII relate to the *construction* of the road or canal, and not to the exercise of Belgium's right of passage (BR, p. 98, para. 104). Belgium also looks to the language of Article XI of the 1839 Treaty of Separation – including the term "*entretien*" which appears therein – and argues further that the Netherlands has a responsibility to maintain the track of the Iron Rhine railway – in a good state and prone to facilitating trade". The question of what constitutes "a good state and prone to facilitating trade", Belgium asserts, must be viewed in light of current circumstances and what is considered commercially viable (BR, p. 113, para. 122). If the Tribunal determines that Belgium should bear any of the costs, such costs should, in Belgium's view, be limited to those needed to meet only minimum requirements consistent with Netherlands legislation, for example with respect to noise abatement. Moreover, if Belgium is to bear the costs of measures resulting from other international obligations (such as EC law), the Netherlands must require only the least costly and/or onerous options available to meet these obligations.

25. In general, the Netherlands, for its part, argues that while it does not contest Belgium's right of transit across Netherlands territory, that right is circumscribed by the requirements set forth in Article XII of the 1839 Treaty of Separation, and that, as a limitation of Netherlands territorial sovereignty, the transit right must be interpreted restrictively. The Netherlands cites in particular the reservation of its sovereignty in Article XII and the requirements that Belgium bear the costs of the *"travaux"* envisaged under that article. Environmental measures and other requirements putatively imposed by the Netherlands on reactivation of the Iron Rhine railway, the Netherlands maintains, constitute the legitimate exercise of its sovereignty under Article XII, leaving Belgium's obligation to pay the costs of complying with the Netherlands' requirements intact. Further, nothing in Article XI of the 1839 Treaty of Separation, the 1897 Railway Convention, or subsequent practice of the Parties, the Netherlands asserts, leads to a different conclusion

(NCM, p. 57, paras. 3.3.8.2-3.3.8.4; NR, pp. 33-35, paras. 133-139). Belgium employs too broad a definition of the term *"entretien"* the Netherlands argues, and it cannot be stretched to cover the costs associated with reactivation (NR, p. 33, para. 135).

C. FINAL SUBMISSIONS OF THE PARTIES

1. Belgium

26. The final submissions of Belgium, made in the Reply, were as follows:

> **ON QUESTION NO. 1**
>
> Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory do not apply in the same way to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, in that:
>
> - The Netherlands shall, if Belgium decides to construct a "*new road or canal*" on Belgian territory, as described in Article XII of the Separation Treaty of 19 April 1839, allow for the prolongation of this road or canal on Dutch territory "*according to the same plan*" as on Belgian territory, without the Netherlands' agreement as to the plan.
>
> - If, in the hypothesis just-mentioned, the Netherlands takes the option to perform the works by itself, such works can only be at the expense of Belgium if they have been agreed upon by both Governments. Conversely, if the Netherlands chooses to have these works performed by Belgium, no agreement is necessary as to the works. In the latter hypothesis, Belgium has the right to benefit from a treatment not less favourable than the one accorded to other operators in this respect.
>
> - Without prejudice to European law, the Netherlands have the obligation to allow for the use of the Iron Rhine route provided that it "*only serve[s] as commercial communication*" and to take all the measures necessary to permit this use.
>
> - The height and mode of collection of toll rights shall be determined by a common agreement between the Netherlands and Belgium. Such agreement must be taken in conformity with international law and European law.
>
> - No re-routings deviating from the historical route shall be decided upon by the Netherlands without the agreement of Belgium.
>
> - The Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner, and so as not to deprive Belgium's rights to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory to use the historical route of the Iron Rhine, of their substance, and so as not to render the exercise of these rights unreasonably difficult.

The Netherlands shall take all necessary measures so as to allow for such a use.

- If the Netherlands has several possibilities of complying with an international obligation, one of which allows it to comply with its obligation towards Belgium as concerns the Iron Rhine, while the others do or did not, the Netherlands are under the obligation to take the possibility which makes it possible for it to comply with both obligations.
- If the Netherlands has conflicting obligations as concerns the reactivation of the Iron Rhine, it shall reduce the effect of such a conflict by taking measures, which are the least onerous for Belgium.
- Without prejudice to Belgium's right to an immediate use of the historical route of the Iron Rhine at full capacity and on a long-term basis, when Belgium makes a demand for provisional driving on the historical route of the Iron Rhine, by 15 trains per natural day (both directions summed up), including at limited speed in evening hours and at night, for a period of 5 years at least, the Netherlands shall immediately accept that demand, and immediately take all decisions necessary to effectively allow for such driving within the shortest time materially feasible, which shall not be more than one month.
- The Netherlands shall take all necessary measures so as to prevent any interruption of the use of the Iron Rhine between "temporary driving" and "long-term" driving, and to effectively allow for the latter within the shortest time feasible.
- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to parts A2, B and C of the track as identified therein, may not be required as a prior condition to Belgium's exercise of its rights on the Iron Rhine, unless such measures do not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and:
  - In primary order, unless the costs and financial risks associated with these measures shall be borne in whole by the Netherlands.
  - In subsidiary order, unless the costs and financial risks associated with such measures be borne by the Netherlands at the least in proportion to its forecasted use of the railway line by 2020, which is at least 77,889 percent, and by Belgium in a proportion of maximum 22,111 percent, under the further proviso that the Netherlands may not charge to Belgium costs which are charged on the users of the line in accordance with Article XII of the 1839 Separation Treaty and European Community rules, nor charge to Belgium costs unrelated to the reactivation, which includes, but is not limited to, costs for the abatement of road traffic noise.
- Without prejudice to Belgium's position under Question No. 3, the measures foreseen in ProRail's "*IJzeren Rijn Concept Ontwerp-tracébesluit versie 1.4*" of July 2003 with respect to noise abatement which are not necessary so as to reach the maximal exemption limit of 70 dB (A) or 73 dB (A) provided by law, unless if such measures do

not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult, and unless if the costs and financial risks associated with such abatement measures are borne in whole by the Netherlands.

- Without prejudice to Question No. 3, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands.

- In subsidiary order to the last submission, if the Tribunal esteems that the former point is outside its jurisdiction, the Netherlands may not require the building of a tunnel in the Meinweg area nor other wildlife and nature protection measures including compensatory measures in areas passed through by the historical route of the Iron Rhine, unless if such requirement does not render the exercise of Belgium's right to the use of the Iron Rhine unreasonably difficult and if the costs and financial risks associated with these measures are borne in whole by the Netherlands, safe to the extent that the Netherlands had no other possibilities to meet its obligations under EC law, and to the extent that the measures required are the least costly for allowing the Netherlands to meet its EC obligations.

ON QUESTION NO. 2

- Belgium does not have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, unless Belgium requests to have a new road on Belgian territory prolonged according to the same plan on Dutch territory, and the Netherlands takes the option of having that prolongation according to the new plan built by Belgium in accordance with Article XII of the Separation Treaty of 19 April 1839.

- Belgium has the right according to Article XII of the 1839 Separation Treaty to have a new road on Belgian territory prolonged on Dutch territory according to the same plan. This is subject to Dutch jurisdiction within the limits set forth under Question No. 1. The right of Belgium to establish plans, specifications and procedures for such works according to Belgian law and the decision-making power based thereon, is limited accordingly.

- The "plan" within the meaning of Article XII of the 1839 Separation Treaty shall be determined by Belgium without the agreement of the Netherlands; however, Belgium shall inform and consult the Netherlands in accordance with the principles of good faith and reasonableness, all of this without prejudice to European Community law.

- The word "plan" in Article XII of the Separation Treaty must be interpreted on the basis of its ordinary meaning, according to which it refers to all the technical characteristics and particularities of the railway.

- Belgium's present request for reactivation does not amount to a request for a "*new road or canal*" within the meaning of Article XII of the Separation Treaty with the consequence that the Netherlands does not have the option provided by Article 12 of the 1839 Separation Treaty to require that Belgium performs work on Dutch territory.

- Works on Dutch territory performed by the Netherlands shall be agreed upon between Belgium and the Netherlands. As the present request of Belgium to reactivate the Iron Rhine is not a request to have the Iron Rhine prolonged on Dutch territory according to the same plan as on Belgian territory, such limitation is not at stake at present. The same is true of Belgium's right to benefit from a treatment not less favourable than that accorded to other operators with respect to other railways on Dutch territory, as concerns the freedom to establish plans, specifications and procedures.

- Further, Dutch regulatory powers to establish plans, specifications and procedures remains limited by the principles set out under Question No. 1.

- The distinction between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the railway infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, is irrelevant, as such, as concerns the extent to which Belgium has the right to perform or commission work on Dutch territory. The distinction is also irrelevant, as such, with respect to the extent to which Belgium has the right to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon. This does not affect the relevance of the said distinction for determining the reasonableness of Dutch requirements for the building of infrastructure to be paid for by Belgium.

- The right of the Netherlands to unilaterally require the building of underground and above-ground tunnels, as well as the proposed associated construction and safety standards, is limited by the above-mentioned rights of Belgium in case it requests that the railway on Belgian territory be prolonged on Dutch territory according to the same plan, which is not the case at present. It is further limited by the obligations of the Netherlands to cooperate with Belgium as well as by the principles stated under Question No. 1.

Therefore, the Netherlands may not impose the construction of underground and above-ground tunnels at the expense of Belgium, if such a requirement is contrary to the principles set under Question No. 1, which notably include the standards of normality and of proportionality, as well of non-arbitrariness and non-discrimination.

The Netherlands is under the obligation to inform and to consult in good faith with Belgium as concerns such requirements, in accordance with its obligation to cooperate and the principle of reasonableness and good faith.

The "*pacta sunt servanda*" principle, and its corollaries the principles of good faith and of reasonableness, also applies in the hypothesis that the Netherlands wishes to build underground and above-ground tunnels on the Iron Rhine on Dutch territory at its own expenses, and not at the expenses of Belgium. As a consequence, the Netherlands may not, notably, decide to build a tunnel at their expenses, if such a construction infringes in an unreasonable manner on the right to passage of Belgium conferred to it by Article XII of the Separation Treaty.

- Diversions and the like may not unilaterally be imposed by the Netherlands, in that they require the consent of Belgium.

ON QUESTION NO. 3

In primary order:

- That, in application of the Iron Rhine's conventional regime, Belgium shall bear the costs and financial risks associated with the Iron Rhine on Dutch territory, only to the extent that Belgium requests that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, and, if the Netherlands would then take the option of having the route constructed by engineers and workers which the Netherlands would employ, to the further condition that the works be agreed upon.

- That Belgium's present request for the reactivation of the Iron Rhine does not amount to a request that a new route on Belgian territory be prolonged on Dutch territory according to the same plan, with the consequence that Belgium is not under the obligation to bear the costs and financial risks associated with this reactivation.

- That, in application of the Iron Rhine's conventional regime, the Netherlands shall be responsible for all cost items and financial risks associated with the restoration, adaptation and modernization of the historical route of the Iron Rhine on Dutch territory, so as to make it in a good state and prone to facilitating trade.

- That the reactivation of the Iron Rhine as it is presently envisaged does not exceed what is necessary for the line to be in a good state and prone to facilitating trade, with the consequence that the Netherlands shall be responsible for all costs and financial risks associated with the envisaged restoration, adaptation and modernization.

In subsidiary order:

- That all costs items and financial risks related to restoration of the historical route, caused by the Netherlands' dismantling part of the infrastructure of the historical track, making it unfit for use or failing to provide maintenance, shall be borne by the Netherlands.

- That the Netherlands shall be responsible for all costs and financial risks associated with (a) of measures related to tracks which are in present or future use for Dutch railway transports, (b) of measures required to meet objectives over and above Dutch legislative requirements, (c) of building a loop around Roermond, and (d) of building a tunnel in the Meinweg and similar nature protection devices and compensatory measures, within the limits set under Question No. 1.

2. Netherlands

27. The final submissions of the Netherlands, made in the Rejoinder, were as follows:

ON QUESTION NO. 1

The Netherlands submits that it has retained the right to exercise in full its legislative, executive and judicial authority in respect of the reactivation of the Iron Rhine, so that the Dutch legislation in force and the decision-making power based thereon in respect of the use, the restoration, the adaptation and the modernisation of railway lines on Dutch territory is applicable in the same way to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory.

Other than Article XII of the Separation Treaty, as supplemented by the Iron Rhine Treaty, there is no agreement obliging the Netherlands to permit Belgium the right to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory.

Article XII of the Separation Treaty forms a special agreement. It contains a restriction on the territorial sovereignty of the Netherlands involving the right of Belgium to the use, the restoration, the adaptation and the modernisation of the Iron Rhine. However, Article XII of the Separation Treaty should, in so far as it contains a restriction to the territorial sovereignty of the Netherlands, in accordance with international law, be construed restrictively.

ON QUESTION NO. 2

In view of the answer given to Question 1 the Netherlands submits that Belgium does not have the right to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the historical route of the Iron Rhine on Dutch territory and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon.

As to the right of Belgium to perform or commission work with a view to the use, the restoration, the adaptation and the modernisation of the Iron Rhine on Dutch territory, the Netherlands refers to the text of Article XII of the Separation Treaty, which specifically states "*Cette route ... seraient construits, aux choix de la Hollande, soit par des ingénieurs et ouvriers, que la Belgique obtiendrait l'autorisation*

d'employer à cet effet dans le canton de Sittard, soit par des ingénieurs et ouvriers, que la Hollande fournirait...."

No distinction may be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure.

The Netherlands may unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards, as long as these are not contrary to applicable rules of international law.

ON QUESTION NO. 3

The Netherlands submits that in view of the passages of Article XII of the Separation Treaty reading "*entièrement aux frais et dépens de la Belgique*" and "*qui exécuteraient aux frais de la Belgique*" all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory subject to the requirements of Dutch legislation and decision-making power based thereon in respect of the functionality of the rail infrastructure and the protection of the residential and lived environment should be borne by Belgium.

Chapter II

LEGAL BASIS AND SCOPE OF BELGIUM'S TRANSIT RIGHT

A. THE APPLICABLE LEGAL PROVISIONS

28. The Arbitral Tribunal has been asked to render an Award, answering Questions jointly put to it by the Parties, "on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under Article 292 of the EC Treaty".

29. Various treaties have a relevance to this dispute and have been brought to the Tribunal's attention by the Parties. In addition, the Parties have each invoked various rules and principles of international law.

30. As noted above (*see* paragraph 16), a key treaty relevant to this dispute is the 1839 Treaty of Separation. By this treaty, Belgium and the Netherlands settled the allocation of territory, and also dealt with various other matters. This was achieved after prolonged diplomatic multilateral negotiations, which had begun in 1830, in which other Powers were involved ("the Conference of London").

31. The 1839 Treaty of Separation determined the territory of Belgium and the Netherlands and specified their borders (Articles I, II and VI). Articles II and V deal with the cession by Willem I of part of the Grand Duchy of Luxembourg. Articles III and IV attribute part of Limburg to the Netherlands. Article VII affirms the continued neutrality of Belgium. Article XIII distributes debts between the two countries. Various transit rights are guaranteed to Belgium by virtue of Articles IX, X, XI and XII. It is Article XII which has been most at issue in the pleadings of the Parties in the present arbitration.

32. The Treaty was concluded in Dutch and in French. There is no dispute between the Parties about such small distinctions as exist in the two languages. The Parties have used the French text (Martens, *Nouveau Recueil des Traités*, Vol. XVI, p. 773) in their pleadings. They have each provided for the benefit of the Tribunal a translation in English of the particular articles. These translations differ from each other in several respects. For this and other technical reasons the Tribunal has prepared its own translation of Article XII, which is as follows:

> In the case that in Belgium a new road would have been built or a new canal dug, which would lead to the Maas facing the Dutch canton of Sittard, then Belgium would be at liberty to ask Holland, which in that hypothesis would not refuse it, that the said road, or the said canal be extended in accordance with the same plan, entirely at the cost and expense of Belgium, through the canton of Sittard, up to the borders of Germany. This road or canal, which could be used only for commercial communication, would be constructed, at the choice of Holland, either by engineers and workers whom Belgium would obtain authorization to employ for this purpose in the canton of Sittard, or by engineers and workers whom Holland would supply, and who would execute the agreed works at the expense of Belgium, all without any burden to Holland, and without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or canal in question.
>
> The two Parties would set, by common agreement, the amount and the method of collection of the duties and tolls which would be levied on the said road or canal.

The French text of which this is a translation is reproduced above (*see* paragraph 17).

33. On the very same day as the 1839 Treaty of Separation was concluded, two further treaties were concluded at the Conference of London, one being a treaty by Belgium with Austria, France, Great Britain, Prussia, and Russia, and the other being a treaty by the Netherlands with the same parties (C.T.S., 1838-1839, Vol. 88, p. 411 ff). These treaties each referred to the provisions of the 1839 Treaty of Separation (the articles of which were annexed thereto), and provided that they *"sont considérés comme ayant la même force et valeur que s'ils étaient textuellement insérés dans le présent*

Acte, et qu'ils se trouvent ainsi placés sous la garantie de Leursdites Majestés".

34. It was thus clear from the outset that the provisions of the 1839 Treaty of Separation, including Article XII thereof, were of more than bilateral interest. That has remained the case until today. In the current era there is a certain interest of the EC in the railway that was in due course to be established by reference, *inter alia*, to Article XII of the 1839 Treaty of Separation. That interest, and the legal implications for this arbitration, are further examined below (*see* paragraphs 145 and 146).

35. Article XII of the 1839 Treaty of Separation referred to a road which might have been built or a canal which might have been dug. In 1842, the Boundary Treaty between Belgium and the Netherlands was concluded in The Hague (C.T.S., 1842-1843, Vol. 94, p. 37 ff). Its purpose, as stated in the preamble, was to clarify a number of issues arising from the 1839 Treaty of Separation. In particular, Article III made clear that the road or canal across the Netherlands referred to in Article XII of the 1839 Treaty of Separation could be constructed by a concessionnaire. (In 1869, Belgium provided for such a concession for a railway (BM, p. 9, para. 9).) The second paragraph of Article III of the Boundary Treaty envisaged the possibility of expropriation by the Netherlands, on the basis of its legislation and for a public utility purpose, of the necessary land for the project that had been envisaged under Article XII. There was immediately added to Article III of the Boundary Treaty the phrase *"et ce de la même manière que si le Gouvernement Belge procédait par lui-même aux travaux d'exécution et d'exploitation de la route ou du canal"* thus maintaining the careful balance between the Parties that had been struck in Article XII of the 1839 Treaty of Separation.

36. In the event, the Boundary Treaty did not resolve all the outstanding difficulties between the Netherlands and Belgium. The Parties were in dispute about whether, for purposes of the extension envisaged in Article XII of the 1839 Treaty of Separation, the road or canal would have had to have been built or merely planned. This problem has since been resolved, as is explained below (*see* paragraph 62). The Parties were also in dispute as to whether Article XII of the 1839 Treaty of Separation envisaged a railway line extension, in contradistinction to the extension of a road or canal. That Belgium could extend a railway line was eventually agreed to by the Netherlands in a letter dated 12 August 1868 (BM, Exhibit No. 15, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 12 August 1868).

37. In 1873, Belgium and the Netherlands entered into a further treaty, the Iron Rhine Treaty. Under Article IV of that treaty the Netherlands acknowledges the *Compagnie du Nord de la Belgique* as the concessionnaire of the railway line on Netherlands territory. It was also agreed that the Antwerp-Gladbach section would be built by either that company or by the *Grand Central Belge*, on conditions echoing the requirements of Article XII

of the 1839 Treaty of Separation, namely *"sans charge aucune pour le Gouvernement des Pays-Bas, et sans préjudice de ses droits de souveraineté sur le territoire traversé".* Agreement was also reached on matters relating to the bridge that in 1873 the Netherlands had agreed would be built over the Maas, near Roermond.

38. Importantly, in the context of this arbitration, a modification to the original route as specified in the 1839 Treaty of Separation was also agreed in the Iron Rhine Treaty: it would now not pass through Sittard after all. Article IV, paragraph 4[6] provides as follows (in the Tribunal's English translation):

> The line will enter the territory of the Duchy of Limburg passing to the south of Hamont (Belgium); it will head towards Weert, pass to the south of that locality as well as of Haelen, traverse the Maas on a fixed bridge in the right part upstream of the bend at Buggenum, between the markers 83 and 84, rejoin the Maastricht line to Venlo north of the station of Roermond, follow part of this line, leave it south of that station to go to reach the Prussian frontier in a direction to be agreed upon with the Government of the German Empire.

39. The Parties thus varied the provision in Article XII of the 1839 Treaty of Separation whereby the road or canal was intended to pass through Sittard. To make clear that this amendment did not amount to an additional line to the one envisaged in 1839, the Belgian and Netherlands representatives jointly confirmed, in a document appended to the treaty at the moment of ratification, that as provided in the statements of the two Governments to their legislative chambers,

> *la concession de l'établissement d'un chemin de fer d'Anvers à Gladbach par le Duché de Limbourg, en passant à Ruremonde, comme elle est stipulée par le Traité du 13 Janvier, 1873, constitue l'exécution pleine et entière de l'article XII du Traité du 19 avril, 1839* [C.T.S., 1872-1873, Vol. 145, p. 447].

There was no suggestion voiced during these ratification procedures that the *"exécution pleine"* was to be understood as meaning that the right of transit had expired or that Belgian rights in relation to what today is termed the "historic route" had lapsed. Rather, the intention was to show an agreed amendment to the location of the track that had originally been designated at Sittard; Belgium's right of transit would henceforth be along a track that now incorporates the variation agreed in Article IV, paragraph 4 of the Iron Rhine Treaty (the "historic track"). The agreed statement made clear that this was a final decision, in the sense that no future claim made by Belgium for a canal, road, or railway through Sittard would be entertained.

40. To affirm the continued existence of an "historic route" and Belgian rights in relation thereto, does not, of course, answer the question as to

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[6] The Netherlands uses Arabic numerals in the Dutch text provided to the Tribunal and Belgium uses Roman numerals in referring to the French text of the Iron Rhine Treaty. The Tribunal will use Roman numerals.

whether Belgium's current requests do amount to a *further* "new track"; or whether, if not, Article XII has any role to play. These questions, of great importance for this arbitration, are distinct, and will beaddressed by the Tribunal below (*see* paragraphs 74 ff).

41. The Iron Rhine railway, on the revised route stipulated in Article IV, paragraph 4 of the Iron Rhine Treaty, came into use from 1879, the concessionaire on both Belgian and Netherlands territory being, in the event, the *Grand Central Belge*.

42. At the end of the nineteenth century, railway lines on Belgian territory were nationalised by that Government. The Netherlands purchased the railway interests of *Grand Central Belge* on its own territory, under an arrangement whereby Belgium was allowed in the first place to buy from *Grand Central Belge* the concession *"[d']Anvers à la frontière Prussienne vers Gladbach",* and then sell it on to the Netherlands (the 1897 Railway Convention). A further arrangement was made between the Netherlands Government and the *Maatschappij tot Exploitatie van Staatsspoorwegen ("Maatschappij tot Exploitatie")* to run the railway lines on Netherlands territory which had been passed by the 1897 Railway Convention to the Netherlands. This further arrangement of 1897, which contained detailed financial provisions to apply as between the *Maatschappij tot Exploitatie* and the Government, was annexed to the Netherlands legislation of 2 April 1898, applying the 1897 Railway Convention (BM, Exhibit No. 25, Agreement between the State of the Netherlands and the *Maatschappij tot Exploitatie*, 29 October 1897, annexed to the Act of 2 April 1898 approving the Railway Convention of 23 April 1897). It stipulated, *inter alia*, that the provisions of an earlier agreement between the Netherlands Government and the *Maatschappij tot Exploitatie* as regards maintenance, would apply to the recent transfers.

43. As has been explained above (*see* paragraphs 16-22), there has arisen, against the background of a certain long pattern and level of use of the Iron Rhine railway, and the Belgian interest in reactivation as initiated and developed between 1987 and 2003, a dispute between Belgium and the Netherlands as to their legal rights and obligations in respect of the Iron Rhine railway, entailing Belgian proposals and Netherlands counter-proposals. It will be necessary for the Tribunal both to interpret some provision of the above-mentioned treaties and to comment upon the legal significance of certain terms.

B. THE PRINCIPLES OF INTERPRETATION TO BE APPLIED BY THE TRIBUNAL

44. It is clear that, in order to respond to the Questions put to it by the Parties, the Tribunal must interpret various provisions in the governing instruments, as well as apply the relevant rules of international law.

45. Belgium and the Netherlands are both parties to the Vienna Convention on the Law of Treaties of 23 May 1969 ("Vienna Convention") (United Nations Treaty Series ("U.N.T.S."), Vol. 1155, p. 331). It is precisely because some terms in that Convention reflected customary law and some were new, that Article 4 provided generally for non-retroactivity of the Convention, but "without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention". It is now well established that the provisions on interpretation of treaties contained in Articles 31 and 32 of the Convention reflect pre-existing customary international law, and thus may be (unless there are particular indications to the contrary) applied to treaties concluded before the entering into force of the Vienna Convention in 1980. The International Court of Justice has applied customary rules of interpretation, now reflected in Articles 31 and 32 of the Vienna Convention, to a treaty concluded in 1955 (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6 at pp. 21-22, para. 41); and to a treaty concluded in 1890, bearing on rights of States that even on the day of the Judgment were still not parties to the Vienna Convention (*Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1045 at p. 1059, para. 18). In the *Sovereignty over Pulau Ligitan and Pulau Sipadan* case, the Court noted that Indonesia was not a party to the Vienna Convention, but nevertheless applied the rules as formulated in Articles 31 and 32 of that Convention to a treaty concluded in 1891. Indonesia did not dispute that the rules codified in these articles were applicable (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625 at pp. 645-646, paras. 37-38). There is no case after the adoption of the Vienna Convention in 1969 in which the International Court of Justice or any other leading tribunal has failed so to act.

46. These articles provide as follows:

"Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

47. Although the clauses contained within Article 31 are not hierarchical, there is no doubt that the starting point for interpretation is the ordinary meaning to be given to the terms, taking them in context, and having regard also to the object and purpose of the treaty. The Tribunal will pay particular attention to these factors in carrying out its tasks of interpretation, along with the other principles of interpretation as appropriate. Its elaboration on the application of the various principles of interpretation will be made in the paragraphs dealing with the various phrases contained within Article XII of the 1839 Treaty of Separation whose meaning is disputed.

48. At the same time, it is convenient for the Tribunal to make certain more general observations at the outset. Although the Parties have provided it with extracts from the prolonged diplomatic negotiations leading up to the conclusion of the 1839 Treaty of Separation, these do not, in the view of the Tribunal, have the character of *travaux préparatoires* on which it may safely rely as a supplementary means of interpretation under Article 32 of the Vienna Convention. These extracts may show the desire or understanding of one or other of the Parties at particular moments in the extended negotiations, but do not serve the purpose of illuminating a common understanding as to the meaning of the various provisions of Article XII. This observation is relevant, in particular, to the question of whether the right of transit afforded to Belgium is to be read as a *quid pro quo* for the agreement that subsequent to the separation, the territory that now constitutes the Netherlands province of Limburg should be part of the Netherlands (the view of Belgium); or whether the obtaining of Limburg by the Netherlands was a *quid pro quo* for the obtaining by Belgium of a part of Luxembourg (the view of the Netherlands). In the absence of *travaux préparatoires* reflecting a common understanding,

the answer cannot be certain, but the Tribunal is of the view that there were very many elements in play (and not one or other of these alone) that contributed to the balance struck in the text of Article XII. At the same time, the Tribunal will remain mindful of the circumstances of the conclusion of each of the applicable treaties, as required in Article 32 of the Vienna Convention. The Tribunal notes also that good faith is both a specific element in Article 31, paragraph 1 of the Vienna Convention and a general principle of international law that relates to the conduct of parties *vis-à-vis* each other.

49. The Tribunal further observes that there exist other well-established principles relevant to the process of interpretation. Of particular importance is the principle of effectiveness: *ut res magis valeat quam pereat*. The relevance of effectiveness is in relation to the object and purpose of a treaty; at the same time this does not entitle a Tribunal to revise a treaty.

50. The Netherlands has placed emphasis on the fact that a right of transit by one country across the territory of another can only arise as a matter of specific agreement. This proposition of law is undoubtedly correct and is not challenged by Belgium. The Netherlands further contends that the transit right as such is to be construed restrictively, citing various cases in support. This latter proposition *is* challenged by Belgium.

51. In the *Case of Free Zones of Upper Savoy and the District of Gex (P.C.I.J., Series A/B, No. 46 (1932)* at p. 166) the Permanent Court of International Justice ("Permanent Court") said, of the stated rights in the case, France's "sovereignty... is to be respected in so far as it is not limited by her international obligations, and... by her obligations under the treaties..." and that "no restriction exceeding these ensuing from those instruments can be imposed on France without her consent". In the *Interpretation of the Statute of the Memel Territory case (P.C.I.J., Series A/B, No. 49 (1932)* at pp. 313-314) the Permanent Court stated that, in the absence of provisions in the treaty providing for the autonomy of Memel, "the rights ensuing from the sovereignty of Lithuania must apply". Nor can it be doubted in the present case that, beyond what rights of Belgium are provided for in Article XII of the 1839 Treaty of Separation, Netherlands sovereignty remains intact.

52. It is true that in both the *Free Zones* case and in *Case of the S.S. Wimbledon (P.C.I. J. Series A, No. 1 (1923)* at p. 24) the Permanent Court said that in case of doubt about a limitation on sovereignty that limitation is to be interpreted restrictively. In the latter case, the Permanent Court did caution, however, that it would nonetheless "feel obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted".

53. The doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention.

The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation. Indeed, it has also been noted in the literature that a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty (*see* Jennings and Watts, *Oppenheim's International Law*, 9th Edition (1992), at p. 1279). Restrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties. Indeed, some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted (Bernhardt "Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights", 42 *German Yearbook of International Law* (1999), p. 11, at p. 14).

54. The Award in the *Lac Lanoux Arbitration* (24 *International Law Reports* (1957), p. 101) remains to this day a very useful guide to the present type of inevitable tension between rights on one's own territory given under a treaty, and reservations as to sovereignty. The relevant clause in the treaty provision for the utilization of the waters of Lac Lanoux referred to territorial sovereignty "except for the modifications agreed upon between the two Governments" (p. 120). Article XII of the 1839 Treaty of Separation has the converse structure, whereby the rights of Belgium are specified and the general reservation as to sovereignty then follows. In the view of the Tribunal, this makes no difference – each is a balancing of special rights granted by a state to another on its own territory, and a general affirmation of territorial sovereignty. As the *Lac Lanoux* tribunal held,

> [i]t has been contended before the Tribunal that these modifications should be strictly construed because they are in derogation of sovereignty. The Tribunal could not recognize such an absolute rule of construction. Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations *[Ibid.]*.

The *Lac Lanoux* tribunal observed that in the application of this observation "the question is therefore to determine the obligations of the French Government in this case…" *(Ibid).*

55. In precisely that same way, the sovereignty reserved to the Netherlands under Article XII of the 1839 Treaty of Separation cannot be understood save by first determining Belgium's rights, and the Netherlands' obligations in relation thereto. This is to be done not by invocation of the principle of restrictive interpretation, but rather by examining – using the normal rules of interpretation identified in Articles 31 and 32 of the Vienna Convention – exactly what rights have been afforded to Belgium. All else falls within the Netherlands' sovereignty. And indeed, the correctness of this methodology seems in the final analysis to be recognized by the Netherlands (NR, p. 7, para. 24).

56. Put differently, the Netherlands may exercise its rights of sovereignty in relation to the territory over which the Iron Rhine railway passes, unless this would conflict with the treaty rights granted to Belgium, or rights that Belgium may hold under general international law, or constraints imposed by EC law.

57. Finally, the Tribunal wishes to draw attention to a matter which in its view is of great importance in this case: the problem of intertemporality in the interpretation of treaty provisions. This idea will have considerable relevance in the ensuing interpretation of certain phrases contained in Article XII of the 1839 Treaty of Separation.

58. It is to be recalled that Article 31, paragraph 3, subparagraph (c) of the Vienna Convention on the Law of Treaties makes reference to "any relevant rules of international law applicable in the relations between the parties". For this reason – as well as for reasons relating to its own jurisdiction – the Tribunal has examined any provisions of European law that might be considered of possible relevance in this case (*see* Chapter III below). Provisions of general international law are also applicable to the relations between the Parties, and thus should be taken into account in interpreting Article XII of the 1839 Treaty of Separation and Article IV of the Iron Rhine Treaty. Further, international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories "environment" is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.

59. Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. Today, both international and EC law require the integration of appropriate environmental measures in the design and implementation of economic development activities. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 (31 I.L.M. p. 874, at p. 877), which reflects this trend, provides that "environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (*see* paragraph 222). This duty,

in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties. The Tribunal would recall the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" (*Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7 at p. 78, para. 140). And in that context the Court further clarified that "new norms have to be taken into consideration, and. . . new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past" *(Ibid.)*. In the view of the Tribunal this dictum applies equally to the Iron Rhine railway.

60. The mere invocation of such matters does not, of course, provide the answers in this arbitration to what may or may not be done, where, by whom and at whose costs. However, the Tribunal notes that, as regards the Questions put to it, neither Party denies that environmental norms are relevant to the relations between the Parties. To that extent, they may be relevant to the interpretation of those treaties in which the answers to the Questions may primarily be sought.

61. The Tribunal now turns to the application of the principles of interpretation to the relevant treaty provisions.

C. The Interpretation of Disputed Elements in Article XII of the 1839 Treaty of Separation

1. "Would have been built"

62. As early as 1864, differences had arisen over the meaning of "would have been built" – differences which did not disappear with the agreement in 1873 to replace the references in the 1839 Treaty of Separation to "road" and "canal" with "railway". The Netherlands informed Belgium in 1864 that what had been agreed to in the 1839 Treaty of Separation was the extension of a route that had already been built in Belgium and not the extension to a route whose status was still that of a project (BM, Exhibit No. 13, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 7 March 1864). In 1868, an extension to a projected route was agreed to *"en principe"* for the sake of *"des bonnes et cordiales relations"* (BM, Exhibit No. 15, Letter of the Dutch Government to the Belgian Ambassador at The Hague, dated 12 August 1868). The legal issues regarding "would have been built/*aurait été construit*" remained unresolved, but no longer of importance. Article IV of the Iron Rhine Treaty of 1873 provided that the *Compagnie du Nord de la Belgique*, which was the concessionnaire of the Antwerp to Gladbach railway line would become concessionnaire *"de cette même ligne*

qui est située sur le territoire du Duché de Limbourg". Notwithstanding the present tense, that sector was yet to be built. But Article IV provided that the Netherlands section "will be constructed and exploited" either by the *Compagnie du Nord de la Belgique* or by the *Grand Central Belge*.

2. "That the said road, or the said canal be extended in accordance with the same plan"

63. The dispute between the Parties as to the meaning of the term "plan" is easy to comprehend. In the opinion of the Netherlands, the word "plan" refers to the works that physically allow cross-border transit to be possible – for a railway to be "extended" from Belgium into and across the Netherlands (NR, p. 31, para. 126). Belgium, invoking the "plain meaning" of that term, and also the meaning to be given to the term in the context of construction projects, insists that "plan" is to be understood as relating to the proposals for and descriptions of the project in its entirety.

64. The Parties are also in dispute as to the rights arising for each of them consequent upon these different views of "the same plan". The Netherlands' position is straightforward: It believes the Belgian request constitutes a demand for a "new railway", which is therefore to be extended "in accordance with the same plan". The reservation of "exclusive rights of sovereignty over the territory which would be crossed" means, in the view of the Netherlands, that "the same plan" cannot entail specifications for the entire project. It can at most be a reference to trans-border functionality. The "same plan" refers to the physical continuity that the Netherlands is obliged to undertake, but not more. The Netherlands finds its view supported by the reference in Article XII to the execution of "the agreed works" – this term affirming that a plan for the line as a whole cannot therefore be unilaterally imposed by Belgium. The Netherlands also contends that Article V of the Iron Rhine Treaty, taken with Article 3 of the 1867 Convention between Belgium and the Netherlands "*pour la jonction de quatre chemins de fer*" (Convention Between Belgium and the Netherlands for the Junction of Railways, The Hague, 9 November 1967, C.T.S. 1866-1867, Vol. 135, p. 467), suggest that agreement is needed upon "the plan."

65. Belgium finds these last provisions irrelevant. Belgium contends that no request is being made for a railway to be extended under Article XII; but it regards the developments and upgrading of the railway as also subject to the "same plan" provisions in Article XII. As the "same plan" refers to the plan that Belgium alone was entitled to make for Belgian territory, it cannot be subject to negotiations for its application on Netherlands territory. The unilateral determination of the plan is, in the eyes of Belgium, also a "logical corollary of the fact that pursuant to Article XII of the Treaty, the costs of building the new route in the Netherlands were to be borne by Belgium" (BR, p. 77, para. 77). Acknowledging that the Netherlands is entitled to exercise jurisdiction within its own territory (the example of establishment of crossings

is given), Belgium argues that it may not do so in a manner that denies Belgian rights recognized under international law. It differentiates, however, its claimed entitlement unilaterally to establish the plan when *it* is to perform the work, from the provision when the Netherlands would opt to perform the work. In the former hypothesis agreement may be desirable, but is not in Belgium's view legally necessary; Belgium accepts that in the latter hypothesis the agreement of the Netherlands to the works[*] is legally necessary (BR, p. 82, para. 81).

66. The Tribunal finds that the functionality of continuation of the line in Belgium through the Netherlands is to be in accordance with track specifications, the dimensions and character of which may indeed have found their origin in Belgian decision-making. But, whether as regards extension or reactivation, the overall plan for the line is subject to mutual agreement. The ensuing works are "agreed works". Naturally, agreement shall not be withheld by the Netherlands, were that to amount to a denial of Belgium's transit right. The Tribunal sees nothing in Article XII of the 1839 Treaty of Separation or in the Iron Rhine Treaty which draws a distinction in this regard between works which may be done legally by Belgium or works which the Netherlands will cause to be done. It cannot accept the contentions of Belgium on this point.

67. The phrase "according to the same plan" is to be read as to give an interpretation that reconciles Belgium's specific rights and the Netherlands' reservation of sovereignty. Although the term "plan" is commonly understood in the construction industry, and in some dictionary references, as comprising the depiction of the entire venture, various provisions in Article XII suggest that this is not the meaning to be accorded in this case. In particular, the reference to "agreed works" and the reservation of Netherlands' sovereignty suggest otherwise. The reservation of Netherlands' sovereignty ensures for it that, apart from the elements specified in terms in favour of Belgium, no further limitations of sovereignty are to be implied. But at the same time, the reservation of sovereignty cannot serve the converse purpose of detracting from the rights given to Belgium under Article XII. Applying these observations, the Tribunal notes that the plan referred to in the phrase "according to the same plan", insofar as it relates to continuity at the border, is a matter for Belgium. That follows from the fact that under Article XII a Belgian line will have been built, and it may or may not be the subject of a later request for extension. Beyond that, specifications for use of the entirety of the line are to be jointly agreed. Matters reserved to the sovereignty of the Netherlands, on which it has the right of decision-making, includes, *inter alia*,

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[*] Secretariat note: The original word "plan" has been replaced by the word "works" by the Arbitral Tribunal on 20 September 2005, following a request for such correction made by the Kingdom of Belgium on 25 July 2005 and accepted by the Kingdom of the Netherlands on 15 August 2005.

all safety elements of the whole work and safety conditions under which the work is carried out.

3. "The said road, or the said canal [would] be extended… entirely at the cost and expense of Belgium…"

"Engineers and workers…would execute the agreed works at the expense of Belgium, all without any burden to Holland…"

68. The Tribunal first observes that the introduction of the adjective "agreed" before the noun "works" clearly suggests, as a matter of ordinary meaning, that both Parties envisaged that although the Netherlands would not refuse a request for a railway to be extended across its territory, the works therefore would be a matter for them both. In this way the reserved sovereign rights of the Netherlands and the entitlement of transit of Belgium could be reconciled.

69. Beyond that, it is clear that the works for a railway to be extended from Belgium up to the borders of Germany were to be paid for by Belgium alone.

70. The dispute that arises is as to whether the specific request of Belgium for the upgrading and restoration of the line beyond its previous capacity is "an extension" within the meaning of Article XII (a question discussed by the Tribunal in paragraphs 82-84 below); and, more particularly, whether the costs and expenses to be incurred by Belgium should include the costs and expenses incurred should the works ultimately agreed upon entail the environmental protection measures required by Netherlands law. Belgium denies such a duty, on the ground that these measures are not measures necessitated by the physical extension of the line – they are measures unilaterally undertaken by the Netherlands in the exercise of its sovereignty. Belgium further claims that it should have been consulted before the various areas were declared protected nature reserves. It observes that the Netherlands has affirmed (NR, p. 23, para. 93) that these specific measures are not as such required of it under EC law. Further, Belgium asserts that the proposed measures for noise protection, in particular tunnelling, are not the least costly available to mitigate any environmental harm.

71. The Netherlands asserts that it has the sovereign right to assess the appropriate means to protect the environment to EC and its own domestic standards; that it has sought to identify objectively, through expert reports, those means; and that the measures would not otherwise have been necessary save for Belgium's request for a restoration and significant upgrading of the capacity of the Iron Rhine railway.

72. There is merit in both arguments. The Tribunal finds it necessary, in order to answer this matter, first to ascertain whether the project is one which would attract the cost-allocation provisions of Article XII, and second, if so,

to see if the costs and expenses of the measures envisaged by the Netherlands are integral to the extension of the Iron Rhine line.

73. The Tribunal will later return to these questions.

4. A "new road" or a "new canal" to "be extended"?

74. The Belgian request for reactivation is both immediate and over the longer term. It is understood that Belgium wishes to achieve by 2020 use in both directions by 43 trains of 700 metres length per day, able to travel at 100 kilometres per hour. The work needed for this is, in the Netherlands' view, so substantial that it "amounts ... to a request within the meaning of Article XII for the extension of a railway on Belgian territory on Netherlands territory. This railway is *new* to the extent that considerable adaptation and modernization is necessary in many ways in order to achieve the desired use". (NCM, para. 3.3.4.5). For the Netherlands, therefore, the Article XII provisions on the costs (beyond restoration to the 1991 level of maintenance, which costs it will bear) apply. This new work is, as regards functionality, to be "entirely at the cost and expense of Belgium" and "without any burden to the Netherlands". Belgium, by contrast, asserts that its request for reactivation is not a demand for "extension" – "[t]he Iron Rhine was prolonged on Netherlands territory in the 1870's and still exists at present". To that extent, in Belgium's view its current claims are outside of Article XII of the 1839 Treaty of Separation.

75. The question thus arises as to whether the Belgian request is a request for a new road or canal or railway line to be extended across the Netherlands within the meaning of Article XII; or whether it is a request for the adaptation of a transit right already in existence under Article XII. The Tribunal is called upon to state whether or not the costs of the reactivation are to be borne by Belgium. In this context, it notes that the positions taken by the Parties are not wholly identical to what they were each prepared to contemplate during negotiations, before resort to arbitration. Belgium assimilates its request to the maintenance of an existing line, such costs to be borne by the Netherlands. It invokes Article XI of the 1839 Treaty of Separation to that end. The Netherlands assimilates Belgium's request to one for a new railway line, with the costs all to be borne by Belgium. In any event, neither Party wholly excludes the relevance of Article XII. Each of these possibilities is not without its difficulties.

76. The Tribunal observes that Article XII of the 1839 Treaty of Separation addresses neither the question of maintenance nor of "adaptation and modernization" (the description jointly agreed in the Questions put to the Tribunal by the Parties). The former has been resolved by a Netherlands practice assuming physical and financial responsibility for maintenance (no doubt perceived by it as an element of its territorial sovereignty) and is accepted by both Parties. Neither Article XII nor the detailed financial arrangements, elaborated in the 1897 Railway Convention, made specific

reference to maintenance costs of the lines on Netherlands territory (including the Iron Rhine railway) and now owned by the Netherlands. Article IX of the 1897 Railway Convention spoke of future agreements for the *"exploitation internationale des chemins de fer rachetés*", but never seems to have been applied to maintenance. And the related agreement between the Netherlands and the *Maatschappij tot Exploitatie* (which Netherlands company was henceforth to exploit the Iron Rhine railway on Netherlands territory) clearly presupposes Netherlands Government responsibility for repairs and renovations (BM, Exhibit No. 25, Agreement between the State of the Netherlands and the *Maatschappij tot Exploitatie*, 29 October 1897, annexed to the Act of 2 April 1898 approving the Railway Convention of 23 April 1897, Articles 2 and 8). The Explanatory Statement associated with the Netherlands' ratification of the 1897 Railway Convention observes that "the State has the obligation to provide, on its own account, a sufficient level of maintenance for the railways to be taken over by the Exploitatie-Maatschappij" (BM, Exhibit No. 22, Approval of the agreement between the Netherlands and Belgium signed at Brussels on 23 April 1897 – Explanatory Statement, pp. 12-13). At the same time, this does not necessarily lead to the conclusion that "renovation" to meet standards needed for previously unanticipated levels of activity under the current Belgian request is thereby part of the maintenance and renovation obligation assumed by the Netherlands at the end of the nineteenth century. In the view of the Tribunal, the Netherlands (as it accepts) is under an obligation to bring the Iron Rhine railway back to the levels maintained during the regular (albeit light) use of the line prior to discontinuation of such use in 1991; but these maintenance and repair obligations do not cover the significant upgrading costs now involved in Belgium's request. Whether these are for Belgium's account under Article XII of the 1839 Treaty of Separation depends on further questions.

77. The question of significant adaptation and modernisation is a more complex, and as yet uncharted, problem. The application of international law principles of treaty interpretation may assist in its resolution.

78. The provision that Belgium will bear all the costs and expenses of the "new road" or "new canal" (railway) is clear, as a matter of "plain meaning". But in deciding what is or is not a "new road" or "new canal" (railway), or rather a reactivation of an existing one, and the related questions of whether, and the extent to which, Article XII is applicable, other principles of interpretation must be borne in mind.

79. Article 31, paragraph 3, subparagraph (c) of the Vienna Convention also requires there to be taken into account "any relevant rules of international law applicable in the relations between the parties". The intertemporal rule would seem to be one such "relevant rule". By this, regard should be had in interpreting Article XII to juridical facts as they stood in 1839. In particular, it is certainly the case that, in 1839, it was envisaged that the costs for any extension of a new road or canal that Belgium might ask for would be limited

and relatively modest. The great advances that were later to be made in electrification, track design and specification, freight stock, and so forth – and the concomitant costs – could not have been foreseen by the Parties. At the same time, this rule does not require the Tribunal to be oblivious either to later facts that bear on the effective application of the treaty, nor indeed to all later legal developments. It has long been established that the understanding of conceptual or generic terms in a treaty may be seen as "an essentially relative question; it depends upon the development of international relations" (*Nationality Decrees Issued in Tunis and Morocco, P.C.I.J. Series B, No. 4 (1923)*, p. 24). Some terms are "not static, but were by definition evolutionary... The parties to the Covenant must consequently be deemed to have accepted them as such" (*Namibia (SW Africa) Advisory Opinion, I.C.J. Reports 1971*, p. 16 at p. 31). Where a term can be classified as generic "the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time" (*Aegean Sea Continental Shelf (Greece/Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 32, para. 77). A similar finding was made by the WTO Appellate Body when it had to interpret the term "natural resources" in Article XX, paragraph (g) of the WTO Agreement (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 130).

80. In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here, too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule. Thus in the *Gabčíkovo-Nagymaros* case, the International Court was prepared to accept, in interpreting a treaty that predated certain recent norms of environmental law, that "the Treaty is not static, and is open to adapt to emerging norms of international law" (*I.C.J. Reports 1997*, p. 7 at pp. 67-68, para. 112). The Netherlands District Court of Rotterdam was faced with the question of whether a provision that referred to telegraph cables could be interpreted as to include telephone cables, even though these had not yet been developed at the time that the 1884 Convention on the Protection of Submarine Cables was concluded. The Court thought that it was "reasonable" to include the later telephone cables in the interpretation of what was protected under the Convention (*The Netherlands (PTT) and the Post Office (London) v. Ned Lloyd, 74 International Law Reports*, p. 212).

81. Finally, the Tribunal notes a general support among the leading writers today for evolutive interpretation of treaties. The editors of the 9th Edition of Oppenheim agree that, notwithstanding the intertemporal rule, "in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption... the concepts embodied in a treaty may be not static but evolutionary (Jennings and Watts, *Oppenheim's International Law*, Vol. 1, p. 1282). *See further* Jimenez de

Arechaga "International Law in the Past Third of a Century" 159 *Recueil des Cours* (1978-1), at p. 49). Rudolf Bernhardt explains it thus: "The object and purpose of a treaty plays... a central role in treaty interpretation. This reference to object and purpose can be understood as entry into a certain dynamism. If it is the purpose of a treaty to create longer lasting and solid relations between the parties..., it is hardly compatible with this purpose to eliminate new developments in the process of treaty interpretation" (42 *German Yearbook of International Law* (1999) at pp. 16-17).

82. The Iron Rhine Treaty was not intended as a treaty of limited or fixed duration. The Parties probably did not think beyond an "extension" of a Belgian railway across the Netherlands, to take place at one moment of time. Indeed, the statements made by the Parties when ratifying the Iron Rhine Treaty, in which, *inter alia*, Article XII of the 1839 Treaty of Separation had been amended, provided that this "constitutes the full and complete execution of Article XII of the Treaty of 19 April 1839". However, the Tribunal believes that it would be incompatible with the object and purpose of the earlier treaty to read those declarations as stating that further work and requests were to be regarded as *en dehors* Article XII. The declarations are to be understood as referring rather to the amended routing of the Iron Rhine track that they had agreed.

83. The object and purpose of the 1839 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was "commercial communication". It necessarily follows, even in the absence of specific wording that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the Parties, remains in principle applicable to the adaptation and modernisation requested by Belgium.

84. Further, it is reasonable to interpret Article XII as envisaging future work occurring – beyond necessary maintenance – on the line. No separate provisions for the allocation of such future costs and rights over the line and the territory which it traversed were provided for in Article XII. However, an interpretation compatible with the principle of effectiveness leads the Tribunal to determine the continued applicability of Article XII of the 1839 Treaty of Separation to upgrading and improvements (save for the path of the route, which remains governed by the amendments of the Iron Rhine Treaty). Applying this dynamic and evolutive approach to a treaty that was meant to guarantee a right of commercial transit through time, the Tribunal concludes that a request for a reactivation of a line long dormant, with a freight capacity and the means to achieve that considerably surpassing what had existed before

for nearly 130 years, is still not to be regarded as a request for a "new line". At the same time, the conditions attaching to this request (that is, for a revival of and considerable upgrading and modernisation of an existing "extension") remain governed by the provisions of Article XII of the 1839 Treaty of Separation. It must be acknowledged that the wording as drafted was directed to the construction of a new road, canal or track, rather than a periodic upgrading inherent in a right of commercial transit. It may therefore be necessary to read into Article XII, so far as the allocation of contemporary costs for upgrading is concerned, the provisions of international law as they apply today (*see* paragraph 59). The Tribunal will have regard to the concept of reasonableness in the light of all the circumstances and to the fairness and balance embodied in Article XII.

5. "Without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or the canal in question"

85. Applying that element in Article 31, paragraph 1 of the Vienna Convention, whereby a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms, it might be thought that the phrase "without prejudice" suggests that any intrusion at all into Netherlands' sovereignty, beyond the acceptance of an extension of a new railway across Limburg, is contrary to Article XII. However, Article 31, paragraph 1 requires that that "ordinary meaning" be read not only in good faith, but also in context and in the light of the object and purpose of the treaty.

86. The Parties have in their pleadings contested whether good faith constitutes a distinct source of international law. Belgium alludes to an absence of good faith in a series of both acts and omissions of the Netherlands, whereas the Netherlands alludes to an abuse of rights in connection with various demands being made by Belgium as regards the reactivation of the Iron Rhine railway. The Tribunal finds rather that there have been important different perceptions by the Parties as to the scope of their respective rights and obligations under international law, and under Article XII of the 1839 Treaty of Separation in particular, and that it is these different perceptions that have occasioned the ancillary contentions of absence of good faith and abuse of rights. The task of the Tribunal is to clarify the rights and obligations held by each, and then to be able to answer the Questions the Parties have jointly put to it

87. As for the injunction in Article 31, paragraph 1 of the Vienna Convention that a term be read "in context" for its correct interpretation, the Tribunal notes that the relevant context of the phrase "without prejudice to the exclusive rights of sovereignty" is its location in a paragraph which also includes rights given to Belgium. The Netherlands has necessarily already derogated from its territorial sovereignty in allowing a railway to be built, at the request of another state, over its territory. The sovereignty reserved is over

the territory over which the track runs. The Netherlands has forfeited no more sovereignty than that which is necessary for the track to be built and to operate to allow a commercial connection from Belgium to Germany across Limburg. It thus retains the police power throughout that area, the power to establish health and safety standards for work being done on the track, and the power to establish environmental standards in that area.

88. In this context, the Tribunal has noted that Netherlands law provides for maintenance of railways not at a fixed level, but rather in relation to the level of traffic occurring at a particular time. With the passing of the Iron Rhine track into disuse after 1991, only minimum upkeep occurred. In 1996, the level crossings on the Roermond-Vlodrop section on the line were removed. Also in accordance with Netherlands legislation, so too, more generally, were flashing signals removed. It has been explained to the Tribunal that "[t]his policy is pursued to prevent road-users from becoming accustomed to level crossings that are no longer in use, so that they would create a risk that they would not expect trains even at crossings that are in use" (NCM, p. 10, para 2.5.4).

89. The Tribunal finds this policy, and the lowering of the maintenance levels thereunder, not to violate Belgium's rights under Article XII of the 1839 Treaty of Separation, and thus to fall within the reservation of Netherlands' sovereignty in that provision. This is the more so as the Netherlands fully accepts its obligation to restore, at its own expense, the maintenance and safety features of the line to the 1991 condition upon a Belgian demand for reactivation.

90. It may thus be said that only if retained sovereignty would be exercised in such a manner that it is inconsistent with Belgium's right to have a railway extended across Limburg, or in violation of other international obligations, would the Netherlands be acting other than in conformity with Article XII. The Tribunal examines below (*see* paragraphs 202-206) whether this is the case.

91. Article 31, paragraph 1 of the Vienna Convention also requires the terms of a treaty to be interpreted "in the light of its object and purpose". It may be queried as to whether any great illumination will follow in this case from the application of this very important principle, because the object and purpose of the 1839 Treaty of Separation was so broad – namely the separation of Belgium and the Netherlands on terms that could satisfy the participants in the Conference of London. It is clear that a Belgian claim to what is now the Netherlands province of Limburg was forfeited and at the same time the commercial proximity that Belgium would otherwise have had to Germany was retained by the road and canal prolongation provisions. In this way (among others) was the overall object and purpose of the 1839 Treaty to be achieved. What may certainly be said is that this object and purpose requires the careful balancing of the rights allowed to each party in Article XII.

92. There requires also to be addressed the question of whether the clause reserving Netherlands sovereignty did or did not require consultation with Belgium before designating any territory over which the historic route runs as a nature reserve.

93. Belgium has not denied the Netherlands' sovereign right to designate reserved nature areas; but it has implied (BM, p. 42, para. 31) that the right of transit which it holds under the 1839 Treaty of Separation and the Iron Rhine treaty was such that the Netherlands should have consulted it before designating the Meinweg as such an area (*see* paragraph 189). Belgium furthermore points to Article 9 of the Treaty of 21 December 1996 concerning the construction of a railway connection for high-speed trains between Rotterdam and Antwerp, which makes reference to the Iron Rhine railway:

> The cases concerning the extension of the No. 11 freight line to the railway line between Goes and Bergen-op-Zoom and the opening up of the port of Antwerp through the so-called "IJzeren Rijn" ["Iron Rhine"] to Germany shall be judged on their own merits, after close consultation and as befits good neighbours. In the first case, efforts shall be made to decide on a route before 1 January 2000. In the second case, the Netherlands shall actively participate in the feasibility study, also in connection with the development of alternative routes near Roermond and the border between the Netherlands and Germany. Depending on the results of that study, the Parties shall jointly hold consultations with the competent authorities of the Federal Republic of Germany [2054 U.N.T.S. p. 293 (1999)].

94. On 12 June 1998, the Prime Minister of Belgium made clear to the Prime Minister of the Netherlands the preference of Belgium for the historic route of the Iron Rhine railway, claiming "a right of public international law on this historic track". Diversions were either too long or could "only be realised in the long run" (BM, Exhibit No. 67, Letter of Belgian Prime Minister Dehaene to Dutch Minister-President Kok of the Netherlands, dated 12 June 1998). Under the seventh and eighth paragraphs of the March 2000 MoU (*see also* paragraph 155 of this Award), it was provided as follows:

> If it is decided that the definitive route shall be another route than that passing through the Meinweg (as the Netherlands assumes, but not Belgium), this route will be considered the complete fulfilment of the obligations under public international law arising from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873. These arrangements will be laid down in a Treaty.
>
> Until the definitive route has been selected, Belgium reserves all its rights under the Separation Treaty of 1839 and the Dutch-Belgian Iron Rhine Treaty of 1873.[7]

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[7] The Netherlands and Belgium offer slightly different English translations of these provisions (BM, para. 34; NCM, para. 2.12.1). The Tribunal here uses the Netherlands' version.

95. The Tribunal notes that the Netherlands has on several occasions acknowledged Belgium's right of transit under international law (BM, p. 46, para. 34). This right of transit was not, *per se*, affected by the designation of the Meinweg as a nature reserve: the relationship between Belgium's right of transit and the Netherlands' rights of sovereignty remained in balance as intended under Article XII. Had the Netherlands at the time of the designation of the Meinweg supposed that Belgium would soon propose a major reactivation programme, it might have been desirable on the basis of "good neighbourliness" to consult with it before the designation. The measures relating to the Meinweg were taken in 1994, after the Belgian communication of 1987. However, against the background of minimal use – and a recent period of non-use – of the line by Belgium, and only periodic reservations of its transit right, it was not unreasonable for the Netherlands to assume that that situation would possibly continue into the foreseeable future. In any event, as the designation of the Meinweg did not in theory constitute a limitation of the right of transit, there was no legal obligation for the Netherlands to have consulted Belgium. If later, the designation of the Meinweg as a nature reserve would have implications for any unforeseen demands for reactivation at a level previously unknown, that is a different matter, and one which clearly requires resolution initially by consultations between the Parties. On this particular point, therefore, the Tribunal finds the Netherlands' contention to be preferred.

96. That being said, the legitimate exercise of the Netherlands' sovereign right to designate the Meinweg as a nature reserve, in the particular circumstances described above, is not necessarily without financial consequences so far as the exercise by Belgium of its right of transit is concerned.

Chapter III

THE ROLE OF EUROPEAN LAW IN THE PRESENT ARBITRATION

A. OBLIGATIONS ARISING UNDER ARTICLE 292 OF THE EC TREATY

97. The Arbitration Agreement between the Parties requests the Tribunal "to render its decision on the basis of international law, *including European law if necessary, while taking into account the Parties' obligations under article 292 of the EC Treaty*" (emphasis added).

98. The Tribunal has already (*see* paragraph 15 above) referred to the letter sent by the Parties to the European Commission on 26 August 2003, in which they stated their common position that, although the core of the present

dispute related to questions not of EC law but international law, they would, if necessary, take all measures required to comply with their obligations under EC law, in particular under Article 292 of the EC Treaty.

99. According to Article 292 of the EC Treaty, "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided therein" (*see* paragraph 13 above).

100. This provision is to be seen in connection with Articles 227 and 239 of the EC Treaty. Pursuant to Article 227, a Member State that considers that another Member State has failed to fulfil an obligation under the EC Treaty may bring the matter before the European Court of Justice, while Article 239 provides the means for Member States of the EC in any dispute which relates to the subject matter of the Treaty, to submit this dispute to the European Court of Justice on the basis of a special agreement.

101. The combined effect of the EC Treaty articles thus referred to (together with Article 234 on preliminary rulings, on which *see* paragraph 102 below) is to establish the exclusive competence of the European Court of Justice "to ensure that in the interpretation and application of this Treaty the law is observed" (Article 220 of the EC Treaty). Hence, within the EC legal system, following a division of competences among the courts of EC Member States and the European Court of Justice, only the European Court of Justice ultimately has the power to decide authoritatively questions of the interpretation or application of EC law. If Member States submit to a "non-EC" tribunal a legal dispute that requires that tribunal to interpret or apply provisions of EC law, proceedings may be instituted against them by the Commission for violation of Article 292 of the EC Treaty.[8]

102. With regard to the obligation to refer questions of EC law to authoritative adjudication by the European Court of Justice, the EC Treaty expressly addresses the domestic courts of Member States in Article 234. Pursuant to this article, a national court faced with the interpretation of EC law may, and in certain cases shall,[9] request the Court to give a preliminary ruling "if it considers that a decision on the question [of the interpretation of EC law] is necessary to enable it to give judgment". According to the settled jurisprudence of the European Court of Justice (*see, e.g., Case C-373/95 Maso, Gazzetta et al. v. Istituto Nazionale della Previdenza Sociale (INPS)*, Judgment of 10 July 1997, para. 26),

> it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision,

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[8] *Cf.* Application of the European Commission to the European Court of Justice against Ireland in the *Mox Plant* case (BR, Exhibit No. 1, pp. 1 ff).

[9] The distinction between a national court having a right of referral or a duty to do so is irrelevant in the present context, as are other issues of the application of Article 234.

> to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court.

The Court has further held that "[a] request from a national court may be rejected only if it is quite obvious that the interpretation of Community law. . . sought bears no relation to the actual nature of the case or to the subject-matter of the main action" (*Case C-186/90 Durighello v. Istituto Nazionale della Previdenza Sociale (INPS)*, Judgment of 28 November 1991, para. 9).

103. In rendering its Award, the Tribunal has carefully considered these elements. The Tribunal is of the view that, with regard to the determination of the limits drawn to its jurisdiction by the reference to Article 292 of the EC Treaty in the Arbitral Agreement, it finds itself in a position analogous to that of a domestic court within the EC, described in the preceding paragraphs. In other words, if the Tribunal arrived at the conclusion that it could not decide the case brought before it without engaging in the interpretation of rules of EC law which constitute neither *actes clairs* nor *actes éclairés*, the Parties' obligations under Article 292 would be triggered in the sense that the relevant questions of EC law would need to be submitted to the European Court of Justice (in the present instance not *qua* Article 234 but presumably by means of Article 239 of the EC Treaty).

104. As to the necessity *vel non* of the Tribunal having to decide issues of EC law in order to enable it to render its Award, the criteria elaborated in the application of Article 234 of the EC Treaty by national courts and the European Court of Justice will also apply by analogy. In this regard, not all mention of EC law brings with it the duty to refer. The European Court of Justice clarified this matter in *Case 283/81, Sri CILFIT and Lanificio di Gavardo SpA v. Ministero della Sanita* [1982] ECR 3415 ("*CILFIT case*") by stating that domestic courts or tribunals faced with the interpretation of EC law and obliged to submit this question to the Court of Justice in accordance with Article 234 of the EC Treaty,

> have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.
>
> ... If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 [now 234] imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise [*CILFIT case* at 3429, paras. 10-11].

105. From the perspective of a domestic court, the same point was explained with characteristic lucidity by Lord Denning in the case of *H.P. Bulmer Ltd. v. J. Bollinger SA*, [1974] 2 C.M.L.R. 91, [1974] 2 All E.R. 1226. As he emphasised,

> *The point must be conclusive.*
>
> The [domestic] court has to consider "whether a decision of the question is necessary to enable it to give *judgment*". That means judgment in the very case which is before the court. The judge must have got to the stage when he says to himself: "This clause of the Treaty is capable of two or more meanings. If it means *this*, I give judgment for the plaintiff. If it means *that*, I give judgment for the defendant". In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgment...

106. It is on the basis thus described that the Tribunal will consider the issues of EC law put forward by the Parties. In their submissions the Parties refer repeatedly to provisions of secondary EC law in two areas, namely that of trans-European rail networks and that of protection of the environment (*see* paragraphs 121-137 below). Further, Article 10 of the EC Treaty is referred to by Belgium. At the same time Belgium states that this is not determinative. The Tribunal will now decide whether these references have the effect that the dispute that has arisen between the Parties requires the "interpretation" of EC law in the sense of conclusiveness, or relevance, described immediately above.

B. ISSUES CONCERNING TRANS-EUROPEAN NETWORKS

107. As both Parties note, the Iron Rhine railway has been earmarked as a priority project within the system of "trans-European networks" ("TEN") provided for in Articles 154-156 of the EC Treaty. Although the Parties do not appear actually to be in dispute concerning the "interpretation or application" of the relevant provisions of EC law (and thus it seems that in this regard a "dispute" within the meaning of Article 292 of the EC Treaty has not arisen at all), a brief review of the provisions of the EC Treaty on the TEN system and of the relevant secondary EC law, as well as of the respective arguments of the Parties, is necessary.

108. According to Article 154 of the EC Treaty, the EC "shall contribute to the establishment and development of the TEN system in the areas of transport, telecommunications and energy infrastructures" (paragraph 1). Action by the EC "shall aim at promoting the interconnection and interoperability" of national networks as well as access to them (paragraph 2).

109. In order to achieve these aims, Article 155 provides for the establishment of "a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks". These guidelines shall identify projects of common interest. Article 155

further calls for EC measures to ensure the interoperability of the networks, authorizes EC support for projects of common interest identified in the framework of TEN guidelines, and mentions the possibility of contributing through the EC Cohesion Fund to the financing of specific projects in the area of transport infrastructure (paragraph 1). Article 155 then stipulates a duty of EC Member States to coordinate among themselves national policies that may have a significant impact on the achievement of the TEN objectives (paragraph 2).

110. Article 156 contains procedural provisions to the effect that the guidelines and other measures referred to in Article 155, paragraph 1 shall be adopted by the Council by way of the co-decision procedure established by Article 251, with the proviso, however, that guidelines and projects of common interest that relate to the territory of a Member State shall require the approval of the Member State concerned.

111. The program set out in Articles 154 and 155 has been implemented by various instruments of EC legislation, foremost among them Decision No. 1692/96/EC of 23 July 1996 ("Decision No. 1692/96") (1996 O.J. (L 228) 1) of the European Parliament and of the Council relating to Community guidelines for the development of the trans-European transport network. The purpose of Decision No. 1692/96 is to lay down the guidelines referred to in the title as "a general reference framework intended to encourage the Member States and, where appropriate, the Community in carrying out projects of common interest" (Article 1, paragraph 2). Section 3 of Decision No. 1692/96 is devoted to the development of a trans-European rail network, comprising both high-speed and conventional lines. It has been concretised by a number of further legislative acts of a more technical nature. Concerning the costs of developing TEN projects, Article 155 of the EC Treaty has been implemented by Council Regulation (EC) No. 2236/95 of 18 September 1995 (1995 O.J. (L 228) 1), as substantially amended by Regulation (EC) No. 807/2004 of the European Parliament and of the Council of 21 April 2004 (2004 O.J. (L 143) 46), in which the rules for the granting of Community financial aid – generally up to a ceiling of 10% of total investment cost – to the TEN system, are laid down.

112. Annex II of Decision No. 884/2004/EC of the European Parliament and of the Council of 29 April 2004 (2004 O.J. (L 167) 1), amending Decision No. 1692/96, lists the "priority projects on which work is due to start before 2010", including (as part of project No. 24) the '"Iron Rhine' Rheidt-Antwerpen, cross-border section".

113. It is to this set of EC legislation, as far as it is devoted to the development of a trans-European railway network, that the Parties refer in their pleadings, albeit arriving at different conclusions and employing different degrees of emphasis.

114. Belgium takes the view that the reactivation of the Iron Rhine railway is governed not only by Article XII of the 1839 Treaty of Separation

but also by EC law (BR, p. 23, para. 25), namely the TEN system just described as well as EC environmental law to which the Tribunal will turn later (*see* paragraphs 121-137 below). More specifically, regarding the trans-European railway network, Belgium points to the "high European value added" through the inclusion of the Iron Rhine railway among the TEN priority projects on all sections of which work is to begin at the latest in 2010 so that they can be made operational at the latest in 2020 (BM, p. 29, para. 22). Belgium views the upgrading of the Iron Rhine railway also as a significant step towards the realization of the policy of so-called "modal shift" from road to rail transportation advocated by the EC and thus towards sustainable development. The need for this modal shift, Belgium argues, will help reduce greenhouse gas emissions and is recognized and supported in various EC official documents, as well as in statements of the Netherlands Government itself (BM, p. 26, para. 20). Belgium further refers to its position expressed in a joint note of the Belgian, Netherlands and German administrations of 20 August 2001, in which the three countries listed their respective viewpoints with regard to the repartition of costs for the definitive track of the Iron Rhine. According to the view of Belgium, the obligations flowing from Decision No. 1692/96 "comprise that each Member State involved has the responsibility of realising the required infrastructure on its territory…and bears the burden of financing the works on its own territory" (BM, p. 64, para. 47).[10] However, the Tribunal notes that in its Reply, in the last instance in which it refers to the set of EC rules on the TEN system, Belgium states that it

> does not…rely on these provisions for the purpose of interpreting the conventional regime of the Iron Rhine in the light of Community law or otherwise. It only seeks to draw the Tribunal's attention to the existence of European Community rules in the field presently discussed for jurisdictional purposes [BR, p. 112, para. 119].

115. With this concluding assessment, the Belgian view on the relevance of the TEN system in EC law for the present case appears essentially to reconcile itself with that of the Netherlands. Thus, regarding Belgium's arguments in support of reactivation of the Iron Rhine railway arising from its inclusion as a priority project in the TEN system, the Netherlands states:

> This classification signifies that the EU attaches importance to the link in question and that any improvements to the link will in principle be eligible for limited EU co-financing (10 percent of the investment at most). Other than that, it has no specific meaning or effect [NCM, p. 17, para. 2.9.3].

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[10] The fact that the TEN decisions relevant to the upgrading of the Iron Rhine railway were adopted with the approval of the Netherlands appears to indicate that the Netherlands did not consider that it would have to finance the development of the Iron Rhine within the TEN system on Dutch territory in its entirety.

116. In addition, the Netherlands cites Article 8 of Decision No. 1692/96 pursuant to which TEN projects must take environmental protection into account. With respect to the environmental advantages cited by Belgium of modal shift (*see also* paragraph 114 above) the Netherlands maintains that the extent of the benefits from modal shift is controversial, and that, in any event, "the Netherlands does not pursue an active modal shift policy" (NR, p. 25, para. 105). Moreover, the Netherlands argues, Belgium has not stated what the specific consequences of reactivation of the Iron Rhine railway, in terms of emissions, would be for the areas in need of environmental protection along the route of the Iron Rhine railway (NCM, p. 15, para. 2.9.1).

117. The Tribunal concurs with the Netherlands' assessment of the – very limited – relevance of the TEN system for the case at hand. The Belgian view according to which the reactivation of the Iron Rhine railway is governed not only by the 1839 Treaty of Separation but also by EC law (and in particular EC secondary law on the TEN system) is in principle correct. However, nowhere does Belgium argue that the inclusion of the Iron Rhine railway in the TEN system of the Community results in any rights in its favour going beyond the right of transit claimed by it on the basis of Article XII of the 1839 Treaty of Separation. Rather, the purpose of Belgium's reliance on the EC law constituting the legal basis for the trans-European rail network seems to be merely that of emphasizing the general desirability of an upgraded Iron Rhine railway from the perspective of fostering both EC transport policy and the modal shift from road transport to railways. As far as the specific issues are concerned on which Belgium and the Netherlands are actually in dispute, the development of the Iron Rhine railway within the TEN system in EC law thus provides no more than a background in policy and in law in front of which the Tribunal has to interpret Article XII of the 1839 Treaty of Separation. In this regard, what is relevant in the specific context of the present case is of a purely programmatic nature. The inclusion of the Iron Rhine railway in the EC list of priority projects in the sphere of trans-European transport networks is a situation the existence of which the Tribunal acknowledges but from which there flow no legal consequences at issue in the present arbitration.

118. While the Netherlands may have a different view on the modal shift policy to which Belgium subscribes, it does not contest Belgium's transit right derived (exclusively, in its view) from Article XII of the 1839 Treaty of Separation, even with the sense given to Article XII in Belgium's pleadings. However, the Netherlands subjects the exercise of this right to what it considers to be measures of environmental protection, adequate under EC law and required under its own law on Netherlands territory, affected by the reactivation of the Iron Rhine railway. Such claims, however, do not generate any conflict with the TEN system which expressly bows to environmental requirements by stating in Article 8, paragraph 1 of Decision No. 1692/96:

> When projects are developed and carried out, environmental protection must be taken into account by the Member States through execution of

> environmental impact assessments of projects of common interest which are to be implemented, pursuant to Directive 85/337/EEC and through the application of Directive 92/43/EEC.

(The Tribunal will turn shortly to the Directives mentioned; *see* paragraph 123 below).

119. In summary of this point, the fact of the inclusion of the Iron Rhine railway in the EC list of priority projects in the sphere of the trans-European rail network does not give rise to the necessity for the Tribunal to engage in the interpretation of EC (*i.e*. TEN) law in the sense set out above (*see* paragraphs 99-105), because this inclusion has not created any rights, or obligations, for the Parties that go beyond what Article XII of the 1839 Treaty of Separation already provides. Thus, the points of EC law put forward by the Parties are not conclusive for the task of the Tribunal.

120. Even had it been the case that EC law on the TEN system afforded a right to Belgium for a renovated and modernised Iron Rhine railway, this would not be determinative of the Tribunal's decision. It is sufficient for the task of the Tribunal that this right derives from Article XII of the 1839 Treaty of Separation, a point on which both Parties are agreed. As a result, to use the terms of Article 234 of the EC Treaty, in the context of the TEN system it is not necessary for the Tribunal to decide on any question of interpretation of EC law. Thus, the obligation under Article 292 of the EC Treaty does not come into play.

C. ISSUES CONCERNING EC ENVIRONMENTAL LEGISLATION

121. The legal consequences for the reactivation of the Iron Rhine railway, particularly with respect to the allocation of the costs involved, resulting from the subjection of certain areas along the historic route to the regime, *inter alia*, of Council Directive No. 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (1992 O.J. (L 206) 7) ("Habitats Directive") have also been discussed by the Parties. From the viewpoint of Article 292 of the EC Treaty the question thus faced by the Tribunal is the same as that posed with regard to the law of the trans-European rail network: does the Tribunal have to engage in the interpretation of the Habitats Directive in order to enable it to decide the issue of the reactivation of the Iron Rhine railway and the costs involved?

122. In order to answer this question, the Tribunal will proceed as it did in the case of the TEN issue. It will first briefly sketch the legal regime of the Habitats Directive. Following this, it will set out the arguments of the Parties with respect to this Directive, before deciding about the relevance, from the point of view of their being determinative, of the EC law issues for its own decision.

123. The Tribunal notes that in their pleadings the Parties refer not only to the Habitats Directive but also to an earlier act of EC legislation in a more

narrow field, namely Council Directive No. 79/409/EEC of 2 April 1979 on conservation of wild birds (1979 O.J. (L 103) 1) ("Birds Directive"). However, as was made clear by its Preamble and Article 7, the Habitats Directive superseded the regime established 13 years earlier by the Birds Directive for the purposes of the present case. Consequently, the Tribunal finds it unnecessary to treat the Birds Directive separately; its findings as to the question of the conclusive nature of the Habitats Directive *vel non* also apply to the earlier EC legislation.

124. The Habitats Directive finds its legal basis in Articles 174 and 175 of the EC Treaty which spell out the EC policy of environmental protection and which were originally introduced by the Single European Act of 1986 (1987 O.J. (L 169) 1). While Article 174 decrees the objective and basic principles of EC environmental policy, Article 175 regulates decision- and law-making in this area. More recently, the Treaty of Amsterdam (1997 O.J. (C 340) 1) amended the EC Treaty to include a new Article 6, which integrates EC environmental considerations into the definition and implementation of all EC policies and activities.

125. The EC Treaty provisions thus mentioned are supplemented by Article 176, according to which, and subject to certain conditions, protective measures adopted pursuant to Article 175 "shall not prevent any Member State from maintaining or introducing more stringent protective measures."

126. The Habitats Directive aims at reconciling the maintenance of biodiversity with sustainable development by developing a coherent European ecological network ("Natura 2000"). This is to be effected by the designation of special areas of conservation, as "sites of Community importance", in accordance with a specified timetable. Sites eligible for such designation are proposed by the EC Member States (Article 4). In exceptional cases, and after consultation with the Member State concerned, the European Commission may propose to the Council the selection of additional sites. The areas thus chosen are subjected to an elaborate conservation regime securing a high level of protection (*cf.* Article 174, paragraph 2, subparagraph 1 of the EC Treaty), the maintenance of which is to be monitored by the European Commission.

127. The provisions of the Habitats Directive most frequently relied on by the Parties are paragraphs 2-4 of Article 6, which read as follows:

> 2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions

> of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.
>
> 4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.
>
> Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

128. The second EC law aspect of the present case thus turns on the fact that the Netherlands has designated the Meinweg area, through which the historic track of the Iron Rhine railway runs, as a special area of conservation according to the Habitats Directive, besides identifying it as a national park and as a "Silent Area" under its domestic legislation (*see* paragraph 189 below). The Netherlands had in 1994 also identified the Meinweg as a special protection area in accordance with the Birds Directive mentioned above in paragraph 123, but, as already mentioned, the provisions of the Birds Directive that are pertinent in the present dispute were amended, and for all practical purposes superseded, by the Habitats Directive.

129. As to the Parties' arguments developing the issues of EC environmental law thus described, Belgium's position regarding the submission of the Meinweg to the regime of the Habitats Directive *per se* is not wholly clear. However, Belgium does claim that the Netherlands should have done (and should still do) more to harmonise the obligations arising for it under EC law on the one hand and Article XII of the 1839 Treaty of Separation on the other (BR, pp. 64-65, para. 67). According to Belgium, this harmonisation would be feasible because the Netherlands has a certain margin of discretion with respect to the scope of the designation of the Meinweg and the consequences flowing therefrom. For instance, Belgium claims, the Netherlands should, for the Meinweg, have followed the approach taken by the European Court of Justice in the so-called *Poitevin Marsh* case (C-96/98 *Commission v. French Republic*, Judgment of 25 November 1999), in which a strip of land was exempted from a designated conservation area in France for the development of a motorway (BM, pp. 85 ff, paras. 70 ff; BR, pp. 65-66, para. 68). Belgium further argues that the Netherlands retained some discretion in determining the type of protection required under EC law. In particular, the Netherlands could have considered the possibility of

compensatory measures under Article 6, paragraph 4 of the Habitats Directive, pursuant to which such measures are to be adopted in the designated areas if a project, although conflicting with the conservation regime established in accordance with the Habitats Directive, must nevertheless be carried out for "imperative reasons of overriding public interest" (BM, p. 87, para. 72). In any event, Belgium is not convinced that the environmental measures envisaged by the Netherlands in the area designated in accordance with the Habitats Directive, and in particular the building of a tunnel under the Meinweg, are the least costly and onerous options that could have been chosen consistent with the Netherlands' obligations under EC law. In Belgium's view, even if the extremely costly measures envisaged by the Netherlands to protect the environment of the Meinweg would have been the only means at the disposal of the Netherlands to meet its obligations under EC law, this would, according to EC law, still not imply that such measures would have to be financed by Belgium (BM, p. 88, para. 75). In any case, Belgium insists, a tunnel under the Meinweg cannot be the only possible solution for the Netherlands to meet environmental obligations (BM, p. 87, para. 73; BR, pp. 61-62, para. 62).

130. Belgium further refers to a discussion in July of 2001 that took place between the Netherlands, Belgium, and Germany with the European Commission, as a result of which the European Commission stated that the benchmark conservation value according to the Habitat Directive was to be based on the environmental situation prevailing in 1994; that is, at a time when, according to the European Commission, the Meinweg area was still crossed by railway traffic[11] (the respective benchmark according to the earlier Birds Directive was to be the situation in 1981) (BM, pp. 52-56, paras. 39-42). Belgium also reminds the Tribunal that in the Commission's 2001 opinion the modal shift from road to train transportation to which the Iron Rhine railway will contribute might eventually imply beneficial consequences of primary importance for the environment in the sense of Article 6 of the Habitats Directive (BM, pp. 54-56, para. 42).

131. At other points in its pleadings, however, Belgium itself detracts from the import of the Habitats Directive for the case at hand by referring to (without in any way disputing) Netherlands statements (*see* paragraphs 132-136 below) as confirming that the designation of the Meinweg and the measures flowing from it were decided by the Netherlands by its own free will, rather than pursuant to obligations under EC law in the sense that these measures would have been the only possible means for the Netherlands to comply with obligations under the Habitats Directive). Thus, according to the observations of Belgium, the environmental requirements decreed by the Netherlands are acknowledged as made necessary not by EC law but by the

[11] The Tribunal notes that the Parties agree that as far as trans-border traffic between Belgium and Germany, crossing Limburg, was concerned, use of the Iron Rhine railway ceased after 1991.

Netherlands' domestic norms governing the status of nature protection zones, which the Netherlands decided to create in the areas crossed by the historic route of the Iron Rhine railway (BM, p. 87, para. 73; BR, p. 51, para. 56). Further, it is not suggested by Belgium that these Netherlands measures are inconsistent with the Netherlands' obligations under EC law.

132. An analysis of the Netherlands' pleadings concerning the relevance of the Habitats Directive for the case at hand indeed confirms that Belgium has read these arguments correctly.

133. On the one hand, the Netherlands is ready to discuss the arguments put forward by Belgium on the impact of the Habitats Directive on the measures it took concerning the natural environment surrounding the route of the Iron Rhine railway. It thus disputes the Belgian contention as to the degree of discretion left to it regarding the choice of the Meinweg as a conservation area; rather, according to the Netherlands, the designations made according to the Directive(s)[12] are to be determined by ecological criteria which leave little freedom to Member States (NR, p. 23, paras. 95-97) and were made pursuant to consultations with the European Commission.

134. Further, the Netherlands denies the applicability of the *Poitevin Marsh* jurisprudence to the Iron Rhine railway (NR, pp. 24-25, para. 102). It distinguishes the facts of this case from the situation at hand and argues that an analogous approach to the Iron Rhine railway would be inappropriate and would not be accepted in Netherlands courts or by the European Commission.

135. So far as the relevant measures consequent upon designation are concerned, Belgium argues that compensatory measures could have been taken according to Article 6, paragraph 4 of the Habitats Directive. However, in the Netherlands' view, such measures may be taken only if and to the extent that a significant negative impact on the environment cannot be mitigated, and alternative solutions cannot be found (NCM, p. 51, para. 3.3.5.6). The Netherlands regards the building of a tunnel under the Meinweg as precisely such a mitigating measure, so that as a consequence, the necessity of taking compensatory steps within the meaning of Article 6, paragraph 4 of the Habitats Directive does not arise. The Netherlands argues further that it would be doubtful whether its national courts or the European Court of Justice would accept the obligation on the Netherlands deriving from Belgium's transit right as providing an "imperative reason of overriding public interests" within the meaning of Article 6, paragraph 4 (NCM, p. 51, para. 3.3.5.6). In any case, the Netherlands argues, the designation of the Meinweg area as a protected zone under the Directive(s)[13] took place in accordance with EC case law and objective criteria (NR, p. 26, para. 107).

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[12] The Meinweg was first identified as a special protection area according to the Birds Directive before, more recently, being subjected to the regime of the Habitats Directive; *cf.* BM, pp. 38-40, para. 29.

[13] *See* preceding note.

136. What is ultimately more significant in the present context, however, is the Netherlands' repeated and unequivocal assertion that while it has taken EC law fully into account,

> it is not necessary – in view of the legislative power based on the Netherlands' exclusive territorial sovereignty – for the measures required by Dutch legislation for the protection of nature and the environment to be based on or justified by the Birds and Habitats Directives, in any event in so far as such measures are not contrary to EU law [NCM, p. 49, para. 3.3.5.6].

Thus, the Netherlands' decisions as to the appropriate environmental protection measures to take in the context of the reactivation of the Iron Rhine railway, were taken by reference to Netherlands environmental law and administrative procedures, albeit in a way consistent with the relevant EC Directives.

The Netherlands continues:

> The Netherlands is *not* saying: "The European Commission is telling us we must construct a tunnel in the Meinweg, because that is an automatic consequence of the Habitats Directives [*sic*]."
>
> The Netherlands has *itself* decided on the basis of the Flora and Fauna Act (Flora en Faunawet) and the ecological values which it protects, that the construction of a tunnel is necessary in order to protect the ecological values in the Meinweg because it considers it to be the only way to adequately protect those values [NCM, p. 49, para. 3.3.5.6].

Finally, the Netherlands refers to the principle embodied in Article 176 of the EC Treaty, according to which EC Member States have the right to impose more stringent environmental framework conditions and conservation measures than what is required by EC Directives. In sum, for the Netherlands, the application of these Directives "is not a decisive factor for the construction of a tunnel in the Meinweg" (NR, p. 23, para. 93). Rather, what is decisive is Netherlands environmental law; provided always that it is in conformity with EC law. According to the Netherlands, it is fully entitled to take these measures, not only under EC law but also by virtue of Article XII of the 1839 Treaty of Separation, due to the reservation of sovereignty embodied therein. In the Netherlands' view it thus necessarily follows that it is for Belgium to bear the costs involved.

137. It is precisely this issue upon which the Tribunal has later to pronounce. But the Tribunal will first have to decide whether it must interpret the Habitats Directive in order to render its Award. Applying the test enunciated at paragraphs 102-105 above, the Tribunal has examined whether it would arrive at different conclusions on the application of Article XII to the Meinweg tunnel project and its costs if the Habitats Directive did not exist. The Tribunal answers this question in the negative, as its decision would be the same on the basis of Article XII and of Netherlands environmental legislation alone. Hence, the questions of EC law debated by the Parties are not determinative, or conclusive for the Tribunal; it is not necessary for the

Tribunal to interpret the Habitats Directive in order to render its Award. Therefore, as in the case of the TEN, the questions of EC law involved in the case do not trigger any obligations under Article 292 of the EC Treaty.

D. ARTICLE 10 OF THE EC TREATY

138. Pursuant to Article 10 of the EC Treaty,

> Member States shall take all appropriate measures,…, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

139. Belgium refers to this basic tenet of EC law by arguing that pursuant to Article 10 it does find itself under an obligation to facilitate the application of the environmental rules of EC law discussed above and, to that end, assist the Netherlands which is bound to apply these rules on its territory (BM, p. 90, para. 75). In Belgium's view, however, its duty arising under Article 10 could never go as far as obliging it to finance EC implementation measures on Netherlands territory. Belgium then points to various aspects of the position it has taken over the years with regard to the modernisation of the Iron Rhine railway, which it wants to be understood as acts of assistance to the Netherlands in complying with Article 10.

140. The Netherlands' pleadings, on their part, nowhere contest this point. Thus, there exists no dispute between the Parties concerning Article 10.

141. The Tribunal therefore finds that the question of obligations arising under Article 10 in the context of the dispute about the Iron Rhine railway does not have to be decided by the Tribunal; it is not determinative or conclusive in the sense of bringing Article 292 of the EC Treaty into play.

Chapter IV

THE BELGIAN REQUEST FOR REACTIVATION AND THE MEMORANDUM OF UNDERSTANDING OF MARCH 2000

142. On 28 March 2000 the Belgian and the Netherlands Ministers of Transport signed a Memorandum of Understanding concerning the Iron Rhine railway "in accordance with the arrangement between the Ministers of 29 February 2000" ("March 2000 MoU"). The main aspects of this instrument were confirmed in a trilateral meeting of the Belgian and Netherlands Ministers of Transport and the German Secretary of State for Transport held

on 5 April 2001 (BM, Exhibit No. 86, Report of the discussions between the Belgian and Dutch Ministers and the German Secretary of State for Transport on the reactivation of the Iron Rhine, held in Luxembourg on 5 April 2001). Normally, a Memorandum of Understanding is "an instrument concluded between states which is not legally binding" (A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2000), p. 26, at p. 31). A key factor in distinguishing a "non-legally binding instrument" from a treaty is the intention of the parties. To ascertain this intention, the Tribunal will, first, review the circumstances that preceded the signature of the March 2000 MoU. It will then set out the content and determine the legal significance of this particular instrument. Finally, it will summarize the circumstances that followed the signature of the March 2000 MoU, and that ultimately led to the present arbitration between the Parties.

A. CIRCUMSTANCES PRECEDING THE SIGNATURE OF THE MEMORANDUM OF UNDERSTANDING

143. As noted in paragraph 19 above, use of the Iron Rhine railway line varied in intensity during the period 1914-1991. It is common ground between the Parties that there was no further transit use of the Iron Rhine railway between Belgium and Germany after 31 May 1991 (BM, p. 23, para. 18; NCM, pp. 9-10, para. 2.5.4).

144. Of interest for the present arbitration is the fact that even before May 1991, various Belgian officials had affirmed Belgium's interest in the future use of the Iron Rhine railway (BM, pp. 32-38, paras. 24-28). The most striking expression of that interest is the letter of 23 February 1987 which the Belgian Minister of Transport addressed to his colleague the Minister of Transport of the Netherlands (original Dutch text in BM, Exhibit No. 59, Letter of the Belgian Minister of Transport to the Dutch Minister of Transport and Waterstaat, dated 23 February 1987; unofficial translation in BM, p. 33, para. 24). This letter already refers to the forthcoming difficulties of reconciling the future use of the Iron Rhine railway with the protection of the environment. The Tribunal now reproduces that translation of certain passages of the Belgian Minister's letter:

> I have the honour of asking your attention for the transboundary railway Antwerp-Roermond-Monchen Gladbach, also called the Iron Rhine.
>
> In Belgian circles,[14] there is strong interest for a modern direct railway link between Antwerp and the Ruhr area, with the consequence that I consider it necessary that an in-depth cost-benefits analysis be made of such a linkage.

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[14] The Tribunal notes that the Netherlands, in its Counter-Memorial, states that the correct English translation of *"in sommige Belgische middens"* is "in *certain* Belgian circles" (see NCM, p. 12, para. 2.7.1.2. and note 19). The Tribunal interprets this phrase to mean "in *some* Belgian circles."

> The NMBS [Belgian railways] has been instructed to study this issue. However such a study could not be finalised without the cooperation of the NS [Dutch railways] and DB [German railways].[15]
>
> I would be highly appreciative if you could request the NS to cooperate in this study with the NMBS.
>
> [...]
>
> To conclude, I refer to plans existing in The Netherlands, to create a natural park between Roermond and Erkenbosch alongside the Iron Rhine, which would limit the railway exploitation on that line.
>
> In my view, such a limitation would go against the rights accorded to Belgium by Article 12 of the Treaty of London of 19 April 1839 between Belgium and the Netherlands, which was executed through the Treaty of 13 January 1873 regulating the passage of the railway Antwerp-Gladbach through the territory of Limburg.
>
> In the above context, it is beyond doubt that Belgium will hold firm to its right of free transport through the Iron Rhine.

In her response of 26 October 1987 the Netherlands Minister of Transport did not address the relationship between the Iron Rhine railway and the designation of an area in the vicinity of the railway line as a nature reserve, but simply acknowledged Belgium's right of transit.

145. In May 1991 an economic study commissioned by the European Commission was published. This study recommended that the existing route of the Iron Rhine railway be preserved, and concluded that "the economics for rehabilitating the Iron Rhine are generally positive" (BM, Exhibit No. S2, Prognos, *The Iron Rhine Railway Link between Antwerp and the Rhine-Ruhr Area*, Final Report, May 1991). This study was discussed at the meeting of the Benelux Economic Union, Commission for Transport, on 11 December 1991, during which the Belgian representative stated that "the possible reactivation of the Iron Rhine must remain guaranteed in the light of an increase of transport in the future" (BM, Exhibit No. 63, Benelux Economic Union, Commission for Transport, Sub-Commission "Railway Transports", Report of the meeting held in Luxembourg on 11 December 1991). A similar statement was made at the meeting of the Benelux Economic Union, Commission for Transport on 20 April 1993 (BM, Exhibit No. 64, Benelux Economic Union, Commission for Transport, Sub-Commission "Railway Transport", Report of the meeting held at The Hague on 20 April 1993).

146. In 1994 the European Commission approved a Belgian request to fund a feasibility study into the modernisation of the Iron Rhine railway. Such a study was subsequently provided for in Article 9 of the Treaty concerning

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[15] See also the Belgian Minister of Transport's letter of 9 November 1987 to his German colleague: BM, Exhibit No. 60, Letter of the Belgian Minister of Transport to the German Minister of Transport, dated 9 November 1987.

the construction of a railway connection for high-speed trains between Rotterdam and Antwerp in 1996. The study (the Tractebel Report) was commenced in December 1996 and concluded in January-February 1997.

147. On 12 June 1998 the Prime Minister of Belgium wrote to his colleague, the Prime Minister of the Netherlands, as follows (BM, Exhibit No. 67, Letter of Belgian Prime Minister Dehaene to Dutch Minister-President Kok of the Netherlands, dated 12 June 1998, unofficial translation: BM, p. 38, para. 28):

> I accord great importance to a rapid realisation of the Iron Rhine. Therewith, the preference is given to the currently existing historic track. This historic track is the flattest, the shortest and the most economical. Furthermore, Belgium can claim a right of public international law on this historic track. Alternative connections (the Brabant-route, the diversion via Venlo) are either a too long roundabout route or necessitate the installation of new lines which can only be realised in the long run.

148. Whether any legal consequences flow from discontinuation in 1991 may now be addressed.

149. In the view of the Netherlands, this history evidenced an inconsistent position on the part of Belgium regarding the reactivation of the Iron Rhine railway.

150. Be that as it may, it is the view of the Tribunal that the Netherlands knew that it was possible that, notwithstanding what had happened before, a formal demand for reactivation at a significantly higher level of use might be forthcoming in the foreseeable future. And Belgium had reserved its right of "free transit" – which right the Netherlands has always acknowledged and continues to acknowledge.

151. The Tribunal observes that the reaction of the Netherlands to these developments has consistently been based on two principles: (i) the Netherlands does not contest Belgium's right of transit with respect to the Iron Rhine railway; and (ii) pursuant to the Netherlands' sovereignty over its territory, any reactivation of the Iron Rhine railway must comply with Netherlands legislation, in particular legislation concerning the protection of the environment. This is clear from, *inter alia*, the answer of 10 July 1998 of the Prime Minister of the Netherlands to the letter of the Prime Minister of Belgium cited above:

> [T]he Netherlands will participate in the consultations in a neighbourly spirit, as it has stated on many occasions. It speaks for itself that reactivating the historical line – or any other line – within Dutch territory is subject to Dutch environmental legislation and EC legislation on the conservation of natural habitats (Habitats Directive) [NCM, Exhibit No. 19, Letter of 10 July 1998 from the Dutch Prime Minister Wim Kok to the Belgian Prime Minister Jean-Luc Dehaene].

152. In the same period the Netherlands made an inventory of its national legislation relevant to the reactivation of the Iron Rhine railway (*see* NCM, p. 21, para. 2.12.2). On the basis of this inventory Belgium agreed with the proposal of the Netherlands to submit the entire railway line to the procedure set out in the Netherlands Transport Infrastructure (Planning Procedures) Act. In addition, the Meinweg area was designated by the Netherlands on 20 May 1994 as a "special protection area" within the meaning of the Birds Directive, later superseded by the Habitats Directive. In the years 1994-1995 the Netherlands also identified the Meinweg area as a national park and as a "Silent Area" under its domestic legislation (*see* discussion below at paragraph 189).

153. It soon became evident that the reactivation of the Iron Rhine railway under the prevailing environmental legislation of the Netherlands would give rise to substantial infrastructure costs (including the envisaged tunnel in the Meinweg area). At a meeting of the Netherlands and Belgian Ministers of Transport and the German Secretary of State for Transport, held in Brussels on 9 December 1999, no overall agreement could be reached on the allocation of the costs between the countries concerned. While it was agreed that the costs for the temporary reactivation of the historic track would be borne by Belgium, no agreement appeared possible on the allocation of costs for a definitive solution. Belgium and Germany based their view on the territoriality principle: each country must bear the investments in infrastructure on its own territory. The Netherlands relied on Article XII of the 1839 Treaty of Separation to contend that such costs on Netherlands territory should be borne by Belgium (BM, Exhibit No. 96, Report of the meeting between Belgian and Dutch Ministers and the German Secretary of State for Transport on the reactivation of the Iron Rhine, held in Brussels on 9 December 1999).

B. THE CONTENTS AND LEGAL SIGNIFICANCE OF THE MEMORANDUM OF UNDERSTANDING

154. The text of the Memorandum of Understanding of 28 March 2000 between Minister Durant and Minister Netelenbos concerning the Iron Rhine reads as follows:[16]

> Belgium and the Netherlands emphasise the importance of being able to swiftly transport freight by rail from the Belgian and Dutch ports to the hinterland, and back again, in an ever-expanding internal market. Access to the infrastructure that is available for this purpose will be open to all railway companies.

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[16] For the authentic Dutch text of the March 2000 MoU, see BM, Exhibit No. 82 and NCM, Exhibit No. 22. Unofficial English translations of selected paragraphs are in BM, pp. 44-47, para. 34 and NCM, pp. 20-21, para. 2.12.1. Except as noted below, the Netherlands' translation is reproduced here.

Both countries will closely cooperate with Germany on an international study of the positive and negative consequences of the reactivation of the Iron Rhine and of the possible alternative routes. This study will assess the situation "as if there were no border". The results of this study must be available in March 2001, so that at that time the international decision-making can take place.

Given the relationship between the international study and the Dutch EIA,[17] the Netherlands will do its utmost to have the results of the EIA for the part of the Iron Rhine that is located on Dutch territory, ready in March 2001. In the EIA the following will be investigated:

- For the short term the possible[18] temporary, limited reactivation of the complete historic route, this temporary reactivation being applicable until the definitive route is being put to use.
- For the definitive solution all relevant routes shall be studied; possibilities for the transportation of passengers will also be examined.

The Netherlands and Belgium will propose to Germany that they discuss the progress of the EIA regularly on a trilateral basis. The Netherlands will invite Belgium to designate an official to monitor the day-to-day progress of the EIA.

The decisions on temporary use and the definitive route will be taken simultaneously.

If, when decisions are taken on the temporary and definitive route in mid 2001 at the latest, the EIA-study concludes that a temporary, limited use will not cause irreversible environmental damage, then, from the end of 2001 onwards a few trains a day will be allowed to use the whole historic route at limited speed between 7 AM and 7 PM. Under these same conditions of timely decision-making and of absence of irreversible environmental damage, trains could, from the end of 2002 onwards, also use temporarily at limited speed the whole historic route in evening hours and at night, up to a maximum of fifteen per 24-hour period (combined total in both directions). The possible loss of ecological value will be compensated for.

If it is decided that the definitive route will be another route than that passing through the Meinweg (as the Netherlands assumes, but not Belgium), this route will be considered the complete fulfilment of the obligations under public international law arising from the Separation Treaty of 1839 and the Belgian-Dutch Iron Rhine Treaty of 1873. These arrangements will be laid down in a Treaty.

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[17] EIA = Environmental Impact Assessment.

[18] The Tribunal here has used the word "possible" (from Belgium's translation) rather than "possibility", which appears in the Netherlands' version.

> Until the definitive route has been selected, Belgium reserves all its rights under the Separation Treaty of 1839 and the Dutch-Belgian Iron Rhine Treaty of 1873.
>
> The costs for the temporary use of the historic route will be met by Belgium.
>
> If the Belgian railways company (NMBS) so wishes, it may undertake these works either by itself or by a third party, always taking account of the European public procurement rules and of the Dutch legal requirement that such works are undertaken by a contractor who is recognized in The Netherlands. This contractor could be Belgian.[19]
>
> For the construction of the definitive route The Netherlands is willing to bear part of the costs related thereto. Further arrangements will be made in this respect after the definitive route has been chosen.

155. The Tribunal observes that the intentions contained in the March 2000 MoU can be summarized as follows.

> (1) An "international study" is to be carried out (jointly with Germany) on the consequences of the reactivation of the Iron Rhine railway and of possible alternative routes. The results of this study must be available in March 2001.
>
> (2) The Netherlands "will do its utmost" to have ready, also in March 2001, the results of its Environmental Impact Assessment ("EIA") procedure for the part of the Iron Rhine railway that is located on Netherlands territory. The EIA procedure will include an investigation of both the temporary use of the Iron Rhine railway and the relevant routes for a definitive solution.
>
> (3) The decisions on the temporary use and on the definitive route are to be taken simultaneously ("dual decision"), in mid-2001 at the latest. The decision concerning temporary use has been made contingent on the decision concerning long-term use, because otherwise there would be no guarantee that this use would be temporary.
>
> (4) During the negotiations between the Parties, several meanings have been advanced for the notion of "temporary use" of the Iron Rhine railway. Under the MoU, temporary use is a "limited reactivation of the complete historic route" until the definitive route is being put to use. (If the definitive route coincides with the historic route, it may be expected that upgrading the historic route will have negative consequences for the temporary use of the route.) The MoU does not address this issue, but its terms perhaps suggest likely agreement on a definitive use that does not wholly follow the

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[19] The translation of this paragraph is that prepared by the Tribunal (neither Party having offered a translation).

historic route. The temporary use is to be allowed if, at the time the Parties take the dual decision, the EIA procedure concludes that a temporary limited use will not cause irreversible environmental damage. If so, from the end of 2001 onwards, a few trains a day will be allowed to use the whole historic route at limited speed between 7 am and 7 pm. From the end of 2002 onwards, trains could, under the same conditions, use the whole historic route at limited speed in the evening hours and at night, up to a maximum of 15 trains per 24-hour period (combined total in both directions). The costs for the temporary use of the historic route would be borne by Belgium.

(5) For the definitive solution, all relevant routes will be examined. Until the definitive route has been selected, Belgium will reserve all its rights under the 1839 Treaty of Separation and the Iron Rhine Treaty of 1873. If it is decided that the definitive route will be another route than that passing through the Meinweg, this other route will be considered the complete implementation of Article XII of the 1839 Treaty of Separation and of the Iron Rhine Treaty of 1873, and the relevant arrangements will be laid down in a treaty. The Netherlands would be willing to bear part of the costs relating to the construction costs of the definitive route.

156. The Parties agree that, as a matter of international law, the March 2000 MoU is not a binding instrument (BR, p. 29, para. 32; NR, p. 7, para. 26). At the same time, it was clearly not regarded as being without legal relevance. The Parties have in fact given effect to a number of provisions of the March 2000 MoU (*see* paragraph 159 below). Further, Belgium has spoken of it as "lapsing" when the date envisaged therein for the dual decision – "mid 2001 at the latest" – was not met. Belgium concludes that, as a consequence, "Belgium's undertaking to finance costs of temporary activation has equally lapsed."

157. The Tribunal notes that, in the arguments that the Parties advance in respect of certain of the Questions put to the Tribunal, the March 2000 MoU is equally not treated as legally irrelevant. Principles of good faith and reasonableness lead to the conclusion that the principles and procedures laid down in the March 2000 MoU remain to be interpreted and implemented in good faith and will provide useful guidelines to what the Parties have been prepared to consider as compatible with their rights under Article XII of the 1839 Treaty of Separation and the Iron Rhine Treaty. The respective allocation of costs for temporary use will depend not upon any undertakings given in the March 2000 MoU, but on other legal considerations (including what the Parties have thought reasonable during their negotiations in connection with the March 2000 MoU). The putative definitive route will – insofar as it may entail a short deviation from the historic route – require agreement; and the March 2000 MoU suggests that such an option was not *per se* considered as unreasonable by the Parties.

158. The Tribunal also finds it of continuing relevance that it was envisaged that the short term and definitive decisions were to be taken simultaneously. Just as Belgium cannot be said to have agreed to the financing of the temporary solution in the absence of agreement on a definitive solution, so the Netherlands cannot be held to have agreed to put the short term solution envisaged immediately into effect, without agreement on the definitive solution having been reached. Further, while at no time did Belgium's right of transit lapse, the long period of minimal use or absence of use, coupled with the technical complexities entailed in reactivation of the Iron Rhine railway, suggests that provision for Belgium's desired short term use may not reasonably be expected in the immediate future. The Netherlands has made clear it would prefer no temporary use, but it has also stated that any temporary use could not continue for more than five years (NCM, p. 25, para. 2.12.4; NR, p. 9, para. 35).

C. Acts Taken Subsequent to the Adoption of the Memorandum of Understanding

159. The international study referred to in the March 2000 MoU was delivered in May 2001 (BM, Exhibit No. S3, Arcadis, *Comparative Cross-Border Study on the Iron Rhine*, Final Report, 14 May 2001). In the same month the results of the Netherlands' EIA procedure, referred to as the "Route Assessment/Environmental Impact Statement" ("EIS"), was delivered (BM, Exhibit No. S4, *Railinfrabeheer/Directoraat-Generaal Rijkswaterstaat, Trajectnota/MER*). Both the international study and the Netherlands Route Assessment/EIS involved detailed examinations of various options for the routes of a reactivated Iron Rhine railway, all starting at the historic entry point into the Netherlands at the border with Belgium. One series of options involved routes through Venlo; the other series of options involved routes through or near Roermond. The routes through or near Roermond included the historic track, with several variations. All options, with their required works, were evaluated on the basis of comprehensive criteria that included costs and environmental effects. Both studies concluded that the preferred option would be the historic route. The Route Assessment/EIS determined that the "most environmentally friendly" option would be the historic route, with modifications including a tunnel in the Meinweg and a diversion around Roermond. On 21 September 2001, the Belgian, Netherlands and German Ministers of Transport decided that an overall decision would be taken, including the dual decision as to the temporary and long term use (*see* paragraph 155, subparagraph 4 above) and a decision on the allocation of costs (BM, Exhibit No. 89, Memo of the informal discussions between the Belgian, Dutch and German Ministers of Transport on the reactivation of the Iron Rhine, held at The Hague on 21 September 2001). During the same period, the three countries concerned met with the Directorate General Environment of the European Commission, which meeting led to a provisional and a final statement of the Commission concerning questions of

interpretation of the Habitats Directive. When it appeared that the reactivation of the Iron Rhine railway could not be properly realised on the sole basis of negotiations, the Parties agreed to have a number of issues resolved through arbitration.

Chapter V

THE MEASURES ENVISAGED BY THE NETHERLANDS IN THE LIGHT OF ARTICLE XII OF THE 1839 TREATY OF SEPARATION

A. INTRODUCTION

160. The Tribunal has concluded above (*see* paragraph 56) that, as a consequence of the reservation of sovereignty in Article XII of the 1839 Treaty of Separation, the Netherlands may exercise its rights of sovereignty in relation to the territory over which the Iron Rhine railway passes, unless this would conflict with the treaty rights granted to Belgium, or rights that Belgium may hold under general international law, or constraints imposed by EC law.

161. The question of constraints posed by EC law is discussed separately, in Chapter III above and paragraph 206 below.

162. In the view of Belgium, the limitations flowing from Article XII entail that the Netherlands is under the obligation to exercise its legislative and decision-making power in good faith and in a reasonable manner and so as not to deprive Belgium's transit right of its substance or to render the exercise of the right unreasonably difficult (BR, p. 69, para. 70). The Netherlands does not contest these limitations, but contends that its actions fully comply with these requirements.

163. In the view of the Tribunal, the first and obvious limitation flowing from Article XII is that the entitlement of the Netherlands to apply its national legislation to the reactivation of the Iron Rhine may not amount to a denial of the right of transit by Belgium over the historic route. The second limitation flows from the generally accepted principles of good faith and reasonableness: any measures to be prescribed by the Netherlands on the basis of its national legislation for the reactivation of the Iron Rhine railway may not render unreasonably difficult the exercise of Belgium's transit right.

164. In this context, the Tribunal notes that Belgium takes the position that the works envisaged by the Netherlands as necessary for the reactivation of the Iron Rhine "do not curtail Belgium's rights *per se*, provided that measures are taken to ensure the uninterrupted use of the railway during and notwithstanding these works, so that (1) temporary driving is followed

directly by long-term use [*see* paragraph 155, subparagraphs 3 and 4 above] and (2) neither of these 'regimes' is affected by construction works" (BR, p. 34, para. 37).

165. Belgium submits that the requirement of the Netherlands for such works is not *per se* an unreasonable exercise of the Netherlands' rights. However, when this requirement is combined with the further insistence that the works be financed by Belgium, and not by the Netherlands, it does, according to Belgium, become such an unreasonable exercise. Thus, Belgium considers that its transit right could be denied through the imposition of financial obligations (BR, p. 34, para. 37). The measures to be prescribed for the reactivation of the Iron Rhine railway, and the allocation of costs therefore, are closely intertwined issues. The former is addressed in this chapter and the latter is addressed in Chapter VI.

166. In the present chapter the Tribunal will examine the measures envisaged by the Netherlands for the reactivation of the Iron Rhine railway in the light of their compatibility with the treaty obligations of the Netherlands. For this purpose it is first necessary to devote some attention to the Netherlands legislation which forms the basis for the envisaged measures.

B. THE APPLICABLE LEGISLATION AND DECISION-MAKING PROCEDURES OF THE NETHERLANDS

167. In its pleadings the Netherlands has made a distinction between two categories of legislation that are applicable to the reactivation of the Iron Rhine railway: so-called "sector-specific" legislation; and general rules of administrative law. The Netherlands has only provided fragmentary information on the content of its national legislation, and Belgium has only commented on specific elements. Nevertheless the Tribunal deems it useful to provide an overview of the information provided by the Parties.

1. Sector-specific legislation

168. Various Netherlands acts and decrees apply to the reactivation of the Iron Rhine railway. Of particular importance are those dealing with technical and safety issues, such as the technical specifications for the track and railroad crossings, and those dealing with environmental issues (land-use planning, health and soil protection, and nature preservation). The technical and safety issues are mainly covered by the Railways Act *(Spoorwegwet)*. The dispute between the Parties about the consequences of the implementation of Netherlands legislation focuses in particular on theenvironmental legislation. The legislation considered most relevant by the Parties in their pleadings includes the following.

169. The Noise Abatement Act *(Wet Geluidhinder)* lays down the allowable noise level standards to be applied with respect to various

categories of buildings and activities. Where dwellings and similar structures are affected, a distinction is made between maximum exemption levels and so-called "preferential levels" of noise. The maximum permitted noise impact of a modified railway is 73 dB(A); for a new railway it is 70 dB(A). The preferential level is 57 dB(A). Section 106, paragraph (d), subparagraph (4) of the Act prescribes the measures to be taken when the preferential level is exceeded. Measures are to be taken in the following order: (1) measures at the source (*e.g.*, using quieter infrastructure and/or quieter trains); (2) measures related to the transfer of noise (*e.g.*, noise barriers); and (3) measures at the point of impact (*e.g.*, facade insulation). Where such measures are insufficient to ensure that the noise will not exceed the preferential level an exemption can be granted under certain conditions. When the noise nuisance is allowed to exceed the maximum exemption level, the relevant dwellings lose their residential function (which may result in compensated expropriation) (BR, pp. 44-46, paras. 48-50; NR, pp. 18-19, paras. 74-77).

170. The Railway Noise Abatement Decree *(Besluit Geluidhinder Spoorwegen)* provides the basis for imposing requirements (for the purpose of abating noise caused by the use of railways)

> on the nature, composition or method of construction and the alteration of a railway line. Alteration refers, among other things, to a significant increase in the number of trains and/or the speed of transit. Certain measures are required in such cases. The railway management company must present these measures to the municipalities concerned. Construction or adaptation can only commence after a final decision has been reached [NCM, p. 21, n. 44].

171. The Flora and Fauna Act *(Flora en Fauna Wet)* protects plant and animal species. It entails

> a ban on the destruction or disruption of the species it protects, as well as of their nests, reproduction, resting and living environments. The stipulations of the bans in the Flora and Fauna Act do not feature the term 'significant'. As a consequence, *any* disruption and/or destruction occurring as a result of the laying of the route represents a violation of the ban stipulations. For the varieties suffering such effects due to the construction of the route, the implementation of a project can only be undertaken if an exemption is obtained on the basis of article 75 of the Flora and Fauna Act [NCM, Annex A, p. 1].

172. The Environmental Management Act *(Wet Milieubeheer)*: as explained in paragraph 82 of the Netherlands' Rejoinder, Section 4, paragraph 9 of this Act requires provinces

> to adopt a Provincial Environmental Policy Plan every four years, in which they identify areas that require special protection to preserve the environment or certain aspects thereof (such as quiet). A silent area is an area where the noise nuisance should be so low that the sounds that occur there naturally are hardly disturbed, if at all (stand still principle). The preferential noise value in silent areas can vary from province to

> province. Both the province of North Brabant and the province of Limburg employ a value of 40 dB(A) during the daytime in their Environmental Policy Plans.

173. The Environmental Impact Assessment ("EIA") Decree *(Besluit Milieueffect-rapportage)* requires the preparation of an EIS for the adoption of a plan for a new railway or the reactivation of an existing railway line that passes for a distance of at least five kilometres through a buffer zone or a sensitive area delimited in a zoning plan or a regional plan (NCM, p. 21, n. 45).

174. The Netherlands also implements international guidelines adopted in 1969 with respect to the establishment of national parks, within the framework of the International Union for Nature Conservation and the Conservation of Natural Resources ("IUCN"). A National Park is defined as

> a consecutive area of at least 1000 hectares consisting of natural land, water and/or woodland, with special landscape features and plant and animal life. The area offers good possibilities for recreational use. In a National Park, nature conservation and nature development are intensified, nature and environmental education is heavily encouraged and forms of nature-oriented recreation and research are promoted [NCM, Annex A, p. 2].

175. At the provincial level also a number of regulations and policies implementing national legislation are relevant. In addition to the Provincial Environmental Policy Plan required by the Environmental Management Act already mentioned in paragraph 172, provinces can designate areas as part of their "Ecological Main Structure" (Limburg) or "Green Main Structure" (Noord-Brabant). These consist of core areas, nature development areas and linking zones for the conservation of which basic protection applies. In addition, areas can be designated for their landscape values under the Provincial Development Plan for the province of Limburg (NCM, Annex A, pp. 1-2).

176. Finally, at the provincial level the Provincial Environmental Regulation for Limburg provides for the possibility of designation as "Silent Area". This provincial regulation includes a general protection stipulation for environmental protection areas, including "Silent Areas" (Article 5.4) which reads as follows:

> Any party carrying out actions in an environmental protection area, who knows or could reasonably have suspected that through those actions in that area the special importance on the basis of which the area is designated a protected area will be or could be damaged, is required to take all measures which can reasonably be demanded with a view to preventing such damage or, if such damage occurs, as far as possible to limit that damage and as far as possible to limit and to reverse the consequences of the actions.

In the Provincial Environmental Regulations, no quantitative noise standards are laid down for "Silent Areas". However, the Provincial Environment Plan

for Limburg specifies that the Province of Limburg has set a maximum value of 40 dB(A) for noise, and that the Province intends to include this value in the Provincial Environmental Regulation (NCM, Annex A, p. 3).

2. General rules of administrative law

177. In the application of sector-specific legislation the Netherlands Government is also required to comply with the general norms for governmental action, in particular the general principles of sound administration as codified in the General Administrative Law Act *(Algemene Wet Bestuursrecht)*. The Netherlands refers in particular to the "general principles of sound administration" codified in sections 3.2 and 3.4 of the General Administrative Law Act, which read as follows:

> When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed.
>
> The administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised [NR, p. 17, para. 69].

According to the Netherlands, these principles can influence the interpretation and application of statutory provisions and the implementation of policy and can also serve as administrative policy in cases where a statutory regulation leaves a certain amount of freedom or is entirely lacking. The Netherlands explains that such principles will be applied in any judicial review proceedings (NR, p. 17, paras. 69-70).

3. The Transport Infrastructure (Planning Procedures) Act

178. In principle, each sector-specific law has its own decision-making procedures (including judicial review) to be followed for the implementation of its substantive provisions. In case of significant transport infrastructure projects a separate law applies, replacing the sector-specific decision-making procedures: the Transport Infrastructure (Planning Procedures) Act *(Tracewet)* (NCM, p. 21, para. 2.12.2). This procedure incorporates reviews of compliance with all the relevant specific legislation and includes an EIA. Only the final Planning Procedure Order issued under this procedure will be open to judicial review. The Netherlands explains that the Transport Infrastructure (Planning Procedures) Act must be applied to the reactivation of the part of the Iron Rhine between Roermond and the German border (NCM, p. 21, para. 2.12.2). The Netherlands, with the agreement of Belgium, has chosen to apply the Act for the purpose of the reactivation of the Iron Rhine railway in its entirety.

179. The decision-making procedure under the Transport Infrastructure (Planning Procedures) Act (including the EIA) consists of six stages which are

described in the Netherlands' Counter-Memorial (p. 22, para. 2.12.3.1) as follows (footnotes omitted):

> 1. A *Notification of Intent (Startnotitie)* marks the formal beginning of the procedure. It specifies the plans of the initiator, what alternatives to the planned activity will be examined and the potential consequences for the environment of each alternative.
>
> 2. The results of the study of the alternatives and their consequences are recorded in the *Route Assessment/EIS (Trajectnota/MER)*, taking into consideration the results of public input regarding the Notification of Intent. The purpose of the Route Assessment/EIS is to describe the anticipated consequences for the environment, so that the environment receives proper attention in the decision-making concerning the planned activity.
>
> 3. On the basis of the Route Assessment/EIS, and with due regard to the results of public input and the advisory report of the independent Committee for Environmental Impact Assessment established pursuant to statute, the competent authorities select a preferred option, which is published in an *Official Position (Standpuntbepaling)*.
>
> 4. The preferred alternative is worked out in detail (this involves specification of the position of the railway line that is accurate to within one meter) and the result is recorded in a *Draft Planning Procedure Order (Ontwerp-Tracebesluit)*, which is published.
>
> 5. After public input on the Draft Planning Procedure Order, the competent ministers adopt a *Planning Procedure Order (Tracebesluit)*, which forms the basis for issuing building permits, expropriation procedures and the like. A Planning Procedure Order is open to judicial review, which can lead to the annulment of all or part of the Order.
>
> 6. Once the Planning Procedure Order has become final and conclusive, the construction stage of the project can begin.

180. Stage 1 (the Notification of Intent) was completed in November 1999. Stage 2 (the Route Assessment/EIS) was completed in May 2001. This document analysed and evaluated a series of options for the reactivation of the Iron Rhine railway. At the same time the international study (sponsored by the three Governments involved in the planning for the reactivation of the Iron Rhine railway, i.e. Belgium, Germany and the Netherlands) was completed (*see* paragraph 159 above). The Governments involved ultimately agreed on the preferred option of the historic track (with a diversion around Roermond).

181. Stage 3 of the decision-making procedure (the issuing of the Official Position) could not be completed because agreement could not be reached with Belgium in the negotiations regarding the costs and their allocation in relation to the preferred option. Stating that its intention was to prevent delays in the execution of the project, the Netherlands Government decided to continue the procedure on an informal basis (NCM, p. 23, para. 2.12.3.2). The Government approved a preliminary Official Position in November 2001 (which has not been published) and on that basis a preliminary version of a

Draft Planning Procedure Order *(IJzeren Rijn, Concept ontwerp-tracebesluit)* was finalised by the Netherlands infrastructure manager ProRail in July 2003. This preliminary version was informally communicated to the Belgian railway company NMBS, and was used by Belgium in the preparation of its Reply (which fact was objected to by the Netherlands (NR, p. 13, para. 52)).

182. According to the Netherlands, the application of its legislation would result in a series of measures required for the long-term reactivation of the Iron Rhine railway as listed in the preliminary version of the Draft Planning Procedure Order. The Tribunal notes that this document has an informal and provisional status, as explained in paragraph 181 above. The Netherlands has observed that, in a formal sense, the measures proposed in this preliminary version cannot be regarded as the definitive ones which will have to be implemented. Even after the issuance of the definitive version of the Order there will still be the possibility of judicial review. Thus, there is still uncertainty about the exact measures to be prescribed for the reactivation of the Iron Rhine railway on Netherlands territory. However, since the arguments of the parties have specifically focused on the measures proposed in the preliminary version, the Tribunal will deal with them in more detail. The Tribunal notes that Belgium, in its Reply (p. 35, para. 38), states that, in referring to this document, Belgium does not imply any acceptance of the contents of the document.

C. THE MEASURES ENVISAGED IN THE PRELIMINARY VERSION OF THE DRAFT PLANNING PROCEDURE ORDER

183. The Tribunal observes that the preliminary version of the Draft Planning Procedure Order is based on the assumption by the Netherlands that it is Belgium's desire to reactivate the Iron Rhine railway in such a way that it can be used by 43 trains (combined total for both directions per working day) in 2020 (NR, p. 14, para. 54). The Tribunal notes that Belgium, in its pleadings, has not contested this assumption.

184. The route of the Iron Rhine railway over Netherlands territory is divided into four track segments (A to D, from west to east). Section 3 of the preliminary version of the Draft Planning Procedure Order describes the track segments in the following way (BR, pp. 35-38, para. 40):

> (1) Track segment A covers the municipalities of Cranendonck and Weert, and lies on the existing, historic track of the Iron Rhine railway between the Belgian border near Budel and the eastern limit of Weert. The preliminary version of the Draft Planning Procedure Order makes a further distinction between two parts of Track segment A. The first part is located between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert, and is also referred to as Al. This part crosses the nature area "Weerter- en Budelerbergen". It is described as follows:

> The railway line is and remains single track between the Belgian-Dutch border and the junction with the railway line Eindhoven-Weert. This railway is not electrified. Currently, the line is used by two freight trains per 24 hours, the two directions combined. Reactivating the Iron Rhine involves an intensification of the railway traffic up to 45 freight trains per 24 hours, both directions combined.
>
> As far as norm setting is concerned, this is a matter of an existing situation. For security on crossings use is made of the national average collision risk. The collision risk on the track must not go beyond the national average as a consequence of reactivation.

The second part of Track segment A is located east of the junction with the railway line Eindhoven-Weert, and is also referred to as A2. It is described as follows:

> East of the junction the existing railway is and remains double track and electrified. Currently the line is used by 104 trains per 24 hours, the two directions combined, 92 of which are passenger trains. This concerns both freight and passenger trains. In 2020, the 43 "Iron Rhine" trains will be added thereto. Including the autonomous development of railway transports, the line will then be used according to the prognosis by 199 trains per 24 hours, the two directions combined, 152 of which are passenger trains. The norm setting is also based on an existing situation. With respect to collision risks, this means that application is made of the stand-still principle. The incident risk will thus remain below the national average.

(2) Track segment B covers the municipalities of Nederweert, Heythuysen and Haelen. It passes next to the nature area "Leudal" and is described as follows:

> This part of the railway lies on the track, which already exists and is in use, between Weert and the eastern accesses to the bridges over the Maas near Roermond. The track is, like track A2, part of the railway line leading from Eindhoven via Weert to Roermond. Track B is and remains double track and electrified. The track is used by 92 trains per 24 hours in both directions combined. This concerns both freight and passenger trains. The norm setting is the same as for track segment A2, which is intensification of the existing train traffic up to 199 trains per 24 hours in both directions combined.

(3) Track segment C covers the municipalities of Roermond and Swalmen and is described as follows:

> For this track a new railway will be realised, which joins eastern of the Maas river near Roermond. The track consists of a loop north and east of Roermond. Near Herkenbosch it joins the part of the historic track which is out of use and which leads from the station of Roermond to the German border near Vlodrop. The new railway

> will insofar as possible be bound up with the National Road 73. The railway is single track and not electrified. The norm setting for this part of the track is based on the fact that a new situation is created locally.

(4) Track segment D covers the municipality of Roerdalen and is described as follows:

> This part of the track lies on the historical track, which is out of use since 1991. Track D lies between the Asenrayerweg and the German-Dutch border near Vlodrop. The track lies in the nature area De Meinweg. For the purpose of reactivation of the Iron Rhine, the track in De Meinweg will be built in part in a tunnel and in part in an embankment. This track is currently out of use. The norm setting for track D is based on the creation of a new situation as a consequence of the reactivation of the Iron Rhine.

185. For these different track segments the preliminary version of the Draft Planning Procedure Order describes in detail all the measures to be taken for the long-term reactivation of the Iron Rhine railway. The main sources of disagreement between the Parties are the measures for noise abatement and nature protection. The Tribunal will next focus on these measures.

1. Noise abatement measures for dwellings and similar objects

186. For the entire track, significant measures are envisaged in order to protect the inhabitants of the areas close to the railway from the increasing noise levels to be produced by the projected future use of the Iron Rhine railway. These measures, required by the Noise Abatement Act, further envisage compensated expropriation of dwellings where noise abatement measures will be insufficient to stay below the maximum exemption level.

187. According to Belgium, the Netherlands does not apply the maximum exemption level that is provided for by the Noise Abatement Act but applies the stricter preferential level. Application of the maximum exemption level would result in less extensive measures to be required. On this issue, and returning also to the financial implications thereof, Belgium concludes that

> it would be contrary to the principle of good faith and the principle of reasonableness to submit the reactivation of the Iron Rhine to the taking of noise abatement measures as contemplated in the Concept [the preliminary version of the Draft Planning Procedure Order] which are not necessary so as to reach the maximal exemption limit of 70 dB(A) (or 73 dB(A)), if such abatement measures are to be financed by Belgium or in any other way render the exercise of Belgium's rights on the Iron Rhine more difficult.

In Belgium's view, this would amount to an unnecessary interference with its right of transit (BR, p. 44-46, paras. 48-50).

188. The Netherlands agrees that the preliminary version of the Draft Planning Procedure Order applies the preferential level but argues that the noise abatement legislation, including the preferential level criteria, is applied in the same way as in other cases of railways, and sees no reason to deviate from the general policy to the disadvantage of the interested parties involved. In this context, the Netherlands additionally invokes the principles of sound administration on which the proposed measures are also based (NR, pp. 18-19, paras. 74-78).

2. Tunnel Meinweg

189. The Meinweg is an area of approximately 1,600 hectares located adjacent to the eastern part of track segment D. On 18 February 1994 the Province of Limburg designated the area as a "Silent Area". By Ministerial Decree of 20 May 1994 the Meinweg was designated as a special protection area under Article 4, paragraph 1 of the Birds Directive. On 1 June 1995 the area was designated a national park by the Minister of Agriculture, Nature Management and Fisheries. On 18 February 2003 the Netherlands Government included the Meinweg on the proposed list of specially protected areas under the Habitats Directive. This proposal was accepted by the European Commission in July 2003. Belgium states that it was not consulted before any of these designations. The Netherlands says there was no requirement for it to consult.

190. According to Belgium, the Netherlands had the obligation to prevent any designations not flowing from its obligations under the EC Directives that would result in the requirement to take additional measures for noise abatement and nature protection.

191. For the passage of the Iron Rhine railway through the historic track in the Meinweg area the preliminary version of the Draft Planning Procedure Order envisages the construction of a tunnel of 6.5 kilometres in length with an aqueduct, and an embankment.

192. According to the Netherlands, these measures are a consequence of the designation of the Meinweg as a national park and as a "Silent Area", and not as a consequence of its designation under the EC Directives which would only require the building of noise barriers. EC law allows the Netherlands to apply stricter standards for environmental protection than those required by the relevant EC Directives. The designation of the area as a national park and "Silent Area" flow from the application of national legislation and policy, which the Netherlands has stated employ objective criteria. The measures envisaged are the result of careful studies and consideration of alternative options under the applicable decision-making procedures, including an EIA (NCM, p. 49, para. 3.3.5.6; NR, p. 23, paras. 93 *ff*).

193. Belgium does not in principle dispute that the Netherlands could make these designations, but disagrees as to the financial consequences for the Parties.

3. Weerter- en Budelerbergen

194. The Weerter- en Budelerbergen are a nature area located in Track segment Al. This area was designated as a special protection area under the Birds Directive on 24 March 2000 (both Parties assert this, but Belgium's Exhibit 77 to its Memorial – The Netherlands, Ministerial Decree of 24 March 2000 – does not include this area), and as a "Silent Area" by the province of Limburg on 18 February 1994 (the same date as the Meinweg), and apparently also by the province of Noord-Brabant.

195. The preliminary version of the Draft Planning Procedure Order envisages a number of measures for the area of the Weerter- en Budelerbergen. These involve the building of noise barriers, a partial deepening of the track, and the building of an ecoduct. In addition, loss of habitat area is to be compensated for.

196. According to the Netherlands, these measures flow from the application of its national legislation and policy; they are a consequence of the designation by it of the area as a "Silent Area" and as a specially protected area under the Birds Directive.

197. That this is so is not contested by Belgium, but it disagrees as to the financial consequences for the Parties.

4. Loop around Roermond

198. The proposed Track segment C involves a rerouting of the historic track of the Iron Rhine railway through the town of Roermond to a new track to the east and north of the town. This is the preferred option of the Netherlands Government for this part of the track. Although it would be possible to keep the historic track, under the current legislative requirements concerning safety and noise abatement, significant additional measures would be required for this purpose. Such measures would not be necessary in the case of a rerouted track staying beyond the town centre. Furthermore, in view of further developing norms on the safety of transport of dangerous goods, preventing the passing through the town of Roermond of large numbers of freight trains in the future, is considered preferable by the Netherlands (NCM, pp. 28-29, para. 2.13.2).

199. Belgium insists that no rerouting deviating from the historic route may be decided upon by the Netherlands without the agreement of Belgium (BR, p. 69, para. 70).

200. The Netherlands essentially agrees with this position. Further, it is willing to pay the extra costs caused by the rerouting (NR, p. 21, para. 85).

201. The Tribunal concludes that the Parties concur that any decision by the Netherlands on the rerouting of the Iron Rhine railway would require the agreement of Belgium. It also notes that such agreement seems in principle to be forthcoming.

D. CONCLUSIONS

202. With respect to the measures envisaged by the Netherlands discussed above, Belgium argues that the Netherlands is under an obligation to apply its legislation in the way least unfavourable for Belgium; in not doing so the Netherlands would be acting contrary to the principles of reasonableness and good faith. Belgium regards some of the measures envisaged as an unnecessary interference with its transit right. They would constitute a breach by the Netherlands of its obligations towards Belgium (BR, pp. 32-33, 46, and 68-71, paras. 37, 50, and 70).

203. The Netherlands argues that it treats the reactivation of the Iron Rhine railway in the same way as other railways in the Netherlands. It accepts Belgium's right to reactivation, but it sees no reason why the Iron Rhine railway should be treated more favourably than regular Netherlands railways. In requiring the envisaged measures for the reactivation, the Netherlands claims that it is acting reasonably and in good faith. Its actions do not constitute an abuse of right, and are not arbitrary or discriminatory. In fact, it asserts that its legislative requirements are applied in the most favourable way for Belgium (NR, pp. 40-42, paras. 158-170).

204. In the view of the Tribunal, the obligations of the Netherlands under Article XII of the 1839 Treaty of Separation do not require it to apply its national legislation and policy with respect to the reactivation of the Iron Rhine railway in a more favourable way than with respect to other railways in the Netherlands, unless such non-discriminatory application would amount to a denial of Belgium's transit right or render the exercise of that right unreasonably difficult.

205. The Tribunal concludes that the measures as such as presently envisaged by the Netherlands cannot be regarded as amounting to a denial of Belgium's transit right or render the exercise of the right unreasonably difficult. The related but distinct question as to whether the laying of the costs for any of these measures on Belgium would amount to a denial of Belgium's transit right or render the exercise of the right unreasonably difficult will be addressed by the Tribunal in Chapter VI.

206. Since the Netherlands insists that the envisaged measures flow exclusively from the application of its national legislation, and Belgium does

not say otherwise, the Tribunal has not found it necessary to address any issue of constraints posed by EC law (*see* Chapter III above).

Chapter VI

ALLOCATION OF COSTS

207. The Tribunal will now turn to the issue of the allocation of costs which forms the subject-matter of the third Question put jointly by the Parties to the Tribunal. It is formulated in the following terms:

> In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

208. The Tribunal notes that under the Arbitration Agreement it is requested to render its decision on the basis of international law, including European law if necessary. It is not authorized to decide these matters *ex aequo et bono*. The introductory words of the third Question clearly indicate that the Tribunal's decision on the cost allocation shall be rendered in the light of the Tribunal's answers to the two previous Questions. The ensuing consideration by the Tribunal of the question of costs is thus based upon the reasoning in the previous chapters.

209. The Tribunal observes that the 1839 Treaty of Separation does not refer to "financial risks". The Parties use that term in the Questions they jointly put to the Tribunal, without specifying the meaning they give to it, nor in their pleadings does either Party explain its understanding of the term. The Tribunal understands that in the context of infrastructure projects such term refers to the covering of financial costs over and above those budgeted for the project, due to different factors, such as higher than projected inflation, underestimation of the costs, unforeseen events, and increases in the costs of materials used and of labour costs. The Tribunal notes that, whatever position on the question of allocation of risks and costs, respectively, the Parties may have taken from time to time in negotiations, the Parties, in their pleadings, have not made any distinction between the costs of the reactivation and financial risks associated with it, nor have they suggested that the financial risks should be borne by a Party other than that which would bear the costs themselves. The Tribunal is of the view that the financial risks are not to be severed from the costs. Thus, the Party which bears the costs will also have to bear the financial risks, and, when the Tribunal refers in this chapter to the costs, it should be understood as including the financial risks as well.

A. ARGUMENTS OF THE PARTIES

210. The Tribunal further notes that both Parties argue that the cost allocation falls within the ambit of the conventional regime for the Iron Rhine railway. They differ, however, in the identification of the relevant provisions and in their interpretation.

211. Article XII of the 1839 Treaty of Separation provides that the "agreed works" would be executed "at the expense of Belgium, all without any burden to Holland."

212. Belgium, however, contends that its obligation to bear expenses as provided in Article XII related to the *construction* of a railway on Netherlands territory as a prolongation of a new railway on Belgian territory, but not to the exercise of Belgium's right of transit (BR, p. 98, para. 104). Belgium refers to Article XI of the 1839 Treaty of Separation and what it terms the *"travaux préparatoires"* to support its contention that its obligation to bear expenses relates to the construction of a new railway prolonged on Netherlands territory, but not to the exercise of its right of passage (BR, pp. 99-100, para. 105). The exercise of the right of passage is, according to Belgium, subject only to moderate toll fees, to be paid by the users of the Iron Rhine railway, for the financing of its maintenance (BR, p. 99, para. 105).

213. Belgium, as a consequence of its view that its present request for reactivation does not amount to a request for a "new road" within the meaning of Article XII of the 1839 Treaty of Separation, maintains that it has no obligation to bear the costs and financial risks associated with the reactivation of the Iron Rhine. Belgium thus argues that in application of the conventional regime for the Iron Rhine all cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine railway on Netherlands territory shall be borne by the Netherlands and not by Belgium (BM, p. 101, para. 86; BR, pp. 103 ff and p. 127, paras. 110 ff and Submission on Question No. 3).

214. Belgium also contends that the Netherlands has rendered impossible the use of the railway by dismantling part of its infrastructure and making it unfit for use, by failing to provide for maintenance, and by deciding to interrupt works aimed at restoring the historic route to a standard necessary for temporary use. Thus, according to Belgium, the Netherlands violated Belgium's right to use the historic route of the Iron Rhine railway as well as the principle of due diligence. Belgium concludes that consequently the costs and financial risks related to the restoration of the historic route, which would not have arisen had the Netherlands not violated its obligations, shall be borne by the Netherlands (BM, p. 109, para. 96). Were the Tribunal to reject Belgium's submissions that all costs and financial risks shall be borne by the Netherlands, then Belgium contends, by way of a subsidiary argument ("in subsidiary order"), that it would still have no obligation to bear those costs and financial risks caused by the Netherlands' violation of its obligation

towards Belgium. According to Belgium that would be a consequence of the obligation to make reparation for the prejudice caused by a violation of international law, as well as an application of the principle that no one shall benefit from his illegal acts *(nullus commodum capere de sua injuria propria)* (BM, p. 107, para. 95).

215. Belgium insists that all costs relating to reactivation, including environmental protection, are for the Netherlands. However, as a "subsidiary" argument, it maintains, with respect to the long-term use of the historic route of the Iron Rhine railway, that the Netherlands may not insist on Belgium paying for the following: (1) measures related to tracks in present or future use for Netherlands railway transport; (2) measures necessary to meet objectives over and above Netherlands legislative requirements; (3) a looparound Roermond; and (4) a tunnel in the Meinweg and similar nature protection structures and compensatory measures there and elsewhere along the route. Belgium concludes that, if the Netherlands imposes these requirements, the Netherlands will have the obligation to finance the measures necessary so as to ensure the exercise of Belgium's right of transit (BR, pp. 118-119, para. 131).

216. The Netherlands contends that Belgium is claiming the right of transit but is not prepared to respect the conditions and obligations inextricably linked to that right under Article XII of the 1839 Treaty of Separation (NCM, p. 43, para. 3.3.4.4).

217. The Netherlands further argues that the Belgian demand for reactivation of the Iron Rhine railway amounts to a request within the meaning of Article XII of the 1839 Treaty of Separation for the extension of a railway originating in Belgium into and over Netherlands territory. In the view of the Netherlands, this railway is new to the extent that a very considerable adaptation and modernisation is necessary in order to achieve the desired use (NCM, p. 43, para. 3.3.4.5). Consequently, the Netherlands, referring to Article XII, and in particular to the words "entirely at the cost and expense of Belgium" and "at the expense of Belgium, all without any burden to Holland, and without prejudice to the exclusive rights of sovereignty over the territory which would be crossed by the road or canal in question", maintains that the costs referred to in Article XII should be borne in full by Belgium (NCM, p. 56, para. 3.3.8.1).

218. The Netherlands thus interprets Article XII of the 1839 Treaty of Separation as requiring Belgium to bear the full costs incurred in connection with its request for adaptation and modernisation of the existing infrastructure, which is at present not suitable for the use desired by Belgium (NCM, p. 57, para. 3.3.8.2).

B. CONSIDERATION BY THE TRIBUNAL

219. That the Parties should advance these arguments is understandable. But each of their positions finds its origins in divergent readings of Article XII of the 1839 Treaty of Separation, neither of which can be sustained. The Tribunal has explained above (*see* paragraphs 82-84) that although Article XII was directed towards the construction of, and regime for, the Iron Rhine, the right of transit there provided for also covers the reactivation of the track and its use through time. The specific financial provisions of Article XII were formulated in respect of the construction of a new road, canal or track. The real questions, so far as allocation of costs is concerned, are the following: what elements of Article XII relating to costs are applicable to a reactivation that is not a construction of a new railway but is nonetheless within the ambit of Article XII? And what other elements within Article XII, interpreted in accordance with the legal principles explained in Chapter II above, may illuminate the allocation of costs for the reactivation that Belgium seeks and is entitled to?

220. The Tribunal finds itself in the presence of three points of departure for its analysis of these questions. The first is that, in matters other than those specifically provided for in relation to the construction of a new line, the Netherlands retains its rights of sovereignty. The second is that a major adaptation and modernisation of an existing railway must today include necessary environmental protection measures as an integral component of such a project. It has been shown in paragraphs 58 and 59 that rules of international law on protection of the environment are applicable law between the Parties in the interpretation of the conventional regime for the Iron Rhine railway. As a third point, the Tribunal will remain mindful that the financial burdens associated with the reactivation must not fall in such a way as effectively to prevent or render unreasonably difficult the exercise of Belgium's right of transit under Article XII of the 1839 Treaty of Separation. These elements, taken together, suggest that the costs are not to be borne solely by Belgium as if it were "a new road"; but neither are they to be borne solely by the Netherlands. The financial obligations of the Parties must therefore be subjected to careful balancing. Such balancing requires a variety of factors to be taken into account. That the Parties did not consider such a balancing unreasonable is demonstrated by their offers, during the negotiations, to contribute to the costs of thereactivation: the Netherlands offered, in October 2001, to pay 25% (€140 million) of the then estimated costs (NR, p. 15, para. 60), with an additional contribution of €40 million if Belgium waived temporary use of the line (NR, p. 16, para. 65), and Belgium was willing to contribute €100 million (BM, pp. 66-67, para. 48).

221. The Tribunal considers that Belgium is in principle entitled to exercise its right of transit in a way which corresponds to its current economic needs. At the same time, the concern of the Netherlands for its environment and the impact thereon of the intended, much more intensive, use of the

railway line is to be viewed as legitimate. Such exercise of Belgium's right of transit and the Netherlands' legitimate environmental concerns are to be, as far as possible, reconciled. The Tribunal notes that such a reconciliation of rights echoes the balancing of interests reflected in Article XII of the 1839 Treaty of Separation. The Tribunal has found that the restoration and upgrading of the line as requested by Belgium falls to be analysed by reference of Article XII of the 1839 Treaty of Separation – not because it amounts to a "new line" (the Netherlands' view) but rather because the object and purpose of the Treaty suggests an interpretation that would include within the ambit of the balance there struck new needs and developments relating to operation and capacity (*see* paragraph 84 above). As the Tribunal has already observed above (*see* paragraph 59), economic development is to be reconciled with the protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded.

222. The use of the Iron Rhine railway started some 120 years ago and it is now envisaged and requested by Belgium at a substantially increased and intensified level. Such new use is susceptible of having an adverse impact on the environment and causing harm to it. Today, in international environmental law, a growing emphasis is being put on the duty of prevention. Much of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. The International Court of Justice expressed the view that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 226 at pp. 241-242, para. 29).

223. Applying the principles of international environmental law, the Tribunal observes that it is faced, in the instant case, not with a situation of a transboundary effect of the economic activity in the territory of one state on the territory of another state, but with the effect of the exercise of a treaty-guaranteed right of one state in the territory of another state and a possible impact of such exercise on the territory of the latter state. The Tribunal is of the view that, by analogy, where a state exercises a right under international law within the territory of another state, considerations of environmental protection also apply. The exercise of Belgium's right of transit, as it has formulated its request, thus may well necessitate measures by the Netherlands to protect the environment to which Belgium will have to contribute as an integral element of its request. The reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures are to be fully integrated into the project and its costs.

224. The Tribunal is not asked to, nor could it, determine which particular measures are to be taken. What the Tribunal is asked to do is to

pronounce on the allocation of costs inrespect of such measures as are to be specified. The Tribunal notes that it was the intention under the March 2000 MoU that these measures would be laid down in a treaty. The Tribunal will not specify in monetary terms the allocation of costs but will, on the basis of the law applicable to this issue, indicate relevant criteria and principles that the Parties should apply to this question.

225. The Tribunal starts by recalling that it is for the Netherlands at its expense to bring the Iron Rhine railway line back to the state in 1991 (*see* paragraphs 76 and 89 above). This is the case for the entire historic line. This conclusion is not dependent upon any violation by the Netherlands as regards maintenance of the line since the early 1990s. The Tribunal further recalls that the Netherlands recognizes that it will be responsible for the maintenance of a reactivated line (NR, p. 34, para. 136).

226. The Belgian obligation to fund the environmental element of the overall costs of the reactivation is integral to its exercise of its right of transit. At the same time, an interpretation, based on reasonableness, of the financial provisions of Article XII also requires that the Netherlands' use of parts of the line be acknowledged. On those parts of the line, both expenditures attributable to autonomous development, and benefits to the Netherlands may be envisaged. This has particular relevance where the line is so significantly adapted and modernised. On those parts of the line where both Iron Rhine trains and Netherlands trains will pass, Belgium will only be obliged to fund the expenditures associated with the measures attributable to the use of the line by Iron Rhine trains. The Netherlands will have to contribute to the total cost to the extent that those measures represent particular, quantifiable benefits to the Netherlands.

227. The application of these principles will depend upon the information given to the Tribunal as regards the particular segments of the line. These segments and their planned future use are described in paragraph 184 above. Relevant information was provided by the Parties, with no distinction being made by them between freight trains and passenger trains as far as the measures necessitated by their use is concerned.

228. Segment A is divided into two parts. The first part between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert (referred to also as segment Al) (*see* paragraph 184 above) is currently used by just two trains per 24-hour period. These are local trains and are not to be viewed as trains being used in the exercise of the transit right of Belgium over the Iron Rhine. The costs of work needed for the reactivation (that is, the use, restoration, adaptation and modernisation, including necessary environmental protection measures) of this part of the track are, in the view of the Tribunal, due to the Belgian request to allow in the future up to 43 freight trains in addition per 24-hour period. Accordingly, the Tribunal concludes that the costs for the reactivation of this part of segment A are to be borne by Belgium.

229. The second part of segment A (also referred to as segment A2) (*see* paragraph 184 above) is located east of the junction with the railway line Eindhoven-Weert up to the municipality of Nederweert. Currently, the line is used by 104 trains per 24-hour period. It is envisaged in the preliminary version of the Draft Planning Procedure Order that in 2020 it will be used by 199 trains including the 43 Iron Rhine trains. It cannot be ruled out that the development of the Netherlands railway transport ("autonomous development") envisaged for 2020 amounting to the addition of 52 trains to the current level of use by 104 trains per 24-hour period would also entail a certain expenditure. Therefore, in the view of the Tribunal, the costs for the reactivation of this segment A2 shall be apportioned between the Parties: the Belgian obligation to fund the costs associated with the reactivation is to be diminished by a financial factor that includes the costs which would otherwise have been required for the autonomous development had the Iron Rhine not been reactivated, so far as both track and environmental factors are concerned. The Tribunal here refers to and bases itself upon the envisaged autonomous development which the Netherlands has itself taken into account when preparing the preliminary version of the Draft Planning Procedure Order.

230. While the overall financial obligation remains that of Belgium, the Tribunal is further of the view that an element that may represent particular, quantifiable benefits to the Netherlands – resulting from, in particular, improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the currently anticipated development for additional use of the track by Netherlands trains – are also to be taken into account in the apportioning of costs between the Parties. In fact, during the trilateral negotiations with Belgium and Germany in early 1999, the Netherlands advocated that the distribution of the benefits (both from the perspective of business economics and socio-economics) should be a point of departure for the distribution of the costs of the reactivation between the Parties (BM, Exhibit 78, Flemish-Dutch Administrative Steering Group, Draft Report "Iron Rhine" for the Ministers of Transport of Belgium, the Netherlands and Germany, p. 25).

231. Segment B (*see* paragraph 184 above) covers the line between the municipalities of Nederweert and Haelen. The current and the planned use of this segment is similar to the segment A2, save that the current use is 92 trains per 24-hour period, rather than 104 trains per 24-hour period (notwithstanding that by 2020 the comparable figure of 199 trains per 24-hour period is envisaged). The Tribunal is therefore of the view that the costs of the reactivation of the railway line shall also be apportioned between the Parties according to the principle set out in paragraphs 229 and 230 above.

232. Segment C (*see* paragraph 184 above) covers the municipalities of Swalmen and Roermond. From the material before it, the Tribunal understands that this segment will be used solely for the railway connection between Belgium and Germany (BR, Exhibit No. 10, as corrected, Preliminary Version 1.4 of the Draft Planning Procedure Order, p. 98,

para. 6.1 ff). The track is envisaged as a loop north and east of Roermond proposed by the Netherlands which, during the negotiations, expressed its willingness to pay the extra costs for a such diversion around Roermond. The loop constitutes a deviation from the route agreed on in Article IV of the Iron Rhine Treaty. Such a deviation cannot be executed without the consent of Belgium, *i.e.*, it must be done by agreement, thus modifying the agreed historic route. Belgium is therefore entitled to request that the Netherlands undertake to bear the extra financial costs of such a deviation over and above those which would otherwise be involved had the historic route through Roermond been adapted and modernised. On the other hand, if the Netherlands is willing to bear these extra costs, Belgium cannot reasonably withhold its consent to a deviation. If a loop around Roermond is agreed, then the costs would be distributed between the Parties in the following manner: Belgium would be obliged to fund the amount which would have been required for the reactivation of the historic route in its current location, while the Netherlands would be obliged to bear costs incurred above that amount due to the relocation of the line to the north and east of Roermond.

233. Segment D (*see* paragraph 184 above) runs through the municipality of Roerdalen. It lies between the Asenrayerweg and the German-Netherlands border. The railway line in this segment has been out of use since 1991 and in the future, as the Tribunal understands, will be used solely for the connection between Belgium and Germany (BR, Exhibit No. 10, as corrected, Preliminary Version 1.4 of the Draft Planning Procedure Order, p. 117, para. 7.1 ff). The reactivation is required because of the Belgian request. Belgium will, for the reasons given above, have to bear the cost of the reactivation of the track.

234. Specifically, Belgium will have to bear costs for noise barriers to be built near dwellings and compensatory conservation measures in this segment. The Tribunal is aware that the major cost factor not only in this segment but in relation to the whole project of the reactivation of the Iron Rhine is attributable to the envisaged tunnel in the Meinweg. Belgium contended that the costs of various environmental measures, in particular of the tunnel in the Meinweg, were "too costly" (BM, p. 82, para. 66), "highly expensive" (BM, p. 88, para. 74), and even "prohibitive" (BM, p. 81, para. 66). The construction of such a tunnel is envisaged in light of the fact that the track lies in the Meinweg area designated as a national park by the Netherlands Minister of Agriculture, Nature Management and Fisheries on 1 June 1995 and as a "Silent Area" by the Province of Limburg. When the Netherlands took that decision it already knew that the historic route crossed that area and that Belgium, despite not exercising since 1991 its right of transit, had reserved its right to the use of the line in the future. The Tribunal is of the view that the Netherlands' decision to declare the Meinweg a national park in an area over which Belgium was entitled under treaty to a right of transit, though a permitted act of Netherlands' sovereignty, cannot remain without financial consequence for the Netherlands. On the other hand, the Belgian Government

reserved its right only in abstract terms, and did not specify the parameters of its future use of the line before the decisions of the Netherlands were taken. The construction of the tunnel is required not only in view of the intensive use envisaged by Belgium, of which nevertheless the Netherlands was not fully informed in a timely fashion, but also arises out of the Netherlands' decision to establish a national park in the area which was already crossed by the historic route. The Tribunal considers that both Parties contributed to the occurrence of the situation which now requires much more costly measures. The Tribunal is therefore of the view that the costs for the tunnel in the Meinweg are to be apportioned equally between the Parties.

235. The Tribunal has in paragraphs 228-234 identified the principles of apportionment of costs in the various segments that it sees as flowing from Article XII of the 1839 Treaty of Separation, taking into account the applicable provisions of international law. The Tribunal has not been asked to calculate precisely the overall costs of reactivation, the costs of autonomous development, and the benefits of the reactivated Iron Rhine railway to the Netherlands. Moreover, it understands that the Draft Planning Procedure Order is of a preliminary character and its content may be subject to further changes. Nor is it the task of this Tribunal to investigate questions of considerable scientific complexity as to which measures will be sufficient to achieve compliance with the required levels of environmental protection. These issues are appropriately left to technical experts. To that effect, the Tribunal recommends that the Parties promptly, and in any case not later than 4 months from the date of this Award, put into effect the conditions necessary for a committee of independent experts to be set up within the same time frame, unless the Parties agree otherwise, to engage in the task of determining:

1. the costs of the reactivation of the Iron Rhine railway;

2. the costs of the autonomous development; and

3. the particular, quantifiable benefits to the Netherlands – in financial terms – of the reactivation resulting from, in particular, improved road traffic circulation, enhanced road safety, reduced noise and the potential beyond currently anticipated autonomous development for additional use of the track by Netherlands trains.

This committee of independent experts should conclude its findings as soon as possible, and in any case not later than 6 months from the date of its establishment.

The findings of this committee of independent experts are to be used by the Parties in determining their respective share for the costs and risks associated with the upgrading of the Iron Rhine railway in segments A2 and B. The Netherlands will have to contribute to the costs of and financial risks associated with the reactivation of the Iron Rhine in segments A2 and B in the amount which comprises the costs of the autonomous development (point 2 above) and the financial equivalent of the benefits for it (point 3), as determined by the committee of independent experts. Belgium will have to

bear all the remaining costs of and financial risks associated with the reactivation of the Iron Rhine in segments A2 and B.

236. The Tribunal thus concludes that the costs and financial risks associated with the long-term use of the Iron Rhine railway are to be borne by the Parties in the following way:

> 1. Belgium alone will be obliged to bear the costs and financial risks of the reactivation of segment Al and segment D with the exception of the tunnel in the Meinweg;
>
> 2. Belgium and the Netherlands will have to share the costs and financial risks of the reactivation of segments A2, B, C and the Meinweg tunnel in segment D in accordance with the formulas specified in paragraphs 229-231 (for segments A2 and B), 232 (for segment C) and 234 (for the Meinweg tunnel).

237. Within the Parties' pleadings there was debate, not only about the separation of temporary use from agreement on long-term use, but also how long any temporary use might last, whether it could be interrupted by work for the long-term reactivation, and the financing of such temporary use. In the March 2000 MoU, the Parties had agreed that Belgium would pay the costs for such temporary use. However, Belgium has since claimed that this undertaking has lapsed, as no timely agreement has been reached on long-term use. The Tribunal notes that the financing of temporary use is not, in terms, among the formal Questions put to it. Nor has the Tribunal understood the Questions it is asked concerning the "use, restoration, adaptation and modernization of the historic route" as being related to the above issues regarding temporary use.

Chapter VII

REPLIES OF THE TRIBUNAL TO THE QUESTIONS PUT BY THE PARTIES

A. QUESTION 1

238. The first specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

> To what extent is Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory applicable, in the same way, to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory?

239. The Tribunal responds as follows:

(a) The Tribunal understands the phrase "in the same way" to refer to an application of Dutch legislation, and the decision-making power based thereon, in respect of the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine as would be the case in respect of the use, restoration, adaptation and modernisation of any other railway on Dutch territory.[20]

(b) Dutch legislation and the decision-making power based thereon in respect of the use, restoration, adaptation and modernisation of railway lines on Dutch territory are applicable in the same way to the use, restoration, adaptation and modernisation of the historic route of the Iron Rhine on Dutch territory to the extent specified in subparagraphs (c) and (d) following.

(c) Such application of Dutch legislation and the decision-making power based thereon may not conflict with the treaty rights granted to Belgium, or the rights and obligations of the Parties under general international law, or constraints imposed by EU law (*see* paragraph 56). Thus, the application of Dutch legislation and of the decision-making power based thereon may not amount to a denial of Belgium's right of transit (*see* paragraph 66), nor render unreasonably difficult the exercise by Belgium of its right of transit (*see* paragraph 163).

(d) The Tribunal further finds that:

(i) Dutch legislation and the decision-making power based thereon may not be applied unilaterally to order a deviation from the historic route;

(ii) the application of such Dutch legislation and the decision-making power based thereon is not dependent upon whether the relevant works are to be performed by the Netherlands itself or by Belgium;

(iii) Dutch legislation and the decision-making power based thereon may not unilaterally fix the level and rate of toll collection; and

(iv) the measures resulting from the application of Dutch legislation and the decision-making power based thereon must allow for the reactivation of the Iron Rhine railway to

[20] The Tribunal has used the formal adjective "Netherlands" throughout this Award, but in answering the Questions it has used the adjective "Dutch", as this is the terminology there employed by the Parties.

be executed in accordance with "the same plan" (understood in the sense of functionality: *see* paragraph 67 above).

B. QUESTION 2

240. The second specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

> To what extent does Belgium have the right to perform or commission work with a view to the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory, and to establish plans, specifications and procedures related to it according to Belgian law and the decision-making power based thereon? Should a distinction be drawn between the requirements, standards, plans, specifications and procedures related to, on the one hand, the functionality of the rail infrastructure in itself, and, on the other hand, the land use planning and the integration of the rail infrastructure, and, if so, what are the implications of this? Can the Netherlands unilaterally impose the building of underground and above-ground tunnels, diversions and the like, as well as the proposed associated construction and safety standards?

241. The Tribunal responds as follows:

(a) Belgium has the right to make a plan to establish track specifications relevant for the functionality of the continuation of the line through the Netherlands. The works consequential upon the requested use, restoration, adaptation and modernisation of the historic route of the Iron Rhine are to be "agreed works". Belgium may not engage in works on Dutch territory that have not been agreed to. The Netherlands may not withhold its agreement to any proposal by Belgium should such withholding of agreement amount to a denial of Belgium's transit rights, or render unreasonably difficult the exercise by Belgium of its right of transit.

(b) This is the case whether the Netherlands chooses itself to carry out the agreed works on its territory, or asks Belgium to do so.

(c) The Tribunal observes, however, that the Netherlands may not unilaterally impose a diversion from the historic route.

(d) The Netherlands was entitled to have designated areas along the historic route as protected areas as this did not *per se* constitute a limitation to Belgium's right of transit and the circumstances examined by the Tribunal do not suggest that there was a legal obligation to have consulted Belgium before doing so.

(e) The Netherlands is in principle entitled unilaterally to impose the building of underground and above-ground tunnels "and the like". However, any such measures that it seeks to impose may not

amount to a denial of Belgium's right of transit over the historic route, nor render unreasonably difficult the exercise by Belgium of its right of transit.

C. QUESTION 3

242. The third specific Question for the Arbitral Tribunal posed in the Arbitration Agreement reads as follows:

> In the light of the answers to the previous questions, to what extent should the cost items and financial risks associated with the use, restoration, adaptation and modernisation of the historical route of the Iron Rhine on Dutch territory be borne by Belgium or by the Netherlands? Is Belgium obliged to fund investments over and above those that are necessary for the functionality of the historical route of the railway line?

243. The Tribunal responds as follows, taking the second element of the Question first:

> The Tribunal recalls that Belgian obligations other than those associated with functionality flow from the fact that the requested reactivation represents an economic development on the territory of the Netherlands, with which the prevention and minimalisation of environmental harm is to be integrated. The Tribunal has further found that the costs of environmental protection measures and other safety measures cannot be severed from the costs necessary for the functionality of the historic route. The costs and financial risks associated with the right of transit on which the use, restoration, adaptation and modernisation ("reactivation") requested by Belgium is based are to reflect the balance between the Parties inherent in Article XII of the 1839 Treaty of Separation, interpreted by reference to the applicable principles of international law. Accordingly, Belgium's obligations to fund investments are not limited to those necessary for the functionality of the historic route of the railway line.

244. The Tribunal further finds that the cost items and financial risks associated with the reactivation of the historic route of the Iron Rhine on Dutch territory are:

> (a) As to the sector between the Belgian-Netherlands border and the junction with the railway line Eindhoven-Weert ("segment Al"), to be borne by Belgium.
>
> (b) As to the sector located east of the junction with the railway line Eindhoven-Weert up to the municipality of Nederweert ("segment A2"), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks associated with the reactivation, such obligation being diminished by a financial factor that represents the costs which would have been required for the autonomous development envisaged for Dutch

railway transport by 2020, were the Iron Rhine not to be reactivated. This remaining obligation of Belgium is further to be diminished by a financial factor representing particular, quantifiable benefits to the Netherlands (other than as regards autonomous development) resulting from, in particular: improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the autonomous development plans.

(c) As to the sector between the municipalities of Nederweert and Haelen ("segment B"), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks associated with the reactivation, such obligation being diminished by a financial factor that represents the costs which would have been required for the autonomous development envisaged for Dutch railway transport by 2020, were the Iron Rhine not to be reactivated. This remaining obligation of Belgium is further to be diminished by a financial factor representing particular, quantifiable benefits to the Netherlands (other than as regards autonomous development) resulting from, in particular: improved road traffic circulation, enhanced road safety, reduced noise, and potential beyond the autonomous development plans.

(d) As to the sector covering the municipalities of Swalmen and Roermond ("segment C"), to be apportioned between the Parties as follows: if a loop around Roermond is agreed, Belgium has the obligation to bear the costs and financial risks associated with the reactivation of the historic route had that reactivation been in the current location of the historic line; while the Netherlands has the obligation to bear the costs and risks over and above that sum due in respect of the relocated line agreed to the north and east of Roermond.

(e) As to the sector running through the municipality of Roerdalen ("segment D"), to be apportioned between the Parties as follows: Belgium has the obligation to bear the costs and financial risks of reactivation of the railway line, which is to be used solely for the connection between Belgium and Germany, including the costs and financial risks associated with noise barriers to be built near dwellings and compensatory conservation measures in this segment. However, as regards any tunnel that may be built in the Meinweg area designated as a national park by the Netherlands Minister of Agriculture, Nature Management and Fisheries on 1 June 1995 and as a "Silent Area" by the Province of Limburg, the need for this being attributable to the past conduct of both of the Parties, they shall share the obligation to bear the costs and financial risks associated therewith in equal parts.

Done at the Peace Palace, The Hague, this 24th day of May 2005.

INTERPRETATION OF THE AWARD OF THE ARBITRAL TRIBUNAL, DECISION OF 20 SEPTEMBER 2005

INTERPRÉTATION DE LA SENTENCE DU TRIBUNAL ARBITRAL, DÉCISION DU 20 SEPTEMBRE 2005

Interpretation–authoritative interpretation by the Tribunal of its own Award–interpretation in the light of its own intention at the time of rendering the Award–interpretation not responding to the various observations and comments of the Parties.

Obligation to repair–obligation understood as a financial rather than a construction obligation–obligation to bring back the railway to the levels of equipment maintained during its light regular use–significant upgrading costs implied by the future intensive use not covered–current safety standards required to be taken into account.

Temporary use of the railway–applicability of the findings of the Award to any use of the railway, including its temporary use.

Allocation of costs–no change resulting from the modification of financial estimates after the Award.

Interprétation–interprétation officielle par le Tribunal de sa propre sentence–interprétation à la lumière de sa propre intention lors de l'exposé de la sentence–interprétation ne répondant pas aux diverses observations et commentaires des Parties.

Obligation de rénover–obligation comprise comme une obligation financière plutôt que matérielle–obligation de remettre la voie ferrée au niveau d'équipement maintenu pendant son utilisation régulière limitée–exclusion des coûts liés à la mise à niveau impliquée par la future utilisation intensive–obligation de prendre en compte les standards de sécurité actuels.

Utilisation temporaire de la voie ferrée–application des conclusions de la sentence à tout usage de la voie, y compris son utilisation temporaire.

Répartition des coûts–aucun changement résultant d'une modification des estimations financières postérieurement à la sentence.

* * * * *

INTERPRETATION OF THE AWARD OF THE ARBITRAL TRIBUNAL

1. On 25 July 2005, Belgium, pursuant to Article 23(1) of the Rules of Procedure for the Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, requested an Interpretation of the Award rendered by the Arbitral Tribunal on 24 May 2005.

2. The application of Belgium comprised three Requests, which were each accompanied by explanations and contentions, and by Exhibits.

3. By letter dated 25 July 2005, the Netherlands was invited to comment on Belgium's Requests. Comments of the Netherlands on each of the Belgian Requests for Interpretation of the Award were received by the Tribunal on 15 August 2005.

4. The Tribunal has examined carefully the contentions of each of the Parties. At the same time, it notes that it is for the Tribunal to interpret how the Award is to be understood, in the light of its own intentions at the time of rendering the Award. The ensuing paragraphs thus do not respond to the various observations and comments of the Parties but rather constitute an authoritative interpretation by the Tribunal of its own Award under Article 23(1) of the Rules of Procedure.

5. First Request:

> Should the Award be interpreted as meaning that the Netherlands is under the obligation to bring at its own expenses the Iron Rhine railway back to a level allowing for a use of the Iron Rhine comparable to the one that prevailed during the regular albeit light use of the line prior to discontinuation of such use in 1991?

6. The Tribunal responds as follows.

7. At paragraph 76, the Award states: "In the view of the Tribunal, the Netherlands (as it accepts) is under an obligation to bring the Iron Rhine railway back to the levels maintained during the regular (albeit light) use of the line prior to discontinuation of such use in 1991; but these maintenance and repair obligations do not cover the significant upgrading costs now involved in Belgium's request."

8. At paragraph 89, the Tribunal found that the Netherlands law which provides for the maintenance of railways by reference to the level of traffic occurring at a particular time did not violate Belgium's rights under Article XII of the 1839 Treaty of Separation. The Tribunal observed that "[t]his is the more so as the Netherlands fully accepts its obligation to restore, at its own expense, the maintenance and safety features of the line to the 1991 condition upon a Belgian demand for reactivation."

9. In the chapter of the Award on the allocation of costs (paragraph 225), the Tribunal recalled that "it is for the Netherlands at its expense to bring the Iron Rhine Railway line back to the state in 1991 (*see* paragraphs 76 and 89 above). This is the case for the entire historic line."

10. While this finding is not repeated in the Tribunal's Replies to the specific Questions put to it, at paragraphs 238-244 of the Award, the finding was a necessary step to the formulation of those Replies.

11. The Tribunal first observes that the reference to the Netherlands' obligation to restore the line to its 1991 condition is to be understood as a reference to financial obligations (rather than construction obligations) incumbent upon the Netherlands as regards outstanding maintenance in the event of a reactivation of the line. That is clear from the reference to cost allocation in each of the paragraphs of the Award cited above.

12. If a decision is taken by the Parties to reactivate the Iron Rhine Railway and if the Parties have agreed on the modalities of its future use, the allocation of costs for its reactivation (as specified in the Award in the Reply to Question 3) shall include as an element the obligation of the Netherlands to bear that portion of the costs that represents the expenses that would have been incurred for outstanding maintenance of the track, including its safety features, to permit use comparable to the one that existed in 1991. The Tribunal recalled at paragraph 225 of its Award that the Netherlands had recognized that it would be "responsible for the maintenance of a reactivated line."

13. The findings of the Tribunal cited above are to be understood as meaning that the financial obligations of the Netherlands (arising in the eventuality described in the preceding paragraph) would relate to safety standards (as an element of maintenance) as current Netherlands legislation would require and not as they may have been applicable in 1991.

14. Second Request:

> Should the Award be interpreted as meaning that Belgium has no right to temporary use of the Iron Rhine line?
>
> Should the finding that the Netherlands' requirements may not amount to a denial of Belgium's right of transit nor render unreasonably difficult the exercise by Belgium of its right of transit (§§ 239(c) and 241(e)) be interpreted as applying to the issue of temporary use of the Iron Rhine, together with the Tribunal's findings on the principles and procedures laid down in the March 2000 MoU, contained in paragraphs 157 and 158 of the Award?

15. Belgium in its Request states that "it is beyond doubt that the Tribunal decided not to uphold Belgium's submission" regarding immediate provisional driving and that "[i]t is also beyond doubt that the Tribunal did not rule on issues regarding temporary use." Belgium continues that: "However, this does not mean that the Award may be interpreted as meaning that

Belgium has no right to temporary use, nor that temporary use is not governed by principles contained in the Award, notably the principles of reasonableness and good faith referred to in paragraphs 239(c), 241 (e) and 157." Belgium seeks an interpretation as to these matters.

16. The Netherlands has observed to the Tribunal "that it believes that the decision-making on any actual use of the Iron Rhine is reserved to the Parties."

17. The Tribunal responds as follows.

18. The Award may not be interpreted as meaning that Belgium has no right to temporary use. Nor is the Award to be interpreted as containing any pronouncement by the Tribunal upon the circumstances in which any such right may be exercised.

19. At paragraph 237 of its Award, the Tribunal noted "that the financing of temporary use is not, in terms, among the formal Questions put to it." Accordingly, the Replies to the Questions do not include any findings concerning allocation of costs for any temporary use.

20. The Tribunal has made no findings as to the legal validity or correct interpretation of the Memorandum of Understanding signed on 28 March 2000 by the Belgian and the Netherlands Ministers of Transport, these not being asked of it in the Questions put. The Tribunal has confined itself to stating that "the principles and procedures laid down in the March 2000 MoU... will prove useful guidelines to what the Parties have been prepared to consider as compatible with their rights under Article XII of the 1839 Treaty of Separation and the Iron Rhine Treaty" (Award, paragraph 157).

21. The Tribunal has found that the application of Dutch legislation and the decision-making powers based thereon may not amount to a denial of Belgium's right of transit over the historic route, nor render unreasonably difficult the exercise by Belgium of its right of transit. These findings, as others in the Award, are applicable to any use of the Iron Rhine.

22. Third Request:

> Should the Tribunal's ruling on the apportionment of costs in segment C if a loop around Roermond is agreed, be interpreted as laying with Belgium the costs of a reactivation of the historic route through Roermond, when such costs result from measures required by the Netherlands after the award had been rendered, over and above those included in the figures presented to the Tribunal, the Dutch legislation of general application remaining unchanged?

23. The Tribunal responds as follows.

24. The pleadings of the Parties and the Annexes thereto suggested that both Parties envisaged that any reactivation of the Iron Rhine would be likely to entail a deviation from the historic route by means of a loop around the town of Roermond. The Tribunal had before it no other scenario for segment C.

25. When it formulated its Replies to Question 3, at paragraph 244(d), and the principles there stated, the Tribunal did not suppose that the projected estimates for the contemplated works it had before it, provided by the Parties, would remain unchanged through time. At the same time, the Tribunal has made clear in its Award that the application of Dutch legislation and the decision-making powers based thereon may not amount to a denial of Belgium's right of transit over the historic route, nor render unreasonably difficult the exercise by Belgium of its right of transit.

26. The Tribunal's ruling on the apportionment of costs in segment C, if a loop around Roermond is agreed, is to be interpreted as applicable to the scenario before it and not to any other hypothetical alternative.

Done at the Peace Palace, The Hague, this 20th day of September 2005,

(*Signed)* Judge Rosalyn Higgins
President

(*Signed)* Professor Guy Schrans

(*Signed)* Judge Bruno Simma

(*Signed)* Professor Alfred H. A. Soons

(*Signed)* Judge Peter Tomka

PART III

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)

Decision of 1 September 2005

Affaire relative à la Réclamation territoriale de Singapour à l'intérieur et à proximité du détroit de Johor (Malaisie c. Singapour)

Décision du 1er septembre 2005

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (MALAYSIA V. SINGAPORE), DECISION OF 1 SEPTEMBER 2005

AFFAIRE RELATIVE À LA RÉCLAMATION TERRITORIALE DE SINGAPOUR À L'INTÉRIEUR ET À PROXIMITÉ DU DÉTROIT DE JOHOR (MALAISIE C. SINGAPOUR), DÉCISION DU 1ER SEPTEMBRE 2005

Jurisdiction of the International Tribunal for the Law of the Sea (ITLOS)–jurisdiction to prescribe provisional measures under article 290, paragraph 5 of the United Nations Convention on the Law of the Sea, pending a decision by the Arbitral Tribunal–compliance of the Parties with the order of ITLOS.

Jurisdiction of the Arbitral Tribunal–constitution under annex VII to the United Nations Convention on the Law of the Sea–*prima facie* jurisdiction to settle the dispute between the Parties–examination of the Settlement Agreement agreed by the Parties–adoption of the final award binding upon the Parties in the terms set out in the Settlement Agreement.

Compétence du Tribunal international du droit de la mer (TIDM)–compétence pour prescrire des mesures conservatoires en vertu de l'article 290, paragraphe 5 de la Convention des Nations Unies sur le droit de la mer, dans l'attente de la décision du Tribunal arbitral–soumission des Parties à l'ordonnance du TIDM.

Compétence du Tribunal arbitral–constitution en vertu de l'annexe VII de la Convention des Nations Unies sur le droit de la mer–compétence *prima facie* pour régler le différend entre les Parties–examen de l'Accord de règlement accepté par les Parties–adoption d'une sentence finale contraignante pour les Parties, conforme aux termes établis dans l'Accord de règlement.

* * * *

PERMANENT COURT OF ARBITRATION

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR

(MALAYSIA v. SINGAPORE)

Award on Agreed Terms

The Arbitral Tribunal

Mr. M.C.W. Pinto, President
Dr. Kamal Hossain
Professor Bernard H. Oxman
Professor Ivan Shearer
Sir Arthur Watts, KCMG QC

The Hague, 1 September 2005

1. Whereas Malaysia and Singapore are, and at all relevant times were, Parties to the United Nations Convention on the Law of the Sea (the Convention), Part XV of which obligates them to settle any dispute between them concerning the interpretation or application of the Convention by peaceful means as specified therein;

2. *Whereas* neither Malaysia nor Singapore has made a written declaration pursuant to article 287, paragraph 1 of the Convention, with the result that, pursuant to article 287, paragraph 3, they are deemed to have accepted arbitration in accordance with Annex VII to the Convention as the means of settling their disputes;

3. *Whereas* neither Malaysia nor Singapore has made a written declaration pursuant to article 298 of the Convention;

4. *Whereas* on 4 July 2003 Malaysia transmitted to Singapore the Notification and Statement of Claim instituting arbitral proceedings as provided for in Annex VII to the Convention in a dispute concerning land reclamation by Singapore in and around the Straits of Johor,[*] and a Request for provisional measures in that dispute pending constitution of an arbitral tribunal under Annex VII to the Convention;

5. *Whereas* Malaysia, in the foregoing Notification, on 4 July 2003, appointed Dr. Kamal Hossain as a member of the Arbitral Tribunal pursuant to article 3, paragraph (b) of Annex VII to the Convention, and Singapore, on 29 July 2003, appointed Professor Bernard H. Oxman as a member of the Arbitral Tribunal pursuant to article 3, paragraph (c) of Annex VII to the Convention;

6. *Whereas* on 5 September 2003 Malaysia transmitted to the International Tribunal for the Law of the Sea (ITLOS) a Request for the prescription of provisional measures in the said dispute by ITLOS in accordance with article 290, paragraph 5 of the Convention;

7. *Whereas* on 5 September 2003 the Registrar of ITLOS was notified of the appointment of H.E. Mr. Ahmad Fuzi Haji Abdul Razak, the Secretary-General of the Ministry of Foreign Affairs, as Agent for Malaysia;

8. *Whereas* on 6 September 2003 the Registrar of ITLOS was notified of the appointment of H.E. Professor Tommy Koh, Ambassador-at-Large in the Ministry of Foreign Affairs, as Agent for Singapore;

9. *Whereas* on 20 September 2003 Singapore filed with the Registry of ITLOS its response to Malaysia, a certified copy of which was transmitted to the Agent for Malaysia on the same day;

10. *Whereas* ITLOS did not include upon the bench judges of the nationalities of the Parties, and pursuant to article 17, paragraph 3 of the

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[*] Secretariat note: See map reproduced as Annex 1.

Statute of ITLOS, Malaysia chose Dr. Kamal Hossain, and Singapore chose Professor Bernard H. Oxman to sit as judges *ad hoc* in the case, and they were duly admitted to sit as such on 24 September 2003;

11. *Whereas* after an exchange of written pleadings, and oral statements at public sittings of ITLOS on 25, 26 and 27 September 2003, ITLOS, in an Order dated 8 October 2003, stated:

> THE TRIBUNAL
>
> 1. Unanimously,
>
> *Prescribes*, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:
>
> Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to:
>
> (a) establish promptly a group of independent experts with the mandate
>
> (i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation;
>
> (ii) to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong;
>
> (b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works;
>
> (c) implement the commitments noted in this Order and avoid any action incompatible with their effective implementation, and, without prejudice to their positions on any issue before the Annex VII arbitral tribunal, consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong, including suspension or adjustment, as may be found necessary to ensure that the infilling operations pending completion of the study referred to in subparagraph (a)(i) with respect to that area do not prejudice Singapore's ability to implement the commitments referred to in paragraphs 85 to 87.
>
> 2. Unanimously,
>
> *Directs* Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.
>
> 3. Unanimously,
>
> *Decides* that Malaysia and Singapore shall each submit the initial report referred to in article 95, paragraph 1 of the Rules, not later than 9 January 2004 to this Tribunal and to the Annex VII arbitral tribunal, unless the arbitral tribunal decides otherwise.
>
> 4. Unanimously,
>
> *Decides* that each party shall bear its own costs.

12. *Whereas* ITLOS, for the reasons stated in its Order dated 8 October 2003, in determining its jurisdiction to prescribe provisional measures under article 290, paragraph 5 of the Convention pending a decision by this Tribunal, found *inter alia* that there was no controversy between the Parties as to the existence of a dispute, and that this Tribunal would *prima facie* have jurisdiction over the dispute;

13. *Whereas*, for the reasons indicated in its Order of 8 October 2003, ITLOS stated in paragraph 73 of that Order that it did not consider it appropriate in the circumstances to prescribe provisional measures with respect to the land reclamation by Singapore in the sector of Tuas;

14. *Whereas* the President of ITLOS had by his letter dated 10 October 2003 addressed to the President of the Tribunal notified the appointment, pursuant to article 3(e) of Annex VII to the Convention, of the following three members of that Tribunal:

Mr. Christopher Pinto (President)
Professor Ivan Shearer
Sir Arthur Watts, KCMG QC;

15. *Whereas* the President of ITLOS by the same letter noted the appointment for the Annex VII arbitration, of H.E. Mr. Tan Sri Ahmad Fuzi Haji Abdul Razak as Agent for Malaysia, and H.E. Professor Tommy Koh as Agent for Singapore;

16. *Whereas* this Tribunal, having been thus validly constituted, and having consulted extensively with the Parties, by its Order dated 19 July 2004, established its Rules of Procedure, article 2 of which designates the International Bureau of the Permanent Court of Arbitration (PCA) as the Registry for the arbitration;

17. *Whereas* the Secretary-General of the PCA, having consulted the Tribunal and the Parties, designated Ms. Anne Joyce, a member of the International Bureau, as the Registrar of the Tribunal;

18. *Whereas* by letters dated 24 September 2004, the Parties notified ITLOS and this Tribunal that the Group of Experts established by them pursuant to paragraph 106(l)(a) of the Order of 8 October 2003, had completed its work on the Interim Report on infilling works required by paragraph 106(l)(a)(ii) of the Order, and transmitted copies thereof both to ITLOS and this Tribunal;

19. *Whereas* the Tribunal, at the request of the Parties, by Order dated 19 October 2004 extended until 8 November 2004 the due date for completion of the Final Report on the study to be carried out by the Group of Experts referred to; and *whereas* the Parties, by their letter dated 8 November 2004, transmitted a copy of the Final Report to the Tribunal, requesting also that arrangements be made for a conference at which the Parties could present to the Tribunal an overview of the Joint Study, and apprise the Tribunal of the progress of consultations that had taken place between them;

20. *Whereas* at the conference referred to in paragraph 19 of this preamble, which took place at The Hague on 10 January 2005, the Parties informed the Tribunal *inter alia* that they had agreed *ad referendum* on the draft of a Settlement Agreement to which it was expected that the Government of Malaysia would give its approval within one month of the conference;

21. *Whereas* the Parties by their letter dated 18 May 2005, notified the Tribunal that the said Settlement Agreement had been signed on 26 April 2005; and *whereas* the Settlement Agreement entered into force in accordance with its terms;

22. *Whereas* the Parties transmitted to the Tribunal duly certified copies of the said Settlement Agreement, as well as the Joint Records of their meetings on 22-23 December 2004, 7-8 January 2005 and 7-8 February 2005 which resulted in that Agreement;

23. *Whereas*, with respect to the dispute submitted by Malaysia to the Arbitral Tribunal on 4 July 2003, the said Settlement Agreement provides:

> 13. This Agreement is in full and definitive settlement of the dispute with respect to the land reclamation and all other issues related thereto. The Parties agree that the issue pertaining to the maritime boundaries be resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement.
>
> 14. This Agreement accordingly terminates the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* upon the agreed terms.
>
> 15. The Parties shall forthwith jointly request that the Arbitral Tribunal in the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* adopt the terms of this Agreement in the form of an agreed Award which is final and binding upon the Parties.

24. *Whereas* the Parties, by their letter dated 18 May 2005, jointly requested the Arbitral Tribunal to deliver a final Award binding upon the Parties in the terms set out in the said Settlement Agreement;

25. *Whereas* the Tribunal has examined the documentation submitted to it by the Parties including the said Settlement Agreement and has concluded that no further proceedings are necessary;

NOW THEREFORE the Tribunal

1. *Decides* in light of the joint request by the Parties referred to in preambular paragraph 24, that it has jurisdiction to render this Award in the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)*;

2. *Decides* to accede to the said joint request by the Parties and deliver a final Award binding upon the Parties in the terms set out in the Settlement

Agreement, and does so by attaching the text of the said Settlement Agreement as the Annex to this Award which is issued pursuant to article 18 of the Rules of Procedure;

3. *Decides*, pursuant to article 19 of the Rules of Procedure, that each Party shall bear its own costs in presenting their respective cases;

4. *Decides* in accordance with article 20 of the Rules of Procedure that the expenses of this Tribunal shall be borne by the Parties in equal shares;

5. *Decides* that these proceedings are terminated.

Done at The Hague, this 1st day of September 2005,

(*Signed)* Mr. M.C.W. Pinto
President

(*Signed)* Dr. Kamal Hossain (*Signed)* Professor Bernard H. Oxman

(*Signed)* Professor Ivan Shearer (*Signed)* Sir Arthur Watts KCMG QC

(*Signed)* Ms. Anne Joyce
Registrar

Annex

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (MALAYSIA v. SINGAPORE)

SETTLEMENT AGREEMENT

WHEREAS paragraph 106(1)(a)(i) of the Order of the International Tribunal for the Law of the Sea in the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v Singapore), Request for Provisional Measures*, dated 8 October 2003, prescribes that the Governments of Malaysia and Singapore (hereafter "the Parties") shall cooperate and shall, for this purpose, enter into consultations forthwith in order to establish promptly a group of independent experts with the mandate to conduct a study, on terms of reference to be agreed by the Parties, to determine, within a period not exceeding one year from the date of the Order, the effects of Singapore's land reclamation at Pulau Tekong and Tuas View

Extension (hereafter "the reclamation works") and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation;

AND WHEREAS the Parties jointly established the Group of Experts (hereafter "the GOE") to conduct the study on terms of reference agreed by the Parties;

AND WHEREAS the Parties jointly appointed DHI Water and Environment (hereafter "DHI") to carry out detailed studies in order to assist the GOE;

AND WHEREAS the GOE completed the study and submitted its Final Report to the Parties on 5 November 2004;

AND WHEREAS the Parties have considered and reviewed the GOE's Final Report and accepted its recommendations;

AND WHEREAS the Parties are desirous of reaching an amicable, full and final settlement of the dispute submitted by Malaysia to the arbitral procedure provided for in Annex VII to the United Nations Convention on the Law of the Sea by a written notification to Singapore, accompanied by a Statement of Claim and Grounds on Which it is Based, on 4 July 2003;

AND WHEREAS the issue of maritime boundaries is to be dealt with in accordance with paragraph 21 of the Joint Record of the Meeting between Senior Officials of the Parties at The Hague on 7-9 January 2005;

AND WHEREAS the Parties agree that the recommendations of the GOE provide the basis for an amicable, full and final settlement of the said dispute;

THE PARTIES HAVE AGREED AS FOLLOWS:

A. Implementation of the recommendations of the GOE's report

(*i*) Design of the Final Shoreline of Area D at Pulau Tekong

1. Singapore shall modify the final design of the shoreline of its land reclamation at Area D at Pulau Tekong to incorporate a "bite" and a "nose" as recommended by the GOE's Final Report as reflected and finalised in the chart at Annex 1.

(*ii*) Maintenance Dredging of the "Bite"

2. Singapore shall carry out maintenance dredging as is necessary to ensure that the depth of the dredged area of the "bite" is kept at minus 12 metres Chart Datum.

(*iii*) Streamlining of Changi Finger

3. Singapore shall streamline Changi Finger in line with the recommendations of the GOE either by a temporary or permanent structure

(which may include a submerged structure) prior to the completion of the reclamation of the south-western bank of Area D of Pulau Tekong. In the event that this is not feasible or practical, or results in significantly increased costs, the rounding off of Changi Finger shall be completed within 12 months of the completion of the south-western reclamation of Area D.

(*iv*) Replacement of the Sheetpile Silt Curtain at Area D by the Final Revetment Protection

4. Singapore intends to replace the existing sheetpile silt curtain on the eastern side of Area D in Pulau Tekong with the final revetment protection as soon as is practicable and, in any case, within not more than 70 months, subject to the availability of resources for this purpose. Singapore shall endeavour to give priority to the replacement of the sheetpile silt curtain with the final revetment protection at the "bite" of Area D which the GOE has concluded shall lead to the widening of Calder Harbour Channel, reducing the local velocities across the Channel and secondarily the current velocities in Kuala Johor.

(*v*) Scour Protection

5. Singapore undertakes to pay the full cost of scour protection works at Tanjung Belungkor jetty, which the Parties have agreed amounts to Three Hundred Thousand Singapore Dollars (SGD 300,000).

6. Malaysia shall be responsible for the full cost of scour protection works at Pularek jetty.

(*vi*) Compensation for Fishermen

7. A lump sum of Three Hundred and Seventy-Four Thousand and Four Hundred Malaysian Ringgit (RM 374,400), which is based on a sum of RM 5,200 per fisherman, shall be paid by Singapore to Malaysia to be distributed by Malaysia to its fishermen as full compensation for losses as a result of the reclamation works.

B. Navigation

8. Singapore reassures Malaysia that even after the Pulau Tekong reclamation, the safe and smooth passage of ships through Kuala Johor and Catder Harbour will not be adversely affected by the said reclamation.

C. Joint Mechanisms

9. The Parties agree to expand the terms of reference of the Malaysia-Singapore Joint Committee on the Environment (MSJCE) to include the following:

a. To exchange information on and discuss matters affecting their respective environments in the Straits of Johor.

b. To undertake monitoring activities in relation to their respective environments in the Straits of Johor and address any adverse impacts, if necessary. These monitoring activities shall include:

(i) monitoring water quality to protect the marine and estuarine environment; and

(ii) monitoring ecology and morphology.

10. The Parties agree that for the purposes of matters affecting navigation in the Straits of Johor under paragraph 8 of this Agreement, a representative of the Marine Department, Peninsular Malaysia shall be designated to co-chair the Maritime and Port Authority of Singapore-Johor Port Authority Operational Meeting (MPA-JPA Operational Meeting) on behalf of the Government of Malaysia.

11. Each Party will keep the other informed, on a regular basis, of the progress of its implementation, pursuant to this Agreement, of the GOE's recommendations through the MSJCE and/or the MPA-JPA Operational Meeting, which shall be the forum for discussions.

12. Each Party undertakes to observe the confidentiality and secrecy of documents, information and other data received or supplied by the other Party through the MSJCE or the MPA-JPA Operational Meeting pursuant to this Agreement.

D. Settlement of the Dispute submitted to the Arbitral Procedure provided for in Annex VII to the United Nations Convention on The Law of the Sea pursuant to the written notification by Malaysia to Singapore accompanied by the statement of claim and grounds on which it is based dated 4 July 2003

13. This Agreement is in full and definitive settlement of the dispute with respect to the land reclamation and all other issues related thereto. The Parties agree that the issue pertaining to the maritime boundaries be resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement.

14. This Agreement accordingly terminates the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* upon the agreed terms.

15. The Parties shall forthwith jointly request that the Arbitral Tribunal in the *Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)* adopt the terms of this Agreement in the form of an agreed Award which is final and binding upon the Parties.

E. ENTRY INTO FORCE

16. This Agreement shall enter into force on the date of its signature.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done in duplicate at Singapore, this 26th day of April, two thousand and five, both texts being equally authentic.

(*Signed*) TAN SRI AHMAD FUZI HJ ABDUL RAZAK
Secretary-General
Ministry of Foreign Affairs
Agent for the Government of Malaysia

(*Signed*) PROFESSOR TOMMY KOH
Ambassador-at-Large
Agent for the Government of Singapore

PART IV

Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them

Decision of 11 April 2006

Arbitrage entre la Barbade et la République de Trinité-et-Tobago, relatif à la délimitation de la zone économique exclusive et du plateau continental entre ces deux pays

Décision du 11 avril 2006

AWARD OF THE ARBITRAL TRIBUNAL CONCERNING THE MARITIME BOUNDARY BETWEEN BARBADOS AND THE REPUBLIC OF TRINIDAD AND TOBAGO, DECISION OF 11 APRIL 2006

SENTENCE DU TRIBUNAL ARBITRAL CONCERNANT LA FRONTIERE MARITIME ENTRE LA BARBADE ET LA RÉPUBLIQUE DE TRINITE-ET-TOBAGO, DÉCISION DU 11 AVRIL 2006

Jurisdiction of the Tribunal–jurisdiction under United Nations Convention on the Law of the Sea (UNCLOS) provisions for the peaceful settlement of disputes–no requirement under general international law to continue compulsory negotiations showing every sign of being unproductive –entitlement of a party under UNCLOS to unilaterally refer a dispute to arbitration after the failure of negotiations.

Jurisdiction of the Tribunal–jurisdiction to delimit by the drawing of a single maritime boundary, relating to both the continental shelf and the Economic Exclusive Zone (EEZ) appertaining to each Party–jurisdiction to delimit the maritime boundary in relation to the part of the continental shelf extending beyond 200 nautical miles–no jurisdiction to confer fishery rights.

Rules of procedure–confidentiality of proceedings unless otherwise agreed by the parties–non-acceptance of request by a neighbouring State to access documents of arbitration as an interested party in the proceedings.

Agents of States in front of international tribunals–State legally bound by commitments made by its Agents before international tribunals–State thenceforth under a legal obligation to act in conformity with the commitment made–Agent considered as an intermediary between the State and the Tribunal.

Method of delimitation of maritime boundary–two-step delimitation process referred to as the "equidistant/relevant circumstances" principle–provisional equidistant line in a first step–subsequent adaptation of the provisional line to the special circumstances of the case to achieve an equitable result in a second step–proportionality test only a way to verify the equitability of the result–"two-step" method not mandatory but the most adequate in order to avoid a subjective determination–identical method of delimitation for States with adjacent and opposite coasts.

Special circumstances–relevant factors to adjust the provisional equidistant line–length of coasts–no mathematical ratio applied while taking into account the length of the coasts–proportionality between the coastal lengths in order to achieve an equitable delimitation–turning point of the corrected line left to the discretion of the Tribunal–exercise of discretion within the limits set out by the applicable law.

Orientation of coastlines–determination by the coasts themselves and not by the baselines–baselines only considered as method to facilitate the determination of the outer limit of the maritime zones in certain areas as archipelagic States.

Principles of delimitation of maritime boundary–stability, predictability, objectivity and equity within the rule of law–equity not a legal method due to the uncertainty of the outcome–avoidance of encroachment.

Delimitation of the maritime boundary–line following points equidistant from the low water line of Barbados and the nearest turning point of the archipelagic baselines of Trinidad and Tobago.

Exercise of sovereignty rights–question of acquiescence of Trinidad and Tobago to the exercise of sovereignty by Barbados in the area disputed and the possible consequent estoppel–seismic surveys sporadically authorised, oil concessions and patrolling by Barbados not

considered as sufficient evidence to establish estoppel or acquiescence on the part of Trinidad and Tobago.

Legal regimes of maritime zones–absence of prevalence between the continental shelf and the EEZ–coexistence of the two legal regimes presenting numerous significant elements in common–trend in State practice towards harmonization and coincidence of legal regimes for convenience and practical reasons–coincidence not enshrined in treaty law.

Effect of a treaty on third parties–treaty of maritime boundary delimitation between two States without effect on the rights of a third State–taking into account of rights claimed and renounced by a State in such a treaty in respect of the consequent modification of the overlapping areas between the parties to the dispute.

Fishery rights–exceptional to delimit the international maritime line in connection with historic fishing conducted by the parties–role of fishery rights restricted to circumstances in which catastrophic results might result from the adoption of a particular delimitation line–insufficiency of six to eight years of fishing practice to give rise to a tradition–injury to the national economy of a State not considered as a legal entitlement for a boundary adjustment.

Fishery rights–Tribunal not competent to confer fishery rights to one Party in the EEZ of the other Party without agreement of the latter–duty to coordinate and ensure the conservation and the development of migrating flying fish stock between the two States–duty to negotiate in good faith and to find an agreement–irrelevance of the nature of the fishery (artisanal or industrial) and of the degree of dependence upon fishing for reaching such an agreement–agreement compliant with UNCLOS principles about relations between neighbouring States and fisheries.

Evidence–risks of giving undue weight to written reports presented as simple record of hearsay evidence and oral tradition–substantial weight conferred to official reports written contemporaneously with the event described–lesser weight given to affidavits written after the arising of the dispute.

Compétence du tribunal–compétence en vertu des dispositions pour le règlement pacifique des différends de la Convention des Nations Unies sur le Droit de la Mer (CNUDM)–pas d'obligation en vertu du droit international général de poursuivre des négociations impératives manifestement infructueuses–droit d'une des parties en vertu de la CNUDM de soumettre un différend à l'arbitrage après l'échec des négociations.

Compétence du tribunal–compétence pour délimiter le plateau continental et la Zone Économique Exclusive (ZEE) respectives de chaque partie en traçant une seule frontière maritime–compétence pour délimiter la frontière maritime relative au plateau continental s'étendant au-delà des 200 miles nautiques–pas de compétence pour attribuer des droits de pêche.

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.

Exercice de droits souverains–question de l'acquiescement de Trinité-et-Tobago à l'exercice de souveraineté par la Barbade dans les zones litigieuses et l'éventuel estoppel y afférent–l'autorisation d'études sismiques sporadiques, de concessions pétrolières et l'organisation de patrouilles par la Barbade non suffisantes pour établir l'estoppel ou l'acquiescement de la part de Trinité-et-Tobago.

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.

Droits de pêche–Tribunal non compétent pour conférer des droits de pêche à l'une des Parties dans la ZEE de l'autre Partie sans l'accord de cette dernière–obligation de coordonner et de garantir la conservation et le développement des stocks migrateurs de poissons-volants (exocets) entre les deux États–obligation de négocier en bonne foi et de trouver un accord–absence de pertinence de la nature de la pêche en question (artisanale ou industrielle) et du niveau de dépendance à l'activité de pêche afin de conclure un tel accord–conformité de l'accord avec les principes de la CNUDM sur les relations entre États frontaliers et sur les pêcheries.

Preuve–dangereux d'accorder un poids excessif à des rapports écrits présentant des simples transcriptions de ouï-dire et de traditions orales–poids substantiel accordé aux rapports officiels rédigés simultanément aux événements décrits–poids moindre accordé aux affidavits rédigés postérieurement à la survenance du différend.

* * * * *

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

BARBADOS

- The Hon Mia A Mottley QC, Deputy Prime Minister, Attorney General and Minister of Home Affairs, Agent for Barbados
- Mr Robert Volterra, Co-Agent, Counsel and Advocate, Latham & Watkins
- Professor Sir Elihu Lauterpacht CBE, QC, Counsel and Advocate
- Professor Michael Reisman, Counsel and Advocate
- Mr Jan Paulsson, Counsel and Advocate, Freshfields Bruckhaus Deringer

TRINIDAD AND TOBAGO

- The Hon John Jeremie, Attorney General, Agent for Trinidad and Tobago
- Mr John Almeida, Co-Agent, Charles Russell
- Mr Laurie Watt, Co-Agent, Charles Russell
- Ms Lynsey Murning, Charles Russell
- Professor James Crawford SC, Counsel
- Professor Christopher Greenwood, CMG, QC, Counsel
- Mr Samuel Wordsworth, Counsel

- Sir Henry Forde QC, Counsel and Advocate
- Mr Stephen Fietta, Counsel and Advocate, Latham & Watkins
- Mr Adrian Cummins QC, Counsel
- Dr David Berry, Counsel
- Ms Megan Addis, Counsel, Latham & Watkins
- Ms Teresa Marshall, Permanent Secretary, Foreign Affairs
- Mr Edwin Pollard, High Commissioner for Barbados in London
- Mr Anthony Wiltshire, Minister/ Counsellor at the Barbados High Commission 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
- Dr Robin Cleverly, UK Hydrographic Office
- Ms Michelle Pratley, Assistant, Latham & Watkins
- Ms Claudina Vranken, Assistant, Latham & Watkins
- H.E. Mr Phillip Sealy, Ambassador to the United Nations
- Mr. Gerald Thompson, Director, Legal Affairs, Ministry of Foreign Affairs
- 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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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

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* 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.