

Minutes of Public Sitings – Procès-verbal des audiences publiques

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



MINUTES OF PUBLIC SITTINGS

**MINUTES OF THE PUBLIC SITTINGS
HELD FROM 8 TO 24 SEPTEMBER 2011
AND ON 14 MARCH 2012**

*Dispute concerning delimitation of the maritime boundary
between Bangladesh and Myanmar in the Bay of Bengal
(Bangladesh/Myanmar)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

**PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 8 AU 24 SEPTEMBRE 2011
ET LE 14 MARS 2012**

*Différend relatif à la délimitation de la frontière maritime
entre le Bangladesh et le Myanmar dans le golfe du Bengale
(Bangladesh/Myanmar)*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the corrected verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux corrigés.

Note by the Registry: The corrected verbatim records are available on the Tribunal's website at www.itlos.org.

Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : www.tidm.org.

**Minutes of the Public Sitings
held from 8 to 24 September 2011 and on 14 March 2012**

**Procès-verbal des audiences publiques
tenues du 8 au 24 septembre 2011 et le 14 mars 2012**

8 September 2011, a.m.

PUBLIC SITTING HELD ON 8 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

Bangladesh is represented by:

H.E. Mrs Dipu Moni,
Minister of Foreign Affairs,

as Agent;

Rear Admiral (Ret'd) Md. Khurshed Alam,
Additional Secretary, Ministry of Foreign Affairs,

as Deputy Agent;

and

H.E. Mr Mohamed Mijraul Quayes,
Foreign Secretary, Ministry of Foreign Affairs,

H.E. Mr Mosud Mannan,
Ambassador to the Federal Republic of Germany, Embassy of Bangladesh, Berlin, Germany,

Mr Payam Akhavan,
Member of the Bar of New York, Professor of International Law, McGill University,
Montreal, Canada,

Mr Alan Boyle,
Member of the Bar of England and Wales, Professor of International Law, University of
Edinburgh, Edinburgh, United Kingdom,

Mr James Crawford SC, FBA,
Member of the Bar of England and Wales, Whewell Professor of International Law,
University of Cambridge, Cambridge, United Kingdom,

Mr Lawrence H. Martin,
Foley Hoag LLP, Member of the Bars of the United States Supreme Court, The
Commonwealth of Massachusetts and the District of Columbia, United States of America,

Mr Lindsay Parson,
Director, Maritime Zone Solutions Ltd., United Kingdom,

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Mr Paul S. Reichler,
Foley Hoag LLP, Member of the Bars of the United States Supreme Court and of the District
of Columbia, United States of America,

Mr Philippe Sands QC,
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London, London, United Kingdom,

as Counsel and Advocates;

Mr Md. Gomal Sarwar,
Director-General (South-East Asia), Ministry of Foreign Affairs,

Mr Jamal Uddin Ahmed,
Assistant Secretary, Ministry of Foreign Affairs,

Ms Shahanara Monica,
Assistant Secretary, Ministry of Foreign Affairs,

Lt. Cdr. M. R. I. Abedin,
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Mr Robert W. Smith,
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Mr Joseph R. Curray,
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Mr Hermann Kudrass,
Former Director and Professor (Retired), German Federal Institute for Geosciences and
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as Independent Experts;

Ms Solène Guggisberg,

8 September 2011, a.m.

Doctoral Candidate, International Max Planck Research School for Maritime Affairs,
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Mr Remi Reichhold,
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Ms Hla Myo Nwe,
Deputy Director General, Consular and Legal Affairs Department, Ministry of Foreign
Affairs,

Mr Kyaw San,
Deputy Director General, Union Attorney General's Office,

as Deputy Agents;

and

Mr Mathias Forteau,
Professor at the University of Paris Ouest, Nanterre La Défense, France,

Mr Coalter Lathrop,
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DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

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Mr Benjamin Samson,
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Ouest, Nanterre La Défense, France,

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Sir Michael Wood, K.C.M.G.,
Member of the English Bar, Member of the International Law Commission, United Kingdom,

as Counsel and Advocates;

H.E. U Tin Win,
Ambassador Extraordinary and Plenipotentiary to the Federal Republic of Germany,
Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Captain Min Thein Tint,
Commanding Officer, Myanmar Naval Hydrographic Center, Yangon,

Mr Thura Oo,
Pro-Rector, Meiktila University, Meiktila,

Mr Maung Maung Myint,
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Mr Kyaw Htin Lin,
First Secretary, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

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Ministry of Foreign Affairs,

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Mr Octavian Buzatu,
Hydrographer, Romania,

8 September 2011, a.m.

Ms Tessa Barsac,
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Mr David Swanson,
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Mr Bjørn Kunoy,
Doctoral Candidate, Université Paris Ouest, Nanterre La Défense, France, currently Visiting
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Mr David P. Riesenberg,
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DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

AUDIENCE PUBLIQUE DU 8 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Le Bangladesh est représenté par :

S. E. Mme Dipu Moni,
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comme agent;

Le contre-amiral (à la retraite) Md. Khurshed Alam,
secrétaire d'Etat auxiliaire, Ministère des affaires étrangères,

comme agent adjoint;

et

S. E. M. Mohamed Mijraul Quayes,
secrétaire d'Etat au Ministère des affaires étrangères,

S. E. M. Mosud Mannan,
Ambassadeur auprès de la République fédérale d'Allemagne, Ambassade du Bangladesh,
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M. Alan Boyle,
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M. James Crawford, S.C., F.B.A.,
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M. Lawrence H. Martin,
cabinet Foley Hoag LLP, membre du barreau de la Cour suprême des Etats-Unis d'Amérique,
du barreau du Commonwealth du Massachusetts et du barreau du district de Columbia, Etats-
Unis d'Amérique,

M. Lindsay Parson,

8 septembre 2011, matin

directeur du cabinet de conseil Maritime Zone Solutions Ltd., Royaume-Uni,

M. Paul S. Reichler,
cabinet Foley Hoag LLP, membre du barreau de la Cour suprême des États-Unis d'Amérique
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comme conseils et avocats;

M. Md. Gomal Sarwar,
directeur-général (Asie du Sud-Est), Ministère des affaires étrangères,

M. Jamal Uddin Ahmed,
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Mme Shahanara Monica,
secrétaire d'État assistante, Ministère des affaires étrangères,

Le capitaine de corvette M. R. I. Abedin,
analyste système, Ministère des affaires étrangères,

M. Robin Cleverly,
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M. Robert W. Smith,
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DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

et

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Le Myanmar est représenté par :

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M. Kyaw San,
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comme agents adjoints;

et

M. Mathias Forteau,
professeur à l'Université Paris Ouest, Nanterre La Défense, France,

M. Coalter Lathrop,
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8 septembre 2011, matin

M. Daniel Müller,
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M. Benjamin Samson,
chercheur au Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre La Défense, France,

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Sir Michael Wood, KCMG,
membre du barreau d'Angleterre et membre de la Commission du droit international, Royaume-Uni,

comme conseils et avocats;

S. E. M. U Tin Win,
Ambassadeur extraordinaire et plénipotentiaire auprès de la République fédérale d'Allemagne, ambassade de la République de l'Union du Myanmar, Berlin, Allemagne,

Le capitaine Min Thein Tint,
commandant le Centre hydrographique de la marine du Myanmar, Yangon,

M. Thura Oo,
prorecteur de l'Université de Meiktila, Meiktila,

M. Maung Maung Myint,
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M. Kyaw Htin Lin,
premier secrétaire, ambassade de la République de l'Union du Myanmar, Berlin, Allemagne,

Mme Khin Oo Hlaing,
première secrétaire, ambassade de la République de l'Union du Myanmar, Bruxelles, Belgique,

M. Mang Hau Thang,
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Mme Tin Myo Nwe,
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DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

Mme Héloïse Bajer-Pellet,
avocate, membre du barreau de Paris, France,

M. Octavian Buzatu,
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Mme Tessa Barsac,
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M. David Swanson,
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Mr Bjørn Kunoy,
doctorant, Université Paris Ouest, Nanterre La Défense, France, actuellement Visiting
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Mr David P. Riesenberg, LL.M.,
faculté de droit de l'Université de Duke, Etats-Unis d'Amérique,

comme conseillers.

OPENING OF THE ORAL PROCEEDINGS – 8 September 2011, a.m.

Opening of the Oral Proceedings
[ITLOS/PV.11/2/Rev.1, E, p. 1–4]

The President:

The Tribunal meets today pursuant to article 26 of its Statute to hear the arguments of the parties in a dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

At the outset I would like to note that Judge Hugo Caminos is prevented by illness from sitting on the bench.

I will now call on the Registrar to summarize the main procedural steps followed in this case.

The Registrar:

Mr President, the proceedings were instituted before the Tribunal on 14 December 2009.

By a letter dated 13 December 2009, filed in the Registry of the Tribunal on 14 December 2009, the Minister of Foreign Affairs of Bangladesh notified the President of the Tribunal of declarations issued by Myanmar on 4 November 2009 and by Bangladesh on 12 December 2009 respectively.

In its declaration of 4 November 2009, Myanmar stated that it “accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of dispute between the Union of Myanmar and the People’s Republic of Bangladesh relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal”.

In its declaration of 12 December 2009, Bangladesh stated that “it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between the People’s Republic of Bangladesh and the Union of Myanmar relating to the delimitation of the maritime boundary in the Bay of Bengal”.

Based on these declarations, the Minister of Foreign Affairs of Bangladesh, in a letter dated 13 December 2009 addressed to the President of the Tribunal, invited the Tribunal to exercise jurisdiction over the maritime boundary dispute between Bangladesh and Myanmar.

On 14 December 2009 a certified copy of the notification of Bangladesh was communicated to Myanmar pursuant to article 55 of the Rules of the Tribunal.

In light of the agreement of the parties, as expressed through their respective declarations, to submit to the Tribunal their dispute relating to the delimitation of their maritime boundary in the Bay of Bengal, the case was entered in the Tribunal’s list of cases as Case No. 16.

(Poursuit en français.) Par ordonnance du 28 janvier 2010, le Président du Tribunal a fixé au 1^{er} juillet 2010 et au 1^{er} décembre 2010 respectivement la date d’expiration des délais de dépôt du Mémoire du Bangladesh et du Contre-Mémoire du Myanmar. Ces pièces ont été dûment déposées par les Parties dans les délais prévus.

Par ordonnance du 17 mars 2010, le Tribunal a autorisé la présentation d’une Réplique par le Bangladesh et d’une Duplique par le Myanmar, et a fixé les dates respectives d’expiration du délai de ces pièces au 15 mars 2011 et au 1^{er} juillet 2011. Ces pièces ont également été dûment déposées par les Parties dans les délais prévus.

Dans son mémoire du 1^{er} juillet 2010, à la page 113 de l’original en langue anglaise, le Bangladesh a déposé ses conclusions, qui ont été reproduites dans sa réplique en date du 15 mars 2011, à la page 149 de l’original en langue anglaise.

Le Myanmar a déposé ses conclusions dans sa Duplique du 1^{er} juillet 2011 aux pages 195 et 196 du texte original en langue anglaise, reproduisant les conclusions faites dans son contre-mémoire du 1^{er} décembre 2010, aux pages 171 et 172 de l’original en langue anglaise.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

The President:

Thank you.

By a further order dated 19 August 2011, the President of the Tribunal fixed 8 September 2011, that is today, as the date for the opening of the hearing. Pursuant to the Rules of the Tribunal, copies of the written pleadings are being made available to the public as of today. They will be placed on the Tribunal's website. The hearing will also be transmitted live on this website.

The first round of the hearing will begin today and will close on Tuesday, 20 September 2011. The second round of the hearing will begin on Wednesday, 21 September 2011 and will end on Saturday, 24 September 2011.

I note the presence at the hearing of the Agents, Counsel and Advocates of both parties.

I now call on the Agent of the People's Republic of Bangladesh, Her Excellency Minister Dipu Moni, to note the representation of Bangladesh.

Ms Moni :

Mr President, it is my distinct pleasure to introduce the members of the Bangladesh delegation.

Our Deputy Agent is Rear Admiral (Retired) Mohammed Khurshed Alam, Additional Secretary, Ministry of Foreign Affairs, Bangladesh.

Our Counsel and Advocates are: H.E. Mr Mohamed Mijarul Quayes, Foreign Secretary, Ministry of Foreign Affairs; H.E. Mr Mosud Mannan, Ambassador to the Federal Republic of Germany, Embassy of Bangladesh, Berlin, Germany; Dr Payam Akhavan, Member of the Bar of New York, Professor of International Law; McGill University, Montreal, Canada; Dr Alan Boyle, Member of the Bar of England and Wales, Professor of International Law, University of Edinburgh, Edinburgh, United Kingdom; Dr James Crawford SC, FBA, Whewell Professor of International Law, University of Cambridge, Cambridge, United Kingdom; Mr Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, The Commonwealth of Massachusetts and the District of Columbia, United States of America; Dr Lindsay Parson, Director, Maritime Zone Solutions Ltd., United Kingdom; Mr Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and of the District of Columbia, United States of America; and Mr Philippe Sands QC, Member of the Bar of England and Wales, Professor of International Law, University College London, London.

Our Advisers: Dr Robin Cleverly, Law of the Sea Consultant, United Kingdom Hydrographic Office; Mr Scott Edmonds, Cartographic Consultant, International Mapping; Dr Robert W Smith, Geographic Consultant; Ms Shahanara Monica, Assistant Secretary, Ministry of Foreign Affairs, Lieutenant Commander MRI Abedin, System Analyst, Ministry of Foreign Affairs of Bangladesh.

The President:

Thank you, Excellency.

I now call on the Agent of the Republic of the Union of Myanmar, His Excellency Attorney General Tun Shin, to note the representation of Myanmar.

Mr Shin:

Mr President, members of the Tribunal, it is a great honour for me to appear before you as Agent of the Republic of the Union of Myanmar in the present proceedings. I should like to begin by expressing our appreciation and thanks to you, sir, and to all your colleagues, and to

OPENING OF THE ORAL PROCEEDINGS – 8 September 2011, a.m.

the Registrar and his staff, and to all those who are working so hard to ensure the smooth running of these proceedings.

I shall now introduce Myanmar's team.

I am the Agent, Dr Tun Shin, the Attorney General of the Union.

Our Deputy Agents are: Ms Hla Myo Nwe, Deputy Director-General, Consular and Legal Affairs Department of the Ministry of Foreign Affairs in Nay Pyi Taw; Mr Kyaw San, Deputy Director-General of the Union Attorney-General's Office, Nay Pyi Taw.

Our Counsel and Advocates are: Professor Alain Pellet, Professor at the University, Nanterre La Défense; Sir Michael Wood, who is a member of the English Bar; Professor Mathias Forteau of the University of Paris Ouest; Mr Coalter Lathrop of Sovereign Geographic and a Member of the North Carolina Bar; Mr Daniel Müller, Researcher at the Centre for International Law at Nanterre; Mr Benjamin Samson, who is also a researcher at that institute; and Mr Eran Sthoeger LLM from New York University.

As Advisers, we have: His Excellency, Mr U Tin Win, Ambassador of Myanmar to the Federal Republic of Germany; Captain Min Thein Tint (Mr), Commanding Officer, Myanmar Naval Hydrographic Centre, Yanbon; Dr Thura Oo, Pro-Rector of Meikhtila University; Ms Khin Oo Hlaing, First Secretary at our Embassy in Brussels; Mr Kway Htin Lin, First Secretary at our Embassy in Berlin; Mr Mang Hau Thang, Assistant Director of the International Law and Treaties Division of the Ministry of Foreign Affairs; Ms Tin Myo Nwe of the International Law and Treaties Division of the Ministry of Foreign Affairs; Mrs Bajer-Pellet, member of the Paris Bar; Ms Tessa Barsac, who is assistant to maître Bajer; Mr Octavian Buzatu, who is a hydrographer; and Mr David Swanson, who is a cartography consultant.

I thank you, Mr President.

The President:

Thank you, Excellency.

I now request the Agent of Bangladesh to begin her statement.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Argument of Bangladesh

STATEMENT OF MS MONI
AGENT OF BANGLADESH
[ITLOS/PV.11/2/Rev.1, E, p. 4-7]

Ms Moni :

Mr President, distinguished members of the Tribunal, it is a great honour and a privilege for me to appear before you today as the Agent for the Government of the People's Republic of Bangladesh.

Please allow me to commence by expressing my thanks. On behalf of Bangladesh, I wish to thank you, Mr President, your fellow judges and the able Registry for all that has been accomplished to facilitate these proceedings. As you know, this is a first appearance by Bangladesh as a claimant before an international court or tribunal. The transparency and fairness with which the Tribunal has conducted this case so far have been a source of great comfort to us and we are confident that this modern Tribunal, composed as it is of judges who truly represent the principal judicial systems of the world, will dispense justice in full conformity with the law.

May I also express our thanks to the Agent of Myanmar and his delegation for the commendable manner in which his Government has approached this case. Our two States have long enjoyed strong ties borne of the familiarity that comes with being neighbours. We are confident that these proceedings, and the resolution of the long-standing dispute they promise, will open the door to even closer and stronger ties in the years ahead.

Mr President, members of the Tribunal, Bangladesh is a developing country that emerged as an independent state in 1971. It is striving to build a better future for its people, sometimes in challenging conditions. Our nearly 160 million citizens are resilient and full of potential, addressing a shortage of natural resources and extreme climatic conditions, including floods and cyclones, that regularly inundate a great part of our landmass. We believe that we have achieved impressive strides in human development in the last 20 years. Securing an equitable share of the maritime areas in front of our coast and the resources they contain is important for the continued success of our development efforts.

The people of Bangladesh have deep ties to the sea, to the Bay of Bengal. The very name of our country, which means "Country of Bengal" in Bengali, parallels that of the Bay. The great number of rivers that flow through our land – large and small – connect us to the sea; and, as you will know from the pleadings, the land itself has arisen from the sea, created by the deposition of vast quantities of sediment carried by rivers and into the Bay over a great period of time.

These natural processes have endowed Bangladesh with a bounty of clean-burning natural gas that my Government hopes to be able to utilize more fully over time. Yet, precisely as a function of the geological facts that you will hear more about this week and next, much of this natural gas is located offshore. The absence of defined maritime boundaries with Myanmar and India has undermined our ability to exploit this much needed resource. Our difficulties are compounded by the far-reaching maritime claims of our neighbours. The resolution of this case in a manner that achieves an equitable solution in the areas beyond 12 miles provides an opportunity for us to realize our full potential.

The same is true of fisheries resources. The people of Bangladesh are deeply connected to and dependent on the sea and its biodiversity. Fish provide both a key source of nutrition and employment for our people. The legal certainty that the resolution of this case will provide will allow us to more rationally exploit this resource so as to maximize the

STATEMENT OF MS MONI – 8 September 2011, a.m.

current benefit while at the same time ensuring long-term sustainability, a goal to which we are strongly committed.

Mr President, if I may, I would like to trace very briefly the path that led us to your distinguished Tribunal today. Since at least 1974 Bangladesh and Myanmar have engaged in extensive negotiations concerning their maritime boundary in the Bay of Bengal. Over the course of 34 years, our countries have conducted some 13 rounds of talks. We achieved some notable early successes. In particular, in 1974, at just our second round of meetings, we reached the agreement concerning the maritime boundary in the territorial sea about which you will hear more tomorrow. That agreement was fully applied and respected by both States over more than three decades. As a result of that agreement, there have never been any problems concerning the right of passage of ships of Myanmar through our territorial sea around St Martin's Island. In its two rounds of pleadings Myanmar had every opportunity to introduce evidence of any difficulties, if indeed there were any. It has not done so. That is because there are no difficulties. I am happy to restate that Bangladesh will continue to respect such access in full respect of its legal obligations.

Now Myanmar says there was no agreement, and we strongly disagree. That, of course, is a question for the Tribunal to decide. But the essential point is that our earliest talks concerning the areas closest to shore met with substantial success.

Unfortunately, the promise of those early talks was short-lived. Despite the meeting of the minds concerning the territorial sea, subsequent talks concerning other maritime zones achieved little. We met in 1975, in 1976, in 1979, in 1986, in 2008, in 2009, and even in 2010 following the initiation of these proceedings, always to discuss our boundary in the continental shelf and exclusive economic zone. All of these meetings were to no avail. Myanmar was, as it still is, steadfast in its insistence that the boundary must be determined by reference to the equidistance method. For our part, we were – and remain – certain of the view that equidistance does not yield an equitable solution given the geographic realities in the northern Bay of Bengal.

Mr President, at this stage of the case, after all you have read, I suspect you do not need me to tell you what Bangladesh considers to be the central geographic fact of this case: it is the concavity of the Bay of Bengal's north coast. This concavity, combined with the location of our land boundaries with Myanmar to the east and India to the west, makes the equidistance method wholly unsuited to produce an equitable solution. It cannot produce such a solution. Despite a coast of several hundred kilometres, equidistance would leave us with just a small, wedge-shaped area of maritime space, all of it less than 200 nautical miles from our coast. It would deprive us of any access to the outer continental shelf.

In 2008, after 34 years of trying, we were stuck. The bilateral path led only to the same endless circle. For Bangladesh, the impasse had much more than diplomatic consequences. The inability to develop our resources in a sustainable manner has slowed the pace of our development.

Faced with this situation, Bangladesh had two options: it could either continue to do nothing, or it could seek the intervention of a neutral third party by pursuing the dispute resolution mechanisms that the drafters of the Law of the Sea Convention so wisely included.

The institution of these proceedings is not in any way a hostile act. It is intended to resolve a long-standing dispute, in an equitable manner that serves the interest of peace and stability in the region. The resolution of this dispute will thus serve the interests of both States. We have every confidence that with your Tribunal's judgment in hand and this matter behind us, Bangladesh-Myanmar relations will be able to move forward on an even more positive and productive basis.

As you know, Bangladesh initially instituted these proceedings under the provisions of Annex VII. We would have preferred to bring proceedings before this Tribunal. But at the

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time there were no applicable declarations in force. We were therefore delighted when Myanmar expressed its willingness to have the matter heard here, and we readily agreed. We were equally delighted that the Tribunal rejected a later effort on the part of Myanmar to withdraw its consent to your jurisdiction. This is the Tribunal's first maritime delimitation case, and we have every confidence of your wisdom as the foremost guardians of the Law of the Sea Convention.

As you know, we have a parallel proceeding pending with our other maritime neighbour, India. That proceeding is being heard before a distinguished arbitral tribunal convened under Annex VII, and there is a degree of overlap between the composition. Bangladesh would have preferred to have that case too heard in this Tribunal. In many respects, the cases are quite similar. We regret that India declined our invitation to accept ITLOS jurisdiction.

Mr President, members of the Tribunal, with that I come to the organization of our first-round presentations. Following me to the podium this morning will be Mr Paul Reichler of Foley Hoag who will provide an overview of the most critical facts relevant to the resolution of this dispute. Mr Reichler will focus on the geographic and geologic circumstances that frame our case. Following Mr Reichler will be Professor James Crawford of the University of Cambridge. Professor Crawford will discuss this matter in institutional context as the Tribunal's first delimitation case.

Tomorrow morning, Professor Alan Boyle from the University of Edinburgh will be the first to speak. He will address the 1974 Agreement between Bangladesh and Myanmar concerning the delimitation of their boundary in the territorial sea. After Professor Boyle, Professor Philippe Sands of University College London will address the principles applicable to the delimitation of the territorial sea in the unlikely event the Tribunal disagrees with us as to the existence of an agreement in 1974.

When we return on Monday morning, Professor Sands will again take the podium to outline the most critical points of law relating to the delimitation of the exclusive economic zone and continental shelf within 200 miles. Mr Lawrence Martin, also of Foley Hoag, and then Mr Reichler, will address in more detail why equidistance cannot achieve an equitable result in the EEZ and continental shelf within 200 miles.

On Monday afternoon, Professor Crawford will return to discuss the 215° bisector that Bangladesh has proposed. When he is done, Professor Payam Akhavan of McGill University will take up the subject of the Tribunal's jurisdiction and show that there can be no doubt that it has jurisdiction over this dispute in its entirety, including in the outer continental shelf, and that there is no bar to its exercise of jurisdiction.

When we return on Tuesday morning, Dr Lindsay Parson will address the geological and geomorphological facts pertinent to the delimitation of the outer continental shelf, which is based in part on expert evidence we have put before the Tribunal and which has not been rebutted by any expert evidence tendered by Myanmar. Our Deputy Agent, Admiral Khurshed Alam, will then describe for the Tribunal the manner in which the limits of our claim in the outer continental shelf were drawn. After that, Professor Boyle will conclude our first-round presentations with a discussion of the legal conclusions that flow from the facts described by Dr Parson and Admiral Alam.

Mr President, members of the Tribunal, I would like to thank you for your time and courteous attention. Bangladesh invites the Tribunal to decide this case in conformity with the 1982 Convention as written, taking due account of the unique aspects you will now hear Mr Reichler describe. I ask that you now invite Mr Reichler to the podium.

The President:

Thank you, Excellency. I now give the floor to Mr Paul Reichler.

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STATEMENT OF MR REICHLER
COUNSEL OF BANGLADESH
[ITLOS/PV.11/2/Rev.1, E, p. 7–19]

Mr Reichler:

Mr President, distinguished Members of the Tribunal, it is a special honour for me to appear before you in these proceedings: the first case in which the Parties have asked this prestigious Tribunal to delimit a maritime boundary.

That the Parties have done so reflects their mutual confidence in the Tribunal, and in your determination and capacity to delimit the boundary in a manner that produces an equitable solution, as required by the 1982 Convention.

I am very pleased to say that the Tribunal has thus far not disappointed. To the contrary, you have lived up to and even surpassed the Parties' high expectations. We stand here before you today, at the opening of oral hearings, less than 21 months from the registration of the case. At the urging of the President, the Parties completed two rounds of comprehensive written pleadings in just 18 months. This is a world record for judicial efficiency in a maritime delimitation case!

Bangladesh, as the Party that initiated these proceedings, is extremely grateful to you, Mr President, to the entire Tribunal and to the Registry, for the fairness and integrity, as well as the efficiency, which have characterized these proceedings. With such a record, this case can only be the first of many maritime delimitation cases to find their way to Hamburg. The entire Bangladesh team feels privileged to be a part of it.

As the first of Bangladesh's counsel to speak, I have been asked by the Agent of Bangladesh, the Honourable Dr Dipu Moni, Minister of Foreign Affairs, to address some matters of administration. In regard to the Judges' folders that have been submitted today, you will note that Bangladesh has provided a hard cover binder that includes the exhibits that will be presented this morning during my speech and that of Professor Crawford. Prior to each of Bangladesh's five half-day sessions in the first round, we will provide the Tribunal with the exhibits for that session, which can be inserted into the binder, along with a different coloured file divider to distinguish the exhibits presented during session one from those presented during session two, and so on. Today's exhibits are preceded by a dark blue file divider, marked with the number 1, to indicate that these exhibits correspond to the first session. The exhibits themselves are numbered consecutively in the order in which they will be presented. As you will soon see, when I speak about the first exhibit in the Judges' folder, it is marked as exhibit 1.1, indicating it was presented in the first session as the first exhibit. This will be followed by exhibit 1.2, and so on. Tomorrow's supplement will be preceded by a light blue file divider, with the number 2, and the exhibits will be numbered 2.1, 2.2, etc.

If you have followed me this far, you need not be concerned about any complexities in the rest of my speech. We have just gotten through the most difficult part!

There is one other clerical matter, however. To avoid the lengthy, and often very boring, reading aloud of citations to the evidence and arguments contained in the written pleadings, including the expert reports and other annexes, my colleagues and I will not read any citations, but will include them as footnotes in the written versions of our speeches that we submit prior to each session for the benefit of the interpreters. We ask that these footnotes be included in the official transcripts of the hearings, even though we do not read them aloud. In this manner, we will provide citations for all of the evidence that we will be discussing, as well as for the case law.

Mr President, members of the Tribunal, it is customary in maritime delimitation cases to begin by setting out the geographical context in which the delimitation is to occur. In this case, where the Tribunal has been called upon to delimit not only the maritime zones within

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200 nautical miles, but also the continental shelf beyond 200 miles – the so-called “outer continental shelf” – it is appropriate to set out the geological context as well, since article 76 of the convention bases entitlement to the outer continental shelf on geological criteria, rather than distance from the coast.

The title given to this case by the Tribunal is the “Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal”. As the title reflects, the boundary to be delimited is in the Bay of Bengal. The Bay is depicted on the screens in front of you and in our exhibit 1.1 of your Judges’ folder. It is a very large body of water, measuring 1,800 kilometres across, from west to east at its widest point, and extending to the south for 1,500 kilometres beginning at its northernmost extremity along the Bangladesh coast.¹ It covers more than two million square kilometres.² According to the International Hydrographic Organization, the Bay is bounded in the north by the Bangladesh and Indian coasts, in the west by the coasts of peninsular India and Sri Lanka, in the east by the Myanmar coast extending down to Cape Negrals, and from there along the Andaman and Nicobar Islands of India.³ In the south, the Bay begins its transition into the Indian Ocean at approximately 6° north latitude.⁴

The area to be delimited in this case is in the northern part of the Bay, adjacent to the coasts of Bangladesh and Myanmar. The northern coast of the Bay is concave.⁵ As highlighted on the screen, and in exhibit 1.2 of your Judges’ folder, the concavity extends from the coast of peninsular India in the west, along all of the Bangladesh coast, to the western coast of Myanmar.⁶ Bangladesh’s entire coast lies within this general, or primary, concavity. At the north-eastern end of the Bay, within Bangladesh itself, there is a secondary concavity – a concavity within the overall concavity of Bangladesh’s coast – which extends from one land boundary terminus to the other. This “double concavity” is a particular and unique feature of the coastal geography of the northern Bay of Bengal.

To the east of the Meghna Estuary, which occupies the centre of Bangladesh’s coast,⁷ the coast extends south-easterly to the land boundary terminus with Myanmar, at the Naaf River. This section of the coast is marked by long sandy beaches and several coastal islands very close to the mainland.⁸ The most significant and heavily populated of these is St Martin’s Island, lying opposite the land boundary terminus. According to British Admiralty Chart 817, which both Parties consider accurate,⁹ St Martin’s lies within five miles of the mainland coast of Bangladesh, and also within five miles of the mainland coast of Myanmar.

West of the Meghna Estuary, all the way to the border with India, Bangladesh’s coast takes on an entirely different character.¹⁰ Here, it is completely deltaic, formed by the mighty Ganges and Brahmaputra Rivers and their many tributaries, which empty into the Bay of Bengal along this section of the coast.¹¹ This is the world’s largest river delta, far larger than the Nile and Mississippi deltas combined. It creates one of the most highly morphodynamic

¹ Memorial of Bangladesh, para. 2.4 (hereinafter “MB”).

² MB, para. 2.4.

³ MB, para. 2.5; see also International Hydrographic Organization, *Limits of Oceans and Seas* (3d ed. 1953), at pp. 21-22. MB, Vol. III, Annex 30.

⁴ International Hydrographic Organization, *Limits of Oceans and Seas* (3d ed. 1953), at p. 21. MB, Vol. III, Annex 30.

⁵ Counter-Memorial of the Union of Myanmar, para. 2.3 (hereinafter “MCM”).

⁶ MCM, para. 2.3.

⁷ MB, paras. 2.11, 2.17.

⁸ MB, para. 2.7.

⁹ See e.g., MB at paras. 3.27, 3.29; MCM at paras. 4.68 and 5.99.

¹⁰ MB, para. 2.12.

¹¹ *Ibid.*

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and unstable coastlines on the planet, with continuous accretion and erosion, and the sudden appearances and disappearances of small islands and low tide elevations that are, almost literally, here today and gone tomorrow.¹²

The Bengal Delta is part of the unique geological structure known as the Bengal Depositional System, depicted on your screens and at tab 1.3 of your Judges' folders.¹³ The Bengal Depositional System is comprised of the same geological material in three contiguous and continuous sections: the above-water portion of the delta, which constitutes the major part of Bangladesh's landmass; the below-water or subaqueous, portion of the delta, which extends seaward into the Bay of Bengal for 80 miles from the shoreline; and the Bengal Fan, which extends from the base of the continental slope more than 1,500 miles southward, beyond the southernmost point of Sri Lanka.¹⁴ These three components of the Bengal Depositional System constitute a single, integrated system that unites the Bangladesh landmass and the Bay of Bengal seafloor both geologically and geomorphologically, from the northern to the southern end of the Bay.¹⁵

The Bengal Depositional System was formed by the accumulation of Himalayan sediments carried by the Ganges and Brahmaputra river system and its precursors over millions of years.¹⁶ The process is ongoing. In an average year, the river system carries nearly a thousand million tons of sediments toward the Bay of Bengal.¹⁷ One third of these sediments are deposited in the above-ground portion of the Bengal Delta; the remaining two thirds are deposited in the Bay, contributing to both the subaqueous portion of the Delta and the Bengal Fan.¹⁸ The thickness of these sediments in the Delta ranges from 12 to 24 km; by way of comparison, Mt Everest rises less than 9 km above sea level.¹⁹

The thickness of the same sediments further south in the Bengal Fan ranges from 16.5 to 1 kilometre, covering a surface of some 3,000,000 square kilometres.²⁰ As shown on your screens, and at tab 1.4 of the Judges' folders, this is the largest river depositional system in the world – larger than the Amazon and Congo depositional systems combined.²¹ The total volume of sedimentary material in the Fan has been estimated at 12.5 million cubic kilometres – more than enough to cover the entire continent of Europe in a layer of sediment an entire kilometre thick.²² More than 80% of these sediments are transported to the Bay by

¹² MB, para. 2.9.

¹³ MB, para. 2.32.

¹⁴ MB, paras. 2.33-2.45.

¹⁵ MB, paras. 2.32.

¹⁶ MB, paras. 2.32, 2.39; see also Joseph R. Curray, "The Bengal Depositional System: The Bengal Basin and the Bay of Bengal" (23 June 2010), at p. 1. MB, Vol. IV, Annex 37 (hereinafter "Curray Expert Report (2010)"); G. Einsele et al., "The Himalaya-Bengal Fan Denudation-Accumulation System during the Past 20 Ma", *The Journal of Geology*, Vol. 104, No. 2 (1996), at p. 179. MB, Vol. IV, Annex 40. Himalayan sediments are easily identified because they are chemically distinct from those originating from other regions that drain into the Bay of Bengal, such as the southern peninsula of India. See G.S. Roonwal et al., "Mineralogy and Geochemistry of Surface Sediments from the Bengal Fan, Indian Ocean", *Journal of Asian Earth Sciences*, Vol. 15, No. 1 (1997), at pp. 33-41. MB, Vol. IV, Annex 44.

¹⁷ MB, para. 2.10; see also Hermann Kudrass, "Elements of Geological Continuity and Discontinuity in the Bay of Bengal: From the Coast to the Deep Sea" (2011), at p. 1. Reply of Banglades, Vol. III, Annex R5 (hereinafter Kudrass Expert Report (2011)).

¹⁸ MB, para. 2.10; see also S. Kuehl et al., "Subaqueous Delta of the Ganges-Brahmaputra River System", *Marine Geology*, Vol. 144, No. 1 (1997) (hereinafter "Kuehl et al. (1997)"), at p. 84. MB, Vol. IV, Annex 42.

¹⁹ MB, para. 2.10; see also Joseph R. Curray, "Sediment Volume and Mass beneath the Bay of Bengal", *Earth and Planetary Science Letters*, No. 125 (1994), at p. 374. MB, Vol. IV, Annex 38.

²⁰ MB, apar. 2.37; Joseph R. Curray et al., "The Bengal Fan: Morphology, Geometry, Stratigraphy, History and Processes", *Marine and Petroleum Geology*, Vol. 19, No. 10 (2002) (hereinafter "Curray et al. (2002)"), at p. 1200. MB, Vol. IV, Annex 48.

²¹ MB, para. 2.35.

²² MB, para. 2.37; see also Curray et al. (2002) at p. 1200.

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the great rivers flowing through Bangladesh. The remainder originates in India, and is supplied especially by the rivers on the Indian side of the Bengal Delta.²³ In contrast, there is no measurable contribution from Myanmar's rivers, the most important of which flow into the Andaman Sea through the Gulf of Martaban, well beyond the eastern limits of the Bay of Bengal.²⁴

Bangladesh and the seafloor of the Bay of Bengal are connected not only by the continuous Bengal Depositional System but by the geological fact that they both lay, almost entirely, on the Indian tectonic plate.²⁵ As shown on the screens, and at tab 1.5 of the Judges' folders, there is no tectonic plate boundary, or geological or geomorphologically separation of any kind, between the Bangladesh landmass and the Bengal Fan, even as far as its southern limit.²⁶

This is not the case for Myanmar. Myanmar sits on a different tectonic plate, the Burma Plate.²⁷ The tectonic plate boundary is located in the easternmost portion of the Bay of Bengal, and runs in a north/south direction close to the Myanmar coast.²⁸ This is the tectonic plate boundary, as I have indicated. The boundary is marked by a subduction zone, where the Indian Plate subducts – or passes under – the Burma Plate.²⁹ The passing of one tectonic plate beneath another frequently produces a deep trench in the seafloor.³⁰ The trench which marks this tectonic plate boundary extends far southward, even beyond Sumatra.³¹ To the east of this plate boundary, there is an accretionary prism, now highlighted, produced by the subduction process, where the leading edge of the overlying Burma Plate has scraped off sediments from the subducting – or downgoing – Indian Plate, deforming the seabed, obscuring the trench, and creating mountains on Myanmar's landmass. The geological extension of Myanmar's landmass seaward, that is to the west of its coast, ends at the outer edge of the accretionary prism which marks the tectonic plate boundary. This, as shown, is approximately 50 miles from Myanmar's coast.³² At no point does Myanmar's geological extension reach any farther, let alone out to 200 miles.³³

All of these facts pertaining to the geology and geography of the Bay of Bengal, and to the particular part of it on which this case is focused, are fully documented in the evidence that has been submitted by Bangladesh to the Tribunal, including the expert reports of Dr Joseph Curray and Dr Hermann Kudrass, two of the world's leading authorities on the geology and geomorphology of the Bay of Bengal.³⁴ None of this evidence has been disputed by Myanmar, which has chosen to submit no contrary evidence of any kind.

This, then, Mr. President, is the overall geographical and geological context in which the present dispute between Bangladesh and Myanmar arises. Within this particular setting, I

²³ MB, para. 2.32; G. Einsele et al., "The Himalaya-Bengal Fan Denudation-Accumulation System during the Past 20 Ma", *The Journal of Geology*, Vol. 104, No. 2 (1996), at p. 179. MB, Vol. IV, Annex 40. See also Kudrass Expert Report (2011) at p. 2.

²⁴ MB, para. 2.32; see also Curray Expert Report (2010), at p. 3.

²⁵ MB, para. 2.23; see also Curray Expert Report (2010), at p. 1.

²⁶ MB, para. 2.30.

²⁷ MB, para. 2.23; see also Curray Expert Report (2010), at p. 1; Kudrass Expert Report (2011), at pp. 2-3.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ MB, para. 2.45; Joseph R. Curray, "Comments on the Myanmar Counter-Memorial" (2011), at p. 3. Reply of Bangladesh, Vol. III, Annex R4 (hereinafter "Curray Expert Report (2011)"). See also Curray Expert Report (2010), at p. 1.

³¹ MB, para. 2.37 and Figure 2.6 following p. 24. of MB; See also Curray et al. (2002), at p. 1200.

³² MB, para. 2.45. Curray Expert Report (2011) at pp. 3-4; see also C. Nielsen et al., "From Partial to Full Strain Partitioning Along the Indo-Burmese Hyper-oblique Subduction", *Marine Geology*, Vol. 209 (2004), at pp. 304, 307. MB, Vol. III, Annex 52.

³³ *Ibid.* MB, para. 2.23. See also Curray Expert Report (2010) at p. 1.

³⁴ Curray Expert Report (2010); Curray Expert Report (2011); Kudrass Expert Report (2011).

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will now bring into sharper focus the main geographical and geological features that characterize and distinguish this particular case.

There are three.

The first of the three, as I have already indicated, is the concave shape of Bangladesh's coastline, which extends from the land boundary terminus with India in the west to the land boundary terminus with Myanmar in the east. What is especially notable here, and at tab 1.6 of your Judges' folders, is that, unlike India and Myanmar, only Bangladesh stands with both feet – that is, both of its land boundary termini – planted inside the general concavity that constitutes the northern coast of the Bay of Bengal. Bangladesh is the only one of these the States that lies entirely within the concavity.³⁵

The Bangladesh coast is also marked by a secondary concavity, that is, a concavity within the overall concavity of its coastline. This “double concavity” also covers Bangladesh's entire coast, receding to the north-east from the land boundary terminus with India and arcing all the way to the land boundary terminus with Myanmar.

Because the entirety of Bangladesh's coast lies within a concavity sandwiched between India and Myanmar, and then recedes into an even deeper concavity, equidistance lines inevitably produce a very noticeable cut-off effect, as shown on the screens and at tab 1.7 of the Judges' folders. The result is not unlike the one faced by the Federal Republic of Germany in the *North Sea* cases.³⁶ Here are the two cases side-by-side. The maps are drawn to the same scale; the only change has been to rotate the North Sea coast so that it faces in the same direction as the northern coast of the Bay of Bengal. The similarity of the two geographical situations – that of concave Germany squeezed between Denmark and the Netherlands, and that of concave Bangladesh pinched between India and Myanmar – makes the judgment in the *North Sea* cases, and especially the ICJ's reasoning in regard to the distorting effects of pronounced coastal concavities like these, particularly relevant to this proceeding. Professor Crawford will have more to say about this later this morning.

The second major geographical feature in this case is Bangladesh's St Martin's Island, a significant Bangladesh coastal island lying within 5 miles of the Bangladesh mainland.³⁷ St Martin's is home to more than 7,000 permanent residents, and is the destination of hundreds of thousands of tourists annually.³⁸ In addition to tourism, St Martin's is a significant fishing and agricultural centre.³⁹ It is also the home base of strategic Bangladesh Navy and Coast Guard stations, with harbours that are important to Bangladesh's naval operations.⁴⁰

The third of the three major distinguishing features in this case is the Bengal Depositional System, which, as I have described, comprises both the landmass of Bangladesh and its uninterrupted geological prolongation into and throughout the Bay of Bengal.⁴¹ It is not connected geologically to Myanmar, which sits on a different tectonic plate than most of Bangladesh and the Bay of Bengal and whose landmass extends geologically no farther than 50 miles into the Bay.⁴²

³⁵ MB, paras. 1.8, 2.2, 6.30.

³⁶ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3.

³⁷ MB, para. 2.18.

³⁸ MB, para. 2.18; See also Sirajur Rahman Khan et al., “St. Martin's Island and its Environmental Issues”, Geological Survey of Bangladesh (2002). MB, Vol. IV, Annex 49.

³⁹ MB, para. 2.18; See also Mohammad Mahmudul Hasan, “Tourism and Conservation of Biodiversity: A Case Study of St. Martins Island, Bangladesh”, *Law, Social Justice & Global Development*, Vol. 1 (2009) (available at <http://www2.warwick.ac.uk/fac/soc/law/elj/igd/2009_1/hasan/hasan.pdf>). MB, Vol. III, Annex 36.

⁴⁰ *Ibid.*

⁴¹ MB, para. 2.32; See also Curray Expert Report (2010), at p. 1 and Figure 22.

⁴² MB, para. 2.23; See also Curray Expert Report (2010), at p. 1.

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Mr President, Members of the Tribunal, there is no dispute about the existence of these three features, or about any of the facts pertaining to them. Bangladesh and Myanmar agree on the facts. They agree on the geography and geology that pertain to this case. Myanmar accepts that the entire coastline of Bangladesh is concave, and that a secondary coastal concavity exists within the extremities of the general concavity.⁴³

Myanmar challenges none of the facts presented about St Martin's Island, including that it is a significant coastal island lying within 5 miles of the Bangladesh mainland, with a permanent population of 7,000 and a vibrant economic life of its own.⁴⁴

And Myanmar also accepts the facts established by the extensive geological and geomorphological evidence submitted by Bangladesh, to the effect that the Bengal Depositional System is the geological prolongation of Bangladesh into the Bay of Bengal and that Myanmar has no similar prolongation because its landmass is separated by a tectonic plate boundary a short distance from its coast; in its Rejoinder, at page 7, Myanmar expressly confirmed that it has not disputed any of these facts.⁴⁵

The Parties are not only in agreement in regard to the existence of these three critical features, and the salient facts pertaining to them, but also on their effects: first, Bangladesh and Myanmar agree that because of Bangladesh's entirely concave coastline, equidistance lines emanating from the Bangladesh/Myanmar and Bangladesh/India land boundaries intersect in front of Bangladesh's coast, cutting it off well short of the 200 mile limit, as measured from its normal baselines;⁴⁶ second, they agree that the existence and location of St Martin's Island influence an equidistance line in Bangladesh's favour;⁴⁷ and, third, they do not dispute that the scientific evidence and expert reports demonstrate that the continental shelf in the Bay of Bengal is the geological continuation and prolongation of Bangladesh, but not of Myanmar.⁴⁸

The difference between the Parties is this. In Bangladesh's view, these are all important geographical and geological features that must necessarily be taken into account in fashioning an equitable delimitation of the maritime boundary between the two States. By contrast, Myanmar's view is that all three of these features should be completely ignored – not taken into account at all – by this Tribunal in fixing the maritime boundary. The delimitation line that Myanmar in its submissions asks the Tribunal to adopt was constructed, as acknowledged by Myanmar, without taking into account any of these three features.⁴⁹

In Bangladesh's view, Myanmar cannot be right to deliberately to ignore the most important and unique features that define the geographical and geological context in which this delimitation is taking place.

Mr President, in the remainder of my presentation this morning, I will explain why Bangladesh believes it is not possible to delimit the boundary in a manner that achieves an equitable solution without taking each of these three features duly into account. I will take them in order, starting with the concave Bangladesh coast.

Here, and at tab 1.10 of the Judges' folders, is Myanmar's proposed boundary line, drawn exactly as per the coordinates and geodetic azimuth presented by Myanmar in its submissions.⁵⁰ Myanmar calls this a properly drawn equidistance line. Bangladesh disagrees, and I will come back to this point later. What is important to observe here is how Myanmar

⁴³ MCM, para. 2.16.

⁴⁴ MCM, para. 2.18.

⁴⁵ Rejoinder of the Republic of the Union of Myanmar, para. 1.17 (hereinafter "MR").

⁴⁶ MCM, paras. 5.155-5.162; RM, paras. 6.71 and A.2.

⁴⁷ MR, paras. 1.6, 5.35-5.36.

⁴⁸ MR, para. 1.13.

⁴⁹ MR, p. 195.

⁵⁰ MCM, p.171; MR, p. 195.

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ignores all three of the most important natural features that characterize and distinguish the area to be delimited in this case. First, Myanmar's line ignores the concavities of Bangladesh's coast and the cut-off effect that predictably results from applying equidistance methodology to a concave coast. Because the Bangladesh coast is concave, it generates no base points inside the concavity for the construction of an equidistance line; as a result, Myanmar constructs its entire equidistance line beyond the territorial sea, using only a single base point on Bangladesh's coast – right here at the land boundary terminus.⁵¹ There are no other base points placed by Myanmar along the rest of the Bangladesh coast, between the land boundary terminus with Myanmar and the land boundary terminus with India, that affect the location or direction of Myanmar's equidistance line. According to Myanmar, none of the rest of Bangladesh's coast, which faces onto the area to be delimited, plays any role in the development of the boundary, and that is just fine with them. The fact that this is due to the double concavity of Bangladesh's coast is simply ignored.

Here is something else that Myanmar ignores. This is India's claim line, as shown in Bangladesh's written pleadings.⁵² It is nowhere depicted by Myanmar: not in their written pleadings or in any of the 45 charts and maps that they have submitted to the Tribunal. This omission cannot be attributed to a lack of knowledge of India's claim. The same counsel that represent Myanmar in these proceedings also represent India in the parallel proceedings between Bangladesh and India under Annex VII. Rather than address, or even acknowledge, India's claim line, Myanmar has deliberately chosen to ignore it – and to ignore the severe cut off of Bangladesh that this line, in combination with Myanmar's putative equidistance line, produces.

Mr. President, it is not as if the inequity to Bangladesh of equidistance-based boundaries was recently discovered. This was expressly recognized in the *North Sea* cases themselves, where Bangladesh's (then East Pakistan's) situation was specifically compared to Germany's, in this graphic.⁵³ You can also see this at tab 1.11 of your Judges' folders. This is the same cut-off 42 years later. It has not become any less inequitable to Bangladesh with the passage of time. To the contrary, the distorting effects of equidistance on a concave coastline have been widely recognized ever since the *North Sea* cases. This is not rocket science; it is not even controversial, and it is certainly not news to this Tribunal. This is at tab 1.12 of the Judges' folders. As stated and depicted in the *Handbook on the Delimitation of Maritime Boundaries*, published in 2000 by the United Nations Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea: "The relevance of convexity or concavity of the relevant coastline was highlighted by the International Court of Justice in the 1969 *North Sea Continental Shelf* cases. The distorting effects of the equidistance method in the presence of a concave or convex coastline is shown in the following illustration":⁵⁴ Instead of acknowledging the "relevance of ... concavity of the relevant coastline" – in this case the concavity of the Bangladesh coastline – Myanmar ignores it.

Mr. President, there is no generally accepted method for measuring, and compensating for, the distorting effects of a concave coastline on the plotting of an equidistance line. That is why, in the only two prior maritime delimitation cases where the relevant coasts were expressly determined to be concave – the *North Sea* cases⁵⁵ and the

⁵¹ MR, para. 5.13.

⁵² RB, Figure R3.2.

⁵³ MB, paras. 1.9-1.10 and Figures 1.1 and 1.2.

⁵⁴ MB, para. 6.32; see also United Nations, Division for Ocean Affairs and the Law of the Sea, *Handbook on the Delimitation of Maritime Boundaries* (2000), at p. 30, para. 143, Figure 6.2.

⁵⁵ *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3.

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Guinea/Guinea Bissau arbitration⁵⁶ – the ICJ in the former case and the distinguished arbitral tribunal in the latter rejected equidistance as an appropriate methodology. Bangladesh follows those examples and does the same in this case, adopting the angle bisector methodology that was employed in the *Guinea/Guinea Bissau* case and in two other ICJ cases in which equidistance was determined not to be appropriate.⁵⁷

In this case, it is possible to measure some, but by no means all, of the distortion produced by the application of equidistance methodology to Bangladesh's concave coast. Let us focus for the time being on only the secondary concavity that marks Bangladesh's coast, the concavity within the general concavity of the coastline. By eliminating on this graphic, which is also at Exhibit 1.13 of your Judges' folder, only this secondary concavity – not the much more influential primary or general concavity in which all of the Bangladesh coast sits, but only the one that recedes from the primary one into the Meghna Estuary – we can see how the equidistance line is distorted by the presence of this secondary concavity. Myanmar's version of equidistance deprives Bangladesh of this area solely because of the secondary concavity within the overall concavity of Bangladesh's coast.

If this were the only distortion produced by equidistance, it might be possible to adjust a properly drawn equidistance line, in some fashion, to produce an equitable result. But the graphic that you just saw does not even begin to measure the distorting effects on an equidistance line of the much more influential primary concavity in which the entirety of Bangladesh's coast sits. It depicts, at most, only a small part of the adjustment to equidistance that would have to be made to achieve an equitable solution. Without a generally accepted means of measuring the distorting effects of the primary concavity of Bangladesh's coast, any attempt to quantify this distortion and further adjust the equidistance line is bound to be highly subjective – hence the need, in Bangladesh's view, to employ the angle bisector method where, as here, equidistance cannot lead to an equitable result and is simply inappropriate.

Bangladesh will address these points in greater depth on Monday, when Professor Sands, Professor Crawford, Mr Martin and I speak about delimitation of the EEZ and the continental shelf within 200 miles and the appropriateness of the angle bisector methodology in achieving an equitable solution.

With your permission, Mr President, I will now turn the spotlight on St Martin's Island. Here again is Myanmar's purported equidistance line. This is at Exhibit 1.14 of your Judges' folders. In regard to the EEZ and continental shelf within 200 miles, Myanmar describes it as a "mainland to mainland equidistance line".⁵⁸ This is a new concept, as far as we can tell, developed by Myanmar for the purposes of this case. There is no mention of such a line in the 1982 Convention or in any of the prior maritime delimitation cases between adjacent States that have preceded this one. It is no doubt the fruit of fertile and creative legal imaginations. Mainland to mainland, according to Myanmar, means that no islands are taken into account. Myanmar thus ignores St Martin's Island, one of the main geographical features that characterize and define the area to be delimited in this case. This appears to be the sole reason for constructing a so-called mainland-to-mainland-only line: to exclude St Martin's.

This brings me back bad memories from my childhood. I do not know whether this happened in your neighbourhood, Mr President, but in mine it was common for a group of boys to form a club, which had no discernible purpose other than to exclude the one boy who

⁵⁶ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252 (hereinafter "*Guinea/Guinea-Bissau*"). Reproduced in Memorial of Bangladesh, Vol. 5.

⁵⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment I.C.J. Reports 1984, p. 246. *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007.

⁵⁸ MR, para. 3.7.

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had temporarily fallen out of favour with the rest. I never liked those clubs, since I was more than once the boy who was excluded. Hence I have a great deal of sympathy for St Martin's, in respect of which Myanmar has created the mainland-to-mainland club for the sole purpose of excluding it.

Myanmar takes great pains in its written pleadings, especially in its Rejoinder, to explain this exclusion. It states over and over again that St Martin's has a distorting or disproportionate effect on the equidistance line in the EEZ and continental shelf within 200 miles, and therefore must be ignored in constructing that line. By my count they make this very statement at least ten times in their Rejoinder alone – you will see the footnotes in the written version of the speech – and they refer to St Martin's 80 times in that single pleading.⁵⁹ That is quite a bit of attention to devote to a feature that Myanmar says the Tribunal should ignore. Like Jacob wrestling all night with the angel of God, Myanmar wrestles with St Martin's Island from one end of their Rejoinder to the other and with the same effect; they do not win and they exhaust themselves trying. Repeating their argument endlessly does not noticeably improve it. What it reduces to is this: the effect of taking St Martin's into account in drawing the equidistance line favours Bangladesh by bringing more sea within its EEZ; therefore it is disproportionate to Myanmar, therefore it must be ignored. But the same argument could be made about any coastal feature, island or mainland, which pushes or pulls the equidistance line in one direction or another: the effect will always be more beneficial to one State. That alone does not make it disproportionate or unworthy of base points in the plotting of the equidistance line.

Myanmar's own graphics demonstrate this. Here is Myanmar's sketch map R5.4 from page 113 of their Rejoinder. The red line, which is Myanmar's proposed boundary with Bangladesh, was constructed using only one base point on Bangladesh's coast, located at the land boundary terminus in the mouth of the Naaf River. The black line is a purported equidistance line, also constructed by Myanmar, using base points on St Martin's Island. What makes the black line disproportionate? The fact that Myanmar is not as well served by an equidistance line that is constructed using the four legitimate base points on St Martin's Island as it would be if St Martin's were ignored in favour of a single base point at the mouth of the Naaf River? Significantly, Myanmar never conducts or provides the results of a proportionality test, or a disproportionality test, to demonstrate that the equidistance line that results from including rather than excluding St Martin's is inequitable to Myanmar.

Now let us take a closer look at the effects of St Martin's on Myanmar's proposed equidistance line. Here again is Myanmar's proposed boundary line. Here again, and at tab 1.15 of your folders, is an equidistance line that is adjusted to compensate only for the effects of the secondary concavity of Bangladesh's coast, the concavity within a concavity, but which still ignores completely St Martin's Island; and here, superimposed as a purple line, is an equidistance line that does not ignore St Martin's. What this graphic now shows is that St Martin's partially offsets the distorting effects of the secondary concavity in Bangladesh's coast, but only partially. There is still an area here, shown in orange, which equidistance takes away from Bangladesh and gives to Myanmar because of the secondary concavity, and which is not recuperated even by including St Martin's in the drawing of the equidistance line. Even giving St Martin's the full effect that it so obviously deserves in the application of equidistance methodology does not come close to relieving the inequity of equidistance to Bangladesh. St Martin's only partially offsets the secondary concavity along Bangladesh's coast and does not begin to offset the distorting effects of the primary concavity in which the entire Bangladesh coast sits. That is why none of these purported equidistance lines can be considered equitable.

⁵⁹ MR at paras. 1.6, 3.15, 3.16, 3.17, 3.18, 3.26, 5.29, 5.34, 5.35, 5.67, 6.92.

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Mr President, before concluding my remarks, please allow me to return briefly to the Bengal Depositional System. Here again is Myanmar's proposed boundary line. As clearly depicted here, this line cuts off Bangladesh well within 200 miles of its coast, thereby completely denying it access to the outer continental shelf. Given this line, it makes no difference where the boundary line between Bangladesh and India is eventually drawn by the Annex VII Tribunal. Wherever that line is placed, it will inevitably intersect with the boundary line Myanmar has proposed in a way that precludes Bangladesh from reaching any part of the outer continental shelf.

In Bangladesh's view, this cut-off is particularly unjustified, especially in light of the extensive area of outer continental shelf that Bangladesh is entitled to claim by application of the provisions of article 76. The factual elements – the underlying geology and geomorphology – supporting Bangladesh's claim in the outer continental shelf are undisputed in these proceedings.⁶⁰ There is no question that the Bay of Bengal seafloor is the physical prolongation of Bangladesh's landmass, which extends into the Bay of Bengal far beyond 200 miles. Bangladesh submits that it cannot be equitable to ignore these undisputed geological and geomorphological facts and delimit the outer continental shelf without taking them into account.

I come now to my conclusions in regard to the geographical and geological facts of this case and the different approaches to them taken by the Parties. There are three:

First, the Parties agree that Bangladesh's entire coastline sits within a pronounced concavity and that it is the only coastal State on the Bay of Bengal with an entirely concave coastline. The Parties also agree that Bangladesh's coastline is marked by a secondary or double concavity within the overall concavity of its coast. They disagree over the relevance of these facts. Bangladesh considers that the concavity of its coastline renders equidistance inherently inequitable as a method for delimiting the maritime boundary in the EEZ and the continental shelf within 200 miles. Myanmar considers the concavity of Bangladesh's coast to be irrelevant and asks the Tribunal to ignore it for purposes of this delimitation.

Second, the Parties agree on all the facts concerning St Martin's Island, including its location within 5 miles of Bangladesh's mainland coast, its permanent population of over 7,000, its substantial tourism, agriculture and fishing industries, and its importance as a naval and coastguard base. Bangladesh believes it is impossible to ignore St Martin's for purposes of delimiting the maritime boundary in this case. Myanmar's submissions ask the Tribunal to ignore St Martin's entirely in the delimitation of the boundary in the EEZ and continental shelf, and to give it reduced weight in the delimitation of the territorial sea.

Third, and finally, the Parties also agree on all of the facts regarding the Bengal Depositional System, and the geological and geomorphological prolongation of Bangladesh's landmass into the Bay of Bengal far beyond 200 miles from Bangladesh's coast. They do not dispute that Myanmar's geological prolongation into the Bay of Bengal extends approximately 50 miles from its coast, and at no point reaches anywhere close to 200 miles. Bangladesh considers that these facts should be taken into account as a relevant circumstance in fashioning an equitable delimitation within 200 miles, and should inform the delimitation of the outer continental shelf as between Bangladesh and Myanmar beyond 200 miles. Myanmar argues that these facts are irrelevant, because its version of an equidistance line cuts off Bangladesh entirely from the outer continental shelf.

Mr President, Members of the Tribunal, this concludes my presentation this morning. I thank you Mr. President for your kind and courteous attention. Bangladesh's next speaker is Professor James Crawford. I would respectfully ask that you call him to the podium, unless you would prefer to hear from Professor Crawford after the mid-morning coffee break.

⁶⁰ MR, para.1.17.

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The President:

Thank you, Mr Reichler. We have seven minutes left, but at this point, the Tribunal will withdraw for a break. The hearing will be continued at 12 noon.

(Short adjournment)

The President:

I now give the floor to Mr James Crawford.

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STATEMENT OF MR CRAWFORD
COUNSEL OF BANGLADESH
[ITLOS/PV.11/2/Rev.1, E, p. 19–35]

Mr Crawford:

Thank you, sir. I am comparatively refreshed by a caffeine-free coffee break!

Mr President, Members of the Tribunal, it is a great honour to appear again before you and to do so on behalf of Bangladesh.

My colleague, Mr Reichler, has already introduced the geographical context, the key features of the coastlines, and the Parties' competing claims. It is my task to emphasise in the context of this dispute the core principles of maritime delimitation, as first articulated in the *North Sea Continental Shelf Cases*, and to stress their continuing vitality.

Mr President, Members of the Tribunal, the first modern judicial determination concerning a maritime boundary was that of the International Court in the *North Sea Continental Shelf Cases*. I stress the plural, "cases"; that was the official title of the two cases after they had been joined by the Court's order of 26 April 1968,¹ following individual counter-memorials. The possibility of joinder – which was agreed between the Parties – arose in those cases for two reasons. First, they were before the same court, which had the power to order joinder. Second, the Court was not asked actually to delimit the maritime boundaries, but rather, in the words of the separate special agreements, to determine "what principles and rules of international law are applicable to the limitation as between the Parties of the areas of the continental shelf in the North Sea."² Following that, the Parties would delimit their respective boundaries by negotiation, which of course they did.³

The Court still lists the two cases separately on its website. They are numbers 1 and 2 on the list of modern maritime boundary decisions. (I omit the *Grisbadarna* case, where a tribunal delimited the territorial sea purportedly applying the law of the 17th century.⁴) If the *North Sea Cases* are numbers 1 and 2, then this – the first case to be decided by this Tribunal – will be the twenty-second judicial decision on maritime boundaries. You will find the complete list as tab 1.16 in your folders. After 42 years, 21 decisions – of the Court, of a commission, of *ad hoc* tribunals, of Annex VII tribunals, you may well think it is time for your first contribution to the case law.

Mr Reichler has already shown you the geographical situation in the *North Sea Cases* but it is worthwhile dwelling a little on the similarities and differences with that case that now confront you between Bangladesh and Myanmar. I will start with the differences – and there are five of them.

The first difference is that the Parties to the *North Sea Cases* had no common conventional link under the law of the sea. Denmark and the Netherlands were parties to the Geneva Convention on the Continental Shelf of 1958; the Federal Republic of Germany was

¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3 (hereinafter "*North Sea Cases*"), p. 9.

² Special Agreement between the Governments of Denmark and the Federal Republic of Germany, Article 1; Special Agreement between the Governments of the Federal Republic of Germany and the Netherlands, Article 1; see *North Sea Cases*, pp. 7-8.

³ Treaty between the Kingdom of the Netherlands and the Federal Republic Germany concerning the Delimitation of the Continental Shelf under the North Sea, 28 January 1971, 857 U.N.T.S. 131; Treaty between the Kingdom of Denmark and the Federal Republic Germany concerning the Delimitation of the Continental Shelf under the North Sea, 28 January 1971, 857 U.N.T.S. 109. See also Protocol to the Treaties of 28 January 1971 between the Federal Republic of Germany and Denmark and the Kingdom of the Netherlands, respectively, concerning the delimitation of the continental shelf under the North Sea, 28 January 1971, 857 U.N.T.S. 155.

⁴ (1909) 11 RIAA 147.

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not. The delimitation dispute was accordingly governed by customary international law, which – the Court famously held – did not embody any presumption, still less rule, of equidistance, but was framed in terms of equity and an equitable solution having regard to varying factors which the Court articulated.

Here, there is an important difference that you are, of course, making your decision under the 1982 Convention, which is an integrated treaty, a system of the law of the sea. Viewed from a certain perspective one can treat the twentieth century as a struggle for coherence in the law of the sea – punctuated no doubt by certain wars. We remember 1907 (at least some items on the agenda), 1930, 1958, 1960, the opening of UNCLOS III in 1974. The 1982 convention is the fruit of that struggle, and that presents a systemic issue. There is, perhaps unfortunately, no single court or tribunal designated to exercise a specialized jurisdiction under the Convention; instead there is an *à la carte* menu. But that is not a recipe for proliferation, still less rivalry. Courts and tribunals exercising jurisdiction under Part XV of the Convention should seek to act in aid of each other and, to the fullest extent possible, foster a consistent interpretation of the convention and its related agreements.

The second and obvious difference is that here there are two cases which have not been joined. One involves Myanmar, which is before you today; the other involves India, which is before an Annex VII tribunal, which will not hear the case before you have handed down your judgment. I will not go into the somewhat tangled procedural history that in the present case brought us to where we are. One can only say that it is regrettable that our two cases were not able to be joined. The more one works with Part XV the more issues one finds with it. I will not in this company mention the word “tuna”!⁵ The absence of a power of joinder is one of several mechanism problems with Part XV. It could only have been fixed had the drafters been willing and able to confront the full implications of their decision to create a new specialist tribunal with a special overarching mandate for the law of the sea. I refer of course to this Tribunal.

But the point for present purposes is that none of this, none of the procedural or mechanism problems, can affect the applicable law, which is the same for all judicial bodies exercising jurisdiction under the 1982 Convention. The key provision is article 293(1), which provides: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” Article 293(2), like its counterpart in article 38(2) of the Statute of the International Court, deals with jurisdiction *ex aequo et bono*; but the jurisdiction to delimit maritime boundaries is jurisdiction to apply the law, not to decide *ex aequo et bono*.

Both paragraphs of article 293 refer to, “A court or tribunal having jurisdiction under this section”. “This section” is of course Section 2 of Part XV, entitled, revealingly, “Compulsory Procedures Entailing Binding Decisions”. I have just said that courts or tribunals with jurisdiction under Part XV should act in aid of each other, to the fullest extent possible. Part XV may not have solved the problem of proliferation of forums but it remains true that the 1982 Convention is an integrated text – no reservations allowed – and the applicable law under article 293 is a single body of law. Under that law, Bangladesh is entitled, in the absence of agreement, to maritime zones which are equitable as between itself and its neighbours, so of course are its neighbours. It is for the “courts or tribunals having jurisdiction under Part XV” to give effect to such entitlements, acting consistently with the judicial function. Thus it should not make any difference to the outcome of this case whether or not the proceedings have been joined – just as it should have made no difference in 1969.

⁵ *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Order of 27 August 1999, ITLOS Reports 1999; Annex VII arbitration, Washington, May 2000, 119 ILR 508.

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The availability or not of a procedure under Part XV should not affect the substance, the equities, the merits of Bangladesh's case.

In its Rejoinder Myanmar responds to this argument by asserting that Bangladesh has no "pre-existing rights which would pre-empt the maritime delimitation".⁶ According to Myanmar: "Bangladesh asserts that it already has maritime rights – in particular in areas also claimed by other States – and deduces from these alleged rights that an equitable maritime delimitation would have to respect them." Myanmar responds: "International law does not grant to a coastal State pre-existing or absolute rights to a 200-mile limit", nor to some alleged "indisputable entitlement in the continental shelf beyond 200 miles".⁷

There are at least three things wrong with this. First, it parodies Bangladesh's argument: we have never suggested that our rights in the maritime areas in question are prior to those of Myanmar or that we are approaching this case on anything else than a basis of equality. Second, it treats maritime delimitation as if it involved the sharing out of an undivided whole in the waters concerned, which is certainly not the case. Third, it misrepresents the judicial process, which under article 293(1) is rule-governed and not a mere discretionary parcelling out. I accept, as I must, that the rules are open-textured – in the 1982 Convention perhaps more than usually so – but that does not mean that they do not exist, or that you are unconstrained. You are not – and in particular you are not constrained by equidistance, even as a starting point, as I will show.

The third difference between this case and the *North Sea* is that – unlike the Court in 1969 – you actually have to delimit the maritime boundary. Moreover, it is – on our submission – a boundary extending beyond 200 miles from the baseline, to the so-called outer continental shelf. But that should present no difficulty of principle. My colleagues will come back to the outer continental shelf in later presentations. The more general point is that it is precisely the function of tribunals sitting under Part XV to settle disputes over sea boundary delimitation by delimiting the boundaries to their full extent and definitively. The only exception is the work of the Annex II Commission, which does not affect bilateral boundaries beyond 200 miles. The position in the *North Sea Cases* was in that respect exceptional. The Parties to the two special agreements specifically withheld from the Court the actual task of delimitation and instead asked it to decide an issue of principle – equidistance plus special circumstances, as laid down in article 6 of the Geneva Convention on the Continental Shelf or some broader, more flexible principle of delimitation. You of course know the result: the Court rejected article 6 and rejected any suggestion of a presumption of equidistance. You can see these negotiated boundaries on the screen, and it is at tab 1.17 in your folders. By comparison with equidistance, the Federal Republic of Germany got quite a lot more. Its continental shelf beyond 12 miles, applying equidistance, would have been 16,500 square kilometres to the nearest hundred. Its negotiated continental shelf as shown here was some 28,600 square kilometres, a substantially greater area, some 1.7 times greater, nearly twice.

Now, it is obvious from the graphic that the resulting lines followed no principle but were the result of bargaining which took into account access to resources. No court or tribunal could have drawn those lines, certainly no sober court or tribunal! But, especially now with 40 years of delimitation experience, a court or tribunal could determine a continental shelf boundary in the *North Sea* between the three states. That task might have been difficult but its difficulty would not have prevented its accomplishment. My present point is that this case is different from *North Sea Cases*, in that the experiment of asking for a response on a point of principle and reserving the actual delimitation for the parties to

⁶ MR, p 147.

⁷ MR, para. 6.9.

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negotiate has not been followed in any subsequent case. No doubt one reason is that articles 74(1) and 83(1) require the Parties to try to reach agreement before resorting to third-party settlement at all. There is no point in telling them to go off and negotiate some more when they have already been fruitlessly negotiating for years, as here. You are here to resolve the disputes, not to postpone their resolution!

The fourth difference is this. By virtue both of the joinder of the two proceedings and the terms of its mandate, the Court in *North Sea Cases* had no third-party problem. There was no problem with the United Kingdom because the boundary between it and the opposite coastal states was fixed and was not in dispute. There was no problem with the adjacent States since they were or had become Parties to the case. Here, by reason of the non-joinder of India, there is a third-party problem. You cannot in these proceedings delimit maritime boundaries as between Bangladesh and India; but that does not mean that you cannot have regard to the situation between Bangladesh and India as a fact, and it does not mean that you cannot perform your task as between Bangladesh and Myanmar to the full.

The fifth difference is that for the first time at the international level – the very first time – your Tribunal is asked not just to delimit a single maritime boundary out to 200 miles but to go further – to boldly go – and to delimit the outer continental shelf. This claim is made of course in the alternative, since our primary submission, based on geomorphology, is that Myanmar has no entitlement beyond 200 miles in any event.

So much for the differences between this case and the *North Sea Cases*.

As against these differences there are two overwhelming similarities, a geographical one and a legal one. The geographical one has already been illustrated, and here it is again. These three States front onto the Bay of Bengal on a markedly concave coastline. This can be compared with the situation in the North Sea, where the scale is of the same general order, but the extent of course is not. In fact, as Mr Reichler has said, the position of Bangladesh is in one respect at least even worse than that of the Federal Republic of Germany, since the waters of the Bay of Bengal are unconfined whereas the three *North Sea* States were limited by the opposite median line boundary with the United Kingdom: there was no possibility of their getting to 200 miles in any event.

Myanmar argues by reference to its graphic R6.4 that there is “nothing comparable between the *North Sea Continental Shelf Cases* and this case.”⁸ Since, as we will shortly see, it asserts that the situations in *Cameroon/Nigeria* and *Barbados/Trinidad and Tobago* are comparable, I can only say it has a curious conception of comparability. Looking at the graphic one would say that the situations here are similar in principle. They show what a concavity can do to a coastal State in the grip of equidistance – it is squeezed of areas of overlapping potential entitlement. It is true that Germany’s situation within 200 miles from the coast was worse, but it was for the same cause.

Indeed the middle State on a concave coast has become the textbook example of the inappropriateness of the equidistance principle in some cases. But because the final outcome in the *North Sea Cases* was negotiated, not adjudicated, there has been surprisingly little consideration in the literature of how exactly to delimit in such a circumstance. The present dispute raises, squarely, that issue.

Myanmar’s response to the concavity argument is to trivialise it by reference in particular to *Cameroon/Nigeria* and to the decision of the Annex VII Tribunal in *Barbados/Trinidad and Tobago*. I should say something accordingly about both cases. First, *Cameroon/Nigeria*. Myanmar described it as “compelling in the present case”.⁹ It implies that it is comparable. It continues:

⁸ MR, para. 6.72; for graphic R6.4 see MR, p.179.

⁹ MR, para. 6.39.

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First, despite the obvious concavity of the Gulf of Guinea and particularly of the Bay of Biafra and of Cameroon's coast, which is not very different from that of Bangladesh, the ICJ decided that the configuration of the coast does not represent "a circumstance which would justify deriving, shifting, or a *fortiori* setting aside the equidistance line."¹⁰

This is, with respect, a complete misinterpretation. The Court did not decide that "the obvious concavity of the Gulf of Guinea and particularly of the Bay of Biafra and of Cameroon's coast" did not justify shifting the equidistance line: it decided that the relevant coasts were not concave at all!

In order to understand the point it is necessary to look briefly at the geographical situation in *Cameroon/Nigeria*, and in particular the claim made by Cameroon (through my old adversary and friend, Professor Pellet – it was one of the cases in which we crossed swords). Here you can see the immediate coastal geography in figure R6.2 taken from Myanmar's Rejoinder.¹¹ It is entitled, "Cameroon's Relevant Coast in Cameroon/Nigeria", and it accurately shows that part of the Cameroon coast which the Court held to be relevant, from Debudsha Point and around the Bakassi Peninsula to the land boundary.

It is the thin red line on this map and easy to overlook. It is dwarfed by the thick red line called "coastal concavity". The result in that case is now superimposed on figure R6.2. Myanmar seeks to recruit the decision to its cause: according to it, "the *Cameroon v Nigeria* case clearly supports Myanmar's position." (I am fond of the word clearly.) Myanmar justifies this in the following passage:

The ICJ decided that the cut-off effect was not a special circumstance requiring the adjustment of the equidistance line *even if* there was an additional element which exacerbated this effect (Bioko Island in this case)... the application of the 2002 Judgment would lead to strict equidistance between the adjacent coasts of Bangladesh and Myanmar even though the cut-off effect would be more marked for Bangladesh than it is in the actual geography of this case.¹²

In the last sentence, Myanmar is hypothesizing that the Island of Bioko, which you see on the screen, is transposed to the Bay of Bengal.

As an exercise in the legal imagination this takes some beating. Myanmar conjures into existence in the Bay of Bengal a non-existing Bioko while further south it ignores an island which does exist, St Martin's Island. For Myanmar, geography is an exercise in virtual reality!

In response, I need to draw attention to the actual coastal geography of the *Cameroon v Nigeria* case and to Myanmar's remark that Bioko Island was simply "an additional element which exacerbated this [cut-off] effect".¹³ Bioko Island was not merely an "additional element" in that case. It was the key to the maritime part of the case, rather as St Martin's Island is key here, but for different reasons. Bioko Island is a large island right in the corner of the concavity: it is host to the capital city of Equatorial Guinea. The distance between the north-west cape of Bioko and the mainland, Cameroon's Debudsha Point, is less than 24 miles. It is less than twice the breadth of the territorial sea. It is instructive in this regard to see Cameroon's actual claim line in its Memorial, which we have superimposed on the map.

¹⁰ *Ibid.*

¹¹ MR, p. 165.

¹² MR, para. 6.42(iii).

¹³ *Ibid.*

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It was that line – and the express claim to redistribute the maritime zones of the seven States bordering the Gulf of Guinea – that the Court rejected. It never had to consider what should have been done if Bioko had not been there – for the very good reason that it is there.

The problem for Cameroon is that it was, relative to Bangladesh here, “a stranger in a crowded room”. I wanted to sing that phrase but I find that it is not quite accurate for the song but it is accurate for the position of Cameroon. It was the stranger in the crowded room in the corner of the Gulf of Guinea. As counsel for Nigeria pointed out, Cameroon had bilateral coastal relationships as adjacent or opposite State with three other coastlines – the east-facing coastline of Bioko, the east-facing archipelagic coast of São Tomé and Príncipe, and the adjacent mainland coast of Rio Muni (Equatorial Guinea). Nigeria had no involvement in any of those coastal relationships.

The only relevant coastal relationship between Nigeria and Cameroon was as regards the Cameroon coastline to the west of Debundsha Point, but those coastlines were not concave at all but essentially south-facing and the Nigerian relevant coastline was actually longer than Cameroon’s. Cameroon sought to take the concave coastline to the east of Bioko, to lift it up over Bioko, and to take it into account *vis-à-vis* Nigeria. That was caught by the prohibition against the reconfiguration of geography. The Court resolutely refused to do it. It said:

... the Court cannot accept Cameroon’s contention that account should be taken of the coastline of the Gulf of Guinea from Akasso (Nigeria) to Cap Lopez (Gabon) in order to delimit Cameroon’s maritime boundary with Nigeria and, on the other, that no account should be taken of the greater part of the coastline of Bioko Island....the presence of Bioko makes itself felt from Debundsha, at the point where the Cameroon coast turns south-south-east. Bioko is not an island belonging to either of the two Parties. It is a constituent part of a third State....The part of the Cameroon coastline beyond Debundsha Point faces Bioko. It cannot be treated as facing Nigeria so as to be relevant to the maritime delimitation between Cameroon and Nigeria.¹⁴

To repeat, the Court applied equidistance in that case, not, as Myanmar would have it, “despite the obvious concavity of the...Bay of Biafra and of Cameroon’s coast, which is not very different from that of Bangladesh”.¹⁵ It decided that the relevant Cameroon coasts were not concave at all because they were limited in extent. If Sherlock Holmes, the famous English detective, had been asked to solve the problem – and I like to think that if Sherlock Holmes had lived in our times he would have been an international lawyer – his amanuensis Dr Watson would have described the story as “The Clear Case of the Missing Concavity”.

In particular, the Court nowhere said that if the island of Bioko did not exist, so that Cameroon and Nigeria had looked out unimpeded into the Gulf of Guinea, a strict equidistance solution would still have been appropriate.¹⁶ That “no Bioko” case did not arise, and it is pure speculation what the Court would have done in that event. We can agree with Myanmar that Bangladesh would be worse off – I should say, even worse off – if there were an island the size of Bioko in front of its coast belonging to a fourth State – you can see that it is Eastern Bioko. No doubt the inhabitants of Western Bioko could go there on holiday! But we are not in Arthur Conan Doyle’s fictional world and we do not have to solve that problem. The problem you have to solve is that of coasts which are open to the sea and not impeded.

¹⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Judgment, I.C.J. Reports 2002, para. 291.

¹⁵ MR, para. 6.39.

¹⁶ Cf MR, para. 6.42(iii).

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In its Rejoinder Myanmar also tries to recruit *Barbados/Trinidad and Tobago* to its cause. It says that Bangladesh's arguments have been tried once before and rejected by the Annex VII Tribunal in that case.¹⁷ Trinidad and Tobago argued that an equidistance-based boundary with Barbados would not lead to an equitable solution because, among other reasons, it would entirely cut it off from its claimed entitlement beyond 200 miles. In its decision, the Tribunal did adjust the equidistance line somewhat in favour of Trinidad and Tobago, as you can see. I argued that part of the case for Trinidad and Tobago. I have always regarded that little triangle in the south-east – I call it affectionately the Tobago triangle – as one of the modest successes in my life. I do admit that it is a very modest success though, relative to Barbados' actual claim, it was a real one. A tribunal that was as devoted to equidistance as Myanmar says this one was would not have awarded that triangle.

Yet it is true that that deviation from equidistance was not enough to give Trinidad and Tobago access to the area beyond 200 miles. In fact, the Tribunal's delimitation line stopped at exactly the point 200 miles from Tobago where it intersected the previously agreed boundary between Venezuela and Trinidad and Tobago.

There are, however, several important distinctions between that case and this one. First of all, Trinidad and Tobago played a significant role in cutting itself off – it was a sort of auto cut-off – by earlier agreeing with Venezuela to a delimitation that materially departed from equidistance to Trinidad and Tobago's detriment. The difference between the Venezuela-Trinidad and Tobago equidistance line and the agreed line is shown again on the map. The Court made specific reference to it, saying that Barbados cannot be required to compensate Trinidad and Tobago for the agreements it made it by shifting the maritime boundary in favour of Trinidad and Tobago.¹⁸ If Trinidad and Tobago had not made that concession to Venezuela, it would have had the potential outlet to the area beyond 200 miles that it sought, at least in the south.

For the *Barbados/Trinidad and Tobago* case to be analogous to the present case, Bangladesh would have to have previously agreed with India to a delimitation departing from equidistance in favour of India, and being tried to pass the cost on to Myanmar, but of course it is doing no such thing. We are currently before an Annex VII tribunal in a parallel case with India where we are making many of the same arguments against equidistance. This Court is part of a system of delimitation. You do not decide a case involving India but you are entitled to take into account the fact that the case involving India has not been decided and that the same issues will arise.

A second distinction between the *Barbados/Trinidad and Tobago* case and the present one is that Trinidad and Tobago had not made a submission to the CLCS, the Annex II Commission, which it did, somewhat surprisingly, in 2009. This fact rendered Trinidad and Tobago's arguments about its entitlement "theoretical and highly speculative",¹⁹ in Barbados' words. The same is not true here. Bangladesh has made its submission to the Annex II Commission on a fully articulated basis. There is nothing either theoretical or speculative about our claim to the outer continental shelf.

A third point and perhaps the most important is that the coastal frontages in *Barbados/Trinidad and Tobago* were tiny: the north- and east-facing coast of the small island of Tobago and the north- and east-facing coast of the small State of Barbados. There was no concave coastline, no state squeezed between adjacent neighbours. It was simply that Barbados lies well to the east of Tobago and that its 200 mile EEZ projects in front of the

¹⁷ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147. Reproduced in MB, Vol. V.

¹⁸ *Ibid.*, para. 346.

¹⁹ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Reply of Barbados (9 June 2005) Vol. I, para. 152.

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EEZ of Trinidad and Tobago, overlapping to a small extent even with the 200 mile EEZ of Guyana. The two situations are completely different.

Thus neither of the “modern” cases on which Myanmar relies to distinguish the *North Seas* case is of any help to it. Bangladesh’s situation is comparable to Germany’s.

So that is the first geographical similarity between his case and the *North Seas* case, but I mentioned also a legal similarity. This concerns the applicable law. The question is as follows: what is the lesson of the *North Seas* case after 40 years and 21 decisions? Of course, article 6 of the 1958 Convention on the Continental Shelf, with its express reference to equidistance beyond the territorial sea, was dropped. It was replaced with the open-ended formula in article 74(1) and 83(1), with its closing phrase “in order to achieve an equitable solution”. Article 6 was rejected but does that mean that the Court’s reasoning in 1969 was effectively endorsed? If so, that would have strong implications for our case. Bangladesh could not, consistently with that reading of the decision, unless the decision itself is repudiated, have the equidistance principle foisted upon it, as Myanmar wishes to do, though admittedly with an equidistance line modified to Bangladesh’s disadvantage.

What does the respondent State say about this question? In its Rejoinder it makes five points.

First, and I am quoting: “the law has considerably developed and matured since the *North Sea Continental Shelf* cases”; the inference is that those decisions were undeveloped and immature – a bit like a teenager;

Second, the decision is riddled with “indeterminacy” whereas since 1969 the uncertainties have been largely cleared up;

Thirdly, the decision played a role in the adoption of the rule in the 1982 Convention but it was a minor role;

Fourthly, the *North Sea Continental Shelf* cases have in important respects been superseded by the subsequent case law.

Fifthly, as to the doctrine of natural prolongation, the decision was largely overtaken by the outcome of the conference.

Indeed, Myanmar repeatedly links the *North Sea Cases* with the *Guinea/Guinea-Bissau* case; the latter it describes as “a very odd decision which calls for particular caution”.²⁰ You’ve got to be careful which cases you are associated with!

All in all, I am reminded of Alexander Pope’s lines, which I hope I may adapt for the occasion, for what Myanmar seeks to do is to

Damn [*the North Sea Continental Shelf case*] with faint praise
Assent with civil leer
And without sneering
Teach the [Tribunal] to sneer.²¹

I will not analyze in detail the *Guinea/Guinea-Bissau* decision – my colleague Larry Martin will do so on Monday – but I will analyze in a bit more detail the *fons et origo mali*, if I can paraphrase what the intention of Myanmar seems to be, the 1969 decision itself. I propose to say something briefly about the legislative history, then its treatment in subsequent cases, before concluding.

The parties have debated the legislative history of article 74 and 83 at some length in the pleadings, and I will not go into the detail here. I will simply make three points.

²⁰ MR, para. 6.10; see also *ibid.*, para. 6.47.

²¹ Alexander Pope, “Epistle to Dr Arbuthnot”, in *Selected Poetry* (Oxford World Authors, 1994) 93.

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The first is that Myanmar, while admitting that the decision “played a role” in the language of articles 74 and 83, asserts that this was only a minor role. It is a bit like saying that Claudius “played a role” in Shakespeare’s *Hamlet*; a bystander really – all he did was kill Hamlet’s father, usurp the throne and marry his mother under questionable circumstances. The authority cited by Myanmar for the limited role of the *North Seas* case in the 82 Convention is El Salvador but, in the passage cited, El Salvador was arguing for article 6, that it should be adopted as a rule. It was not; El Salvador lost that argument.

The second point is that even a mere chronological recital shows what happened.

1945: the Truman Proclamation affirms that delimitation of the continental shelf is to take place by agreement “in accordance with equitable principles”.²²

1958: acting on cartographic advice and in the interests of certainty, the legislators agree on article 6, equidistance subject to special circumstances – equitable principles or equity are not mentioned.

1969: The *North Sea Cases* reject article 6 as customary international law, referring to the importance of negotiation and equitable considerations.

1974-1982: UNCLOS III rejects article 6 and prefers a general formulation reminiscent of the Truman Proclamation in order to achieve an equitable solution.

You do not need to be Sherlock Holmes to follow the train of events; even the stolid Dr Watson could do that without the aid of a detective.

The third point is that the 1982 Convention predated the decisions on which Myanmar relies as evidence of movement away from the *North Sea* cases towards a presumption an equidistance, but as between the parties to it, it is the 1982 Convention which prevails and not article 6. Of course articles 74 and 83 cannot be read in isolation, clinical or otherwise; they refer to international law which can change and develop, but they expressly refer to the agreement of the parties and to equity, which is the context and sense of the 1969 decision. The presumption must be that the law develops accordingly, with greater flexibility than Myanmar allows.

I turn briefly to review the *North Sea* cases through the eyes of later Courts and Tribunals. The decision was of immediate relevance in the *Tunisia v Libya*²³ and *Gulf of Maine*²⁴ cases. In neither decision was the central contention of the *North Sea* cases – that equidistance was not custom or even a presumption – challenged. In fact in neither case did any party request delimitation according to an equidistance or median line.²⁵ You will recall a special agreement²⁶ in the *Tunisia v Libya*²⁷ which provided that the Court, in rendering its decision, should take account of equitable principles in the relevant circumstances, as well as the recent trends admitted at the Third Conference on the Law of the Sea.

In *Gulf of Maine* the Chamber invoked the *North Sea* cases while positing a broad solution to the problem before it noting: “delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the

²² 1945 United States Presidential Proclamation No 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil of the Seabed and Continental Shelf, reprinted in Lowe & Talmon, *The Legal Order of the Oceans: Basic Documents of the Law of the Sea* (2009), no 5.

²³ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, (hereinafter “*Tunisia/Libya*”).

²⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment I.C.J. Reports 1984, p. 246.

²⁵ The final result was the division of the contested area into two sectors, which were then delimited separately to reach the most equitable solution.

²⁶ Special agreement between the Republic of Tunisia and the Socialist People’s Libyan Arab Jamahiriya for the submission to the International Court of Justice of the question of the continental shelf between the two countries, 10 June 1977, 1120 U.N.T.S. 106.

²⁷ See further *Tunisia/Libya*, at pp. 43–44.

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geographic configuration of the area and other relevant circumstances, an equitable result.”²⁸ The Chamber then used a bisector line to delimit the contested area, discarding equidistance.²⁹

In *Libya/Malta* the court was called upon to delimit the maritime boundary between two opposite States. Equidistance functions differently between opposite States as compared with adjacent States. The Parties were in agreement that their dispute was governed by customary international law. The Court concluded that article 83(1) was an adequate reflection of customary international law – not surprisingly. The Court went on to place particular emphasis on the need for an equitable solution and further noted:

The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, but it is left to the States themselves, or the courts, to endow this standard with specific content.³⁰

The Court remained adamant that by first having recourse to an equidistance line, it was upholding the *North Sea* cases with equitable principles as the central mode of delimitation. Consequently, insofar as judicial commentary is concerned, the Court in *Libya/Malta* clearly considered the *North Sea* cases to be continued good law. It is true that it continued the trend of looking at equidistance as the best method of determining equity, but it never said that it was the only method.

It should be remembered that the central point of *North Seas* was not that the equidistance line could not be considered as equitable; it was that there was no single method of delimitation.³¹ In *North Seas* the Court disregarded a delimitation based on the equidistance which would have led to an inequitable result due to the concavity of the coastline³² and advocated a more nuanced delimitation. That implication was equally accepted in the later decisions – indeed, the possibility of the plurality of methods even in a single case:

If for the above reasons equity excludes the use of the equidistance method in the present instance as the sole method of delimitation, the question arises whether there is any necessity to employ only one method for the purposes of a given delimitation. There is no logical basis for this, and no objection need be felt to the idea of effecting a delimitation of adjoining continental shelf areas by the concurrent use of various methods. The Court has already stated why it considers that the international law of continental shelf delimitation does not involve any imperative rule and permits recourse to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at.

And yet there are commentators who, in search for complete and illusory certainty, failed to grasp that essential point: there is a choice of methods.

Libya/Malta was also the decision in which the *North Sea Continental Shelf* position on natural prolongation was abandoned for delimitations within 200 miles. This is the one qualification which was brought out by the 1982 Convention. The Court said:

²⁸ *Gulf of Maine*, at para. 112.

²⁹ *Ibid.*, pp. 300–302.

³⁰ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter “*Libya v. Malta*”), p. 30.

³¹ *North Sea Cases*, pp. 35–6, 45–6.

³² *North Sea Cases*, p. 49.

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To rely on the earlier jurisprudence would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in the regime of the title itself which used to allot these factors a place which now belongs to the past, *in so far as seabed areas less than 200 miles from the coast are concerned*.³³

That is the qualification. It is a crucial qualification in the accretionary manner of the law of the sea and of international law in general. The automatic 200-mile continental shelf was superimposed on a newly-defined geomorphological continental shelf which in certain circumstances extended beyond 200 miles. These are sovereign rights. The one does not exclude the other.

With *Libya/Malta* showing the way, the Court has issued a series of continental shelf delimitation decisions, all of which follow the *North Seas* in their application of equitable principles while normally utilizing the equidistance line as the default first step,³⁴ but not inevitably. This allows for the marriage of equity and greater certainty in delimitation, as the Court observed in *Cameroon v Nigeria*.

This method has been seen in *Jan Mayen*,³⁵ in *Qatar v Bahrain*,³⁶ in *Cameroon v Nigeria* and in *Black Sea*.³⁷ In all of these cases *North Sea Continental Shelf* was referred to without disapproval. Particularly popular was the *dictum* that “delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.”³⁸ Other points relied on in *North Seas* include the various factors that will justify the modification of a provisional equidistance line³⁹ and the distinction between delimitation and the apportionment of resources.⁴⁰ The central thesis of the *North Sea* cases is not diminished. The equidistance line is applied in all cases with particular attention to equity, even if it is found that equity does not require the application in a given case of a different methodology.

I turn now from the Court to arbitrations. The *Anglo-French Continental Shelf* arbitration⁴¹ fills a gap of sorts between the *North Sea* cases and *Tunisia v Libya*. The law applicable was the 1958 Convention, but the Tribunal chose to interpret it in light of the *North Sea* cases, which was considered to be reflective of customary international law,⁴² and it paid great attention to the decision.

In the *Guinea-Guinea Bissau* maritime delimitation,⁴³ there was a more direct application of *North Sea Continental Shelf*. There the 1958 Convention did not apply. The Tribunal emphasized that equidistance was one of only several methods that could be applied

³³ *Libya v. Malta*, p. 36 (emphasis added).

³⁴ D. Colson, “The Delimitation of the Outer Continental Shelf Between Neighboring States” (2003) 97 AJIL 91, 101.

³⁵ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38.

³⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 40.

³⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, (hereinafter “*Romania v. Ukraine*”).

³⁸ *North Sea Cases*, p. 18. See, e.g., *Romania v. Ukraine*, p. 100.

³⁹ *North Sea Cases*, p. 59. See, e.g., *Romania v. Ukraine*, p. 112.

⁴⁰ *North Sea Cases*, p. 22. See, e.g., *Romania v. Ukraine*, p. 116.

⁴¹ (1977) 54 I.L.R. 6.

⁴² (1977) 54 I.L.R. 6, 57. Indeed, both France and the UK relied heavily on the decision in making their submissions.

⁴³ *Delimitation of the Maritime Boundary between Guinea-Guinea Bissau* (1985) 77 ILR 635.

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to resolve the dispute, and it refused to draw a median line on the basis that it would not be equitable to do so.⁴⁴

In the light of *Libya/Malta*, the 1969 decision was also recontextualized in the *St Pierre and Miquelon*⁴⁵ and *Eritrea/Yemen*⁴⁶ cases.⁴⁷ Equidistance was considered first as a methodology but was abandoned to a large extent in *St Pierre and Miquelon* and retained in *Eritrea/Yemen*. In the former case, where *North Sea* cases are mentioned, it is spoken of as the progenitor of later decisions on delimitation.⁴⁸ In *Eritrea/Yemen* it is referred to in order to explain the corrective “test” of proportionality.⁴⁹

I have already dealt with the *Barbados/Trinidad and Tobago* arbitration as to the actual situation. But what the Tribunal there said, and I quote:

It is today well established that the starting point of any delimitation is the entitlement of a State to given maritime areas ... At the time when the continental shelf was the principal maritime area beyond the territorial sea, such entitlement found its basis in the concept of natural prolongation ... However, the subsequent emergence and consolidation of the EEZ mean that a new approach was introduced, based upon distance from the coast.⁵⁰

Well that is true, but it is true only within 200 miles, and it is without prejudice to the effect of the *North Sea* cases in the actual context of delimitation.

Finally, there is the *Guyana/Suriname* arbitration,⁵¹ in which only limited reference is made to the *North Sea* cases. The Court’s elucidation of the “equity is not equality” principle emerged in the award, quoted through the lens of *Cameroon v Nigeria*.⁵²

So I’ve been through them all, at some speed.

To summarize, the *North Sea Continental Shelf* decision remains good law. It remains the progenitor of the modern law of maritime delimitation and requires, in essence, two things: the use of equitable principles in the delimitation of maritime boundaries to achieve an equitable result; and, second, no one method of maritime delimitation is considered automatically as obligatory.⁵³ The sole area in which the decision is out of step with the current law is in its reliance on natural prolongation as defining the continental shelf within 200 miles, and it is for this reason that *Libya/Malta* is considered the modern benchmark; not as a replacement for the *North Sea* cases but as an elaboration which emerged to take account of the post-UNCLOS landscape.

Mr President, members of the Court, let me summarize.

The decision in the *North Sea* cases has never been disapproved or even overtly criticized as a decision on delimitation in subsequent decisions of the Court or of other Tribunals. Forty-two years on, it is still taken as authority.

⁴⁴ (1985) 77 I.L.R. 635, 686–91.

⁴⁵ *Case Concerning Delimitation of Maritime Areas between Canada and France (St Pierre et Miquelon)*, Decision, 10 June 1992, 95 I.L.R. 645.

⁴⁶ *Arbitration between Eritrea and Yemen*, Award, Second Phase (Maritime Delimitation), 17 December 1999, 119 I.L.R. 419.

⁴⁷ D. Colson, “The Delimitation of the Outer Continental Shelf Between Neighboring States” (2003) 97 AJIL 91, 101.

⁴⁸ See, e.g., (1992) 95 I.L.R. 645, 667 (identifying the principle of non-encroachment as being introduced by *North Sea* Cases).

⁴⁹ (1999) 119 I.L.R. 419, 465.

⁵⁰ (2006) 139 I.L.R. 449, 519–520, and see further 521–522. The Tribunal also made reference to *North Sea Continental Shelf* as the source of the principle of non-encroachment (at 545).

⁵¹ (2007) 139 I.L.R. 566.

⁵² (2007) 139 I.L.R. 566.

⁵³ As seen in the *Gulf of Maine*, *Guinea-Guinea Bissau* and *St Pierre & Miquelon* cases.

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Second, it is notable for its ready acceptance of the geomorphological continental shelf as already customary international law. That strand of custom is still very much with us in the context, for example, of the Annex II Commission.

Third, the decision has a strong relation to existing customary international law, implying a dynamic conception of our discipline – by contrast with what I will only describe as the ethnocentric stolidity of Lord Asquith in the *Abu Dhabi* case (his Lordship).⁵⁴ Notably, in emphasizing the importance of negotiated solutions and of equitable outcomes, the *North Sea* cases reaffirmed the customary law origins of the continental shelf doctrine in the Truman Proclamation.

Despite Myanmar's insistence to the contrary, the *North Sea* decision was obviously determinative in the formulation of the delimitation provisions of the 1982 Convention, as we have seen with the authority of Dr Watson.

Although overlain by subsequent state practice and treaty provisions concerning the 200-mile zone (both as *ipso facto* continental shelf and claimed EEZ) the *North Sea* cases continue to be influential in terms of delimitation.

In particular, there is no presumption of equidistance outside the territorial sea (see article 15 where it is expressly referred to) – a distinction both sensible in itself and one which testifies to the influence of the decision in terms of delimitation beyond 12 miles.

In other words, maritime delimitation is inescapably a more flexible and open process than article 6 implied, at least on a strict interpretation. In many situations one starts with equidistance, but equidistance is subsumed by the overarching principle stated in the 1982 Convention and is displaced where the circumstances require it – as they did with the angle bisector in *Nicaragua/Honduras*. That decision came as a shock to some. It was a manifestation of the underlying logic of the maritime delimitation rules and the law of the sea.

It is in the tradition of judicial decisions on the law of the sea to opt for flexibility rather than rigidity, notably *Anglo-Norwegian Fisheries*⁵⁵ and – dare I say it? – even *Lotus*.⁵⁶ The latter decision was repudiated by the legislator, whereas *Anglo-Norwegian Fisheries* and *North Sea Continental Shelf* were accepted, and still are accepted, as fundamental precedents.

Consistently with this appreciation of the law, an equidistance line solution in the present case is not opposable to Bangladesh, any more than it was to Germany. Equity prevails, OK! To support that, I have allocated each decision since 1969 to one or more of four categories: strict equidistance; modified equidistance; geometric solutions, including bisectors; and the fourth, miscellaneous category. That is at tab 1.18 in your folders. You will see that the cases are spread across the spectrum: seven equidistance; five modified equidistance; four geometric solutions; and five *sui generis*. That is in the nature of things.

Mr President, members of the Tribunal, this is your first delimitation case; this is your *North Sea Continental Shelf* case. It is brought under the 1982 Convention, the greatest diplomatic achievement in the field of general international law of our shared professional lives. That is the heritage that you will leave to your successors, and your decision in this case will be a notable part of that heritage.

There are, with respect, at least five elements that fall within your mandate in this case and by which you as Judges, I respectfully suggest, will be judged. I say this with all the respect due to this Tribunal and its present membership.

Those five elements are as follows: first, respect for the existing body of authority on maritime delimitation and its integration into articles 74 and 83 of the 1982 Convention; secondly, developing the geomorphologic basis of the continental shelf beyond 200 miles

⁵⁴ See the Award of Lord Asquith as umpire in the *Abu Dhabi* Arbitration (1951) 37 LL.R. 18.

⁵⁵ ICJ *Fisheries case* (United Kingdom v. Norway), Judgment, ICJ Reports 1951, p. 116, 131.

⁵⁶ *The Lotus* (1927) P.C.I.J. Series A, No. 10.

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and, depending on your decision in that regard, delimiting for the first time that sector of the shelf between two States, such delimitation of course without prejudice to the position of India as a third State in these proceedings; thirdly, giving due – we say full – effect to the significant feature of St Martin’s Island, in the spirit of article 121 of the Convention, a point that I have not addressed because my colleagues are dealing with it later on; fourthly, taking due account of the position of India as a third party, but nonetheless producing as complete a delimitation as possible as between these two States – they have not been able to solve the problems themselves and it is for you to solve them; above all, delimiting the maritime entitlements, as you decide them to be, of these two States “on the basis of international law ... in order to achieve an equitable solution”.

For its part, Bangladesh is confident in this Tribunal. It is confident that you will perform your task to the full, with full regard to what is appropriate in the high tradition of the law of the sea.

Mr President, members of the Tribunal, thank you for your attention.

The President:

Thank you, Mr Crawford.

That brings us to the end of today’s sitting. The pleading will be resumed tomorrow morning at 10 a.m. The sitting is now closed.

(The sitting closes at 1 p.m.)

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

PUBLIC SITTING HELD ON 9 SEPTEMBER 2011, 10.00 A.M.**Tribunal**

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 9 SEPTEMBRE 2011, 10 HEURES**Tribunal**

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Please be seated. The sitting is open.

This morning we will continue hearing the arguments of the People's Republic of Bangladesh. I give the floor to Mr. Alan Boyle.

Have the floor Sir.

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STATEMENT OF MR BOYLE
COUNSEL OF BANGLADESH
[ITLOS/PV.11/3/Rev.1, E, p. 1–19]

Mr Boyle:

Mr President, members of the Tribunal: It is a pleasure for me to appear before you for the first time today, and an honour to do so on behalf of Bangladesh. In the present sitting, Bangladesh will deal with the delimitation of the territorial sea boundary. I will present Bangladesh's first argument, that there is an agreement between the Parties which already delimits the territorial sea boundary. My colleague Professor Sands will then address the Tribunal on Bangladesh's second and alternative argument that, even if there is no such agreement, the territorial sea boundary would nevertheless be an equidistance line drawn in conformity with article 15 of the 1982 UN Convention on the Law of the Sea, and one that gives full effect to a 12-mile limit.

Mr President, I have three submissions to make before you today: first, that in accordance with article 15 of the 1982 Convention, the territorial sea boundary between Bangladesh and Myanmar was settled definitively by agreement in 1974, that agreement was subsequently re-confirmed and amended in minor detail in April 2008.

Secondly, the Agreed Minutes that constitute the 1974 agreement are an "agreement" for the purposes of article 15, are binding in international law and remain valid and in force between the Parties.

And thirdly, that the practice of both Parties shows that from 1974 until now, they have fully respected the agreed boundary, entirely without incident or dispute, and that both Parties treated the 1974 Agreed Minutes as reflecting a binding agreement with respect to the delimitation of the territorial sea.

Let me begin by simply setting out the terms of article 15. You will find the text at tab 2.1 in the Judges' folder, but you will also see it on the screen. Both sides accept that article 15 represents the applicable law on delimitation of the territorial sea.

Article 15 provides:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, *falling agreement between them to the contrary*, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision, [it goes on,] does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.

Save in one entirely immaterial respect, this article replicates article 12 of the 1958 Geneva Convention on the Territorial Sea.¹

The key point in article 15 is that it envisages the possibility of delimiting a territorial sea boundary by "agreement", and only in the absence of such an agreement is it necessary to resort to the article's other rules on delimitation. If the Tribunal concludes that there is indeed an agreed territorial sea boundary between the Parties then it need go no further on this element of the case.

¹ The second sentence reads as follows in article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone: "The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision".

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The Parties disagree on two central points: whether they in fact concluded a delimitation agreement in 1974 or subsequently, and whether as a matter of law such an “agreement” must be a formally negotiated treaty in order to fall within the terms of article 15 of the 1982 Convention. And it’s convenient to deal first with the question whether there is an agreement before considering what kind of “agreement” article 15 envisages.

Bangladesh has no doubt that there is an agreement on delimitation of the territorial sea, that it was negotiated in 1974 and supported subsequently by the consistent conduct of both Parties, and reiterated and confirmed in a further agreement concluded in 2008. The original agreement takes the form of Agreed Minutes from a meeting between the Parties on 23 November 1974. The Agreed Minutes were subsequently signed by the heads of the both delegations, Ambassador Kaiser of Bangladesh and Vice Chief of the Myanmar Naval Staff, Commodore Hlaing. The agreed boundary line was set out on Chart No.114, also signed at the same time by Ambassador Kaiser and Commodore Hlaing. And if we look at the map on the screen, you will see the signatures down in the left-hand corner. It may also be useful at this point to look at the agreed line as indicated on Chart 114. And that should be coming up at any moment, I hope. And there it is and you can see to the left of that line you can also see St Martin’s Island. And that was the line agreed in 1974, annexed to the Agreed Minutes, and signed by the heads of both delegations.

In deciding whether these Agreed Minutes and the annexed chart constitute an agreement on delimitation of the territorial sea the court should of course focus on the terms of the Minutes and the chart. Let me remind the Tribunal what the Agreed Minutes say with respect to the territorial sea. Paragraph 1 records that delegations from both States, and I should perhaps say that you will find a copy of the Agreed Minutes in your folder at tab 2.2., Paragraph 1 records that delegations of both States held discussions on delimiting their maritime boundary in September and November 1974.

Paragraph 2 indicates that with respect to the territorial sea boundary the two delegations agreed as follows (and the text should be about to come up on screen any moment and you will find it in your bundle at tab 2.3):

The relevant paragraph one says that:

I. The boundary will be formed by a line extending seaward from Boundary Point No.1 in the Naaf River to the point of intersection of arcs of 12 nautical miles from the southernmost tip of St Martin’s Island and the nearest point on the coast of the Burmese mainland, connecting the intermediate points, which are mid-points between the nearest points on the coast of St Martin’s Island and the coast of the Burmese mainland.

It goes on to say that:

The general alignment of the boundary mentioned above is illustrated on Special Chart No.114 annexed to these minutes.

And that is the chart we have already seen. And finally in Section II of paragraph 2 says:

II. The final coordinates of the turning points for delimiting the boundary of the territorial waters as agreed above will be fixed on the basis of the data collected by a joint survey.

That is all that remained to be done.

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Paragraph 3 provides:

The Burmese delegation in the course of the discussions in Dacca stated that their Government's agreement to delimit the territorial waters boundary in the manner set forth in para.2 ... is subject to a guarantee that Burmese ships would have the right of free and unimpeded navigation through Bangladesh waters around St Martin's Island to and from the Burmese sector of the Naaf River.

Bangladesh's agreement to that proviso is set out in paragraph 4 of the Minutes.

Finally, paragraph 5 indicates that copies of a draft treaty on the delimitation of the territorial sea boundary were given to the Burmese delegation so that they could elicit the views of their government. And paragraph 6 notes that discussions on an exclusive economic zone and continental shelf boundary would continue.

That is all the Agreed Minutes say.

Do these two documents evidence the conclusion of an agreement delimiting the territorial sea in 1974? Yes, for four reasons. First, the terms are clear and unambiguous. Their ordinary meaning is that a boundary has been agreed. The text clearly identifies a boundary located midway between St Martin's Island and the coast of Myanmar, from points 1-7 as shown on Chart I14. Second, the object and purpose of the agreement and the context in which it was negotiated could not be clearer: to negotiate a maritime boundary. Third, the fact of agreement is evidenced by the signature of the heads of both delegations and the terminology they used – "Agreed Minutes". Fourth, they are unconditional apart from completing the technicalities required to establish the final co-ordinates resulting from the joint survey.

Myanmar alleges that the agreement on a territorial sea boundary was also conditional on negotiating a more comprehensive maritime boundary² but paragraph 6 of the Agreed Minutes simply indicates that an EEZ/continental shelf boundary had been discussed and that discussions on that issue would continue. Nowhere in the Agreed Minutes is it suggested, as Myanmar alleges, that the territorial sea agreement was conditional on negotiation of a larger package - nowhere.

If the conditionality point was repeated time and time again in the negotiations, as Myanmar alleges,³ why do the Agreed Minutes not reflect this? Why indeed do Myanmar's own records not reflect it? It is true, if you read them, that at their third meeting on 23 November Myanmar records that "The Burmese side (and I'm quoting) took the position that the agreed minutes should deal with the subject matter *en toto* as one of delimiting the overall maritime boundary between the two countries, and not be specific about a particular sector."⁴ That is what they record, but that tells us only what Myanmar's preferred position was at that point in the negotiations. By the end of the negotiations the Parties had been unable to conclude the comprehensive agreement that Myanmar would have preferred, hence their acceptance at that point of an *ad hoc* agreement limited to the territorial sea.

Bangladesh was well aware in 1974 and subsequently that Myanmar would have liked to conclude a comprehensive maritime boundary treaty, but that does not mean that Bangladesh understood Myanmar to say in 1974 that whatever was agreed on the territorial sea would be merely provisional and conditional on broader agreement. Bangladesh's own record of the negotiations shows only that Myanmar was not at the outset inclined to conclude a separate treaty on delimitation of the territorial sea, and would have preferred a

² Rejoinder of the Republic of the Union of Myanmar (hereinafter "MR"), paras. 2.17-2.19.

³ MR, para. 2.17.

⁴ Counter-Memorial of the Union of Myanmar (hereinafter "MCM"), Annex 3, 3rd Mtng, 23/11/74, p.3. See also 1st Mtng, 20/11/74, p. 5, para. 10.

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comprehensive treaty.⁵ Myanmar's records show the same.⁶ But by the end of the negotiations they had concluded the Agreed Minutes on the territorial sea.

Now, even though Myanmar subsequently decided not to agree to the adoption of the draft treaties that Bangladesh had earlier prepared, because it did want a broader agreement, and even if it did reiterate the point in the negotiations, that does not alter or diminish in any way the plain wording of the 1974 Agreed Minutes. The Minutes may indeed be an *ad hoc* agreement – that is what you would expect, but so what? The clear implication of the text is that – however reluctantly – both Parties in the end concluded their broader negotiation by signing a boundary agreement limited to the territorial sea. That agreement was on its face unconditional, save for completing the technicalities. It made no reference to conditionality on any further agreement. Myanmar's version of events is simply not consistent with the text as drafted or with its own record of the 1974 negotiations or with the practice of both States for nearly four decades.

Over the next twelve years the Parties continued to try to negotiate an EEZ and continental shelf boundary, unsuccessfully, as we know. Nevertheless, both Parties accepted and respected the 1974 Agreed Minutes on the territorial sea until 2008, when negotiations on a more comprehensive boundary agreement resumed. They adopted further Agreed Minutes in 2008 and in those Minutes the parties record or the minutes record that the Parties decided, *inter alia*, that "the agreed minutes of ... 1974 will remain the same" – will remain the same – subject to two very minor alterations.⁷

First, and I quote, the Parties "plotted the coordinates as agreed in 1974 of the *ad hoc* understanding on a more recent and internationally recognized chart, as you can now see on the screen, namely Admiralty Chart No. 817". Points 1 and 5 were slightly adjusted on that chart,⁸ but points 2-4 and points 6-7 were unchanged, as a comparison of the two charts will show. The specific coordinates of the revised territorial sea delimitation you can see on the map. You will also find the map at tab 2.4 in your folder. That was the first minor change.

Secondly, the Parties agreed to replace the phrase "unimpeded access" in paragraph 3 of the 1974 Agreement with the rather more up-to-date phrase which reads: "Innocent passage through the territorial sea shall take place in conformity with the UNCLOS 1982 and shall be based on reciprocity in each other's waters." Yesterday you heard the Foreign Minister and Agent for Bangladesh reiterate that commitment, which has proved entirely trouble-free. All of the other terms of the 1974 Agreed Minutes remained the same.

The 2008 Agreed Minutes cannot be read in any other way than as affirming and updating the agreement reached in 1974 and followed thereafter. You will find the full text of those Minutes set out at Annex VII in Vol. III of Bangladesh's Memorial.

It was then some five months later, five months *after* the 2008 Agreed Minutes had been adopted when Myanmar attempted first of all to annul the agreed boundary, allegedly because the 1974 Minutes had been signed before adoption of the 1982 UNCLOS.⁹ Myanmar quickly realized that was not a very sensible approach. They withdrew its attempt to annul the whole agreement, and argued instead that the final point, point 7, had not been agreed. This remains the position taken by Myanmar. It is of course flatly contradicted by the terms of the

⁵ *Brief Report on Negotiations on Maritime Boundary*, 19th-25th November 1974, Memorial of Bangladesh (hereinafter "BM"), Vol. III, Annex 14.

⁶ See Annexes 2-5 of MCM.

⁷ *Agreed Minutes of the meeting held between the Bangladesh Delegation and Myanmar Delegation regarding the delimitation of the Maritime Boundary between the two countries dated 1 April 2008*, BM, Vol. III, Annex VIII.

⁸ Point 1 was adjusted to reflect the co-ordinates agreed in 1980 and Point 5 was adjusted approximately 0.15 km south. See BM, para. 3.27.

⁹ *Report of the Visit of the Bangladesh Delegation to Myanmar regarding the delimitation of the maritime boundary*, Bagan, Myanmar, 4-5 September 2008, BM, Vol. III, Annex 18.

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Agreed Minutes of 1974 and the Agreed Minutes of 2008 and the charts attached thereto. Point 7 is clearly indicated on those charts. It is shown on the 1974 chart and again on the 2008 chart. And if we look again at the 2008 chart you can see it there.¹⁰ There was no indication of any uncertainty or dispute about point 7 when the 2008 Agreed Minutes and chart were adopted or in the negotiations, and there is no uncertainty today. In contrast – and I think this proves the point – there was initially a point 8 in Bangladesh’s original proposal in 1974, but Myanmar did object to that one, and it was eventually dropped.¹¹ If you look at the charts, there is no point 8, so you can see that clearly there was negotiation about at least one point and changes were made, but point 7 was agreed.

So summing up this part of the argument, a territorial sea boundary was agreed in 1974, with seven points, marked on Chart No. 114; it was reiterated and confirmed in 2008 with minor modifications to two points, also marked on an agreed chart. Only since September 2008 has Myanmar contested the course of this previously agreed boundary. In Bangladesh’s submission, Myanmar cannot now change its mind and unilaterally repudiate part of a boundary agreed definitively and put into effect 37 years ago, and respected thereafter.

Mr. President and members of the Court, let me now turn to the legal questions that separate the Parties with respect to article 15 of the 1982 Convention. Article 15, as we have seen, uses the term “agreement”. We all know that a treaty between States is necessarily an agreement binding in international law, whatever its particular designation and article 1 of the 1969 Vienna Convention on the Law of Treaties so provides,¹² but it does not follow that an “agreement” between States must necessarily be in every sense a formally negotiated and binding treaty. Bangladesh takes the view that the 1974 and 2008 Agreed Minutes are “agreements” delimiting the territorial sea boundary in accordance with article 15. Myanmar disagrees and claims that these agreements must be binding treaties,¹³ concluded by representatives with full powers,¹⁴ and must be ratified.¹⁵ Myanmar in effect says that the Agreed Minutes have no legal status because those who conducted the negotiations did not possess full powers; and the Agreed Minutes were never ratified, and they cannot therefore be binding. Myanmar’s approach is not supported by the text of article 15, for reasons I will explain.

But let us suppose, purely for the sake of academic argument, that Myanmar is partly right and let’s suppose that the word “agreement” in article 15 does mean “binding treaty”. Would that be fatal to Bangladesh’s case? Well no, it would not because whether an agreement constitutes a binding treaty has to be determined objectively, by reference to what the text says and the circumstances of its conclusion.¹⁶ The question cannot be answered subjectively by reference to what the parties subsequently say they intended, because they will of course disagree on exactly that point, as they are in this case. In the *Qatar v. Bahrain*, a maritime delimitation case, the International Court had to deal with exactly this article. In

¹⁰ BM, Vol. II, Figure 3.3.

¹¹ 1974 1st Mtng, para. 7, MCM Annex 2; 1974 3rd Mtng, chapeau para., MCM Annex 3.

¹² Article 1(a), Vienna Convention on the Law of Treaties, 23 May 1969, 8 ILM 1969 (hereinafter “VCLT”); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p.112, para. 23 (hereinafter “*Qatar v. Bahrain*”).

¹³ MR, paras. 2.35-2.36.

¹⁴ MR, paras. 2.23-2.38.

¹⁵ MR, paras. 2.29-2.34.

¹⁶ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment of 19 December 1978, ICJ Reports 1978, p. 3, para. 96 (hereinafter “*Aegean Sea Case*”); *Qatar v. Bahrain* paras. 23-30; See A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge, 2007), pp. 49-52; S. Rosenne, “The *Qatar v. Bahrain Case*,” (1995) *Leiden J.Int.L.* 161, 165; C. Chinkin, “A Mirage in the Sand? Distinguishing Binding and Non-binding Relations between States,” (1997) *Leiden J.Int.L.* 223.

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that case, the Court held that agreed minutes of a negotiation constituted a binding agreement, a binding treaty in other words, despite strong disagreement between the parties on whether they had intended to conclude a treaty.

Quoting the *Aegean Sea Case*, the Court said in its judgment that I quote “[i]n order to ascertain whether an agreement of that kind has been concluded, ‘the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up’.”¹⁷ Having examined the agreed minutes, the Court went on in this case to hold. I quote again:

... the Minutes are not a simple record of a meeting...; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.¹⁸

Exactly the same can be said in the present case about the 1974 and 2008 Agreed Minutes. They are not a simple record of a meeting or a summary of points of agreement and disagreement. They articulate a commitment to a clearly defined maritime boundary in the territorial sea. Both Parties have consented to this agreed boundary. The fact that Myanmar and Bangladesh felt obliged to amend the Agreed Minutes in 2008 supports that conclusion. Why would they do so if the 1974 Agreed Minutes did not constitute an agreed boundary? Why would Myanmar then seek to annul the 2008 Agreed Minutes if they too did not constitute an agreed boundary? It makes no sense to amend or annul something that allegedly has no legal significance or effect.

Myanmar says that the “ordinary meaning of the text should not be mistaken for the form”.¹⁹ But as both the *Aegean Sea Case*²⁰ and the *Qatar v. Bahrain Case*²¹ make clear, the content and wording of the text is one of the best possible indicators of the existence of an agreement – the other indicator being the circumstances in which it is negotiated and adopted. There is really no need for me to labour this obvious point again. The very fact that Myanmar makes the argument at all shows how they do actually accept that the ordinary meaning of the 1974 Minutes indicates an agreement between the parties.

Myanmar then attempts to evade these rather obvious points by saying that the 1974 Agreed Minutes are simply an “ad hoc conditional understanding” – that nothing is agreed until everything is agreed.²² They are trying to turn it into the UNCLOS III Conference, I think. They cite David Anderson, a very distinguished former judge of this Tribunal, in an attempt to reinforce their very thin argument, but if you read the quotation from Judge Anderson’s work in full, and they do set it out in the counter-memorial, if you read it in full it becomes clear by the end that he actually supports Bangladesh’s views. Having noted that

¹⁷ *Qatar v. Bahrain*, para. 23.

¹⁸ *Ibid.*, para. 25.

¹⁹ MR, para. 2.13.

²⁰ The Court stated:

Accordingly, whether the Brussels Communiqué of 31 May 1975 does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which the Communiqué gives expression; and it does not settle the question simply to refer to the form—a communiqué—in which that act or transaction is embodied. On the contrary, in determining what was indeed the nature of the act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

Aegean Sea Case, para. 96.

²¹ *Qatar v. Bahrain*, paras. 2.3-2.5.

²² MR, para. 2.5.

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some agreements of a negotiated boundary can be “banked” provisionally – although I wonder whether references to banking in the modern world are perhaps a little unwise – but the references to some agreements that have been negotiated can be banked provisionally until a full agreement is reached, he nevertheless concludes by saying, and I quote: “At the same time a failure to reach full agreement may still yield a partial agreement thereby reducing the scope of the remaining dispute.”²³ That is precisely the position set out by Bangladesh with respect to the 1974 and 2008 Agreed Minutes. Both in 1974 and 2008 the parties sought to reduce the scope of the remaining dispute by reaching an *ad hoc* agreement limited to the territorial sea – a very sensible way to proceed, you may think, familiar to anyone in this room who has ever advised governments on these delicate situations.

Myanmar also tries to buttress its argument by quoting from the *Qatar v. Bahrain* case where the International Court notes that “agreement is not easily to be presumed”. Well fortunately, the Tribunal in the present case has no need to presume an agreement: it has two clearly worded unambiguous texts on which to base its conclusions, supported by detailed charts. Myanmar says that it is “not particularly common” for agreed minutes to constitute an agreement.²⁴ But even Myanmar does not rule out the possibility that agreed minutes may constitute an agreement, as they undoubtedly did in the *Qatar v. Bahrain* case. These are very weak arguments put forward by Myanmar. They really are clutching at straws.

Then they go on to say, and this is their last point, that Commodore Hlaing had no authority to sign an agreement²⁵ and that the agreement has not been ratified. But that argument assumes that an article 15 agreement has to be a formally negotiated treaty, attended by all the panoply of full powers, ratification and so on. Bangladesh does not agree. In its view a less formally negotiated agreement is still fully within the terms of article 15, including, for example, if the agreement takes the form of agreed minutes, a memorandum of understanding, or an agreement between officials, then the full powers envisaged by article 7(1)(a) of the Vienna Convention on Treaties or the ratification envisaged by article 14 are unnecessary.

In such cases the practice of States is to allow the appropriate officials to express the State’s consent without the full powers required for a treaty, and without the need for formal ratification. Let me at this point, draw the Tribunal’s attention to article 7(1)(b) of the Vienna Convention on Treaties. You will also see it on the screen and the tab 2.5 in your folder. Article 7(1) says and I read it out:

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
 - a. he produces appropriate full powers; or
 - b. it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Sir Ian Sinclair, in his book on the Vienna Convention, explains that “Subparagraph (b) [of article 7(1)] is intended to preserve the modern practice of States to dispense with full powers in the case of agreements in simplified form.”²⁶

²³ MR, para. 2.6.

²⁴ MR, para. 2.10.

²⁵ MR, paras. 2.23-2.28.

²⁶ I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn., Manchester, 1984), p. 31.

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Well, that is exactly the situation in the present case. There can be no doubt – and Myanmar does not deny – that Commodore Hlaing was the appropriate Burmese official to negotiate with Bangladesh in 1974. He did not require full powers to conclude an agreement in simplified form. In any case, if he did lack authority to sign, he would only make the agreement voidable, not void.²⁷ It remains valid, in accordance with article 8 of the Vienna Convention on Treaties, if it is afterwards confirmed by the State concerned.²⁸ The Agreed Minutes were adopted in 1974, yet the first occasion on which Myanmar has alleged that Commodore Hlaing lacked authority to sign them was in the pleadings for this case. For 35 years Myanmar respected the agreement and relied on its terms. They were confirmed and re-adopted in 2008. The terminology used in article 8 is afterwards confirmed by that State. They were confirmed in 2008. In these circumstances Myanmar cannot claim a lack of authority on the part of the officials concerned. By confirming and re-adopting the Agreed Minutes in 2008 and implementing them in practice, they have waived any right to make such an argument, and are now estopped from changing their position.²⁹ Frankly, it does not matter because Commodore Hlaing did not need full powers to conclude an agreement in simplified form.

The 1974 Agreed Minutes as amended in 2008 thus remain valid and binding between the parties and Myanmar has done nothing to alter that position. They constitute a binding treaty under international law, and the label “Agreed Minutes” cannot alter that status.

But Myanmar would have you believe that the 1982 Convention uses the term “agreement” in a much more limited sense. They would like you to exclude from article 15 those less formally negotiated agreements that characterize much of modern international relations in a globalised world, even if they are otherwise binding in international law. Myanmar’s conception of the term “agreement” would not have looked out of place at the Hague Conferences of 1899 and 1907, but it looks very outdated today. Even the Vienna Convention on the Law of Treaties uses the word “agreement” more loosely to include instruments that are not formal treaties and are not necessarily even binding. If we take article 31(3) of the Vienna Convention, it refers to “agreements relating to the treaty” and “subsequent agreements” but in neither case is it necessary that these agreements of that kind must themselves be formally negotiated treaties.

Tony Aust, a former foreign ministry legal adviser with great experience in this field, has written in his book on treaties that “There is no need [in the circumstances of article 31(3) of the Vienna Convention] there is no need for a further treaty, since the paragraph refers to an ‘agreement’, not a treaty. Provided the purpose is clear, (he goes on) the agreement can

²⁷ VCLT, Article 8 provides: “An act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorized to represent a state for that purpose is without legal effect *unless afterwards confirmed by that State.*”

²⁸ *Ibid.*

²⁹ *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment of 5 April 1933, PCIJ Series A/B, 22 at pp. 70-71; *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, ICJ Reports 1962, p. 6 at 34; *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 253 at 267-268; M.N. Shaw, *International Law* (5th edn. Cambridge, 2003), pp. 439-440. VCLT, Article 45 also provides:

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

- (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
- (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.

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take various forms.³⁰ He cites, *inter alia*, an agreed minute, an exchange of letters, a decision of the parties, and agreed understandings of some provision in a treaty.³¹

At least 37 articles – I have to be slightly cautious about the number there because there is only so much of my energy can be devoted to counting articles in the 1982 Convention, but I tried, at least 37 articles of the 1982 Convention use the term “agreement”: you will see the list on screen – I will not bore you by reading it out. You can see the sorts of things they cover, a wide variety of activities and articles.

A handful of those articles does use the phrase “international agreement” [article 23 on nuclear powered ships, article 288 on jurisdiction, article 303 on archeological objects and article 311 on relationship to other international agreements]. In those four cases the agreements in question are very likely to be binding multilateral treaties, probably adopted by IAEA, IMO, UNESCO or the UN, but article 15 does not refer to an “international agreement”; it simply talks about “an agreement”. It does not use any other qualifying form found elsewhere in the 1982 Convention. The correct interpretation of any of these UNCLOS provisions will of course depend on the context, but there is no reason in principle why the term “agreement” should always be synonymous with a binding treaty formally negotiated by representatives with full powers to sign and ratify.

To take a random example – and it was random, but it is a good one – from Part III on international straits, an agreement under article 43 to co-operate on navigational aids or prevention of pollution. Agreements of that kind are far more likely to be in the form of a memorandum of understanding or an action plan negotiated between the relevant government agencies. Certainly it would be very odd to insist that only a formally negotiated and ratified treaty could satisfy the terms of article 43. A great deal of maritime co-operation is carried out under less formal bilateral or multilateral agreements. Good examples can be found in UNEP’s Regional Seas Programme, which is replete with agreements and action plans that are not registered at the UN as treaties, or published in national treaty series, or ratified.³²

So, to hold that the word “agreement” is synonymous with a formally negotiated and ratified treaty every time it appears in the 1982 Convention would neither be right nor prudent nor would it reflect the real-world practice of states.

The only authority advanced by Myanmar to justify its contention that such agreements must be formally negotiated treaties is the ICJ judgment in the *Maritime Delimitation of the Black Sea Case*.³³ This case does not decide that only a formally negotiated treaty can delimit a maritime boundary. On the contrary, the Court held that a procès-verbal negotiated in 1949 had already delimited an agreed territorial sea boundary. And if I quote from the judgment, they say that the procès-verbal contains a complete description covering both land territory in the national border area and the maritime territory up to Point 1439.³⁴ The Court held that that was an agreed boundary of the territorial sea.

So the issue before the Court was not the status of the procès-verbal but whether it also established a continental shelf/exclusive economic zone boundary for the purposes of

³⁰ A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge, 2007), p. 239.

³¹ *Ibid.*, pp. 237, 239.

³² 1981 Caribbean Action Plan; 1994 Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region; 1995 Action Plan for the Protection and Development of the Marine and Coastal Areas of the East Asian Region; 1994 Action Plan for the Protection, Management and Development of the Marine and Coastal Environment of the Northwest Pacific Region; 1981 Action Plan for the protection and Development of the Marine Environment and Coastal Areas of the West and Central African Region; 2002 Plan of Action for the Protection and Sustainable Development of the Marine and Coastal Areas of the North-East Pacific; 1995 South Asian Seas Action Plan. See UNEP @ <http://www.unep.org/regionalseas/programmes/unpro/eastasian/instruments/default.asp>

³³ 2009 ICJ Reports p. 61 (hereinafter “*Black Sea Case*”).

³⁴ *Black Sea Case*, para. 57.

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articles 74 and 83. They simply went on to find that the procès-verbal as drafted in 1949, not surprisingly, had not delimited a boundary in the continental shelf or the exclusive economic zone, but it nowhere suggested that the term “agreement” referred to in articles 74 and 83 had to be a formally negotiated treaty rather than a procès-verbal, nor did it say anything that supports Myanmar’s assertions to this effect. It referred simply to “agreements” and carefully avoided any suggestion that a formal treaty was required.³⁵

The *Black Sea* case thus shows that an appropriately worded agreement or procès-verbal between officials is sufficient for the purposes of article 15 and would appear to be equally sufficient for the purposes of articles 74 and 83 even if it is not a formally negotiated treaty.

It is interesting to note that in the *Qatar v. Bahrain* maritime delimitation case the International Court also translated the term “procès-verbal” as “minutes”.³⁶ The 1974 Agreed Minutes which form the basis of the agreement on which Bangladesh relies in this case are very similar or identical to the procès-verbal in the *Black Sea* case. They both record an agreement negotiated by officials with power to conclude agreements in simplified form in accordance with article 7(1)(b) of the Vienna Convention, and Myanmar’s objections to the conclusion of an agreement by officials who lack the full powers to conclude treaties are irrelevant, as are its arguments about ratification. What matters is whether the Parties have agreed on a boundary, even in simplified form, not whether their agreement is a formally negotiated treaty or has been signed by representatives empowered to negotiate or ratify the treaty.

So the 1974 and 2008 Agreed Minutes are thus valid agreements within the terms of article 15, and the annexed charts show exactly where that boundary is located. There is no uncertainty or doubt on that matter.

Mr President, that brings me to my third and final argument, and on this I can be mercifully brief. As I have indicated several times, the existence of an agreed boundary is confirmed by the settled practice of the parties since 1974. Myanmar tries to deny this rather obvious fact,³⁷ but there have been no conflicts over the territorial sea during that long period of time. Fishermen have fished, ships have sailed unimpeded, navies have patrolled their own side of the line, entirely without incident. As the minister said yesterday, there have been no navigational problems over unimpeded access to the Naaf River and Myanmar has not alleged any. This would all be very remarkable indeed if there were no agreed boundary. It is merely commonplace where there is an agreed boundary. All that Myanmar can manage to say is that Bangladesh has not proved any of these things.³⁸ It is a bit difficult to prove the absence of conflict, though I suppose we could try reading the newspapers for the past 30 years! But, of course there is plenty of evidence to show that Bangladesh has policed its side of the agreed boundary without challenge from Myanmar. That is the point of the naval logs and affidavits from fishermen set out in the annexes to its Reply.³⁹

The evidence adduced by Bangladesh shows that fishermen are arrested when they fish illegally or carry illegal immigrants on the Bangladeshi side of the line, and the fishermen appear well aware of the existence of a boundary in the territorial sea.⁴⁰ Again there is no evidence of any fishing disputes one would expect if the boundary was not agreed; and one can think of many fishing disputes that occur in countries where there is no agreed boundary.

³⁵ *Ibid.*, para. 69.

³⁶ 1994 ICJ Reports 112.

³⁷ MR, para 2.68.

³⁸ MR, paras, 2.56-2.68.

³⁹ BR, Vol. III, Annexes R 15, R 16 and R 17.

⁴⁰ BR, Vol. III, Annex R 16.

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Myanmar dismisses the note verbale of 16 January 2008⁴¹ concerning a Myanmar survey vessel conducting research on both sides of the territorial sea boundary,⁴² but the fact is that, however it may dress the matter up, Myanmar did notify Bangladesh of its intention to carry out survey work on both sides of the boundary, and Bangladesh raised no objection thereto.⁴³ Now, why would Myanmar seek Bangladesh's consent if it regarded the whole area as falling within Myanmar's territorial sea? Its conduct in 2008 clearly amounts to an acknowledgment of Bangladesh's sovereignty over the territorial sea up to twelve miles from St. Martin's Island up to the median line, and its own note verbale even made express reference to the 1974 Agreed Minutes in that context.

So all of the circumstances therefore point to the existence of an agreed, trouble-free boundary that has worked successfully since 1974 and continues to work even after it was questioned by Myanmar in 2008.

Mr President, members of the Court, that brings me to my very brief conclusions. The Agreed Minutes of 1974 delimit the territorial sea between Bangladesh and Myanmar. That agreement, as re-confirmed and modified in 2008, is fully within the terms of article 15 of the 1982 UN Convention on the Law of the Sea and it thus constitutes a definitive boundary line within the territorial sea. That boundary is indicated on Special Chart 114 and is subsequently modified on Admiralty Chart No. 817. Its existence is further confirmed by the subsequent practice of the Parties, including the lack of objection and the absence of any disputes.

Mr President, members of the Tribunal, it has been a pleasure to appear before you this morning. I thank you for your patience in listening to me and I now ask you to give the floor to Professor Sands.

The President:

Thank you, Mr Boyle.

I now give the floor to Mr Philippe Sands.

(Short adjournment)

⁴¹ BR, Vol. III, Annex R I.

⁴² MR, para 2.67.

⁴³ BR, para. 2.94.

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STATEMENT OF MR SANDS
COUNSEL OF BANGLADESH
[ITLOS/PV.11/3/Rev.1, E, p. 19–30]

Mr Sands:

Mr President, members of the Tribunal, it is a privilege for me to appear before you in these proceedings on behalf of Bangladesh. I will address Bangladesh's second argument, the delimitation of the territorial sea in the event that the Tribunal concludes, contrary to our primary submission, that there is not already an agreement between the Parties on this matter.

I will not finish, Mr. President, before the break. So, with your permission, I may indicate a suitable moment in my submissions for the 30-minute break.

Bangladesh submits that there is compelling evidence to show that both Parties proceeded to act, for more than three decades, on the basis of a binding, valid effective agreement in force between them on the delimitation of the territorial sea, as set out for you by my friend and colleague Professor Boyle. This boundary was settled definitively by Bangladesh and Myanmar in 1974 and it was reaffirmed in 2008, both Parties have respected that agreement and they have abided by it without apparent incident or protest over four decades. The submissions that I will put before you this morning are to be treated as an alternative. It is only if the Tribunal declines to find an agreement on the delimitation of the territorial sea that the other requirements of article 15 of the 1982 Convention come into play.

Yet even if the 1974 Agreement is put to one side, the result is virtually identical. On your screens you can now see, in green, the 1974 line as agreed. Indeed, it very largely reflects a delimitation that accords with the requirements of article 15 of the 1982 Convention. It is no coincidence that Bangladesh's proposed line is for all practical purposes the same: the line agreed in 1974 is in essence an equidistance line constructed by means of base points located on St Martin's Island and Myanmar's mainland coast. It is, to take the language of article 15, a line that in the view of the Parties in 1974 reflects and I quote: "the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured". On your screens you can now see in addition, in red, the line that Bangladesh proposes in these proceedings only in the absence of a pre-existing agreement. It is abundantly clear, blindingly obvious, that the lines are not materially different, although some minor differences do exist, and I will come back to those in due course.

By contrast to these two lines, Myanmar now proposes a radically different and wholly new line, entirely at odds with what it has been perfectly happy to accept and respect for nearly four decades. You can see that line in black. I pause for a moment to allow the differences to sink in, so that you can see the full extent of the changes that Myanmar now proposes between the black line to the north and the more southern red or green lines. That is in the shaded area. That is the new area claimed by Myanmar, initiated only in the course of these proceedings. Let's be very clear about what is going on here. Assisted by its new legal team, Myanmar has completely abandoned more than three decades of practice and it invites this Tribunal to take an entirely new approach, departing from the 1974 agreed line and appropriating as new territory of Myanmar approximately 240 square kilometres and, most strikingly, newly creating what amounts to in effect a semi-enclave around St Martin's Island. Myanmar, of course, is entirely free to develop its legal strategy as it wishes, but let's be very clear about this: it is totally inconsistent with its own practice, it is inconsistent with the international case law, it is inconsistent with the requirements of article 15 and it is inconsistent with the geographic reality. That inconsistency becomes most marked at a point to the south of St Martin's Island, at points D and E on the chart that you can see on the screens. Myanmar has proposed a new point D by giving to St Martin's a mere six-mile

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territorial sea – that is how they do this – and Myanmar’s proposed point E is pushed westward to the point where it intersects with a wholly novel creature of international law, the so-called mainland-to-mainland equidistance line invented by Myanmar for the purpose of these proceedings. It might be said that this case is, to quote Sherlock Holmes, the curious incident of the changing line. The novel approach has no precedence at all and lacks all juridical merit. The effect is to deprive Bangladesh of a significant part of the territorial sea over which it has exercised sovereignty for more than three decades and to which it has a continuing entitlement. It further exacerbates Bangladesh’s evident geographical disadvantages. Could it be that Myanmar’s newly discovered approach is influenced in any way by a glance across the waters to the impact of the agreed 1974 line – or the proper application of article 15 – to the interests of its newfound Indian friends? Could it be that this is an invention of what Hamlet referred to as a “robustious periwig-pated fellow”? It seems that Myanmar has adopted this approach to support a line of demarcation beyond the territorial sea precisely because it will stop Bangladesh from reaching a 200-mile limit. That is what is going on here.

Mr President, against this introductory background, my submissions are in four parts. First, I am going to address Myanmar’s erroneous assertion that St Martin’s somehow lies, as it now puts it, on the “wrong” side of the equidistance line. Second, I am going to address Myanmar’s equally erroneous claim that St Martin’s is a “special circumstance” within the meaning of article 15 of the Convention.¹ Third, I will explain why Myanmar’s proposed semi-enclave of St Martin’s Island is inconsistent with the law of the sea and cannot be justified, given that St Martin’s is entitled to a full 12-mile territorial sea in accordance with article 15, a fact that was explicitly recognized by Myanmar in the 1974 agreement. The fourth and final part of my submissions will address Myanmar’s proposal to shift the delimitation line around St Martin’s to the west, to a point where it intersects with Myanmar’s curious mainland-to-mainland equidistance line.

But before addressing these four sets of submissions, it is appropriate to recall that there are at least six points that are important that are not in dispute between the Parties. First, Bangladesh and Myanmar agree that the law applicable to the delimitation of their territorial sea is article 15 of the 1982 Convention. In the absence of agreement, the territorial sea is to be delimited by an equidistance line, subject to any special circumstances or historic title. Neither Bangladesh nor Myanmar claim historic title in the relevant area. Myanmar’s claim that St Martin’s is a “special circumstance” is new.

A second point of agreement is that St Martin’s is an island within the meaning of article 121 of the 1982 Convention. It is inhabited by a very large number of people and it sustains extensive economic activity, including a vibrant and international tourist area; it serves as an important base for operations of the Bangladesh Navy and Coast Guard. It is not a rock and it is not a “clod”, as John Donne put it. Relatedly, there is no dispute that Bangladesh has – and has always had – sovereignty over St Martin’s, and Myanmar accepts that St Martin’s Island “can (and I quote) generate maritime areas”.² A third point is that both Parties agree that St Martin’s Island is properly to be taken into account in drawing the base-points that are to be used in drawing an equidistance line in the territorial sea.

A fourth point of agreement is that the Parties have no difference as to the location of the land boundary terminus. In fact, the location was agreed between Burma (as it then was) and Pakistan as far back as 1966. It is located where the centre of the main navigational channel of the Naaf River meets the sea. In 1980 the precise co-ordinates were agreed and have been relied upon by both Parties ever since.³

¹ RB, para. 2.8; RM, para. 3.8.

² CMM, para. 4.53.

³ CMM, paras 2.27-2.29, 4.68; RB, para. 2.9.

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Fifth, the Parties agree that, despite the name that has been given to it, Oyster Island is not an island and is not to be given any effect in the delimitation of the territorial sea.⁴ It is a tiny, uninhabited rock within the meaning of article 121(3) of the Convention, approximately 10.5 miles from Myanmar's mainland and 26 miles from Bangladesh. It sustains "no human habitation or economic life of its own" within the meaning of article 121.

And finally, it is appropriate to mention that both Parties admit that Admiralty Chart 817 "is the most accurate chart for the area" and that it has been an agreed basis for plotting the boundary in the territorial sea.⁵ As Mr Reichler explained to you yesterday, on the basis of Admiralty Chart 817 there is no material difference as to the distance of St Martin's from Bangladesh or Myanmar: it lies, on Chart 817, 4,547 miles from Bangladesh, 4,492 miles from Myanmar and - amazing coincidence - exactly the same distance, 4,492 miles, to the land boundary terminus. The written pleadings have made reference to other figures⁶ based on other charts or satellite images, but in no case can it be said that there is any material difference for the purposes of the Parties' respective claims as to proximity. With these points of agreement, important points of agreement, one can see why the parties were, as far back as 1974, easily able to reach agreement on the delimitation of the territorial sea.

Mr President, against that background I now turn to our first submission, which addresses Myanmar's first argument against giving full effect to St Martin's Island in the territorial sea. For the purpose of supporting its claim that St Martin's is a "special circumstance" and as such not entitled to enjoy a full 12-mile territorial sea, Myanmar has conjured up the argument that it somehow lies on the "wrong" side of the equidistance line that is to be drawn in accordance with article 15. It makes this point frequently, no less than ten times, in its written pleadings; so it would be churlish to accuse Myanmar of subtlety.⁷ Let us deal with the matter logically. First, there is no legal authority for the proposition that the presence of an island on the "wrong" side of an equidistance line - assuming that to have been established - is a matter having any relevance to the weight to be accorded to the island in the delimitation of the territorial sea. In the ICJ Case of *Nicaragua v. Honduras*, for example, a recent example where the islands certainly were on the "wrong" side of an equidistance line, to take Myanmar's parlance: the ICJ ruled without any hesitation that four Honduran islands situated on the Nicaraguan side of the bisector line were to be accorded a full - a full - 12-mile territorial sea. Each was significantly further from the mainland; each was much smaller, and they were scarcely inhabited.⁸ So even if St Martin's was on the "wrong" side - we say it is not - there is no support in law for Myanmar's claim that St Martin's is entitled to anything other than a full 12-mile territorial sea and it has to be fully taken into account, we say fully, for the delimitation of maritime areas beyond the territorial sea.

Myanmar's "wrong" side argument is no stronger in fact than in law. Myanmar asserts that St Martin's lies "in front of the Myanmar mainland coast",⁹ and that it is situated "south of any delimitation line properly drawn from the coasts of the Parties".¹⁰ This is

⁴ RM, Chapter 3, footnote 169 ("the territorial sea of May Yu Island (Oyster Island) does not overlap with any Bangladesh territorial sea. Therefore May Yu Island (Oyster Island) does not influence the territorial sea boundary.")

⁵ RM, para. 5.25; RB, para. 2.4; CMM, para. 3.43.

⁶ MB, para. 2.18; CMM, para. 2.8; RB, paras. 2.63, 2.67, 2.76, 3.110; RM, para. 3.11.

⁷ CMM, paras. 4.8; 4.52; 4.66; 4.71; 5.153; RM paras. 1.5; 3.3; 3.14; 3.26; 5.34.

⁸ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, para. 302.

⁹ RM, para. 3.18.

¹⁰ RM, para. 3.14.

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simply wrong. It is just wrong, and it is premised on Myanmar's curious conception of frontage and its particular use of the words "properly drawn". What are the geographic facts? On your screen you can see St Martin's, at tab 2.7 of the Judges' folder. Two points are immediately apparent: first, on Chart 817 you can see that St Martin's is pretty much just as close to Bangladesh as it is to Myanmar: in fact the difference, Mr President, is 88 metres, less than the distance from where you are sitting from the front entrance of this Tribunal, something that *Usain Bolt* could probably run in less than nine seconds. Second, St Martin's lies well within the 12-mile limit drawn from Bangladesh's coast, shown here in darker blue. St Martin's is as much "in front of" Bangladesh's coast – to use Myanmar's bold expression – as it is "in front of" Myanmar's coast.

Bangladesh has not disputed that St Martin's Island lies south of an entirely hypothetical so-called mainland-to-mainland delimitation line, but that is not the proper approach: St Martin's does not lie south of a delimitation line "properly drawn" in accordance with the requirements of article 15. Myanmar's so-called "wrong" side argument simply ignores St Martin's Island; it is as though the island does not exist. Myanmar would like the island to just go away, to be a non-island, to be an ex-island. Well, it has been there for a long time and it has been there throughout the 37 years in which they have respected the 1974 Agreement, which of course took account fully of the geographic reality. Equally significantly, for the purposes of this case, the approach also contradicts Myanmar's earlier statement that St Martin's Island is entitled to "generate maritime areas".¹¹

Now, in its Rejoinder Myanmar recognises that "the delimitation of the territorial sea between the Parties must be effected in accordance with the rules embodied in article 15", and what this means for the present case, in application of the equidistance/special circumstances rule of article 15 is that the boundary must first follow the median line between St Martin's Island and the Myanmar's mainland coast.¹² Bangladesh agrees with that in so far as it goes: a "properly drawn" delimitation line in the territorial sea, drawn in accordance with the requirements of article 15, is an equidistance line that is controlled by base points located on Myanmar's mainland coast and on St Martin's Island.

But, Myanmar's "wrong side" argument depends in large measure on a cartographic manipulation. For St Martin's to be on the "wrong side" of an equidistance line, it would have to be located at a sufficient distance from the terminus of the agreed land boundary so that it could not provide any legitimate base points in accordance with the 1982 Convention. On your screen you can see the situation as it is now. Let's see what happens when we start moving St Martin's Island, which you will see in the animation. That is how they draw their line; they just disappear St Martin's. They have to move it a distance of 11 miles south east in order to draw their entirely artificial line. What are they doing? They are re-fashioning geography. Time after time, the case law has told us that it is not something an international court or tribunal is entitled to do. St Martin's does not have wheels, Mr President.

The first sentence of article 15 makes it clear that Myanmar's "wrong" side approach is simply unarguable. It says: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled ... to extend its territorial sea beyond the median line of every point which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of *each* of the two States- each of the two states - is measured." Myanmar has long accepted that St Martin's coastline lies opposite its own mainland coast, and it continues to do so in its written pleadings in this case. It has not disputed at all that St Martin's provides legitimate base points for the construction of an article 15 equidistance line. And from this concession it must follow that article 15 provides

¹¹ CMM, para. 4.53.

¹² RM, para. 1.6.

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for an equidistance line derived from the actual costal geography – not a hypothetical line based on Myanmar’s conception of moving islands. Myanmar cannot ignore the geographical reality that St Martin’s is where it is. Mr President, it is not anywhere else. There is no basis under the 1982 Convention for Myanmar to claim that St Martin’s is on the “wrong” side of the equidistance line. We invite you to reject this argument and to do so robustly.

I turn now to our second submission, on Myanmar’s claim that St Martin’s is not entitled to have a full 12-mile territorial sea. Why? Well, Myanmar says, and I quote, because its “presence ... in this geographical location is a classical example of ‘special circumstance’ within the meaning of Article 15’s second sentence ...”.¹³ Well, just pause for a moment here, there is a certain inconsistency, it has to be said. The extreme concavity of Bangladesh’s entire coastline is not a “special circumstance” but this moving island is! To support its claim, Myanmar invokes an alleged “confluence” of three factors: (1) that Bangladesh and Myanmar’s coastlines are adjacent not opposite; (2) the location of St Martin’s Island close to the terminus of land boundary and “in front of the Myanmar mainland coast”; and (3) – another new idea they have conjured up – the lack of any “balancing islands within 12 nautical miles”.¹⁴ And these three factors it is said that lead to the conclusion, as night follows day, that St Martin’s has to be treated as a “special circumstance”. Well, this, frankly, is a very striking argument. They are robust assertions, but that is all they are – robust assertions - because Myanmar has not been able to find a single legal authority in 21 decided cases to support its approach. It is entirely unsupported by any judicial or arbitral authority. Mr President, it has been very clear again what Myanmar is asking you to do. You are a court; you are not a legislature. They are asking you to legislate a new rule of international law, and we say you cannot do that.

Myanmar’s inability to find a single case in which an island located close to the coast, within the territorial sea, with a population, with economic and military activity comparable to that of St Martin’s, is really destructive of its argument. Faced with this unfortunate reality, Myanmar has opted to invoke a series of cases in which islands in no way comparable to St Martin’s Island have been accorded less than full effect. Mr President, this is pretty desperate stuff. Take, for example, the Court of Arbitration’s findings on the Channel Islands in the *Anglo French Continental Shelf Case*. This is a case on which Myanmar places heavy reliance.¹⁵ Myanmar says that “The Court of Arbitration decided that the Channel Islands could not generate full maritime zones, but that, due to their position, they must be treated as a special circumstance...”¹⁶

Well, the first point to make is an obvious one. In that case the tribunal was delimiting the continental shelf, not the territorial sea. Moreover, according to Myanmar, it was the position of these islands that merited their designation as a special circumstance by the Court of Arbitration. The point that Myanmar has difficulty with, as many of you know, is that the Channel Islands are located more than 60 miles from the United Kingdom mainland. You can see that on your screens. It is very clear that the Channel Islands lie far outside the limits of the United Kingdom’s territorial sea, and immediately off the coast of France. The Channel Islands, Mr President, are not 4.5 miles from the United Kingdom coastline.

Bangladesh fails to see how the Court of Arbitration’s designation of Channel Islands “situated not only on the French side of the median line drawn between two mainlands, but also practically within the arms of a gulf on the French coast” can provide any support for Myanmar’s assertion that St Martin’s is to be treated as a “special circumstance”. Indeed, the

¹³ RM, para. 3.11.

¹⁴ RM, paras. 3.15-3.18.

¹⁵ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

¹⁶ CMM, para. 4.55.

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Court of Arbitration went so far as to explicitly distinguish the Channel Islands from islands like St Martin's. It said that the case of the Channel Islands is, and I quote "quite different from that of small islands on the right side or close to the median line".¹⁷ Let me emphasize those words: "quite different from that of small islands on the right side or close to the median line".

Other cases in which international courts and tribunals have determined an island to be a "special circumstance" are readily distinguishable from the present case. In *Qatar v. Bahrain*, the island of Qit'at Jaradah was treated as a special circumstance, but is totally different from St Martin's. The ICJ ruled that it "is a very small island, uninhabited and without any vegetation. This tiny island ... is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a base point in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature."¹⁸ No such words can be used in relation to St Martin's, which is obviously not an "insignificant maritime feature", and a comparison of the two islands makes this crystal clear, by reference to size, population and activity. Now, on your screens you will see a satellite photograph, and it is also at tab 2.10, which is a comparison of both islands. They are shown in this image to exactly the same scale. The coastlines of both islands are shown in bright red. Bright Red. Those cover the areas permanently above water. On the right is Qit'at Jaradah, on the left is St Martin's. Mr President and the Tribunal, I wonder if you can even see the red dot in relation to Qit'at Jaradah; it is uninhabited, it has no vegetation, and it is entirely different from St Martin's.

But in that case of *Qatar v. Bahrain* there were islands that were relevant on which Myanmar was conspicuously silent. At Tab 2.11 you will be able to see the Hawar Islands that fall under Bahraini sovereignty and have a permanent population of less than 4,000. Now, as you can see on the screen, they are located a greater distance from Bahrain's coastline, that is about ten miles, but very close indeed to Qatar. One would have expected in these circumstances, on Myanmar's approach, for the Hawar Islands to be treated as a special circumstance but the ICJ said they were not a special circumstance. We pointed this out in our Reply. What did Myanmar have to say in its Rejoinder? Nothing.¹⁹ We look forward to hearing next week what they have to say about Hawar, and why the International Court of Justice got the law wrong. On the basis of the treatment accorded to the Hawar islands, it is very difficult to see how Myanmar can argue with a straight face that St Martin's must be treated as a special circumstance on the basis that it is just as close to Myanmar as it is to Bangladesh and because it lies "in front" of both coasts.

Mr President, Myanmar is seeking to manufacture a special circumstance where there is none. We invite you to reject also this argument that it is to be treated as a special circumstance, and to do so equally robustly.

Mr President, this brings me to a point in the speech that may be appropriate for a 30-minute break and I wonder whether with your permission I should stop here or proceed.

The President:

If you so wish we will now take a break. We will resume at twelve.

(Short adjournment)

¹⁷ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, para. 199, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

¹⁸ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, I.C.J. Reports 2001, para. 219.

¹⁹ RB, para. 2.74.

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The President:

We resume the hearing. I give the floor to Mr Sands.

Mr Sands:

Mr President, members of the Tribunal, I just concluded just before the break with my second submission inviting you to reject the argument that St Martin's should be treated as a special circumstance.

So I turn now to our third submission on this issue of the delimitation of the territorial sea and it is based on the evidently simple and correct proposition that St Martin's is where it is and not where Myanmar would like it to be. There is no basis in law or in fact, we submit, for it to be treated as a special circumstance. And against that background, article 15 inevitably requires that St Martin's Island be given full effect and accorded no less than a 12-mile territorial sea. And that is, of course, exactly what was reflected in the 1974 agreement, as Professor Boyle described to you.

It is appropriate to highlight some of St Martin's more salient features. As you can see from the four photographs on your screen, there is ample evidence of human activity; you can see land cultivation, boats, large buildings and antennae. It is 8 square kilometres in size; it supports a population of some 7,000 permanent residents. It is extensively cultivated and produces enough food to meet the needs of a large proportion of its residents. And as Mr Reichler said on Thursday, it does also receive more than a quarter of a million tourists annually, and has an important function as a naval and coastal base. In fact, I have been there and seen for myself how vibrant a place it is. Myanmar does not dispute any of these facts.

I have already mentioned that on Admiralty Chart 817 St Martin's is located only 4.5 miles from the Bangladesh mainland, and Myanmar also of course does not dispute that it is an island, a naturally formed area of land surrounded by water, which is above water at high tide. So determined, an island is entitled to a full 12-mile territorial sea, as well as its own continental shelf and Exclusive Economic Zone. This is also a well-established principle of customary international law.²⁰ In disregard of these undisputed facts, Myanmar is now inviting you to cast aside these well-established rules of international law and make up a new approach, one that would delimit by way of a line that cuts across the southern portion of the territorial sea over which St Martin's has had sovereignty over the past four decades. We urge you to reject this argument, based on the realities of the situation.

St Martin's is a coastal island and as such it forms an integral part of the coast of Bangladesh. Myanmar argues that two cases in which an island or a group of islands were designated as coastal islands are different from the present case. For example, it distinguishes the award in *Guinea v. Guinea Bissau* on the basis that the islands in that case "lay immediately off the mainland coast which was under the same sovereignty as the islands themselves."²¹ It makes the same argument in relation to the findings of the Tribunal in *Yemen v. Eritrea*, arguing that the islands in that case were "situated off the coast of the State to which they belonged."²² With respect, these cases really do not assist Myanmar's contention. You have seen the charts. St Martin's is as immediately off the coast of Bangladesh as the islands in those two other cases, or off the coast of the mainland State.

Myanmar's assertion that St Martin's Island should be given less than full effect in the delimitation within 12 nautical miles²³ is, we say, entirely without merit. In fact, it is

²⁰ See Y. Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006), at p. 184. RB, Vol. III, Annex R28.

²¹ RM, para. 3.20.

²² RM, para. 3.21.

²³ RM, para. 3.26.

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undermined by Myanmar's own practice over more than three decades. None of the cases cited by Myanmar, several cases, helps its cause. In no case was reduced effect given to any island located in the territorial sea. The vast majority of these cases invoked by Myanmar were concerned exclusively with the weight to be accorded to islands on the continental shelf, in the EEZ, not in the territorial sea. Of course, my colleagues will return to this next week. This was so, for example, in the *Tunisia v. Libya Continental Shelf* case. The weight to be accorded to the islands referred to by Myanmar, in that case the Kerkennah Islands and the Island of Jerba, was only in relation to the delimitation of the continental shelf, not the territorial sea.²⁴ The same is true of the French Islands of St Pierre & Miquelon, which received full effect within the territorial sea.²⁵ So these cases just do not support Myanmar's attempt to usurp St Martin's territorial sea entitlement.

There are other cases cited by Myanmar but these two are, frankly, easily distinguishable on the facts. In the *Anglo French Continental Shelf* case a number of different islands were at issue.²⁶ Myanmar seeks support from the half-effect accorded to the United Kingdom's Scilly Isles and makes much of the fact that these isles "are located in front of the British coast, not the French coast",²⁷ but what they prefer to forget is that the Scilly Isles are not 4.5 miles off the coast of the United Kingdom; they are 21 miles from the mainland United Kingdom coast. That is significantly further than St Martin's and, perhaps even more significantly, well outside the limit of the territorial sea as drawn from the mainland. So, that example really is not analogous to the present case.

It is interesting that Myanmar fails to address adequately the French island of Ushant, which in many respects is more comparable to St Martin's and it was accorded full effect. The Court of Arbitration determined that Ushant "not only forms part, geologically, of the land mass of France but lies no more than 10 miles from the French coast within the territorial sea of the French mainland".²⁸ Ushant has a population of less than 1,000 but it is located five miles further from the French coast than St Martin's, but it was accorded full effect.

What does Myanmar have to say about this argument? It tries to distinguish the case on the basis that the Court of Arbitration was in that case dealing with two sets of arguments: one belonging to France located in front of its coast; the other belonging to the United Kingdom located in front of its coast. By contrast, says Myanmar, in the present case St Martin's Island stands alone.²⁹ Well, with respect, it is just not correct to claim that St Martin's stands alone, given its close proximity to the coast of Bangladesh, closer to it than Ushant is to the coast of France.

Referring to the *Dubai v. Sharjah Arbitration*,³⁰ Myanmar also claims that St Martin's is more like Abu Musa; it is an island of 12 square kilometres with just 500 inhabitants.³¹ But as Myanmar itself acknowledges, the tribunal in that case accorded Abu Musa a full 12-mile

²⁴ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, paras. 2, 4.

²⁵ *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149, at paras. 66-74. Reproduced in MB, Vol. V.

²⁶ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

²⁷ RM, para. 5.31.

²⁸ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision of 30 June 1977, para. 248, reprinted in 18 RIAA 3, reproduced at MB, Vol. V.

²⁹ RM, para. 5.31.

³⁰ *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, International Law Reports (I.L.R.), Vol. 91, 1981, p. 677.

³¹ CMM, para. 5.97.

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territorial sea. Where is it located? It is located 34 miles from the coast of Sharjah, in the middle of the Persian Gulf.³²

Another case that Myanmar invokes is the decision of the International Court's Chamber in the *Gulf of Maine* case, which accorded Seal Island only half effect.³³ Again, the facts are relevant and they are different. Seal Island is located some 15 miles from the coast of Nova Scotia, seaward of Canada's territorial sea, measured from the mainland. Not only is it half the size of St Martin's and more than three times further from the coast, but it also only sustains two small settlements of fishermen and no year-round population.³⁴ We say the facts are very different in that case.

In fact, all of the cases relied upon by Myanmar are distinguishable and none supports the claim that St Martin's should be given anything less than full entitlement to its maritime zones. The International Court's two most recent maritime delimitation cases are also highly relevant to the issue of the weight to be accorded to islands in the territorial sea. Both clearly support the position adopted by Bangladesh, confirming the propriety of the approach taken by both States in reaching their agreement in 1974, namely to give St Martin's a full, 12-mile territorial sea. In *Nicaragua v. Honduras*, Nicaragua argued that a number of small cays, all located more than 20 miles offshore, should be enclaved, and accorded a territorial sea of only three miles.³⁵ You can see again in the same scale charts on your screen and at tab 2.14 the comparison between on the left-hand side our case of St Martin's and on the right-hand side the Honduran cays. The Court rejected Nicaragua's argument. Every single one of these cays was given a full 12-mile territorial sea.³⁶

And the same approach was taken in *Romania v. Ukraine*, which you can see on the screen and which is also at tab 2.15. Serpent's Island, which was the island at issue in that case, was accorded a full 12-mile territorial sea, despite the fact that it is located some 20 miles offshore and is nearly 50 times smaller than St Martin's.³⁷ If small islands like this at a far greater distance sustaining tiny populations or no population at all are to be given a full, 12-mile territorial sea, it is really very difficult to see on what basis St Martin's should be treated differently.

Myanmar accepts, as it is bound to do, that the two cases I have just mentioned are, as it puts it, relevant, and it acknowledges that both cases dealt with a lateral delimitation between adjacent mainland coasts in the vicinity of islands. It also accepts, as obviously it has to do, that in both cases the ICJ did accord the islands in question a full, 12-nautical-mile territorial sea.³⁸ Frankly, it is hard pressed to find ways to distinguish these cases but, ever inventive, it has done so, or sought to do so, on two grounds. First, it asserts that both cases reflect what it calls "the practice of the International Court of Justice of conceptualizing coasts in terms of the predominant mainland relationship"; second, it asserts that the International Court's approach reflects what it calls "the practice of enclaving islands located in the vicinity of, and especially on the 'wrong' side of, a mainland delimitation line".³⁹ Both arguments are wrong. The ICJ has not developed any sort of "predominant relationship" test.

³² CMM, para. 4.57.

³³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984.

³⁴ RB, para. 3.121.

³⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 300.

³⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, para. 302.

³⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, para. 219.

³⁸ RM, para. 3.24.

³⁹ RM, para. 3.24.

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In neither *Nicaragua v. Honduras* nor in *Romania v. Ukraine* were islands “in the vicinity of” the coast, since in both cases they were well beyond the 12 miles from the coast; they were well outside the mainland territorial sea. The enclaving approach, to which I am going to return, occurs outside the territorial sea, not within. That is a vital difference with this case. A key point is that Myanmar has simply no answer to the fact that the ICJ gave a full, 12-mile territorial sea to the islands in both cases.

Now, Myanmar then invokes alleged State practice to support its argument that St Martin’s should not be accorded full effect in the territorial sea, but again we say the approach is flawed; it is deeply flawed for the same reason. Almost all of the practice it invokes concerns the delimitation in the continental shelf or EEZ and it deals with islands that are geographically very different from St Martin’s. Of all the examples given,⁴⁰ only two are concerned with a delimitation within 12 miles of a mainland coast. The first is the 1969 agreement between Qatar and Abu Dhabi. Myanmar seeks support from the two States’ decision to accord Daiyina Island a three-mile territorial sea, but the treatment of Daiyina Island in the 1969 agreement is not pertinent to this case. First, the 1969 agreement did not purport to give effect to an emerging 12-mile rule. By contrast, as you will recall from the first plate I showed you, the 1974 agreement, signed just five years later, or agreed just five years later, did reflect a full, 12-mile territorial sea, in terms, for St Martin’s Island up to point 7. Second, there are geographic factors that also explain why so little effect was given to Daiyina. It is a remote, uninhabited maritime feature; it is 2.5 kilometres long and less than 1.5 kilometres wide, and it is located more than 35 miles from the coast of Qatar. If full effect had been given to this island, a substantial inequity might have resulted for Qatar. But, most important and not addressed by Myanmar and especially relevant to this case, is the motivation for the 1969 agreement. It was largely intended by both parties to equitably allocate valuable oil deposits in the vicinity of Daiyina Island.⁴¹ That is what that agreement was about.

The second agreement cited by Myanmar on the weight accorded to islands in the territorial sea is the 1978 Treaty between Australia and Papua New Guinea. You can see this on your screen and it is at tab 2.17. The Australian islands of Saibai, Boigu and Dauan, just south of Papua New Guinea, are located two, three and five miles respectively from the coastline but more than 75 miles from the Australian mainland. It is plain, you just have to look at the plate, to see that this is completely different from the geographic realities faced by Myanmar in the present case.

There is another problem with Myanmar’s invocation of practice. Whilst it is happy to reach out to the practice of third States, it would rather not talk to you about its own practice, and why is that? It is because Myanmar’s practice directly contradicts the approach that it has taken in these proceedings. As Professor Boyle explained, part of that practice was the 1974 agreement, which gave St Martin’s full effect and was respected fully until 2008, but it is not the only bit of Myanmar practice that is relevant. There is other practice which also supports this approach. For example, there is the 1980 Myanmar-Thailand agreement. You can see this now or ought to be able to see it shortly on your screens; if you can’t it is at tab 2.18. You will see in the middle of the page Myanmar’s Aladdin Islands, which lie south-west of the land boundary terminus. They are significantly smaller than St Martin’s Island and they are much further offshore than St Martin’s. But what does the 1980 agreement do? Well, surprise, surprise, like the 1974 agreement, it gives full effect to the Aladdin Islands. It does not adopt a hypothetical “mainland equidistance” line. You can see that line in black. If

⁴⁰ CMM, para. 4.60.

⁴¹ J. I. Charney & L. M. Alexander, *International Maritime Boundaries*, (1996), Vol. II, at p. 1543.

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Myanmar had followed the approach it urges upon you in these proceedings, that is the line that it would have drawn and it did not do so.

And it is not the only agreement reflecting Myanmar's practice. Six years after that agreement, it entered into another agreement, this time with India and in relation to the delightfully named Little Coco Island. You can see that on your screens. Little Coco is about the same size as St Martin's but it sustains no known population. It is located some 130 miles from Myanmar's coast. That is a very significant distance. But it is only 21 miles from India's Andaman Islands. In the 1986 agreement, Little Coco Island (over which Myanmar has sovereignty) was the sole controlling point for the delimitation up to a distance of 235 miles. You can see that on your screen. It was given full effect within 12 miles and beyond 12 miles. Now against that background, on what basis can Myanmar reasonably sustain the argument it is encouraging you to adopt in these proceedings?

With great respect, Myanmar may wish to disown this practice, but that practice is devastating for its case before this Tribunal, because here we have two relatively recent examples in which islands are given full effect, a full 12-mile territorial sea. Therefore, on what basis does Myanmar seek to disown its own practice that is inconsistent with the argument in this case? Well what it says is: "[t]here may be many reasons of policy why a particular negotiated maritime boundary is agreed between two States; the fact that State A has reached a particular solution in its negotiations with State B is of no significance when it comes to a third-party decision on the maritime boundary between State A and State C."⁴² Well of course, we must not forget that just a little earlier Myanmar invoked the 1969 Agreement between Qatar and Abu Dhabi, so it has to be consistent. It either likes agreements involving third States or it doesn't, it cannot have it both ways. The inconsistencies, the contradictions, in its approach are self-evident and, with respect, no amount of creative periwigged-thinking can justify a State's wholesale abandonment of its own practice.

Myanmar seeks to distinguish the 1980 Agreement with Thailand on three grounds.⁴³ First, it argues that the starting point of the delimitation, point 1, is located 47 miles from the terminus of the land boundary. That may well be the case, but it fails to deal with the fact that the 1980 Agreement does not endorse the use of the kind of hypothetical mainland-to-mainland line that Myanmar urges upon you. In 1980 Myanmar did not agree to cut into the territorial sea of the Aladdin Islands to deprive them of a full 12-mile territorial sea. Myanmar's second argument is that a first part of the delimitation – that near the mouth of the Pakchan River – was agreed as far back as 1868 by Great Britain and Siam (as it was then known) and hence allows the example to be distinguished. But why should that make any difference? Why should that be the case? In this case, the land terminus between the Parties was agreed by Pakistan and Myanmar in 1966, nearly 50 years ago, and ratified and then taken forward by Bangladesh and Myanmar in 1974, so we do not see that's a reason to distinguish. Third, Myanmar tries to distinguish the 1980 Agreement by pointing to other offshore islands which it alleges have the effect of offsetting the effect of Aladdin Islands. However, it provides no evidence to show that the Parties adopted this approach, and it has not explained why, in the absence of these balancing islands, the agreed delimitation would have been any different.

Myanmar also tries to distinguish the 1986 Agreement with India on the basis of its alleged practice in relation to islands which are less significant and further from its coast than is St Martin's. Myanmar says that Little Coco is different from St Martin's because the 1986 Agreement dealt with the delimitation of opposite coasts. Well we ask why as a matter of

⁴² RM, para. 3.28.

⁴³ RM, para. 3.28.

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principle, having regard to the text of article 15, should a difference of approach automatically follow. We say that it does not.

There is another basis upon which Myanmar tries to distinguish Little Coco. It says that it is part of what it calls “a string of islands”⁴⁴ and therefore carries more weight in the delimitation. The only word that I can think of for that argument, Mr President, is hopeless. The nearest island to Little Coco is 8 miles away. The next closest island is then 50 miles away. This is not a string of islands any more than a necklace comprising three pearls at a great distance from each other can be called a string of pearls. By contrast to all of this, St Martin’s is only 4.5 miles off the Bangladesh mainland coast.

Finally, Myanmar concocts another novel argument to justify its claim that full effect should not be given to St Martin’s. It says that to do so would undermine what it calls “security interests” and the right of “unimpeded passage and access from the mouth of the Naaf River to the open sea...”⁴⁵ Mr President, we very much appreciated the question that was put to us by the Tribunal at the meeting earlier this week on Wednesday afternoon, inviting both Parties to clarify their positions with regard to right of passage of ships of Myanmar through the long existing 12-mile territorial sea around St Martin’s, but the situation is crystal clear: since 1974 these ships have had an unimpeded right of passage, and there is no evidence to the contrary.

Now, the argument might perhaps have legs if Myanmar could adduce any evidence to show that since 1974 its security interests have somehow been undermined, or that there were any problems with passage to and from the Naaf River. However, not once in the 30 years after the Parties agreed to the boundary in 1974 has Myanmar claimed that St Martin’s should not be entitled to a full territorial sea on the basis of alleged security or right of passage interests. In fact, it was only when the Counter-Memorial was filed in December 2010 that Myanmar for the first time raised this argument in the way it did, and it did so, so powerful was the argument, by devoting just one line to it at paragraph 4.66 of its Counter-Memorial. So we responded at paragraph 2.68 of our Reply. We made two points: first we said, that Myanmar has advanced no evidence as to any problem since 1974 regarding passage; and, our second point was, that a move of the boundary line from point C (more or less where it was agreed in 1974) to points D and E would not accomplish that putative objective. Now, one would have expected the Reply having been filed, for Myanmar to respond in its Rejoinder with a welter of evidence about all of the problems that exist in relation to this matter. Yet they have provided not a shred of evidence. Nothing, nada, rien on this issue. They have not identified a single occasion on which the existing agreed line has created any difficulty in terms of rights of passage, and we pointed this out in the Reply.⁴⁶ Myanmar, in its Rejoinder, says: “Bangladesh accuses Myanmar of providing no evidence that the right of unimpeded passage has been problematic in any way.”⁴⁷ I read that and thought, “OK, here it comes, we are going to have 47 witness statements, annexes of diplomatic notes of protest and all the other things that many of us are so used to in so many of these cases”, but there was nothing. Instead, they say – and you will see it underlined there – “Future tensions cannot be excluded”. Mr President, it is not the function of an international court or tribunal to engage in speculation, and in particular speculation that has no connection with reality and is unsupported by any evidence. This is a court of law and evidence, not a court of speculation. It is a well-established general principle of international law that “it is

⁴⁴ RM, para. 5.32, citing RB, para. 3.123.

⁴⁵ CMM, para. 4.66.

⁴⁶ RB, para. 2.68-2.69.

⁴⁷ RM, para. 3.30.

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the litigant seeking to establish a fact who bears the burden of proving it”,⁴⁸ and Myanmar has patently failed to meet this test. The extent of its response had been to cite two cases in which mention was made of security interests being taken into account in a delimitation. And no doubt that may be right where there is evidence of a genuine issue, but in this case there is no such evidence. Myanmar has not demonstrated that at any point in the past 37 years has the question of passage through the territorial sea of St Martin’s ever been an issue.

Mr President, the “access relief” argument is wholly unsustainable. Having failed to produce any evidence as to a problem, nevertheless Myanmar continues to propose a new point D on the line of delimitation, which cuts across St Martin’s existing territorial sea – you can see it there on the screen – but you will see straightaway from just looking at the chart that it does nothing to improve Myanmar’s access to the mouth of the Naaf River. The point at which access to the Naaf River is most constricted is not around points C, D and E, where Myanmar’s proposed line diverges from the 1974 Agreement and article 15, it is at Myanmar’s points B to B5 at the mouth of the river, which you can see on the screen. Therefore, the question for Myanmar is this: if it is so concerned about unimpeded passage to the mouth of the Naaf River, why has it proposed cutting off St Martin’s to the south and proposed nothing to allegedly improve access near the mouth of the Naaf River?

Mr President, Members of the Tribunal, I hope this clarifies the response to your question. Myanmar has simply no answer to that question; it is stuck with its bilateral, peaceful, untroubled practice with Bangladesh over nearly four decades, with its own practice with Thailand and India and with all the established international case law. Denying St Martin’s its full 12-mile territorial sea to the south – in the triangle that is created by points C, E and 7 – does nothing, absolutely nothing to improve passage to the Naaf River. In fact, the presence of shoals to the south of point C reveals that in any case vessels navigating to and from the mouth of the Naaf River would be required to adopt a course far south of point C to avoid shallow waters. The solution that Myanmar asks of this Tribunal is aimed not at improving access but rather at appropriating a larger share of maritime area in the territorial sea. Of course, this really is not an issue because Bangladesh has always respected the unrestricted passage by Myanmar vessels and will continue to do so, as the distinguished Foreign Minister made clear in this Court Room. The findings of the Tribunal in *Guyana v. Suriname*, on which Myanmar relies, to the effect that a delimitation line ought to “avoid [...] a sudden crossing of the area of access to the Corentyne River”,⁴⁹ which some members of this Bench will remember well, does not provide any support at all to Myanmar. As I noted at the outset, the first eight points of the line that it has proposed nearest to the mouth of the Naaf River are virtually identical to the first six points agreed by the Parties in 1974 and followed ever since. St Martin’s is entitled to a full 12-mile territorial sea, and we invite you to so declare.

Mr President, I will conclude with the fourth part of our submissions. You will have noted that parts of Myanmar’s proposed line are very similar to that put forward by Bangladesh and that to which the two States agreed in 1974. However, in our submission the initial segment of Myanmar’s line (between points A and B) which you can see on your screens and at tab 2.22, has been incorrectly plotted by Myanmar. The first segment of Myanmar’s equidistance line, that’s the line from points A to point B, adopts a direction that would (if extended) pass north of St Martin’s Island, and that conveniently bolsters the misguided argument that St Martin’s lies on the “wrong” side of the equidistance line. And this, we think, is what apparently aims at opening the door to Myanmar’s special

⁴⁸ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 392, at para. 101.

⁴⁹ RM, para. 3.31.

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circumstances argument, which is intended to provide support for the new claim that the island should be enclaved.

Mr. President, we think that Myanmar has incorrectly plotted its point B. It has done so because it has ignored the closest points on the Bangladesh coast at the mouth of the Naaf River, which points you can see highlighted on the screen. It has taken a more distant base point on the Bangladesh coast – that is point beta 1 – which you can see there on the screen. If Myanmar had used the correct base points, which you will see further down the coast, its point B would have been located in a more southerly place, as you can now see on the screen and at point 2A.

Now on the screen is Bangladesh's proposed line, in red, and Myanmar's proposed line, in black. As you can see on the screen – this is also at tab 2.23 – the middle segment of Myanmar's proposed line, that is points B1 to B5, is virtually identical to the Bangladesh line. In this segment, the equidistance line is governed by base points on the low watermark of St Martin's and on Myanmar's mainland coast, so this part is not in dispute.

Beyond that to the south, Myanmar's lines, from points C to E, severely cut off St Martin's Island, depriving it of a full 12-mile territorial sea. Now this attempt to enlave St Martin's is novel and it is of course, as I have already said, contradicted by the practice between the Parties and by the case law. We have explained already why St Martin's is entitled to a full 12-mile territorial sea. It therefore follows, in our submission, that a properly constructed line in the territorial sea in accordance with the requirements of article 15, taking account of the base points, must continue along a more southerly direction (the red line), reflecting a 12-mile territorial sea, until it reaches the intersection of the 12-mile limit as measured from the southern tip of St Martin's and Myanmar's coastline. You can see this red line on the screens. That is where we say the outer limit of the territorial sea is located.

Following article 15, there really is no basis for any enclaving of St Martin's, and we think that Myanmar has fallen into error in seeking to characterize the dispute between the parties. In its Rejoinder, it asserts that there are two issues as regards delimitation in the territorial sea. It does this by way of rhetorical questions. First, it asks: "What is the size and shape of the territorial sea enclave to be given to St Martin's Island?" Second, "By what method does the outer limit of that enclave reconnect to the mainland-to-mainland lines used to delimit area of overlapping EEZ/continental shelf areas beyond the territorial seas of the Parties?"⁵⁰ Those are the two questions that they ask. And curiously, they then go on to say that Myanmar and Bangladesh and I am quoting here "take only slightly different approaches to the size and shape of the St Martin's Island enclave."⁵¹ That is at paragraph 3.4 of their Rejoinder. That is totally wrong. We have never accepted that there is any sort of enclave to be established around St Martin's, and until 2010 Myanmar made no such claim either.

It is a new claim and it is not an agreed basis on which to proceed. It is in fact, a desperate effort to refashion the geographic reality and to refashion the law. We assume that it has been done to support a line of delimitation beyond the territorial sea that would contribute to preventing Bangladesh from reaching any sort of entitlement to exercise sovereign rights beyond 200 miles. So, it is, in this way, an entirely artificial and strategic construct, put together with an eye to the line that will eventually be delimited between Bangladesh and India. The approach dates to 2010, at a time when Myanmar was advised by the same lawyers who represent India. This may, of course, be entirely coincidental.

In any event, Myanmar's last two points – points D and E – are plotted on the basis of what it describes as a "transition from a relationship of oppositeness to one of adjacency."⁵² Now this really is rather bizarre reading. They cannot seem to make up their mind as to

⁵⁰ RM, para. 3.4.

⁵¹ RM, para. 3.4.

⁵² RM, para. 3.5.

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whether the delimitation here is between opposite States or adjacent States. We refer you in this regard, to the text of article 15 of the Convention, which does not in terms provide for any distinction. In both cases the method of delimitation is an equidistance line. A properly constructed equidistance line, plotted in accordance with the requirements of article 15, is controlled by base points on St Martin's and on Myanmar's mainland coast. There is no dispute between the Parties as to that. There is therefore no basis in law or fact to accord St Martin's anything less than full weight in the equidistance calculation. Myanmar's point D is located just six miles from the southern tip of St Martin's and it is plotted in manifest disregard of practice and legal authorities and in manifest disregard of the geography.

In relation to point E, there is simply no merit in Myanmar's attempts to shift the line of delimitation back to a hypothetical mainland-to-mainland equidistance line that ignores the existence and location of St Martin's. Now, at this point Myanmar makes an accusation against Bangladesh; it criticises us for what it says is plucking up its mainland-only angle bisector, moving it nearly 12 nautical miles to the south-east and attaching it to points 8A and 7.⁵³ But Myanmar cannot simply ignore St Martin's altogether, as I have already explained and illustrated with that animated plate, by drawing a mainland-to-mainland delimitation line which moves St Martin's into a different place.

There are two points to be made in relation to Bangladesh's point 8A, which you can see on the screen and which is at tab 2.24. First, it is beyond question, in our submission, that point 8A is, on the proper construction and application of article 15, the appropriate end point of the territorial sea delimitation. It is situated at the intersection of the 12-mile limit as measured from the southernmost point of St Martin's and Myanmar's mainland coast. This is the line to be drawn in accordance with international judicial and arbitral practice. There is no basis for moving the end point on the basis of some hypothetical mainland-to-mainland line.

Secondly, the transposition of the starting point of a delimitation line beyond the terminus of the land boundary is a practice that finds support in the relevant case law. The angle bisector method, which is the most appropriate in this case, and will be dealt with in some detail by Mr Martin and Professor Crawford, only produces a direction of the line. There is no implicit location of that line. In the *Gulf of Maine Case* the Chamber began its delimitation from point A, which is located 39 miles from the land boundary terminus.⁵⁴ The Chamber then drew lines from the land boundary terminus representing the general direction of the coast and then it drew perpendiculars – as you see in the dotted blue line. It then moved the bisector line such that it started at point A.

Mr President, Members of the Tribunal, this concludes my presentation of our submissions this morning and for this week. On this matter, Bangladesh invites the Tribunal to rule that in 1974 the Parties did reach agreement on the delimitation of the territorial sea boundary, for the reasons explained in our written pleadings and by Professor Boyle this morning. If for some reason the Tribunal concludes that there has been no such agreement, despite the constant practice, we then invite you to delimit by reference to the standard required by article 15. That leads to the line that is shown on your screens. It is remarkably similar to the line agreed in 1974. That line you will find at tab 2.24. We ask you to reject all of Myanmar's newly invented argument and all of its newly constructed lines of delimitation. We invite you to take account of the geographic reality. We invite you to take full account of Myanmar's own practice both in relation to Bangladesh and with third States, and invite you to give effect to the rules of the 1982 Convention as they are drafted. In particular, we urge you to conclude that St Martin's is not a "special circumstance" and that it is entitled to a full 12-mile territorial sea. We would welcome, as I think many would, a very firm decision that

⁵³ RM, para. 3.34.

⁵⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, paras. 20, 23.

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rejects the effort by Myanmar to cause you to make entirely new law by enclaving an island that lies within 12 miles of the coast of Bangladesh, an island the sovereignty of which has never been in dispute between the Parties, which is large, and which sustains a significant and economically active population. We think that any other approach threatens very great mischief to the system established by the Law of the Sea Convention.

Mr President, in his presentation, if I heard him correctly, Professor Crawford alluded to the rather famous opening sequence in *Star Trek* that is very familiar to many of us. He invited you, I think in relation to the outer continental shelf to “boldly go where no man has gone before” and delimit the outer continental shelf.

In respect of the territorial sea delimitation there is no need for you to go boldly where none have been before, and we think it would be deeply damaging for you to do so.

Mr President, it remains for me simply to wish all Members of the Tribunal on behalf of our delegation a very fine weekend. That concludes my presentation this morning and it concludes our presentation for this week. We very much look forward to seeing you on Monday morning. Thank you very much for your attention.

The President:

Thank you, Mr Sands.

This brings us to the end of today’s sitting. The hearing will be resumed on Monday 12 September 2011 at 10 a.m. The sitting is now closed.

(The sitting closes at 12.45 p.m.)

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

PUBLIC SITTING HELD ON 12 SEPTEMBER 2011, 10.00 A.M.**Tribunal**

Present: President JESUS; Vice-President TUERK; Judges MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN and PAIK; Judges ad hoc MENSAH and OXMAN; Registrar GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 12 SEPTEMBRE 2011, 10 HEURES**Tribunal**

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Please be seated. Good morning. Today we will continue the hearing of the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I give the floor to Mr Sands.

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STATEMENT OF MR SANDS (CONTINUED)
COUNSEL OF BANGLADESH
[ITLOS/PV.11/4/Rev.1, E, p. 1-13]

Mr Sands:

Mr President, Members of the Tribunal, my submission today will outline a number of general principles that Bangladesh submits should govern the approach that this Tribunal should take in this case, in relation to the delimitation of the exclusive economic zones and continental shelves of Bangladesh and Myanmar where those claims overlap. It builds on what Mr Reichler and Professor Crawford had to say last Thursday morning, during the first session, and I will be followed, Mr President, by Mr Martin, who will take us up to the coffee break, and then Mr Reichler will take over.

It is a particular privilege to be involved in the first case in which the Tribunal is called upon to adjudicate a delimitation dispute between two parties to the 1982 Convention. This may be your first case involving a boundary dispute; it will surely not be your last. As Professor Crawford intimated, it provides this Tribunal with an important opportunity to set out the approach that this Tribunal will take in interpreting and applying the applicable articles of the 1982 Convention, and not least its article 83 in the area that we have referred to as the outer continental shelf.

Mr President, in delimiting the continental shelf, both within and beyond 200 miles, where no international tribunal has gone before, the Tribunal will no doubt want to proceed in a balanced manner. This case, of course, allows the Tribunal to speak in its own voice, whilst taking account of what has come before, drawing in particular on the legacy of the *North Sea* cases, and contributing to a stable, predictable legal order that achieves equitable solutions. We are very mindful that the Tribunal finds itself in a unique and historic moment: a first international court or tribunal to delimit a continental shelf boundary between two States in areas beyond 200 miles.

Against this background, and before getting into details in the presentations that will follow, Bangladesh thought that it might be helpful to re-visit, on a broader canvas, the principles that we believe the Tribunal should adopt in dealing with delimitation beyond the territorial sea. As part of its judicial function, and having regard to its particular composition and representation of the global community as a whole, this Tribunal has of course already crafted a distinct and authoritative approach, and has often acted with a commendably unanimous voice. It is against this background that I make these submissions in the form of six propositions in two parts. First, I will pick up on references that Professor Crawford made to certain legal instruments that are relevant to maritime delimitation, primarily of course the 1982 Convention but also the 1958 Conventions. Second, I will set out six propositions that we say the Tribunal should follow, identifying points of commonality between the parties with respect to the applicable principles, as well as points on which there is disagreement. This will set the scene for the more detailed and fact-specific presentations that will be made by Mr Martin, Mr Reichler, Professor Crawford and Professor Boyle, as well as two other colleagues, who will address the application of these principles and rules to the facts of this case over the rest of today and tomorrow morning.

You will be aware, Mr President, that Bangladesh consistently has sought to give effect to the relevant rules of international law governing the delimitation of maritime spaces. Bangladesh was an active participant in the work of the Drafting Committee of UNCLOS III, and it played an active role in the negotiations leading to the adoption of the 1982 Convention. We pay tribute to the work of the delegation of Bangladesh, those individuals who contributed to the negotiation and adoption of this vital instrument. We note also the positive role played by Myanmar – or Burma as it then was – in those negotiations. It is also

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important to recognize that since attaining independence in 1971, Bangladesh has made consistent and sustained efforts to negotiate maritime boundary treaties with its neighbours, in accordance with international law.¹ 1974, early in its history, was an important year; that is when negotiations started with Burma, with Myanmar, and of course in that year 1974 Bangladesh enacted its Territorial Waters and Maritime Zones Act. The most recent meeting between Bangladesh and Myanmar, meetings which had continued right up until 2008, were then followed by further meetings that took place in 2010. The distinguished Foreign Minister who sits behind me explained the elements of success and failure, and how eventually Bangladesh saw no alternative but to institute legal proceedings with its neighbours, so as to definitively settle the boundary in the area beyond the territorial sea.

Let me just begin with the law. It is of course appropriate to interpret and apply the 1982 Convention in its historical context, as Professor Crawford did in his forensic detailed submissions of last Thursday. Of particular importance is the newly codified approach to the delimitation of continental shelf boundaries and to the exclusive economic zone (which of course was a concept new to the 1982 Convention), as compared with the approach taken by the Geneva Conventions of 1958. The 1982 Convention places an emphasis on achieving an equitable solution. This is reflected in articles 74 and 83. And Bangladesh very strongly supported this modern approach, as did Myanmar. You will see this in the record of negotiations. For example, on 26 August 1980, in calling for continental shelf delimitation “on the basis of the principle of equity”, Mr Sultan of the Bangladesh delegation explicitly invoked what he called,

The peculiar geomorphological conditions and concave nature of the coast of Bangladesh [that] had created for his country an extraordinary situation which deserved serious consideration so that it might be protected from an unfair and untenable solution.²

Indeed, the representative of Burma, U Kyaw Min, as Burma then was, similarly recognized that the discarded elements of the 1958 Convention were disadvantageous – and inequitable – for many States with a unique coastal geography, noting that “equidistance boundaries were by definition arbitrary”.³ That was Burma’s position in 1980.

Mr President, Members of the Tribunal, as you well know, until 1958 the rules of international law governing the use and delimitation of maritime areas was not codified. International law recognized the rights of coastal States over the waters immediately adjacent to their coasts – territorial sea – but did not recognize the sovereignty of states or the exercise of sovereign rights in maritime areas beyond the territorial sea. From the 1940s onwards, States increasingly asserted such claims, invoking rights over the continental shelf. And this of course catalyzed some of the major developments of the modern law of the sea.⁴

The process of codification followed seven years of work by the International Law Commission starting its activities in 1949.⁵ The 1958 diplomatic conference transformed the

¹ In 1974, Bangladesh also enacted the *Territorial Waters and Maritime Zones Act* (Act No. XXVI of 14 February 1974), MB, para. 3.2.

² A/CONF.62/SR.138, para. 61.

³ A/CONF.62/C.2/SR.291, para. 7.

⁴ For example, in 1945, President Truman of the United States made a proclamation asserting rights over a continental shelf:

...the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.

Whitman’s Digest, Vol. IV, 756 (1963-1973).

⁵ United Nations, *The Work of the International Law Commission*, Vol. I, 114-122 (6 ed., 2004).

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ILC's work into four conventions,⁶ one of which – the Convention on the Continental Shelf – is of particular contextual significance. That Convention was signed by Pakistan (of which Bangladesh was then a part) but it was never ratified, and it was never signed or ratified by Myanmar (Burma, as it then was).⁷ That inaction on the part of Myanmar cannot be said to lend support to their newly-found warm embrace of equidistance in this case.

The 1958 Continental Shelf Convention marked a first codification of the rights of coastal States over their continental shelves, which it defined as follows:

The seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas (article 1).

The 1958 Convention recognized that the coastal State's rights over the continental shelf were inherent – they were not dependent upon prior occupation or proclamation⁸ – but that they fell short of sovereignty. As regards delimitation, the key provision for our purposes in 1958 was article 6(2), which provided as follows:

Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

It is important to recall these words, precisely because they have since been rejected, by courts, by arbitral tribunals and by the drafters of the 1982 Convention. You will note in particular the emphasis that is given to the principle of equidistance – and I quote again, “shall be determined by application of the principle of equidistance” – subject to any special circumstances or agreement. This was a modest variation of the delimitation rule that was set out in article 12 of the 1958 Territorial Sea and Contiguous Zone Convention. The approach taken by article 6 was not acceptable to Bangladesh, or indeed to many States, and Bangladesh fought strongly for a new approach in what became article 83 of the 1982 Convention. In that legislative effort, Bangladesh's approach was strongly reinforced by the judgments in the 1969 *North Sea* cases, as anyone who was present in those negotiations between 1974 and 1982 will be able to attest.

The Preamble to the 1982 Convention indeed recognizes that “developments since [...] 1958 [...] accentuated the need for a new and generally acceptable Convention on the law of the sea.” For the exclusive economic zone and the continental shelf, “the new and generally acceptable rule” is reflected in, respectively, articles 74 and 83 of the 1982 Convention. Article 83(1) provides:

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

⁶ The Conference met from 24 February to 27 April 1958. For the *travaux préparatoires* and the proceedings of the Conference, see *Official Records of the United Nations Conference on the Law of the Sea*, Vols. I to VII (1958).

⁷ BM, para. 5.5.

⁸ Convention on the Continental Shelf, 499 U.N.T.S. 311 (29 April 1958), entered into force 10 June 1964, article 2(3).

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to in article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

The President:

Mr Sands, I am sorry for interrupting you; the interpreters are experiencing some difficulties in following you. Could you slow down a bit, please? Thank you.

Mr Sands:

I will be happy to slow down, sir.

Article 74(1), in respect of the EEZ, is in the same terms. Mr President, Members of the Tribunal, you will be well aware that unlike article 6(2) of the 1958 Convention, article 83(1) does not cite to equidistance at all. What it requires – what it requires pre-eminently – is the achievement of “an equitable solution”.⁹ This was recognized and emphasized by the ICJ in *Tunisia v. Libya*, where judgment was given just a few months before the 1982 Convention was adopted but after the text of article 83 had been agreed. And that Court put its view in the following terms:

In the new text [i.e. the official draft convention before the Conference the text of which has remained unchanged¹⁰], any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of the continental shelf areas are those which are appropriate to bring about an equitable result.¹¹

In this way, as the International Court and a number of Annex VII arbitration tribunals have recognized, the 1982 Convention marked a clear departure from the 1958 Convention. In our written pleadings we explained the reason for the change: the negotiators of the 1982 Convention could not reach consensus, it being clear that there were too many situations in which equidistance plainly would yield a manifestly inequitable solution, or an “arbitrary” result, to take the words of the distinguished Delegate of Burma.¹² The coastal geography of Bangladesh – which had already been referred to in the pleadings in the 1969 *North Sea* cases, a point to which Mr Martin will return – was one such situation.¹³ Since then, equidistance has not somehow re-emerged as the gold-standard for delimiting areas beyond 12 miles, as Myanmar now argues: there has not been a return to the situation that pertained in the 1958 Convention.¹⁴

⁹ *Eritrea/Yemen*, Award of the Arbitral Tribunal, Second Stage (Maritime Delimitation), at para. 116 (1999), *The Eritrea-Yemen Arbitration Awards of 1998 & 1999* online: <http://www.pca-cpa.org>. See also *Delimitation of Maritime Boundary between Guyana and Suriname*, Award, 17 September 2007, www.pca-cpa.org, (hereinafter “*Guyana/Suriname*”), at para. 332.

¹⁰ Earlier, with regard to the delimitation of the continental shelf between States with opposite or adjacent coasts, article 83 (1) of the Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea (A/CONF.62/WP.IO/Rev.2) provided that:

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.

See *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 49.

¹¹ *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 50 [emphasis added].

¹² *Virginia Commentary* at p. 954 *et seq.* BM, Vol. III, Annex 32 cited in BM, para. 6.15.

¹³ BM, para. 6.34. See also ITLOS/PV.11/Rev.1, pp. 7-19 (Reichler) and in particular pp. 12-13 (Reichler).

¹⁴ MCM, para. 5.15.

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Mr President, since 1982 there have been a great number of cases addressing the Convention and the approach that it has adopted. Professor Crawford dealt with this very fully, and there is no need for me to re-visit. He made it crystal clear, via the undiscovered writings of Sir Arthur Conan Doyle, directing you to the detective story of *The Strange Case of the Missing Concavity*, Chapter 1 of this collection of recently discovered writings. The second chapter might be called *The Curious Incident of the Convention that was Abandoned in the Night*. In its Counter-Memorial Myanmar asserts that Bangladesh has lost sight of developments since 1969.¹⁵ With great respect, this is entirely wrong, as the pleadings of Bangladesh make clear. If anyone has lost sight of developments, it is surely Myanmar, harking back to those happy, carefree, teenage days of simple equidistance, reflected in the 1958 Convention, an instrument Myanmar seems to like quite a lot but, rather bizarrely perhaps, somehow failed to sign or ratify. Perhaps it is too much to suggest that Chapter 3 of the recently discovered writings might be entitled: *The Bizarre Episode of the Country that Invoked the Instrument it Forgot to Ratify*. Mr President, the 1958 Convention is long gone. The 1982 Convention and subsequent practice reflect a different approach. I can deal with them then in six propositions, in relation to delimitation in the areas beyond 12 miles.

Our first proposition is this: in carrying out its judicial function a tribunal is bound to apply the rules of maritime delimitation set forth in the 1982 Convention to the facts that are established by the evidence – including expert evidence – that is before it in the record. These substantive rules are set forth in articles 74 and 83, as well as article 293 that directs the Tribunal to apply the rules set forth in the 1982 Convention and other rules of international law that are “not incompatible with” the 1982 Convention. The evidence on which you are entitled to rely is set forth in the pleadings of the parties.

Articles 74 and 83 deal with the delimitation of the EEZ and the continental shelf of States with opposite or adjacent States. The delimitation is to be effected by agreement to achieve an equitable solution. The Annex VII Tribunal in *Barbados v. Trinidad and Tobago* had this to say about the formulation:

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.¹⁶

There’s nothing controversial there.

Bangladesh fully associates itself with the approach reflected in those words, and recognizes there is no disagreement in principle between the Parties with regard to the identification of the applicable, substantive law.¹⁷ Where there is disagreement, however, is on the application of those rules to the facts. And in this regard, we are bound to note – with considerable surprise – that Myanmar has adopted a notably minimalist approach to matters of evidence. As I mentioned on Friday, Myanmar appears to have a tendency to make assertions that are not supported by any evidence; they are mere speculation. But Mr President, this Tribunal is required to decide facts on the basis of evidence, tendered in accordance with the rules of the Tribunal. And that is why it is so very striking that Myanmar has tendered no evidence – literally nothing – as regards geomorphological, geological or any

¹⁵ MCM, para. 5.16.

¹⁶ *Barbados v. Trinidad and Tobago*, Award of 11 April 2006, p. 68, para. 222, available at: <http://www.pca-cpa.org/upload/files/Final%20Award.pdf>

¹⁷ MCM, paras. 4.3, 4.4, 5.5-5.7.

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other matters relating to the delimitation of the outer continental shelf, beyond 200 miles. Now, it is entirely a matter for Myanmar to litigate this case as it sees fit. However, the approach it has taken means that the Tribunal is confronted with a particular reality: having no expert evidence of its own to rely upon, Myanmar simply has no evidentiary basis of its own upon which to rely. It cannot challenge, on the basis of evidence, Bangladesh's approach. Indeed, Bangladesh's evidence stands unchallenged and un rebutted as a matter of evidence and this, frankly, is a rather novel situation, speaking personally, not one I have come across on many occasions, if any. Myanmar can make legal arguments as to the adequacy of Bangladesh's evidence, or its pertinence or relevance but it cannot seek to prevent the Tribunal from delimiting those areas on the grounds that it has, of its own accord, decided not to tender any evidence in this case in relation to that part of the dispute. The Tribunal has to decide the case on the basis of the evidence before it.

I would rather refer to another matter. Dealing with issues of fact without any evidence rather reminds me of the challenge that was faced by Dr Spock in a very early episode of *Star Trek* that went to air in 1967. When he was asked by a character (amazingly enough played by a very young Joan Collins), what exactly he was doing and he offered the following reply: "I am endeavouring, madam, to construct a [computer] using stone knives and bearskins."¹⁸ That seems to me to indicate the kind of challenge that Myanmar currently faces in relation to the outer continental shelf.

Which brings me to our second proposition: in accordance with international practice, the Tribunal is free to – and we say must – identify a single line to delimit the seabed and subsoil, and the superjacent water column, within 200 miles. Although the 1982 Convention contains distinct provisions relating to the delimitation of the EEZ and the continental shelf, over time the practice has generally been to draw a "single maritime boundary" to delimit both zones within 200 miles. In *Qatar v. Bahrain*, the International Court noted that this approach "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."¹⁹ As the Annex VII Tribunal in *Guyana v. Suriname* noted, a single maritime boundary serves "to avoid the difficult practical problems that could arise were one Party to have rights over the water column and the other rights over the seabed and subsoil below that water column".²⁰ The avoidance of practical difficulties inspired the approach taken by Bangladesh in its Memorial; Myanmar has expressed its agreement that the Tribunal should delimit a "single maritime boundary" up to 200 miles.²¹ So there is no difference between the Parties, and no rule, principle or policy, we say, that ought to prevent the Tribunal from delimiting a "single maritime boundary", subject to a point that Professor Crawford will make later about grey zones.

I turn to our third proposition: the Parties also agree that the correct approach is for the Tribunal first to delimit the territorial sea up to a limit of 12 miles, in accordance with article 15, and then proceed to delimit the areas beyond 12 miles. As Myanmar put it in paragraph 2.40 of its Rejoinder, "In principle, the last point of the boundary in the territorial sea should serve as the starting point of the EEZ/continental shelf boundary." We say that principle applies in this case too. It is consistent with practice, and no departure is called for. One leading judgment that we submit is particularly apposite is that of the International Court in *Qatar v. Bahrain*, where the Court stated that:

¹⁸ *Star Trek*, City on the Edge of Forever, Season 1, Episode 28, first broadcast on 6 April 1967.

¹⁹ *Qatar v. Bahrain*, Merits, Judgment, I.C.J. Reports 2001, p. 40, at para. 173.

²⁰ *Delimitation of Maritime Boundary between Guyana and Suriname*, Award of 17 September 2007, at para. 334, available at: www.pca-cpa.org, (hereinafter "*Guyana/Suriname*"),

²¹ MCM, paras. 5.1, 5.2 and 5.46.

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[It] has to apply first and foremost the principles and rules of international customary law which refer to the delimitation of the territorial sea, while taking into account that its ultimate task is to draw a single maritime boundary that serves other purposes as well. [...] Once it has delimited the territorial seas belonging to the Parties, the Court will determine the rules and principles... to be applied to the delimitation of the Parties' continental shelves and their exclusive economic zones or fishery zones.²²

In our respectful submission, that is the correct approach to be followed in this case too. The approach recognizes that there is a distinction to be applied in delimiting different areas. We see no reason to depart from the approach reflected in existing and recent case-law.²³ That approach also supports the principle that the line of delimitation beyond the territorial sea should be transposed to the last point of the boundary in the territorial sea. Professor Crawford will return to this during the afternoon.

I turn now to a fourth proposition: in delimiting the areas beyond 12 miles, the 1982 Convention does not require any particular methodology to be applied. It does, however, impose upon the Tribunal an obligation to achieve an equitable solution, within the meaning of articles 74 and 83.

Bangladesh, Mr President, is not blind to the fact that in a great number of cases concerning the delimitation of the EEZ and continental shelf, the approach has been to follow two steps: first, to start by drawing a provisional equidistance line, and second, then to determine whether there are any relevant circumstances which require an adjustment to – or abandonment of – that line.²⁴ We do not challenge the propriety of that approach, but only for relevant cases. It is not the approach to be taken in all cases. And we therefore strongly disagree with Myanmar when it claims that “it is now scarcely arguable that any other approach can or should be adopted”.²⁵ That is simply wrong. It reflects a partial, selective and self-serving reading of the international case law, an approach inspired no doubt by the desire to enhance the role of equidistance, putting a cart – and the wrong cart at that – before the horse. Myanmar is inviting you to return to 1958. That is the wrong approach.

Now, the Tribunal of course appreciates that articles 74 and 83 make it clear that the ultimate aim of the delimitation process is the achievement of an “equitable solution”. That is the horse that should be leading this process of delimitation. Those two articles do not prescribe any method of delimitation, unlike the 1958 Convention. As we have explained, efforts to include any express role for equidistance were rejected outright during the negotiations leading up to the 1982 Convention. Myanmar may not be happy with that, but that is the reality with which it must live, and this Tribunal’s role, as an institution established by the 1982 Convention, is to do justice to what the instrument’s negotiators intended. That is one of the reasons why this case is of singular importance for this Tribunal: some three decades after the Convention was adopted, the full bench of the Tribunal has an opportunity to give its stamp of authority to the correct approach.

In this regard, it is noteworthy too that other legal fora, including the International Court, have recognized that “equidistance may be applied if it leads to an equitable solution”,

²² *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40, at paras. 174-176.

²³ *Qatar v. Bahrain*, I.C.J. Reports 2001, p. 40, para. 231. The following year, the Court again described the two methods as “very similar.” See *Land and Maritime Boundary between Cameroon and Nigeria*, Merits, Judgment, I.C.J. Reports 2002, p. 303, para. 288.

²⁴ See BM, para. 6.18 and MCM, para. 5.30 – 5.31; see e.g. *Barbados v. Trinidad and Tobago* (Annex VII 2006), *Guyana v. Suriname* (Annex VII 2007) and *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (ICJ 2009).

²⁵ MCM, para. 5.32.

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but “if not, other methods should be employed”.²⁶ That is surely the right approach: it does not imply any presumption in favour of equidistance, or indeed any requirement at all to make any use of equidistance. Equidistance may be a starting point in some cases – but not all – and even in those cases it may not end up providing the actual result. The Court made this very clear in a recent judgment in 2007, in the dispute between Honduras and Nicaragua, with which Myanmar seems notably reticent. The Court said that the equidistance method “does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.”²⁷ This approach is entirely consistent with other judgments and awards that make clear that equidistance is “not the only method applicable” and, to take it a step further, in the words of the Court, does “not even have the benefit of a presumption in its favour.”²⁸

The key point for this case is that the Tribunal’s focus cannot be on any particular *a priori* methodology as to the mechanics of drawing a line; it has to focus on the end result, the achievement of an equitable solution. To adopt a different approach would be to undermine the 1982 Convention. The drafters of that Convention took into account what the ICJ had observed in 1969, that it would be “ignoring realities” if one failed to recognize that the blind use of a particular methodology – equidistance – will “under certain circumstances produce results that appear on the face of them to be extraordinary, unnatural or unreasonable”.²⁹ As has already been emphasized by Professor Crawford, and as Mr. Martin will in due course address in detail, these joined cases are of singular importance in guiding this Tribunal in its approach in resolving the present dispute. They confirm that the equidistance methodology urged upon you by Myanmar, in plain disregard of the geographic circumstances of this case, would undoubtedly result in a manifestly inequitable result. It would be arbitrary.

Now that is not to say, as Myanmar wrongly asserts, that Bangladesh seeks a delimitation on the basis of an *ex aequo et bono* approach, or as apparently articulated, with characteristic elegance but ultimately unpersuasively, by Professor Pellet, the notion of an *équité créative* (a “normative equity”).³⁰ Bangladesh has never suggested that the delimitation should be achieved on the basis of an *ex aequo et bono* approach, or any other fancy name given to it.³¹ A range of proper methodologies have been tried and tested, depending on the case in question, and they are also available in this case. The chart that Professor Crawford drew your attention to on Thursday made clear that there is no single methodology that has been dominant. The existing jurisprudence confirms that the angle-bisector methodology, for example, that is relied upon by Bangladesh has been used to achieve a solution that is equitable. And contrary to Myanmar’s submission, this does not depart from the existing jurisprudence.³² Quite the contrary, the bisector method has been used in a number of recent judgments – such as that of the International Court in *Honduras v. Nicaragua* – and in arbitral tribunals’ awards – such as that in *Guinea v. Guinea Bissau*. The Tribunal again will have noted Myanmar’s plain discomfiture with this jurisprudence with these cases. Myanmar urges you not to follow this approach. It calls on you “not to depart,” as it puts it, “from the modern rules clearly established in the recent law”. It invites you not to undermine

²⁶ *Tunisia/Libya*, Judgment, I.C.J. Reports 1982, p. 18, at para. 109.

²⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 159, at para. 272.

²⁸ See *Qatar v. Bahrain*, 2001 I.C.J. 40, at para. 233 (citing *Libya v. Malta*, ICJ Reports 1985, p. 13, 47, para. 63).

²⁹ *North Sea Continental Shelf*, Cases, Judgment, ICJ Reports 1969, p. 3, para. 24.

³⁰ See *inter alia* MCM, paras. 5.6, 5.34, 5.36, 5.127, 5.134.

³¹ BR, paras 3.10, 3.23 – 3.25.

³² MCM, para. 5.139 (citing *Romania v. Ukraine* at para. 201).

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“consistency in international law and international judicial decisions.”³³ Well Mr President, we simply do not see how, following these and other cases, it can possibly be said that reliance on the bisector methodology we invite you to apply can in any way be said to undermine an established consistency in the case law. To the contrary: as Professor Crawford will explain, a methodology that has been used in no less than four major judgments and awards, including as recently as 2007, enhances consistency. An angle bisector is, as the International Court put it in *Honduras v. Nicaragua*, a viable method where “equidistance is not possible or appropriate”;³⁴ And I emphasize the words “not [...] appropriate”. In that case, the Court did not even draw an equidistance line; it went straight to the angle bisector. It seems that the Court was not willing to draw an equidistance line on the basis of a single base point plotted on each side of the constantly shifting mouth of the shared river that formed the boundary. Yet the Tribunal will have noted that in this case Myanmar has plotted just one single, lonely, sad base point on the coast of Bangladesh from which to draw the entire equidistance line. It is difficult to think, Mr. President, of any case in which equidistance would be less “appropriate” than this one.

This brings me to Bangladesh’s fifth proposition: in delimiting this maritime boundary, as with any other, the Tribunal is permitted to take into account, and should take into account, the relevant regional context in which the delimitation is taking place. What this means is that the Tribunal must have regard to the situation of Bangladesh and Myanmar in the context of the relevant areas of the Bay of Bengal as a whole. The Tribunal must have regard to the implications of India’s claim, and the impact that this has on Bangladesh’s ability to exercise sovereign rights.

This approach is entirely well-established in seeking to achieve an equitable solution, and it is reflected in numerous judgments and awards. One clear example is the award of the Arbitral Tribunal in *Guinea v. Guinea Bissau*, which was presided over by the President of the International Court of Justice, Manfred Lachs, who will have been very well known to many of you sitting on the bench today. It cannot be said that Judge Lachs was without experience in or insight into these matters. The Arbitral Tribunal did not view its task solely from a bilateral perspective. It recognized that a broader, regional perspective was appropriate. It sought a solution that would take overall account of the shape of the entire West African coastline.³⁵ The Arbitral Tribunal referred to the need to produce a delimitation that would in its words:

be suitable for equitable integration into the existing delimitations of the West African region, as well as future delimitations which would be reasonable to imagine from a consideration of equitable principles and the most likely assumptions.³⁶

These words are pertinent for this case. That Arbitral Tribunal rejected equidistance for the very same reasons that it is inappropriate in this case: the concave configuration of the West African coast in the vicinity of the Guinea-Guinea Bissau boundary made equidistance inequitable.

³³ MCM, para. 1.28.

³⁴ *Nicaragua v. Honduras*, Judgment, ICJ Reports 2007, p. 659, 746 at paras. 287 [emphasis added].

³⁵ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 I.L.M. 252, para. 108. BM, Vol. V.

³⁶ *Ibid.* at para. 109 (In order to do so, “it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline, and what deductions should be drawn from this in relation to the precise area concerned in the present delimitation”). In the *Libya v. Malta* case, the ICJ similarly took a regional perspective, stating that it “has to look beyond the area concerned in the case, and consider the general geographical context in which the delimitation will have to be effected” (para. 69).

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Existing and future delimitations in the Bay of Bengal provide compelling support for Bangladesh's approach. On your screens and at tab 3.4 you can see existing delimitations outlined in black, and now you can see in red future delimitations, based on the claims of Myanmar and India. We invite you to step back for a moment look at that plate, look at the region as a whole, and ask yourselves whether you can possibly conclude that the extensive existing rights and claims of our two neighbours can be said to allow Bangladesh a result that could in any terms be considered to be equitable. The existing case law confirms that in resolving this dispute you have to look at the region as a whole. And in this case, that necessarily also means taking into account the area beyond 200 miles: we invite the Tribunal to ask itself whether a delimitation that would allow Myanmar and India to exercise sovereign rights beyond 200 miles but did not permit Bangladesh to do so could be said to achieve an equitable solution. In our submission, the answer to that question is blindingly obvious.

Mr President, I turn now to our sixth and final general proposition, which concerns the relevant or special circumstances that are to be taken into account in achieving an equitable solution. It will be obvious that state practice demonstrates that each delimitation depends on its own particular set of geographical and historical circumstances. This was explained rather aptly by the Annex VII Tribunal in *Guyana v. Suriname*, which noted that "international courts and tribunals are not constrained by a finite list of special circumstances". The Tribunal emphasized that special circumstances giving rise to an equitable result are not a "defined or limited category of circumstances".³⁷ Bangladesh agrees with those words and invites the Tribunal to adopt the same approach. As that Arbitral Tribunal put it, in a unanimous award, "special circumstances that may affect a delimitation are to be assessed on a case-by-case basis, with reference to international jurisprudence and State practice."³⁸ Other cases support that approach.

Last Thursday Mr Reichler addressed two geographic aspects of this case that are to be treated as relevant circumstances with regards to the delimitation of the continental shelf. The first is obviously the pronounced concavity of Bangladesh's entire coastline and the double concavity within that overall concavity; the second is the extensive Bengal deposition system and the geological and geomorphological prolongation of Bangladesh's coastline.³⁹ Mr. Reichler also mentioned that St Martin's Island, which is located only 4.5 miles from the Bangladesh coastline, is a normal feature to be taken into account fully in delimiting the continental shelf. Now, this afternoon, Mr Martin and Mr Reichler will have more to say about these three elements, so I am just going to touch on one of them to which we say the Tribunal needs to pay particularly special attention. In 1969, in the *North Sea* cases, the International Court confirmed that it is "necessary to examine closely the geographical configuration of the coastline of the countries whose maritime areas are to be delimited."⁴⁰ And in 1977, the Court of Arbitration in the *Anglo-French Continental Shelf* case ruled that the appropriateness of any method for the purpose of effecting an equitable delimitation "is a function or reflection of the geographical and other relevant circumstances of each particular case."⁴¹ That approach is surely correct: it is reflected in all the subsequent practice, and also reflected in the academic literature. And this case provides the Tribunal with an opportunity to give its own particular stamp of authority to that approach, recognizing the significance of coastal geology.

³⁷ *Guyana v. Suriname*, Award of the Arbitral Tribunal, PCA, 17 September 2007, para. 302.

³⁸ *Ibid.*, para. 303.

³⁹ ITLOS/PV.11/Rev.1, pp. 18-19 (Reichler).

⁴⁰ *North Sea Cases*, 1969 ICJ Reports 3, at para. 96.

⁴¹ *Anglo-French Continental Shelf Case*, ILR, Vol. 54, p. 66.

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We have addressed in some detail the relevant features of the coastal geography of Bangladesh. One that is particularly significant, as I mentioned, is concavity, a feature that would tend, if equidistance were to be applied, to cut off Bangladesh's seaward projection. As early as 1969, the International Court articulated the principle of preventing, in such circumstances and as far as possible, a cut-off effect on the continental shelf delimitation, and the problem can be seen easily on your screen. As you can see, where a State like Bangladesh is situated in a concavity between two adjacent States – that's in the top right corner – the equidistance lines with its neighbours will converge in front of its coast. And this creates a "cut-off" effect. It deprives that State of a great deal of continental shelf – and EEZ – in which it would otherwise be entitled to exercise sovereign rights. In this case, in fact, it would completely prevent Bangladesh from having an extended continental shelf beyond 200 miles, a point to which Mr Martin will return. He will also have more to say about the *North Sea* cases, where the Court was careful to state that whilst it was not a question of "completely refashioning nature" – and I emphasize the word "completely" – it had to take account of the situation in which the configuration of the coastline of one of the three States would, if the equidistance method was used, create an inequity. "What is unacceptable in this instance", said the International Court, "is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length."⁴² These words, and the principles they reflect, are equally applicable in this case. And as Professor Crawford reminded you, the Court's judgment was then followed by a negotiated agreement, one that virtually doubled Germany's maritime spaces in the area, as compared with that which equidistance would have afforded.

In adopting this approach, the Tribunal would be following and building on a settled and respected approach. The novelty of this case is that it raises, for the first time, the detailed applicability of the principle to the outer continental shelf. As a case of first impression, of course, I cannot refer you to any judicial or arbitral authority, but I can direct you to article 76 and urge you to lay down the analogous principles that will assist Bangladesh and Myanmar to resolve their dispute in a manner that can provide a useful contribution in affirming the need to assure an equitable solution in all areas of the continental shelf that are to be delimited. Professor Boyle will return to this tomorrow.

Mr President, Members of the Tribunal, this concludes this introductory overview, setting the scene for the more detailed submissions that will now follow. These are the broad principles that we say should inform the Tribunal as it adjudicates this first case. No doubt this case presents challenges and opportunities, but it is surely an important moment.

Mr President, on another planet, where Myanmar's legal arguments sometimes seem to be, I would be tempted to say "Beam me up, Scotty", as Captain Kirk or Dr Spock might have said once their mission was accomplished. Happily I do not need to be beamed up anywhere; I can just take my seat a couple of rows back. However, before doing that, I invite you to call Mr Martin to the Bar to address in more detail the application of these general propositions to the specific facts of this case. I thank you for your attention, Mr President.

The President:

Thank you.

I now give the floor to Mr Martin.

⁴² *Ibid.* para. 91.

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STATEMENT OF MR MARTIN
COUNSEL OF BANGLADESH
[ITLOS/PV.11/4/Rev.I, E, p. 13–24]

Mr Martin:

Mr President, distinguished Members of the Tribunal, good morning. It is a very special honour for me to appear before you today, and it is a privilege to do so on behalf of Bangladesh. My role today is to continue the discussion concerning the inappropriateness of using equidistance for delimiting the EEZ and continental shelf within 200 miles that Mr Reichler began last Thursday. Mr Reichler will follow me to the podium after the coffee break to complete our discussion of the issue.

Last Thursday, Mr Reichler described the three most important geographical and geological features of this case. They are the concavity of the Bangladesh coast, St Martin's Island and the Bengal depositional system. I will be dealing with the first: the concavity of the coast. Mr Reichler will be dealing with the second and the third later this morning.

My submissions this morning will be divided into four parts. First, I will discuss the distorting effects that concave coasts have on the plotting of an equidistance line. Second, I will respond to Myanmar's arguments that the concavity of Bangladesh's coast is not an important element of this case. Third, I will discuss State practice that supports Bangladesh's position. Fourth, and finally, I will address certain other flaws with Myanmar's proposed equidistance line, most of which are also a function of the concavity of Bangladesh's coast.

In his opening presentation to the Tribunal on Thursday, Mr Reichler discussed the doubly concave nature of Bangladesh's coast. Not only is it pinched between Myanmar and India in the concavity formed by the Bay of Bengal's north coast, Bangladesh's coast is itself defined by a secondary concavity. This, in our view, is the single most important geographic element, and fact, in this case.

In considering the relevance of this circumstance, I hope that it will be useful to step back just for a moment and see how equidistance works differently in the case of a concave coast. I will do so by reference to a series of schematics which are derived from a similar schematic included in the ICJ's judgment in the 1969 *North Sea Continental Shelf* cases.¹ All four schematics can be found at tab 3.7 of your Judges' folder.

We begin with an idealized straight-line coast along which lie three States: A, B, and C. (I assure you that it is pure coincidence that State B is the one in the middle!) In a situation like this, equidistance works well to divide the maritime areas equitably. As you see, the two notional equidistance lines are perpendicular to the coast and parallel to each other. All three States enjoy an access to their 200-mile limits that is equal in width to the length of their coasts.

On the next slide, we have a concave coast. The coasts of A and C bend upward and inward. You can see the difference immediately. Although States A and C continue to make out well, State B now has a substantially reduced maritime area. The equidistance lines on either side are pushed inward in the direction of State B's coast. The result is that the breadth of its maritime areas narrows noticeably further from shore. Although State B still reaches 200 miles, it does so to a more limited extent than in the prior schematic. We might call this narrowing of maritime space the most obvious footprint of a concavity.

Next up is a schematic of a more severe concavity. Here, the coasts of A and C bend upward and inward more sharply than in the prior image. Using equidistance, those two States again do just fine. State B, however, is much worse off. Not only is its maritime space

¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 3, at p. 16.

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reduced to a tapering wedge, it no longer even reaches the 200 mile limit. These, you might say, are the evil twin effects of a severe concavity.

Fourth and finally, we have a schematic showing what happens in the case of a concavity within a concavity. In this case, instead of having a straight line coast, as in the prior examples, State B's coast recedes from its land boundary termini on either side. This exerts a multiplier effect on the concavity. The equidistance lines on either side are pulled even further inward. The wedge of maritime space with which State B is left is now even smaller and reaches an even lesser distance from its coast.

Mr President, Members of the Tribunal, Bangladesh's location between Myanmar and India at the northern end of the Bay of Bengal is most like the final schematic we just looked at. The effect of the double concavity is to push the two equidistance lines between Bangladesh and its neighbours together. The effect is depicted on the map appearing in front of you, which you will recognize from Mr Reichler's Thursday presentation.

Both of the worst effects of a severe concavity are evident. Bangladesh is not only left with a wedge of maritime space that narrows dramatically to seaward but it is also stopped short of its 200-mile limit.

I come then to the second part of my presentation: our response to Myanmar's arguments that the concavity of Bangladesh's coast is irrelevant.

Myanmar, especially in its Rejoinder, seems reluctant to engage with the issue of the concavity. As Mr Reichler observed last week, they would prefer to ignore it. They want the Tribunal to ignore it too. In this respect, it is interesting that the Rejoinder does not get around to even talking about the concavity until deep into Chapter 6, the last substantive chapter. Considering that the concavity may be the single most important factual element of the case, Myanmar's approach evidences its discomfort with the issue.

When Myanmar does finally get around to addressing the issue of concavity, at around page 157 of the Rejoinder, Myanmar deploys two, not entirely consistent, arguments to deny its relevance. It argues first that there is no appreciable concavity and, second, that the concavity is legally irrelevant in any event. Both assertions are incorrect.

Turning to the first argument, at paragraph 5.15 of the Rejoinder, Myanmar argues that "the relevant sector of the coast – that is the part of the coast immediately adjacent to the land boundary terminus – does not exhibit particular concavity".² Mr President, with respect, it is just not credible for Myanmar to say that the coast of Bangladesh exhibits no particular concavity. The only way you can miss seeing the concavity – in fact, the double concavity – of Bangladesh's coast is by keeping your eyes closed.

It is very easy to illustrate this. Let us start right here in this courtroom by looking at the Tribunal's bench. I do not know whether this is providential or not, Mr President, but your bench is a close replica of Bangladesh's coast. Is there anyone here that would deny that your bench exhibits a pronounced concavity? Like Bangladesh's coast, it is entirely concave, from one end to the other.

Myanmar misses the point by asking the Tribunal to focus myopically on the coast in the immediate vicinity of the land boundary terminus. It would be like me suggesting to the Tribunal that the Judges' bench does not look particularly concave if you look only at the small bit right in front of you. The same is true in this case. One need do no more than look at a map of the Bay of Bengal to see the concavity of the Bangladesh coast.

Myanmar's argument that Bangladesh's coast is not concave also directly contradicts what it said in its own Counter-Memorial, which expressly acknowledged the doubly concave nature of Bangladesh's coast. I refer to paragraph 2.14 of the Counter-Memorial, which

² RM, para. 5.15.

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states: “Bangladesh’s coast on the Bay of Bengal is approximately 520 kilometres in length. Its coast is concave, like the entire northern part of the Bay of Bengal.”³

Myanmar’s other argument is that even if it is there, the concavity of the Bangladesh coast is legally irrelevant; concavity is *not* a circumstance warranting a departure from equidistance. According to Myanmar’s Counter-Memorial, contemporary case law “invalidates” the assertion that concavity is “among the recognized circumstances where equidistance does not result in an equitable solution.”⁴

The only ostensible jurisprudential basis for this claim is the ICJ’s decision in *Cameroon v. Nigeria*. Their argument on “contemporary case law”, therefore, succeeds or fails on the basis of this one decision. As Professor Crawford showed last Thursday, it fails badly.

According to Myanmar, the Court in that case held that “concavity did not represent a circumstance which would justify the adjustment of the equidistance line.”⁵ Professor Crawford already demonstrated the error of this argument in his opening comments. I could not possibly improve on them. I would add only one point. Far from stating - much less ruling - that concavity was not a circumstance rendering equidistance inequitable, the ICJ actually said exactly the opposite. In particular, the Court said:

The Court does not deny that the concavity of the coastline may be a circumstance relevant to the delimitation, as it was so held to be by the Court in the *North Sea Continental Shelf* cases and as was also so held by the Arbitral Tribunal in the case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*⁶

As Professor Crawford described earlier, the Court found the concavity about which Cameroon complained irrelevant to the area that was being delimited, due to the presence of Bioko Island so close offshore; and it found expressly that the portion of the coast relevant to the delimitation was not concave. *Cameroon v. Nigeria* thus offers no help to Myanmar.

In truth, there are only three decided cases that arose in circumstances similar to those here. The first two, of course, are the *North Sea* cases. Here again, Professor Crawford thoroughly addressed them last Thursday. I will confine myself to responding to one additional point that Myanmar raised in its Rejoinder. That is, Myanmar claimed that “there is nothing comparable between the *North Sea Continental Shelf* cases and this case” because the effect of Myanmar’s and India’s most recent claim lines is to truncate Bangladesh’s maritime areas 182 miles from its coast.⁷ In contrast, Myanmar says, the equidistance lines claimed by Germany’s neighbours ran together just 98 miles from its coast.

This, I suppose, is something of a fall-back to Myanmar’s fall-back argument. First, we are told there is no concavity. Second, we are told that even if there is, it is not legally relevant. And now, third, we are told that even if it is relevant, Bangladesh is actually better off than Germany so the Tribunal doesn’t need to worry about it. But this third argument is as unpersuasive as the first two.

There are several elements that show the cut-off effect on Bangladesh is every bit as prejudicial as was the cut-off of Germany. Myanmar ignores all of them.

First, account must be taken of the fact that Bangladesh has a significantly larger coastal front than Germany. Measured point-to-point from one end of the concavity to the

³ CMM, para. 2.14.

⁴ MCM, para. 5.121 (citing MB, para. 6.32).

⁵ MCM, para. 5.122.

⁶ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I. C. J. Reports 1998, p. 275, at para. 296.

⁷ RM, para. 6.72.

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other, the coastal front of Bangladesh measures 350 kilometres, Germany's 200 kilometres. In other words, Bangladesh's coastal front is 70% larger than Germany's. The fact that it has a somewhat longer maritime reach is a direct function of this size difference.

Second, account should be taken of the fact that Bangladesh faces directly onto the open seas of the Bay of Bengal. Its maritime reach is thus limited only by the extent of its juridical continental shelf as provided in article 76. Germany, in contrast, faces across the North Sea at the opposite coast of the United Kingdom. Its maritime areas could therefore extend no further than the location of the mid-channel median line with the UK, approximately 175 miles from its coast.

Third, and relatedly, in contrast to Germany, Bangladesh has an indisputable – and, in fact, undisputed – entitlement in the outer continental shelf that reaches to as much as 390 miles from its coast. Limiting it to an area within 182 miles would thus stop it more than 200 miles short of its maximum reach. This is reflected on the graphic now appearing before you, which you can also find at tab 3.8 of your Judges' folder.

The reality is then that equidistance threatens Bangladesh with a more severe cut-off than Germany.

Aside from the *North Sea* cases, the other case that had similar circumstances is the *Guinea/Guinea-Bissau* arbitration decided by an arbitral tribunal composed of three sitting ICJ Judges and presided over by Judge Manfred Lachs. The effect of Guinea's concave coast on equidistance lines with its neighbours can be seen on the screen in front of you. The equidistance lines are depicted in blue. Depicted in red is the final delimitation line determined by the tribunal. As you can see, the relief the tribunal gave Guinea is considerable, certainly far greater than anything that Bangladesh is seeking in this case.

Later today, Professor Crawford will discuss the specific methodology – the angle bisector methodology – that the tribunal used to arrive at this result. The point I would invite you to focus on now is simply the fact that given the concave configuration of the coast, the tribunal discarded equidistance as an appropriate delimitation methodology. It stated:

When in fact - as is the case here, if Sierra Leone is taken into consideration - there are three adjacent States along a concave coastline, the equidistance method has the other drawback of resulting in the middle country being enclaved by the other two and thus prevented from extending its maritime territory as far seaward as international law permits.⁸

Myanmar's Rejoinder is oddly ambivalent about the *Guinea/Guinea-Bissau* decision. On the one hand, it says it is "so eccentric that it is difficult to refer to it".⁹ It also says that it is "a very odd decision and calls for particular caution"¹⁰. We say these are strong and misplaced words to direct at such a distinguished tribunal.

Be that as it may, the most interesting comment Myanmar makes about the case is this: After levelling very strong criticism at the tribunal, the Rejoinder changes tack and admits that the tribunal's approach "led to an equitable solution in the singular circumstances of this case"¹¹. Mr. President, you heard that right. Myanmar admits that the approach taken by the arbitral tribunal in *Guinea/Guinea Bissau* – that is the rejection of the equidistance method in favour of an angle bisector – "led to an equitable solution in the singular circumstances of this case". I refer to paragraph 5.58 of the Rejoinder.

⁸ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252, para. 104.

⁹ RM, para. 4.27.

¹⁰ RM, para. 5.58.

¹¹ RM, para. 5.58.

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We say this is a critical admission. By acknowledging that the tribunal's decision to give Guinea relief from the concavity of its coast "led to an equitable solution", Myanmar undermines its own arguments against giving Bangladesh comparable relief in this case. How can relief from a concavity be equitable in the case of Guinea but not in the case of Bangladesh? How can it be equitable to reject equidistance because of the concavity of the coast in *Guinea/Guinea Bissau* but not here?

Indeed, the approach taken in *Guinea/Guinea Bissau* is all the more appropriate here because the cut-off Bangladesh suffers is much more pronounced than Guinea. The equidistance lines between Guinea and its two neighbours did not fully cut Guinea off within 200 miles. Even with equidistance, it had an outlet to 200 miles. Yet, Bangladesh does not get so far even though it is a significantly larger coastal State. Moreover, as I mentioned, Bangladesh has an entitlement in the outer continental shelf that extends out to some 390 miles from its coast. Although Guinea too appears to have an entitlement in the OCS, that entitlement reaches no more than approximately 250 miles from its coast.¹²

As I mentioned, the effect of the arbitral tribunal's delimitation on Guinea and its maritime rights was considerable. Equidistance would have given it only a modest outlet to 200 miles. In its award, the tribunal accorded it a much larger outlet measuring some 140 miles across; that is, about 260 kilometres. This is nearly the size of Guinea's 284 kilometres coastal front as measured between its two land boundary termini. The map on your screen is included at tab 3.9 of your Judges' folder. The Tribunal was evidently motivated to permit Guinea to extend its maritime territory to 200 miles across a broad area.

Mr President, that brings me to the third part of my presentation this morning: the pertinent State practice.

Although the *Guinea/Guinea Bissau* case is the only adjudicated delimitation arising in circumstances like those prevailing in the Bay of Bengal, there are a number of instructive examples from the State practice. These examples involve instances where a State is pinched in the middle of a concavity and would have been cut-off, had the equidistance method been used. The maritime boundaries that were ultimately agreed discarded equidistance in order to give the middle State access to its 200-mile limit.

I will show the Tribunal the principal examples of State practice to which I am referring in just a moment. Before doing so, I want to anticipate Myanmar's counter-argument because our answer is best understood by looking at the maps. Bangladesh presented many – but not all – of these examples of State practice in our Reply. In its Rejoinder, Myanmar tried to undermine their relevance by arguing that the agreements in question "generally created only very narrow corridors which are not comparable at all" to what Bangladesh seeks here.¹³

Mr President, as you are about to see, if it is true that the corridors in question were indeed narrow, that is only because the relevant States had relatively small coasts. In fact, the access zones granted them were generally equal in size to the full breadth of their coastal fronts. The fact that relatively small States were accorded such broad access to their natural limits is actually an argument that supports Bangladesh. If comparatively smaller coastal States were accorded full access zones, denying comparable treatment to a large coastal State like Bangladesh would be inequitable.

The first example is the 1975 agreed delimitation between Senegal and The Gambia on the coast of West Africa. As you can see on the screen, due to the concavity of the coast in the area, equidistance would have cut The Gambia off short of its 200-mile limit. In their agreement, the parties avoided this result by agreeing to give The Gambia a 200-mile zone of

¹² Guinea, *Preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles of 11 May 2009* available at <http://www.un.org/depts/los/clcs_new/commission_preliminary.htm>

¹³ RM, para. 6.22.

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access identical in width to the full breadth of its 61-kilometre coastal front. This map can also be found at tab 3.10 of your Judges' folder.

This next map shows you the situation at issue in the 1987 agreed boundaries in the Atlantic between Dominica and the French islands of Guadeloupe and Martinique. Because both Guadeloupe and Martinique lie east of it, Dominica sits in what is functionally a concavity facing onto the open Atlantic. The equidistance lines converge shortly in front of its coasts. To remedy this cut-off, the parties agreed to accord Dominica the 200-mile access zone you see depicted on the screen. This map is at tab 3.11 of your Judges' folder. Again, the extent of access is virtually identical in width to the breadth of Dominica's coastal front. Although it tapers very slightly, it is still almost as wide at the end – 31 kilometres – as Dominica's coast is broad – 49 kilometres.

Next is the 1984 agreement between France and Monaco. Once more, as you can see, the effect of equidistance would have been to cut Monaco off a short distance from its coast. In their agreement, the Parties agreed to accord Monaco a 48-mile long access zone that is again virtually identical to the breadth of Monaco's coast. You can find this map at tab 3.12 of your Judges' folder.

You will notice that unlike the prior two agreements, the corridor does not extend out to 200 miles. This is because the French Island of Corsica is directly opposite Monaco. The access zones thus extend to the full extent of Monaco's natural limit at the location of the median line with Corsica.

To these agreements, which we presented in Bangladesh's Reply, at least two more should be added. The first is the 2009 memorandum of understanding between Malaysia and Brunei. According to published accounts, Malaysia agreed that Brunei has jurisdiction over the areas formerly encompassed within Malaysia's oil blocks L & M.¹⁴ The location of those blocks, combined with the effect of equidistance on Brunei's maritime areas, can be seen on the image in front of you. It is also at tab 3.13 of your Judges' folder. (The red lines are the colonial maritime boundaries dating to 1958 established by the United Kingdom.) Here once more, we see that the potentially cut-off State, Brunei, has been accorded an access zone equal in breadth to its coastal front.

A final example is the 1990 agreement between Venezuela and Trinidad and Tobago. Much like the other examples we have been looking at, Venezuela is located in a functional concavity between Trinidad and Tobago to the north and Guyana to the south. The effect of equidistance lines on its maritime areas is shown on the map in front of you. You can see the unmistakable footprints of a concavity; Venezuela's maritime space tapers and ends well short of 200 miles.

To take account of this fact, the parties to the 1990 agreement departed from equidistance in Venezuela's favour, as depicted on the map on the screen. This combined map is at tab 3.14 of your Judges' folder. The negotiating history shows that this was done precisely to accord Venezuela a *salida al Atlántico* - an outlet to the Atlantic - with the result of the *North Sea* cases very much in mind.¹⁵

Now, there are a couple of points that make this agreement different from the others that we have discussed.

First, Venezuela's maritime space was not limited to the Atlantic areas delimited by this agreement. It also has a sizable maritime area in the Caribbean as well. In contrast, Bangladesh does not have other maritime areas beyond those at issue in this case. Myanmar, however, has extensive coasts fronting on areas other than the Bay of Bengal, for example in the Andaman Sea.

¹⁴ N. Najib and S. Ali Bernama, "Oil Blocks 'Giveaway' to Brunei", *The Malay Mail* 30 April 2010 available at <<http://www.mmail.com.my/content/35121-oil-blocks-giveaway-brunei>>

¹⁵ J. Charney and L. Alexander (eds.) *International Maritime Boundaries* (1996), Vol. I, at p. 681-682.

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Second, the bilateral agreement between Venezuela and Trinidad and Tobago was incapable by itself of giving Venezuela the outlet to the Atlantic that it sought. Venezuela still requires corresponding relief on the other side with Guyana. The completion of that delimitation has yet to occur.

Third, unlike any of the other cases we have been looking at, and unlike the situation in the Bay of Bengal, you will see that there are actually competing cut-offs in this area of the Atlantic. In particular, equidistance cuts off both Venezuela and Trinidad and Tobago short of their 200-mile limits. By accommodating Venezuela's demand for an outlet to the Atlantic, Trinidad and Tobago was thus exacerbating its own cut-off, by Barbados. As Professor Crawford described on Thursday, this good deed did not go unpunished.

In any event, there are no similar competing cut-offs to worry about in the Bay of Bengal. Neither Myanmar nor India faces the prospect of being cut off should the effects of the concavity of Bangladesh's coast be abated. Bangladesh's claims leave both neighbours with the extent of their access to the 200-mile limit virtually undiminished.

In its Rejoinder, Myanmar attempts to minimize the significance of these instances of State practice by arguing that, as political compromises, these agreements have no direct applicability to the questions of law now before the Tribunal. We disagree. It is impossible *not* to draw the conclusion that these agreements, collectively or individually, evidence a broad recognition by States in Africa, in Europe, in the Americas, and in the Caribbean that the equidistance method does not work in the case of States trapped in the middle of a concavity. All of these States recognized that an equitable solution required abating the effects of equidistance, and according the middle State access to the natural limits of its maritime jurisdiction. In his writings, Jonathan Charney has referred to this as the principle of "maximum reach".¹⁶

I should note too that the other thing these cases show is the extent of State reliance on the holding of the *North Sea* cases. I invite the Tribunal to review the description of these agreements in the relevant volumes of the American Society of International Law's multi-volume set *International Maritime Boundaries*. When you do, you will see numerous references to the relevant States' reliance on the ICJ's Judgment in the *North Sea* cases.¹⁷ That fact is a powerful demonstration of just how settled the international community's understanding of the law has become.

Myanmar tries to enlist alleged countervailing State practice to argue that there are "many other cases where no corridor has been granted by way of an agreement between the States concerned, although equidistance has led to some cut-off effect".¹⁸ This is at paragraph 6.31 of the Rejoinder. The Tribunal may wish to examine that statement closely. When it does, it will see that there is no footnote; it is an assertion without a citation. Not a single agreement is cited. This is not an oversight. Myanmar cites nothing because there is nothing. If Myanmar disagrees with us, we invite it to show us, and the Tribunal, later this week.

¹⁶ Jonathan I. Charney, "Progress in International Maritime Boundary Delimitation Law," *American Journal of International Law*, Vol. 88, No. 227 (1994), at pp. 247 *et seq.* RB, Vol. III, Annex R22. In support of this view, Charney cites the following cases: *North Sea Cases* at para. 81; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, Judgment, I.C.J. Reports 1993, p. 351 (hereinafter "*Gulf of Fonseca*"), at paras. 415-420; and *Case Concerning Delimitation of Maritime Areas between Canada and France (St Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149 (hereinafter "*St Pierre & Miquelon*"), at paras. 66-74.

¹⁷ See e.g., Press Statement by the Honourable Minister of External Affairs and International Trade, Port of Spain, 16 July 1990, at para. 29 (cited in J. Charney and L. Alexander (eds.) *International Maritime Boundaries* (1996), Vol. I, at p. 678).

¹⁸ RM, para. 6.31.

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In the next paragraph of the Rejoinder, paragraph 6.32, Myanmar offers what it calls “the practice in the region” as support for the supposed fact that cut-offs within 200 miles are common.¹⁹ The examples Myanmar cites are: (1) the agreements among India, Indonesia and Thailand in the Andaman Sea of 1978; (2) the agreement among Indonesia, Malaysia and Thailand in the Northern Part of the Strait of Malacca of 1971; and (3) the agreement among Myanmar, India and Thailand in the Andaman Sea

Mr President, these agreements do not support Myanmar’s proposition. As you can see from the map in front of you, which is also at tab 3.15 of your Judges’ Folder, all of these cases relate to situations where the States in question sat *opposite* each other at distances of less than 300 miles. It was thus impossible for *any* State to reach even 150 miles, much less 200 miles. This, of course, is not the situation here. Bangladesh faces directly onto the open sea. The only landmass opposite it is Antarctica, 5,200 miles away!

For all these reasons, we say the weight of the State practice supports Bangladesh’s position concerning the inadequacy of the equidistance method in this case. When a State is located on a concave coast sandwiched between two neighbours, equidistance by definition cannot lead to the equitable solution the law requires.

(Short adjournment)

Mr. President, I have arrived at the last portion of my comments this morning. Largely as a result of the effects of the concavity of Bangladesh’s coast, Myanmar’s proposed equidistance line suffers from still other defects than the ones I have already discussed.

In the first instance, Myanmar does not seem to know exactly where its own line goes. The Tribunal will have no doubt noted that the line described in Myanmar’s Submissions is not the same as the line described in the body of its Pleadings. In both the Counter-Memorial and the Rejoinder, Myanmar’s Submissions describe the final segment of its proposed delimitation as follows:

From Point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of 231° 37’ 50.9” until it reaches the area where the rights of a third State may be affected.²⁰

This suggests that the proposed delimitation continues along a 232° line throughout its course, no matter where the rights of a third State may be determined to come into play, but that is not an accurate description of the line Myanmar purports to be drawing.

As the Tribunal well knows, Myanmar’s proposed equidistance line gives St Martin’s Island no effect. If drawn all the way out to 200 miles, this nil-effect line actually bends to the southwest in its final 10 miles or so. It does so at the point Myanmar labels Point Z in Sketch map No. 5.8 of the Counter-Memorial, where Bangladesh’s base point β2 begins to affect the course of the equidistance line. That Sketch map is displayed before you now. You can also find it at tab 3.16 of your Judges’ Folder. Curiously, Myanmar never bothers to show the effect of base point β2 on its proposed delimitation. Here is what it would look like had Myanmar bothered to show it. It is the black line on the map you see in front of you.

Interestingly, Myanmar’s proposed Point Z coincides almost precisely with the location at which Myanmar’s proposed equidistance line intersects with India’s most recent claim line. The relationship between the two is portrayed on the large-scale map now appearing before you. It’s also at tab 3.17 of your Judges’ Folder. India’s claim line not-so-coincidentally passes about 900 metres to the east of Point Z. By limiting its description of its

¹⁹ RM, para. 6.32.

²⁰ MR, para. 6.93.

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proposed line to the area east of Point Z, it is as if Myanmar knew exactly what India's claim was going to be. This has always struck us as a bit odd because Bangladesh itself did not know about India's new claim line until much later in the life history of this case.

Myanmar's proposed equidistance line is also problematic because it is drawn on the basis of just four coastal base points, three on Myanmar's coast and only one – base point $\beta 1$ – on the Bangladesh coast, which Myanmar places very near the land boundary terminus with Bangladesh and Myanmar in the Naaf River. Myanmar takes pains to make it appear as though it actually uses two Bangladesh base points in the plotting of the equidistance line, but that is not true. As we saw, Myanmar never bothers to show the effect of alleged base point $\beta 2$ on its proposed delimitation line, because it has none. Base point $\beta 2$ never actually comes into play in Myanmar's proposed delimitation.

We say it would be quite remarkable to base a delimitation that apportions rights out to 200 miles – not to mention amputates Bangladesh's entitlements extending out to 390 miles – on the basis of a single coastal base point. Indeed, after a review of the jurisprudence and State practice, we have been unable to find even one example where a delimitation extending so far from the coast is based on just one base point. Moreover, in the *Nicaragua v. Honduras* case, the ICJ drew a bisector precisely to avoid such a situation.

The paucity of base points is yet another reason that calls into question the viability of equidistance as a delimitation methodology in this case. In its Rejoinder, Myanmar quotes the *Black Sea* case for the proposition that base points will generally “have an effect on the provisional equidistance line that takes due account of the geography”.²¹ This may be true as a broad proposition, but I would submit that an equidistance line that reaches out to 180 miles from the coast yet is based on a single coastal base point could not possibly “take due account of the geography”.

The dearth of base points on the Bangladesh coast is a function of the concavity of Bangladesh's coast. After base point $\beta 1$, Bangladesh's coast recedes into the mouth of the Meghna estuary. There is thus nothing to counteract the effect of Myanmar's coast south of the land boundary terminus.

Myanmar's Rejoinder again cites the *Black Sea* case for the proposition that:

Equidistance and median lines are to be constructed from the most appropriate points on the coasts of the two States concerned, with particular attention being paid to those protuberant coastal points situated nearest to the area to be delimited.²²

The trouble here is that due to the concavity of Bangladesh's coast, there are no “protuberant coastal base points”.

The consequence can be seen in what happens to Myanmar's equidistance line as it moves further and further from shore. As it does so, it becomes increasingly prejudicial to Bangladesh, and increasingly inequitable. This is shown on the annotated copy of Sketch map No. 5.8 from the Counter-Memorial appearing before you now, which you can also find at tab 3.18 of your Judges' Folder. The first segment of Myanmar's line between the land boundary terminus and Point F, as you see on the map, which is controlled by base points $\beta 1$ and $\mu 1$, follows an azimuth of 214°, that's all but identical to Bangladesh's proposed bisector of 215°, as Professor Crawford will be discussing later. The second segment between Point F and Point G, where Myanmar's base point $\mu 2$ takes effect, is pushed inward towards Bangladesh at an azimuth of 223.5°, a difference of about 9°. And then in the third segment

²¹ MR, para. 5.45 (citing *Black Sea* case, para. 117).

²² MR, para. 4.25 (citing *Black Sea* case, para. 117).

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between Points G and Z where Myanmar's base point μ_3 is controlling, the line arcs even further inwards at an angle of about 232° .

Myanmar's Rejoinder again cites the *Black Sea* case for the proposition that an equidistance line will be "heavily dependent on the physical geography."²³ Here the "physical geography" is a concave coast, the effect of which is to cause Myanmar's equidistance line to swing progressively inward to Bangladesh, and to its detriment. It is precisely this same sort of physical geography where equidistance was rejected as the applicable delimitation methodology in the *North Sea* cases and in the *Guinea/Guinea-Bissau* decision.

Mr President, Members of the Tribunal, that concludes my presentation this morning. I thank you for your kind attention and I ask that you call Mr Reichler to the podium.

The President:

Thank you, Mr Martin.

I now give the floor to Mr Reichler.

²³ MR, para. 4.25 (citing *Black Sea* case, para. 117)

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STATEMENT OF MR REICHLER
COUNSEL OF BANGLADESH
[ITLOS/PV.11/4/Rev.1, E, p. 24–34]*Mr Reichler:*

Mr President, Members of the Tribunal, I am very pleased to appear before you again. It falls to me today to give you the second part of the two-part presentation by Mr Martin and myself on why equidistance cannot lead to an equitable maritime boundary between Bangladesh and Myanmar in the areas beyond the territorial sea.

As we have emphasized from the outset of these hearings, Myanmar has chosen to present a boundary proposal that intentionally ignores what we believe to be the three most dominant geographical and geological features that characterize and define the area to be delimited. They are all highly relevant to this case. They are, as you are by now quite familiar, the double concavity of Bangladesh's coast, the existence of St Martin's Island, and the natural, uninterrupted, geological and geomorphological prolongation of Bangladesh's landmass into the Bay of Bengal far beyond 200 miles. We say that it is impossible to delimit an equitable boundary in this case without duly taking into account all three of these natural features.

My colleague, Mr Martin, in the first part of this presentation, focused on Myanmar's failure to take into account the double concavity of Bangladesh's coast, and the inequity of any boundary line, including Myanmar's equidistance line, which fails to do so. I will address the failures of Myanmar and its proposed delimitation methodology to account for St Martin's Island, and for the natural prolongation of Bangladesh's landmass beyond 200 miles.

Mr President, as I said last Thursday, Myanmar deliberately ignores St Martin's Island, giving it no effect, in their construction of an equidistance line in the EEZ and continental shelf. In their own words, they plot their equidistance line "from both Parties' mainland low water lines, without taking the island into consideration."¹ We think they are wrong to begin with an equidistance line at all but, having done so, they are wrong also to have eliminated St Martin's from the line they have drawn: given the geography of this case, its removal cannot lead to an equitable solution, for the reasons I introduced last Thursday, and as I will further explain today.

Myanmar tries to justify its exclusion of St Martin's from the pertinent geography of this case by telling you that Bangladesh agrees to it. They say, in their written pleadings, that "an important point of agreement"² between the parties is on "the non-use of St Martin's in the construction of the initial provisional line, which constitutes the first step in the delimitation process."³

Mr President, it is bad enough that they fall into the error of ignoring one of the most significant geographical features that characterizes this case; it is even worse that they try to use us to break their fall.

Why would Bangladesh agree that its own highly important coastal feature, St Martin's Island, should be ignored in the delimitation of the boundary? It makes no sense. What is true is that Bangladesh takes the position – indeed, it has always taken the position, including the consistent position in 37 years of negotiations with Myanmar – that equidistance is not an acceptable basis for delimiting the boundary beyond the territorial sea, and that no form of an equidistance line, however modified or adjusted, is capable of leading to an equitable solution in these circumstances. Consistent with this approach, Bangladesh

¹ RM, para. 1.6.

² RM, para. 3.3.

³ RM, para. 1.20.

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did not present to the Tribunal, in either of its written submissions, a version of its provisional equidistance line in the EEZ and continental shelf. To say, as Myanmar does, that Bangladesh has not placed any base points on St Martin's is true, but only in a very limited and misleading sense. It is true in the same sense that we have not placed any base points anywhere along Bangladesh's coast, or on Myanmar's coast. We have not placed any base points there because we have not constructed a provisional equidistance line; hence, there is no need for us to put base points on St Martin's Island or anywhere else.

What makes Myanmar's statement even more strange is that in the delimitation line that we have submitted to the Tribunal we have taken St Martin's fully into account and given it the proper effect which it merits under article 121. As Professor Crawford will explain this afternoon, instead of an equidistance line, Bangladesh believes an angle bisector is the appropriate method for delimiting the boundary in the EEZ and continental shelf within 200 miles in this case. Our bisector of 215° is initially drawn from the point where the coastal façades of Bangladesh and Myanmar intersect, and is then transposed to the south so that it commences at the outer limit of the territorial sea boundary. In this manner, our proposed delimitation line gives full effect to St Martin's, both in the territorial sea and in the EEZ and continental shelf to 200 miles. As you will hear from Professor Crawford, this is entirely consistent with the established case law, and produces an equitable result as between Bangladesh and Myanmar.

In short, Mr President, Myanmar is not entitled to claim any support from us in regard to their highly unorthodox decision to exclude St Martin's Island from the case. They are entirely on their own on that one.

But worse than being confused about our position on St Martin's, Myanmar seem to be especially confused about their own. They repeat at several places what they regard as the methodology that, according to their reading of the case law, must be applied in the delimitation of a maritime boundary.⁴ Then they go and do something completely different and contradictory when it comes to St Martin's. This divergence between what they say and what they do is almost as wide as the tectonic plate boundary in the Bay of Bengal.

Myanmar says repeatedly that there is a conventional approach that international courts and tribunals commonly use, in cases where equidistance is appropriate, to implement the "equitable principles/relevant circumstances" rule articulated in the *North Sea* cases and subsequent ICJ judgments. First, a provisional equidistance line is drawn. Second, consideration is given to whether there are any relevant circumstances warranting a departure from the line. Myanmar is quite devoted to this approach, at least on paper. It insists on it repeatedly throughout its written pleadings.⁵ Yet, it fails to follow its own advice. By proffering a so-called mainland-to-mainland equidistance line as its "provisional equidistance line", Myanmar makes the prior assumption that St Martin's should have no effect. In so doing, it confuses the second step of its equidistance methodology with the first.

There is no legal basis for an *a priori* assumption that St Martin's Island should be ignored in the drawing of Myanmar's provisional equidistance line. As Professor Sands described yesterday, it is a significant coastal feature that indisputably generates entitlement in the continental shelf and EEZ. There are thus no grounds, other than Myanmar's self-interest, for excluding it in the plotting of a provisional equidistance line, where, in the first instance, all coastal features are to be included. In the equidistance method, it is only after the provisional equidistance line has been plotted that it is analyzed to determine whether it should be adjusted in light of relevant circumstances. In Myanmar's words, citing the ICJ's judgment in *Romania v. Ukraine*: "At this initial stage of construction of the provisional

⁴ RM, paras. 4.14-4.23.

⁵ MCM, paras. 5.76-5.81; RM, paras. 4.14-4.23.

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equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.”⁶

If St Martin’s is the relevant circumstance that Myanmar paints it to be – which Bangladesh disputes, along with any use of the equidistance method in these circumstances – then it is up to Myanmar, in the first instance, to draw a provisional equidistance line “on strictly geometrical criteria on the basis of objective data”. Then, and only then, it is for Myanmar to demonstrate how and why the provisional equidistance line so drawn is inequitable, and that the putative inequity is attributable to a disproportionate effect exerted by St Martin’s. But Myanmar doesn’t do this. They shouldn’t be drawing a provisional equidistance line at all, in our view, but if they insist on going down that route, they should at least do it in accordance with the approach taken in those cases where it is justifiable. They don’t even attempt that. Myanmar conveniently skips over what they themselves insist is the first essential step. Their provisional equidistance line excludes St Martin’s. How can they, the champions of equidistance, the truest of the true believers, ignore what they have said many times is the appropriate way to apply equidistance methodology? Here is all they offer by way of explanation: “[I]t is quite obvious that there is no case for selecting base points on St Martin’s in order to draw the equidistance line beyond the territorial sea given the island’s location directly in front of the coast of Myanmar and the disproportionate effect this feature would have on the entire course of the line.”⁷ In other words, they assume their own conclusion. So much for “strictly geometrical criteria” and “objective data”. What is “obvious” to Myanmar, in its subjective and not unbiased judgment, is not to Bangladesh; and if the disproportionate effect of St Martin’s on a provisional equidistance line is so “obvious”, why don’t they plot the line using St Martin’s first, and then show how and why St Martin’s makes it inequitable, so that it may be treated as a relevant circumstance according to the methodology that they repeatedly pay lip service?

One of Myanmar’s principal arguments in favour of an equidistance line is its alleged objectivity. According to Myanmar, “the equidistance method is much less subjective than others.”⁸ But Myanmar itself proves the opposite – that equidistance is just as susceptible to subjectivity as any other delimitation method. Myanmar’s *a priori* decision to ignore St Martin’s Island on the self-serving grounds of “obviousness” is an example.

Further, under the so-called conventional approach, as Myanmar describes it, the second stage of the delimitation process requires an examination of relevant circumstances to see whether there are disproportionate effects caused by a particular feature and, if so, how large an adjustment to the provisional equidistance line is warranted. The determination of whether any given mainland or insular feature, like St Martin’s, constitutes a relevant circumstance requires a judgment that, at least in part, is subjective; so does the determination as to how large an adjustment of the line is warranted. Geometric criteria and objective data will rarely answer these questions. For a party to a case to declare that a particular feature has disproportionate effects and then exclude it from the delimitation analysis on the grounds that this is “obvious” emphasizes the subjective nature of the exercise. If more evidence of Myanmar’s subjective application of equidistance is required, it need only be pointed out that Myanmar treats St Martin’s Island as a relevant circumstance, but not the double concavity in which Bangladesh’s entire coast is located.

Mr President, as you know, Bangladesh eschews equidistance methodology as not appropriate for this case. This is a good illustration. Even if we could all agree that the double concavity of Bangladesh’s coast is a relevant circumstance, as the ICJ found in similar

⁶ RM, para. 4.22.

⁷ RM, para. 5.29.

⁸ RM, para. 4.24.

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circumstances in the *North Sea* cases,⁹ and the arbitral tribunal found in *Guinea/Guinea Bissau*,¹⁰ how would we measure the distorting effects on a provisional equidistance line, and how would we calculate how much of an adjustment to equidistance to make? In this context, an equidistance approach turns out to be even more subjective.

Myanmar offers three alleged principles for determining whether an island is what they call a “special circumstance”. First, they say that an island is more likely to be a “special circumstance” when it is adjacent to, as distinguished from opposite, the coast of the neighbouring State.¹¹ Second, they say an island closer to the mainland is more likely to be a special circumstance than one lying farther offshore.¹² And third, the island is more likely to be a special circumstance, according to Myanmar, if there are no so-called “balancing islands” of the neighbouring State.¹³ These propositions are all stated in successive paragraphs at pages 57–58 of the Rejoinder. What is common to all of them is that there are no citations to any judicial or arbitral decisions or any other legal authorities – not a single one. This is mere assertion, not legal argument.

Myanmar here invents its own rules. The first two of them are closely related. In essence, they claim that St Martin’s is a special or relevant circumstance because it lies directly in front of Myanmar’s mainland, necessitating that the equidistance line be drawn around it, rather than through it. On Friday, Professor Sands addressed Myanmar’s insistence that St Martin’s Island is located in front of its coast. I will therefore not dwell on this matter, but I would like to make these observations.

First, and most important, whether or not an island can be characterized as being “in front of” one coast or another does not in itself determine whether it is a special or relevant circumstance. Instead, as explained by the Court of Arbitration in the *Anglo-French Continental Shelf* case, the pertinent question is whether it would produce “an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States.”¹⁴ In other words, what counts is the effect an island produces in the context of a particular delimitation. Labelling St Martin’s as being “in front of” Myanmar’s coast will, of itself, establish nothing.

Second, St Martin’s Island is as much in front of the Bangladesh coast as it is in front of Myanmar’s coast. As Professor Sands explained, in order for it to be true that St Martin’s Island lies entirely in front of the Myanmar coast, St Martin’s would have to be shifted significantly southwards by at least 11 miles.

Third, the case law supports the view that St Martin’s Island lies in front of the mainland of Bangladesh as well as of Myanmar. At paragraph 5.31 of its Rejoinder, Myanmar describes the French island of Ushant as being “located in front of the French coast”.¹⁵ This is interesting because Ushant lies 10 miles off France’s Brittany coast, further than St Martin’s is from Bangladesh. Similarly, the Rejoinder describes the UK’s Scilly Islands as being “located in front of the British coast.”¹⁶ The Scilly Islands are 21 miles off the UK coast. *A fortiori*, St Martin’s is in front of the Bangladesh coast. Moreover, Myanmar’s proposition that a finding of special or relevant circumstance is more likely when

⁹ *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 3, at para. 91.

¹⁰ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252, at paras. 107-110.

¹¹ RM, para. 3.15.

¹² RM, para. 3.16.

¹³ RM, para. 3.17.

¹⁴ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3, at para. 246.

¹⁵ RM, para. 5.31(i).

¹⁶ RM, para. 5.31(ii).

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an island lies closer to the mainland is wrong. In fact, it is when islands lie *outside* a State's 12-mile territorial sea that they have been treated as relevant circumstances and given less than full effect in the EEZ and continental shelf delimitations.¹⁷ Here, Myanmar has it backwards.

What really matters is a contextualized assessment of an island's effect in the particular circumstances of a given case. Only in a particular geographical setting can the effect of an island be judged proportionate or disproportionate. Here again, Myanmar has very little to say. What they do say is this, and only this: "An 8 square kilometres island generating approximately 13,000 square kilometres of maritime entitlement is the very definition of disproportion."¹⁸

No authority is cited. Again, Myanmar pleads by way of assertion, not legal authority. It simply assumes, once again, that what it says is "obvious", but there is nothing obvious about it. Merely measuring the amount of maritime space that an island generates cannot be dispositive on the question of disproportionate effects. A mid-sea island with no neighbouring States, for example, controls a maritime area 400 miles in diameter, an area of approximately 430,000 km². Is that the "very definition of inequitable"? Of course not. By definition, equity can only be judged in context. Whether or not an 8 km² island, like St Martin's, controlling a certain amount of maritime space is inequitable cannot be decided in the abstract; it depends on the circumstances of the case. Here, the circumstances not only show no inequity, they show the opposite: they show that ignoring St Martin's only exacerbates the inequity of Myanmar's proposed equidistance boundary.

Mr President, with your indulgence, I will return very briefly – in fact, for one paragraph – to a chart that I displayed last Thursday. This can be found at tab 1.15 of your Judges' folders. We start with Myanmar's version of an equidistance line and India's claim line. Here, just for illustration purposes, you will recall that we removed the secondary concavity of Bangladesh's coast – the concavity within a concavity – but not the primary concavity, and we then plotted another version of an equidistance line which, like Myanmar's, completely ignores St Martin's. The area in red is a rough approximation of the area that Bangladesh loses to Myanmar by virtue of the secondary concavity in the Bangladesh coast. Now, again, in purple, as shown on Thursday, is a third version of an equidistance line, which is like Myanmar's except that it takes St Martin's and its four base points into account. As you can see, the effect of adding St Martin's to the picture is to offset, but only partially, the effect of Bangladesh's secondary concavity. There is still an area, in orange, which St Martin's fails to recapture for Bangladesh; and St Martin's does nothing to offset the even greater prejudice to Bangladesh caused by the primary concavity.

What this confirms is that we can only ascertain the effects of a particular feature – in this case St Martin's – in context. To merely say that it generates 13,000 km² of maritime space – full stop – is to say nothing that is dispositive. It tells us zero about whether the effects are disproportionate. In context, we can see that the effects of St Martin's plainly are not. To the contrary, it is the elimination of St Martin's that disproportionately affects Myanmar's delimitation exercise, and renders it even more inequitable than it already is.

Myanmar's invocation of prior court decisions and arbitral awards involving islands does not alter this conclusion. Take, for example, the decision in the *Dubai/Sharjah* case cited by Myanmar.¹⁹ The geographical circumstances at issue there were completely different

¹⁷ See, e.g. the Scilly islands in *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3; the Abu Musa island in *Dubai/Sharjah Border Arbitration*, Award, 19 October 1981, reprinted in 91 ILR 543; the Seal Island in *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246.

¹⁸ RM, para. 5.35.

¹⁹ *Dubai/Sharjah Border Arbitration*, Award, 19 October 1981, reprinted in 91 ILR 543.

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from those here. The island of Abu Musa was located 34 miles off the coast of Sharjah - five times further than St Martin's is from Bangladesh and not far from the location of the median line in the middle of the Persian Gulf between Dubai and Iran. At that distance, Abu Musa and Dubai stand in a relationship of oppositeness. If it was given weight beyond the 12-mile territorial sea, Abu Musa would have had the effect of deflecting the equidistance line between Dubai and Sharjah across Dubai's coastal front, cutting it off and preventing it from reaching its natural outlet at the location of the mid-Gulf median line. You can see this on the screen in front of you, and at tab 3.19 of your Judge's folder.

In the tribunal's words, giving Abu Musa effect beyond 12 miles "would have produced a disproportionate and exaggerated entitlement to maritime space as between the Parties."²⁰ The reference to the effect of an island "as between the Parties" is important. Disproportion is not determined in the abstract by reference to a particular number of square kilometres. Instead it depends on the island's impact on the delimitation viewed in its overall context. The tribunal's decision to give Abu Musa no effect beyond the territorial sea supports Bangladesh's case, not Myanmar's. The tribunal's delimitation line is depicted in red on the screen before you, together with the equidistance line that the tribunal rejected. The effect of Abu Musa's location was to place Dubai in a functional concavity between Sharjah/Abu Musa on the one side and Abu Dhabi on the other. What the arbitral tribunal did was to give Dubai relief from the cut-off that equidistance would have imposed upon it by virtue of this concavity.

Moving from the Persian Gulf to the Black Sea does not assist Myanmar. It gets no benefit from its effort to compare St Martin's Island to Ukraine's Serpents' Island, which was given no effect beyond the territorial sea in the *Romania/Ukraine* case.²¹ There is really no comparison. Serpents' Island is one-fiftieth - 2% - the size of St Martin's.²² It has no permanent population, just a few lighthouse-keepers, as compared to the 7,000 permanent inhabitants and hundreds of thousands of tourists on St Martin's, and it lies more than three times further from the Ukraine coast than St Martin's does from the rest of Bangladesh.²³ Even Myanmar admits these major differences.²⁴ Nonetheless it attempts to find commonality between the two islands by arguing that St Martin's, like Serpents', lies "alone" and not in "a cluster of fringe islands constituting the coast of Ukraine."²⁵ Even if that were a significant detail, it would not be true, because unlike Serpents' Island, which does lie alone 20 miles off the Ukraine coast, St Martin's is a coastal island in close proximity to the mainland land mass of Bangladesh, and functions as an integral part of the Bangladesh coast.

Myanmar also fails to find support for its treatment of St Martin's Island in the *Anglo-French Continental Shelf* case.²⁶ The treatment accorded Ushant Island in fact supports Bangladesh's case. There, the Court of Arbitration gave full effect to Ushant, with a population of less than 1000, and lying 10 miles off France's Brittany coast. That is twice as far from the French coast as St Martin's is from the Bangladesh mainland, and only one-seventh as populated as St Martin's. The Court of Arbitration nevertheless determined that Ushant forms part of the coast of France and "cannot be disregarded in delimiting the continental shelf boundary without 're-fashioning geography'".²⁷ Notably, as the western-

²⁰ *Dubai/Sharjah*, p. 677.

²¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86 (hereinafter "*the Black Sea Case*"), at para. 149.

²² RB, para. 2.91.

²³ RB, para. 2.91.

²⁴ RM, para. 5.33.

²⁵ RM, para. 5.33.

²⁶ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter "*Anglo-French Continental Shelf Case*").

²⁷ *Anglo-French Continental Shelf Case*, at para. 248.

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most point in France, the island controlled the direction of the delimitation line over its final 210 miles.

Myanmar's own practice also undermines its argument that St Martin's Island should be ignored, or given anything less than full effect, in the delimitation of the boundary in this case. In 1986, Myanmar and India agreed to delimit the boundary between Myanmar's Coco and Prepara Islands and India's Andaman Islands in the Andaman Sea and the Bay of Bengal.²⁸ Professor Sands spoke about this agreement in relation to the territorial sea on Friday. I will only add to his comments insofar as the argument bears on the delimitation of the EEZ and continental shelf.

The agreed line in the Bay of Bengal is depicted on the screen. This is also at tab 3.20 of your Judge's folder. What is interesting about this line is that it is entirely controlled on the Myanmar side by Little Coco Island, which was given full effect by the Parties. Little Coco and St Martin's are virtually identical in size. A side-by-side view of the two at the same scale shows just how similar they are. This is at tab 3.21. If Little Coco Island was taken fully into account by Myanmar and India in delimiting the EEZ, why should St Martin's be treated less favourably?

Finally, to summarize Mr President, Myanmar has offered no valid reason for ignoring St Martin's island in the delimitation of the EEZ and continental shelf as between Bangladesh and Myanmar, or for giving it anything less than full effect. St Martin's is one of the important geographical features in this case. Any line of delimitation that would ignore it, as Myanmar's proposed boundary does, is inherently and necessarily inequitable. But even including St Martin's in the delimitation exercise, and giving it the full effect to which it is entitled under the Convention and the applicable case law does not – it cannot – make up for the severe prejudice caused to Bangladesh by an equidistance line – any equidistance line – in the presence of Bangladesh's doubly concave coast. That is why, as Professor Crawford will explain this afternoon, the only way to achieve an equitable solution in this case is to begin with a wholly different methodology, as supported by the relevant jurisprudence, to recognize that equidistance is inappropriate in these circumstances, and to employ the angle bisector methodology in its place.

Mr President, I turn now to the third major feature of this case that Myanmar ignores, the Bengal depositional system and the undisputed prolongation of the Bangladesh land mass far beyond 200 miles from its territorial sea baselines. As we have said since our opening speeches last week, Myanmar's proposed boundary is inequitable to Bangladesh because, in addition to the other reasons that we have discussed, it completely cuts off Bangladesh from any access to the outer continental shelf.

I introduced this subject on Thursday, and it was touched on by Professor Sands this morning. Tomorrow, our entire session will be devoted to delimitation of the outer continental shelf. The undisputed facts regarding the geology and geomorphology of the Bay of Bengal, and the Bangladesh and Myanmar landmasses, will be laid out by Dr Lindsay Parson and Admiral Mohamed Khurshed Alam; and Admiral Alam will explain and support Bangladesh's claim in the outer continental shelf, which both Bangladesh and Myanmar recognize lies well within the outer limit of the continental margin in the Bay of Bengal. I will not, therefore, address the pertinent facts, or the merits of the specific claims of Bangladesh, today.

My point this morning is simply that the physical, geological and geomorphological connection between the Bangladesh land mass and the Bay of Bengal sea floor is so clear, so direct and so pertinent, that adopting a boundary in the area within 200 miles that would cut

²⁸ Agreement between the Socialist Republic of the Union of Burma (Myanmar) and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal of 23 December 1986 (J. Charney and L. Alexander, *International Maritime Boundaries* (1996), at pp. 1330-1340).

STATEMENT OF MR REICHLER – 12 September 2011, a.m.

off Bangladesh and deny it access to, and rights in, the area beyond would constitute a grievous inequity.

This has been our argument since the beginning of this case. To date, Myanmar has offered no serious response. In its written pleadings Myanmar argued that Bangladesh was putting the cart before the horse by supposedly assuming that it has rights in the outer continental shelf that the Tribunal is required to recognize.²⁹ That assumption, Myanmar said, was incorrect since equidistance prevents Bangladesh from ever getting to the area beyond 200 miles.

This argument suffers from at least two flaws. First, Bangladesh makes no assumptions as to its rights. It claims that it is entitled to a part of the outer continental shelf under article 76 of the Convention; it recognizes that it is for this Tribunal to determine whether in fact it has those rights. Myanmar's equidistance boundary would automatically and completely eviscerate Bangladesh's claims, even if they are justified under the applicable provisions of the Convention.

Myanmar nowhere – nowhere – challenges any of the facts or legal principles on which Bangladesh's claims in the outer continental shelf are based, and it acknowledges this.³⁰ At paragraph A.43 of the Rejoinder's Appendix, Myanmar states: "If the outer edge [of the continental shelf] is situated at a distance greater than 200 nautical miles from lawfully established baselines, the coastal State is entitled to exercise its sovereign rights up to this edge"³¹ Since there is no dispute about the fact that the outer edge of the continental shelf of Bangladesh lies beyond 200 miles, by Myanmar's own reasoning Bangladesh "is entitled to exercise its sovereign rights up to this edge" – absent the cut-off imposed by Myanmar's equidistance boundary.

The other flaw in Myanmar's argument is that it assumes its own conclusion. By telling the Tribunal that it does not need to concern itself with Bangladesh's claim in the outer continental shelf because equidistance stops it from getting there, Myanmar gets stuck in a logical roundabout. Myanmar says, in effect, that the problem takes care of the problem. Because of its insistence on equidistance, which is the central problem, Myanmar creates – it does not resolve – the problem of Bangladesh's inability to access the part of the outer continental shelf in which it, otherwise, would have undisputed rights.

Mr President, Members of the Tribunal, as you know from reading the written pleadings, there is an important point on which the Parties are in agreement: that is, that any delimitation will work some cut-off on both Parties' maritime entitlements. That being true, the goal must be, as the ICJ observed in the *Black Sea* case: to "allow [...] the coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way" and in a manner that achieves an equitable solution.³² This is a point with which Myanmar has expressly agreed. I refer in particular to page 153 of the Counter-Memorial where this very passage is cited with approval.

Given its agreement with this statement of principle, I ask how could Myanmar possibly believe its proposed delimitation line satisfies it? The effect of Myanmar's reliance on an equidistance boundary is to cut Bangladesh off entirely from any ability to exercise sovereign rights over an area of some 100,000 km² that is part of its natural prolongation. In contrast, it would allow Myanmar to exercise sovereign rights over some 140,000 km² in the area beyond 200 miles, and that is assuming that Myanmar has any natural prolongation in the area, which it does not. Bangladesh will return to this issue tomorrow.

²⁹ MCM, paras. 5.157.

³⁰ RM, para. 1.7.

³¹ RM, para. A.43.

³² *Black Sea Case*, para. 201.

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In any event, Myanmar's proposed delimitation line contradicts the very principle Myanmar purports to embrace. A delimitation that prevents Bangladesh from exercising sovereign rights beyond 200 miles while at the same time permitting Myanmar to do so over a huge area is not reasonable, is not balanced and cannot be an equitable solution.

Mr President, in final summary of Mr Martin's presentation and my own, Myanmar has chosen to submit a proposed boundary line based on equidistance methodology that deliberately ignores the most important geographic and geologic features pertinent to this case – the double concavity of Bangladesh's coast, the existence of St Martin's Island, and the fact that the Bay of Bengal sea floor is the natural prolongation of Bangladesh but not of Myanmar. In Bangladesh's view, it is impossible to delimit the maritime boundary between the two Parties equitably without taking all three of these critical features into due account. The boundary proposed by Myanmar is therefore not equitable. But the point is larger than this. In Bangladesh's view there is no version of an equidistance line that could suitably and equitably take account of all of these features, especially the double concavity of Bangladesh's coast. As Professor Sands recalled for you this morning, Myanmar's (then Burma's) position during the negotiations leading to the 1982 Convention was that: "equidistance boundaries were by definition arbitrary."³³ That is certainly true in this case.

For these reasons, a different methodology must be employed. Professor Crawford will discuss it with you when we return for the afternoon session.

Mr President, Members of the Tribunal, I thank you once again for your patience and courteous attention. Bangladesh's presentation this morning is now concluded. We look forward to seeing you at 3 p.m.

(Adjournment)

³³ A/CONF.62/C.2/SR.291, para. 7.

12 September 2011, p.m.

PUBLIC SITTING HELD ON 12 SEPTEMBER 2011, 3.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 12 SEPTEMBRE 2011, 15 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good afternoon. We now resume our hearing.

I give the floor to Professor Crawford.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR CRAWFORD
COUNSEL OF BANGLADESH
[ITLOS/PV.11/5/Rev.1, E, p. 1–17]*Mr Crawford:*

Mr President, Members of the Tribunal, this morning, you heard Bangladesh's views on the inadequacy of equidistance in this case. My task now is to present the delimitation Bangladesh proposes within 200 miles from the coasts of the two Parties, and to justify the angle bisector method on which it is based.

This presentation is in five parts. First, I will discuss the cases that support the use of the bisector, and through them explain the underlying concept. Second, I will identify the relevant coasts. Third, I will present the angle bisector Bangladesh proposes. Fourth, I will demonstrate the equitableness of the solution thereby put forward. Fifth, and because we are dealing with the areas within 200 miles of both States, I will discuss the issue of the so-called "grey zone", sometimes referred to as the *alta mar*, that is, the area created by the bisector that is beyond 200 miles from Bangladesh's coast but within 200 miles from Myanmar's.

I turn to the first point, the use of the bisector in the jurisprudence.

Mr President, Members of the Tribunal, this morning, my friend Professor Sands discussed the law applicable to the delimitation of the EEZ and continental shelf within 200 miles. What the relevant texts require is an equitable solution. But how you get there must be determined by the particular circumstances of a given case.

Myanmar itself accepts this:

the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate.¹

This morning Mr Martin and Mr Reichler addressed the factors that make the application of the equidistance method inappropriate in this case. There are two possible solutions to that problem: either (1) adjust the equidistance line by an amount sufficient to offset the inequities it creates, or (2) adopt another method. In our view the second alternative is to be preferred, for reasons I will explain.

The bisector method is the main alternative delimitation method to equidistance or adjusted equidistance which has been employed by international courts and tribunals. It has been employed in some fashion or another in five of the international delimitation cases decided in the modern era: *Anglo-French Continental Shelf*, *Libya/Tunisia*, *Gulf of Maine*; *Guinea/Guinea-Bissau* and, most recently, *Nicaragua/Honduras*.

I would stress that although the angle bisector is an alternative method, it is not divorced from the concept of equidistance. What it does is to simplify the relevant coasts by drawing lines which reflect their general direction, then drawing a bisector which is, of course, equidistant between those lines. Whereas the equidistance/special circumstances method takes equidistance and then adjusts it, the angle bisector method first simplifies the coast, then draws a strict equidistance line between the simplified coastal projections. Using the angle bisector helps eliminate the need for the subjective determination of how much adjustment is required from this equidistance. In this respect both methods aim at achieving equality between like-situated coasts. In this regard I recall the remark of the Chamber in *Gulf of Maine*, which endorsed...

¹ CMM, para. 5.20 (quoting *Nicaragua v. Honduras*, para. 272).

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[the] criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States [...] converge and overlap.²

Throughout its written pleadings, Myanmar has insisted that the angle bisector is only used in very limited circumstances: when it is not technically feasible to draw an equidistance line.³ We thought we had thoroughly refuted that in our Reply but since Myanmar insists on the point again in its Rejoinder, let me try again.

In the first instance, it is a very rare case in which it is impossible to draw an equidistance line. It is not a difficult operation. It may be a more or less complex line, it may be more or less equitable, but in any given case it is not impossible.

Moreover, the jurisprudence refutes Myanmar's argument. In the *Gulf of Maine* case, the first case in which the bisector was used in the manner we propose, there was nothing that made it difficult, much less technically unfeasible, to draw an equidistance line. You can see the equidistance line on the screen; and compare it with the Chamber's line. The Chamber decided that the extraordinary irregularity of the coast, particularly on the United States side, made the use of equidistance problematic. The Chamber concluded that:

it is necessary to renounce the idea of employing the technical method of equidistance. ... [P]reference must be given to a method which, while inspired by the same considerations, avoids the difficulty of application ... and is at the same time more suited to the production of the desired result⁴.

Similarly, in the *Guinea/Guinea-Bissau* arbitration, there were no difficulties associated with drawing an equidistance line. The tribunal decided that the use of the equidistance method was inappropriate due to the concavity of Guinea's coast and to the cut-off effect that equidistance would have imposed on the parties and on other neighbouring coastal States. I will return to that case shortly but you can see the equidistance line on the screen.

Finally, even in the *Nicaragua/Honduras* case, which is the key case in Myanmar's argument that equidistance must be infeasible before the angle bisector method will be used, it is wrong to say that it was impossible to draw an equidistance line. In fact, both parties presented an equidistance line to the Court as part of their case but they were different lines because they had different base points.⁵ The issue was just that the instability of the coast in the area made equidistance unreliable. In its judgment, the Court specifically said:

The use of a bisector ... has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate.⁶

Myanmar's Rejoinder evidences a particular concern about the *Guinea/Guinea-Bissau* decision, as I said the other day. After ignoring it entirely in the Counter-Memorial, it directs rather sharp criticism at the decision in the Rejoinder, saying "it is so eccentric that it is difficult to refer to it."⁷ The disapprobation is understandable since *Guinea/Guinea-Bissau* refutes Myanmar's approach to this case in almost every respect: one, equidistance was

² *Gulf of Maine*, para. 195.

³ MCM, paras. 5.23-5.26; MR, paras. 4.27, 5.42, 6.67(v).

⁴ *Gulf of Maine*, para. 212.

⁵ *Nicaragua v. Honduras*, para. 91.

⁶ *Nicaragua v. Honduras*, para. 287.

⁷ RM, para. 4.27.

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rejected due to the concavity of the coastline; two, a bisector was used instead; and three, the bisector chosen was designed to enable Guinea to “extend its maritime territory as far seaward as international law permits”.⁸

Among its other critiques, Myanmar claims that the methodology employed by the tribunal was not exactly that of the angle bisector.⁹ With respect, that is not right. What the arbitral tribunal did was to draw a delimitation line perpendicular to a single coastal front that covered the entire coast in the region. As the Court observed in *Nicaragua/Honduras*,¹⁰ what is a perpendicular but the bisector of a 180 degree angle? What indeed?

In this respect, I should note that the use of a perpendicular to the general direction of the coast is a method that has support in State practice. I refer, for example, to the agreements between Argentina and Uruguay,¹¹ Brazil and Uruguay,¹² Lithuania and Russia (in part)¹³ and Estonia and Latvia.¹⁴ I would only note that the Argentina/Uruguay boundary formally employs an equidistance line, but as Antunes notes in his book, this is then converted into a perpendicular via the use of a 180 degree line closing off the mouth of the River Plate.¹⁵

The Rejoinder also criticizes *Guinea/Guinea-Bissau* on the basis that the tribunal took into account the “rarely expressed concern”¹⁶ to ensure that the delimitation was suitable for integration into the regional context. Again, this is, in fact, not so unusual. In *Libya/Malta*, the Court stated that it ...

...has to look beyond the area concerned in this case, and consider the general geographic context in which the delimitation will have to be effected.¹⁷

Furthermore, it is hardly unconscionable to take account of macro-geographical factors in order to ensure that the rights of third States are not affected by any eventual delimitation, a point raised in *Tunisia/Libya*,¹⁸ *Qatar v. Bahrain*¹⁹ and *Cameroon v. Nigeria*,²⁰ amongst others.²¹ This makes sense. You cannot arrive at an equitable solution by ignoring the world around you.

Myanmar’s argument about *Guinea/Guinea-Bissau* reduces to concern about its “eccentricity”. Evidently, the International Court does not share this view – or perhaps it likes eccentricity. It cited the case favourably at key points in its two most recent delimitation judgments, *Nicaragua v. Honduras*²² and *Romania v. Ukraine*.²³

To summarize, the bisector has been used as an alternative to equidistance in a number of different contexts for a number of different reasons, including to abate the prejudicial effects of a concave coast, that’s exactly the reason Bangladesh says it should be used here.

⁸ *Guinea/Guinea-Bissau*, para. 104.

⁹ RM, para. 5.58.

¹⁰ *Nicaragua v. Honduras*, para. 288.

¹¹ 19 November 1973.

¹² 21 July 1972.

¹³ 24 October 1997.

¹⁴ 12 July 1996.

¹⁵ N. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (2003) 162.

¹⁶ RM, para. 5.58.

¹⁷ *Libya/Malta*, para. 69.

¹⁸ *Tunisia/Libya*, para. 130.

¹⁹ *Qatar v. Bahrain*, para. 250.

²⁰ *Cameroon v. Nigeria*, para. 250.

²¹ See also *Libya/Malta*, para. 21; *Eritrea/Yemen*, para. 162.

²² *Nicaragua v. Honduras*, para. 280.

²³ *Romania v. Ukraine*, para. 211.

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Mr President, Members of the Tribunal, I turn then to the second part of my presentation this afternoon, the definition of the relevant coasts. As you know, the bisector method involves depicting the general directions of the coasts by means of a straight line. This is done by reference to the relevant coasts of the Parties. The term was authoritatively defined in Romania/Ukraine as follows:

the coasts of [the parties] which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned.²⁴

The Parties disagree over the extent of their relevant coasts. Myanmar claims that Bangladesh's relevant coast is *shorter* than we believe it is, and it claims that its own relevant coast is *longer* than we think it is.

I will address the two coasts in turn.

Bangladesh considers that its own relevant coast extends from one end of the country to the other, from the land boundary terminus with Myanmar in the Naaf River to the land boundary terminus with India in the Raimangal Estuary. To avoid the significant difficulties associated with trying to measure the sinuosities of this coast, we measure it by means of the two straight lines, as you can see on your screen. Their combined length is 421 kilometres.

Myanmar arrives at a different figure of 364 kilometres for the length of Bangladesh's relevant coast. In order to get to this number, it divides the coast into four segments you can see on the screen and in tab 5 in your bundle. It then eliminates the middle two segments as irrelevant because they supposedly "face each other". It measures the two remaining segments by means of irregular lines which are meant to trace the sinuosities of the coast. The numbers it gets are 203 kilometres and 161 kilometres on either side for a total of 364.²⁵

In our view, there are several problems with what Myanmar has done but before getting to that, there is one significant point of agreement: the Parties agree that both ends of the Bangladesh coast on the side abutting Myanmar and on the side abutting India are relevant. I will deal with the implications of this point shortly.

The most obvious difference in the Parties' treatment of Bangladesh's relevant coast is the effort to cut the middle out of it, to eviscerate it, to disembowel it, you might say.

Myanmar attempts to justify this by analogizing its situation in the mouth of the Meghna River to the International Court's treatment of the Gulf of Karkinit's'ka in the *Black Sea* case. You can see the Gulf of Karkinit's'ka on your screen. It is tab 4.6. The Court excluded the two lengths of the Ukraine coast that face back on each other within the Gulf of Karkinit's'ka from its calculation of the relevant coast and it is on that analogy that Myanmar relies.

The analogy is inapposite. Most obviously, in the enclosed setting of the Black Sea, the opening at the mouth of the Gulf of Karkinit's'ka faces back onto other portions of Ukraine's coast, and not on to the delimitation.

You can see this on the graphic now on the screen, which compares the Gulf of Karkinit's'ka and the mouth of the Meghna. The Court in Romania/Ukraine held that:

[t]he coasts of this gulf" – that is Karkinit's'ka – "face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinit's'ka Gulf do not project in the area to be delimited.

²⁴ *Romania v. Ukraine*, para. 77.

²⁵ MCM, para. 5.58.

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They were accordingly subtracted from Ukraine's total coastal length.²⁶ Here, in contrast, the mouth of the Meghna River faces directly on to the open sea and the areas of the delimitation.

In this respect, the opening at the mouth of the Meghna River is much more like the opening at the mouth of the Bay of Fundy in the *Gulf of Maine* case; again you can see the contrast on the screen. Although the coasts of the Bay of Fundy are generally parallel, and "face each other" much more even than the Gulf of Karkinit'ska, the opening at the mouth of the Bay of Fundy faces directly on to the delimitation. In its judgment, the Chamber deemed relevant segments of Canada's parallel coasts within the Bay as well as the line drawn across the Bay inside its mouth. In the words of the Chamber:

The Chamber wishes to emphasize that the fact that the two coasts opposite each other in the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area.²⁷

I should add that by attempting to sever the middle portion of Bangladesh's coast on the ostensible grounds that the two segments it identifies face each other, Myanmar seeks to extract yet more benefit from the concavity of the coast. In our view, a more equitable approach, consistent with the fact that the entirety of Bangladesh's coast faces on to the Bay of Bengal, is to measure the middle portion of Bangladesh's coast by means of a straight line that neither artificially lengthens the coast in the area of the Meghna nor artificially shortens it by pretending it does not exist. In this respect, Bangladesh is not seeking treatment as favourable as the Chamber gave Canada in *Gulf of Maine*.

The second problem with Myanmar's measurement of Bangladesh's relevant coast is its use of irregular lines purporting to trace the sinuosities. Measuring this way introduces evident opportunities for mischief. Fractal geometry – the Tribunal will be familiar with fractal geometry just as I am now – Fractal geometry teaches that there is no limit to the length of an irregular object such as the sea-shore: it simply depends on the scale on which you measure it. It is William Blake's infinity in a grain of sand. By tracing the sinuosities on either side with different degrees of precision, one can artificially shorten or lengthen the coasts at will. As you will see when I discuss Myanmar's relevant coast, that is exactly what Myanmar has done. It has measured the sinuosities of Myanmar's coast with far greater, one might say loving, attention to detail. Measuring coastal lengths by means of straight lines avoids this pitfall.

Turning to the relevant coast of Myanmar, Bangladesh considers that it extends from the land boundary terminus in the Naaf River to the point approximately 200 miles south of the location of a feature known as Bhiif Cape. That coast is highlighted on the map now on the screen, which is tab 4.9. It measures 370 kilometres by means of the straight line you see. And on that basis, the ratio of relevant coastal lengths is 421:370, or 1.1:1, in favour of Bangladesh.

Now of course, Myanmar takes a different view. It says its relevant coast extends all the way down to Cape Negrals, 595 kilometres, or almost 300 miles, away from the land boundary terminus. According to Myanmar, this coast measures 740 kilometres in length owing to its sinuosities, not coincidentally almost exactly two times the purported length of

²⁶ *Romania/Ukraine*, para. 100.

²⁷ *Gulf of Maine*, para.

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Bangladesh's truncated relevant coast.²⁸ This is the sketch map from No. 5.2 from the Counter-Memorial, which is tab 4.9 in your bundles.

Just as Myanmar has artificially downsized the Bangladesh coast, it has artfully upsized its own. First, there is the issue of how the measurement has been taken. Myanmar has used irregular lines purporting to trace the sinuosities, but it has traced its own sinuosities with a far greater degree of precision than it has on the Bangladesh side. Particularly in the areas south of Bhiff Cape, the Tribunal can see just how scrupulous Myanmar's cartographers were in taking account of every last curvature in the coast, whereas the sinuosities on our side, which are in fact more pronounced, are smoothed over. Myanmar says, "Our sinuosities are more sinuous than your sinuosities".

If Myanmar's coast to Cape Negrais is measured in the same manner as the coast of Bangladesh, that is by means of straight lines as shown on this graphic, Myanmar's coastal length would be 595 kilometres. Even accepting, which we don't accept, that the whole of that coast is relevant, the ratio of coastal lengths would be 595:421, which is 1.4:1, in favour of Myanmar, much less than the 2:1 disparity that Myanmar claims.

In truth, though, none of Myanmar's coast south of Bhiff Cape is relevant. It is just too far away.

Myanmar justifies its inclusion of this remote coast on the grounds "Cape Negrais [is] the last point on Myanmar's coast generating maritime projections overlapping with Myanmar's coastal projections".²⁹ Yet, neither in its Counter-Memorial nor in its Rejoinder does Myanmar describe how these "coastal projections" should be drawn, much less show where they overlap. We invited them in our Reply to do so.³⁰ They declined the invitation. In actuality, since the entire length of Myanmar's coast below Bhiff Cape is more than 200 miles from Bangladesh, and therefore beyond any conceivable projection of the Bangladesh coast, the projection of Myanmar's coast south of Bhiff Cape could not overlap with that of Bangladesh in terms of EEZ entitlement. I will demonstrate graphically why this is so in a few moments.

The relevant coastal lengths are therefore 421 kilometres for Bangladesh and 370 kilometres for Myanmar.

Mr President, Members of the Tribunal, this brings me to the third portion of my presentation: the application of the bisector method in this case. Step one is the drawing of a straight line façade representing the general direction of the Parties' relevant coasts. This part of the process is not complicated. In fact, the Parties will agree about one half of the equation – the Myanmar half. I will therefore start there.

Myanmar's relevant coast extends down to Bhiff Cape. The general direction of this coast can be portrayed by means of the coastal façade that appears on the screen before you now or will shortly do so. It follows an azimuth of N 143° E. I'm sorry, this is Myanmar's relevant coast. Yes, we have Bangladesh's. We might go back to Myanmar.

I said a moment ago that Myanmar is in agreement, but that is something of a dangerous statement. But in the Rejoinder, Myanmar states that it "agrees with Bangladesh on the general direction of Myanmar's coast even though both Parties differ on the methodology".³¹ Given Myanmar's argument that its relevant coast extends all the way down to Cape Negrais, this argument may strike the Tribunal as a bit curious, indeed it is. It is made possible by Myanmar's view that there are two different relevant coasts: one for "the delimitation in general" and another for "the depiction of the general direction of the coast

²⁸ MCM, para. 5.60.

²⁹ CMM, para. 5.67; see also RM, para. 6.78.

³⁰ RB, para. 3.151.

³¹ RM, para. 5.54, fn. 345.

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when applying the angle-bi-sector method.³² Myanmar cites no authority for the proposition that one State can have two relevant coasts on the same coastal frontage, and there is none. In *Nicaragua/Honduras*, the Court specifically stated that the angle-bisector method “should seek a solution by reference first to the States’ ‘relevant coasts’³³, implying that there was only one relevant coast for each State.

On the other hand, the Parties disagree about the length of Bangladesh’s relevant coast and about whether the middle portion should be counted or not; I have dealt with that disagreement. Whichever of us is right about how to account for the central bit of the coast, depicting Bangladesh’s relevant coast by means of a straight-line façade still requires determining the general direction of a bi-directional coast.

I should first point out that at this stage of the proceeding it should go without saying that the bi-directionality of the Bangladesh coast is due to the fact that it is fundamentally concave in shape.

In our view, the simplest way to depict this bi-directional coast as a single façade is by means of a straight line connecting the two end points, that is, the land boundary termini on either side. You see that line on the screen before you now.

In its Counter-Memorial Myanmar had precious little to say about the Bangladesh coastal front.³⁴ The Rejoinder, in contrast, does try to tackle the issue. According to Myanmar, “Bangladesh’s coastal façade by no means follows the general direction of the coasts of that country.”³⁵ It accuses Bangladesh of being engaged in a “land reclamation project” – I won’t discuss the land reclamation case in this context – and it says that this land reclamation project “takes refashioning nature to a new extreme”.³⁶

But Bangladesh is doing no such thing. The problem is how to depict the average direction of a bi-directional coast, but the average bearing – that is, the general direction – of two sides of a triangle is nothing other than the direction of the third side that connects the ends of the other two. I think that is Pythagoras’s fourth theorem. That is all we have done. Perhaps it would be more visually pleasing to portray the general direction of the two segments of the coast by means of a single line that looks like this; but then this line would have to be transposed to the location of the land boundary terminus in order to meet the general direction line on the Myanmar side. Again, that is all we have done. The direction of the Bangladesh coastal façade is N 287° E.

Myanmar tries to compare what we have done with what Nicaragua proposed for the general direction of the Honduras coast in *Nicaragua v. Honduras*. You can see it on the screen, and your eyes do not deceive you! Nicaragua proposed a coastal front that ran from its land boundary terminus in the south to its land boundary terminus with Guatemala in the northwest. You can see that this “coastal frontage” pursues a distinctly terrestrial course, condemning large numbers of Honduran coastal residents to a watery existence – the very opposite of land reclamation, you may think, the condemnation of areas of lands to the sea. Not surprisingly the Court rejected Nicaragua’s proposal, but not for the reason Myanmar gives. Instead, the Court gave two reasons: First, the distance between Honduras’ two land boundary termini was much greater than it is here. Point-to-point, it was 549 kilometres. The Court noted that, as a result, much of this coast was “far removed from the area to be delimited”.³⁷ The point-to-point distance for Bangladesh is 349 kilometres, 200 kilometres less. Second, the Court limited the Honduras coastal front to a shorter segment because “to

³² RM, para. 5.52; see also RM, para. 5.59.

³³ *Nicaragua v. Honduras*, para. 289.

³⁴ See CMM, paras. 3.157-3.160.

³⁵ RM, para. 5.48.

³⁶ RM, para. 5.48.

³⁷ RM, para. 5.48.

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the northwest the Honduran coast turns away from the area to be delimited.”³⁸ That is not the case with Bangladesh. All the Bangladesh coast faces directly onto the area to be delimited.

This land boundary terminus to land boundary terminus coastal front for Bangladesh has the additional advantage of abating somewhat the effects of the concavity within a concavity, the secondary concavity, that defines the Bangladesh coast. Eliminating this internal concavity with a straight line has the effect of pushing back on the delimitation of Myanmar, abating partially some of the cut-off effect that equidistance produces.

This point is critical. In *Nicaragua/Honduras*, the Court made clear “[i]dentifying the relevant coastal geography calls for the exercise of judgment ...”.³⁹ As in the *Guinea/Guinea-Bissau* case, that judgment must be exercised with a view to addressing the problems that warrant recourse to the angle-bisector in the first place. In this case, the problem is the effect of the concavity in the Bay of Bengal’s north coast. Any other approach would convert the angle-bisector method from the solution it’s intended to be into a perpetuation of the problem. With the coastal fronts both defined, bisecting them is mere arithmetic. Half-way between Myanmar’s 143° E coastal façade and Bangladesh’s 287° E façade is 215°, as shown on the map appearing before you in red, and that is our bisector proposal.

There is one final step. The general direction for the boundary in the EEZ and the continental shelf within 200 miles must be transposed slightly south to the end point of the territorial sea boundary, as discussed on Friday. You can see this on the sketch map. Myanmar complains about this transposition, but it is absolutely necessary.

For example, in the *Gulf of Maine* case, the Chamber transposed the initial segment of its bisector line from the land boundary terminus to point A. Point A was the point-which the Parties had stipulated the user limitation should start from.⁴⁰ You can see the Chamber’s approach on the screen before you now. The angle of the bisector is taken from the land boundary terminus and shifted south-southwest 39 miles. Bangladesh proposes the same approach here, except the transposition is for a shorter distance, just under 20 miles. And the reason for the transposition is clear. We have criticized Myanmar for failing to take St Martin’s Island into account in its delimitation scheme. By contrast, we give St Martin’s its full and appropriate effect by transposing the bisector to the south of the island; and starting it where the 12-metre arcs drawn from the island and the mainland coast intersect to form the outer limit of the territorial sea boundary. That is the obvious starting point for the boundary in the EEZ.

The President:

Excuse me for interrupting. The interpreters believe that you are too fast.

Mr Crawford:

I am sorry. I have tried to go slow and I will go even slower, sir.

Mr President, Members of the Tribunal, this brings me to the fourth part of my presentation: the question whether the 215° bisector that we propose leads to an equitable result.

The equity of the 215° line can be seen in the first instance, in that it takes account of all three of the salient features of this case as described by Mr Reichler on Thursday: the twin concavities, the potential entitlement in the outer continental shelf and St Martin’s Island.

It takes account of the concavity by abating the cut-off effect on Bangladesh. I use the term “abating” advisedly. The 215° bisector minimizes but does not eliminate the effects of the macro-concavity on the Bay’s north coast, which remain very much evident. You can see

³⁸ *Nicaragua v. Honduras*, para. 296.

³⁹ *Ibid.*, para. 289.

⁴⁰ *Gulf of Maine*, paras. 212–14.

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this in the fact that Bangladesh's maritime space narrows dramatically in the areas farther seaward. As Mr Martin described this morning, these are the unmistakable fingerprints of a concavity. Bangladesh starts with a coastal opening as measured between land boundary termini of 349 kilometres. With the bisector it proposes, taken in combination with India's claim line as now disclosed, it reaches its 200-mile limit with a much narrower access corridor measuring just 50 miles across.

The 215° line also takes account of Bangladesh's entitlement in the outer continental shelf by according it access to the 200-mile limit and from there to the areas beyond. I will not dwell on this issue further today, as a fleet of colleagues commanded by Admiral Alam, with an experienced crew of Dr Parson and Professor Boyle, will deal with it in detail tomorrow morning.

And finally, the 215° bisector takes due account of St Martin's Island by virtue of the transposition to the end of the territorial sea boundary. On this basis the island gets its full effect to which it is entitled under article 121 *prima facie*.

The overall equity of the 215° line can perhaps best be viewed in a regional context. On the screen before you now are the maritime areas within 200 miles appertaining to the Bay of Bengal's littoral States. In this view, the Bangladesh-Myanmar maritime boundary is defined by Myanmar's equidistance proposal. The cut-off effect on Bangladesh is unmistakable – that is the dark green. Now you look at the Bangladesh-Myanmar boundary defined by the 215° bisector, that's the area in light green. The difference is not very noticeable – at least to all but Bangladesh. Myanmar's maritime space within 200 miles overall is reduced by 4%; Bangladesh's is increased by a full 25%. Moreover, Bangladesh gains a substantial though relatively still modest outlet to the 200-mile limit.

Myanmar's counter-argument against the equitable character of the 215° line is weak. In the Counter-Memorial it did not even try to argue that the line was inequitable. There was silence. We pointed this out in our Reply and the Rejoinder took up the challenge. How did it do so? It said: "The inequitable character of the Bangladesh's [*sic*] bisector is so obvious that it does not need a long discussion."⁴¹ Mr President, Members of the Tribunal, I don't know if a long discussion was needed or not. Professor Pellet and I tend to disagree about what is a long discussion - I have finished the discussion and gone to bed before he is half-way through his; but at least some discussion would seem to be in order. The fact that there was none to speak of is telling.

The only argument against the equity of the 215° line that Myanmar makes in the Rejoinder concerns the transposition of the bisector to the end of the territorial sea boundary, the effect of which is to add approximately 8,000 km² to Bangladesh's maritime space.⁴² But as we have shown in our discussion of St Martin's Island, demonstrating inequity is not a matter of tossing numbers about in the abstract. The numbers must be viewed in their overall context. And here, for the reasons I have given, the overall context confirms the equity of the 215° bisector line.

The equitableness of Bangladesh's boundary proposal is confirmed lastly by the disproportionality test. The Parties are agreed that this is the last stage of the delimitation process, a final check, done to ensure that a proposed result does not result in any evident disproportion by reference to the ratios of the relevant area allocated to each Party and their respective relevant coastal lengths.⁴³

⁴¹ RM, para. 5.63.

⁴² RM, para. 5.64-65.

⁴³ See, e.g., *North Sea Continental Shelf*, paras. 92, 101; *Gulf of Maine*, para. 222; *Libya/Malta*, paras. 68, 73; *Jan Mayen*, para. 61; *St. Pierre & Miquelon*, para. 93; *Eritrea/Yemen*, para. 168; *Qatar v. Bahrain*, paras. 241-3; *Cameroon v. Nigeria*, para. 301; *Barbados/Trinidad & Tobago*, paras. 237, 369-73.

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We already have a clear definition of the relevant coasts. What we need then is an equally clear definition of the relevant area. Unfortunately, here again the Parties again are in substantial disagreement. It is a hotly contested issue what is the relevant area, made hotter by the fact that the existing jurisprudence is not altogether clear.

Mr President, Members of the Tribunal, I wonder if I might suggest a way of looking at the issue that I hope promises a greater measure of objectivity. The point is that any delimitation has a cut-off effect on both States in that it prevents them from exercising rights over the full extent of their potential entitlements. The goal of the delimitation process must be to apportion these entitlements – and I quote from the court in *Black Sea* “in a reasonable and mutually balanced way”.⁴⁴

What better way then to define the relevant area than by reference to the area of overlapping potential entitlements? This is the approach the Court adopted in the *Jan Mayen* case, when it observed:

Maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State[s].⁴⁵

It is precisely this area of overlapping entitlements that is in issue here.

Defining this area of overlapping entitlements within 200 miles is a simple cartographic exercise. Each State’s zone of entitlement can be identified by projecting an envelope of 200-mile arcs from all points on that State’s relevant coast. This is nothing more than the process by which a State’s 200-mile limit is defined. The area of overlapping entitlements is where the two zones of entitlement overlap. And as I say, that is how the Court did it in *Jan Mayen*.⁴⁶ You can see the area of overlapping potential entitlements on the screen now.

The total area intersection of these two sets of potential entitlements is shown on the screen before you in blue. Two additional observations are necessary about the areas so defined. First, in the west it excludes maritime areas claimed by India on the basis of the claim line in its Counter-Memorial in the counterpart case. In our view, areas claimed by third States should not be considered part of the area of bilateral overlap and must be excluded.

The result is the final relevant area depicted on the screen in a colour which I am told is blue but is a sort of blue-green – a very attractive colour in any event. In total, it measures 175,326.8 km².

My second observation is that defining the relevant area in this way has implications for the definition of the relevant coasts. We can see that on the Bangladesh’s side, the entirety of that coastal frontage is embraced by the area of overlapping entitlements, confirming that all of Bangladesh’s coast is relevant. You can also see that on the Myanmar side, only Myanmar’s coast down to the area approximately of Bhiff Cape is included in the area of overlap, similarly confirming that none of Myanmar’s coast further south is relevant in this case.

By using the Court’s methodology from the *Jan Mayen* case – envelopes of overlapping 200-mile arcs – we can thus derive more objective measurements of the relevant coasts and areas, and avoid the manipulation of these concepts.

⁴⁴ *Black Sea*, para. 201.

⁴⁵ *Jan Mayen*, para. 59.

⁴⁶ *Jan Mayen*, para. 59, and for a map of the area of overlapping claims see p. 80.

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Using Bangladesh's 215° bisector to apportion this relevant maritime area yields the following figures: 89,803 km² for Bangladesh, shown in red, and 85,524 km² for Myanmar, shown in yellow. In other words, the bisector splits the relevant area almost exactly in half. The ratio is 1.05:1 in favour of Bangladesh. Given a ratio of coastal lengths, that is 1.1:1 in favour of Bangladesh. This allocation is plainly not disproportionate.

But the same conclusion would be true even if one accepted Myanmar's view of its own relevant coast, which we think is wrong for the reasons I have given. Properly measured, the difference between Bangladesh's relevant coast and Myanmar's coast all the way down to Cape Negrais gives a ratio of 1.4:1 in favour of Myanmar. A 1.1:1 allocation of the relevant area is not disproportionate even on this basis.

In short, the 215° line is fully consistent with the rules of delimitation referred to in articles 74(1) and 83(1), and we commend it to the Tribunal.

Mr President, Members of the Tribunal, I now address one of the more analytically interesting issues in the law of maritime delimitation, which we will call the "grey area" – also known as the orphan wedge, and also known as the *alta mar* problem. This is the area which is beyond 200 miles from the Bangladesh coast but within 200 miles from the Myanmar coast, yet on the Bangladesh side of the bisector line. The extent of this wedge-shaped area is depicted on the screens in front of you, shown appropriately in grey. By virtue of what we submit is its entitlement beyond 200 miles, Bangladesh is entitled to claim this area as continental shelf. At the same time, it is overlain by waters that Myanmar could in principle claim as EEZ.

In addressing the status of this area, the grey zone, I should note that it is not a rare, or uncommon, occurrence. It arises every time you depart from equidistance. By definition, a delimitation that is anything other than a strict equidistance line will reach the 200-mile limit of one State before it reaches the 200-mile limit of the other.

The result of the delimitation in the *Gulf of Maine* case, for example, was to create an area on the United States' side of the delimitation line but beyond 200 miles from the US coast, and within 200 miles of the Canadian coast. You can see the area on the map in front of you. The area will shortly occur. It's that little triangle, the grey zone. You can see the equidistance line. You can see the line awarded, which stopped at the US 200-mile zone but could have kept going to the Canadian 200-mile line, and the triangle of the figure there, which is approximately a triangle, is the grey zone. To this day the status of that area is still in dispute between the United States and Canada.

The issue here is made even more interesting by the fact that Bangladesh has an entitlement in the outer continental shelf that overlaps with Myanmar's 200-mile EEZ entitlement.

As I have said, the grey zone issue arises whenever one departs from equidistance. The only way to avoid it altogether is to make equidistance a mandatory rule of law applicable at all times and in all places, and if you did that you would not have a grey zone; but for all the reasons I explained last Thursday, that is not a serious option and, of course, it is not the law.

Now your Tribunal will be the first to confront this issue.

Although the issue arises whenever one departs from equidistance, in this case it is, like much else, yet another effect of the concavity of the Bay's north coast. To see how this is so, we have prepared a short animation that illustrates the problem.

We begin with what every tribunal dreams to have, an unproblematic delimitation exercise, an idealized straight-line coast with three adjacent States. The 200-mile limit from all three is a straight line that parallels the coast. The equidistance boundaries between them are perpendicular to the direction of the coastline; so the angle bisector and the equidistances principle produce exactly the same outcome. But now the coasts begin to arc inward, and the

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notional equidistance lines begin to move inward too. As the coast continues to bend, the 200-mile limit of the middle State is increasingly pinched by the 200-mile limits of the other two. Already, potential grey zones are being created as the delimitation varies from equidistance, which on this graphic it does not. Past a certain point the concavity is severe enough that the 200-mile limit of the middle State is forced inside the 200-mile limit of the others. The consequence is that any effort to abate the effects of the equidistance principle with a delimitation that gives the middle State access to 200-miles results in the creation of grey zones, about which we are speaking.

That is exactly the situation in which Bangladesh finds itself. You can see how our notional graphic is transformed into the real-life world of the Bay of Bengal. To use Myanmar's own words, "Bangladesh's 200-mile limits are completely surrounded by the 200-nautical-mile limit of Myanmar and by the 200-nautical-mile limit of India."⁴⁷

After entirely neglecting the issue in its Counter-Memorial (not the only questions entirely neglected), Myanmar's Rejoinder belatedly tries to leverage it into another reason the Tribunal is prohibited from recognizing any rights of Bangladesh beyond 200 miles. And I quote:

The extension of the delimitation beyond 200 miles would inevitably infringe on Myanmar's indisputable rights. This would preclude any right of Bangladesh to the continental shelf beyond 200 nautical miles.⁴⁸

In a similar way, but rather more emphatically, Myanmar asserts "it is not legally possible to deprive it of its indisputable rights within its 200-mile limit"; so the problem is clearly posed.⁴⁹

Mr President, Members of the Tribunal, with all due respect, Myanmar has fallen into its own confusion. Myanmar elsewhere accuses Bangladesh of assuming it has rights that it does not yet have. Only the Tribunal can determine who has what rights.⁵⁰ But that is exactly what Myanmar is doing here. What rights it may or may not have, and where, is for this Tribunal to decide.

There is no textual basis in the 1982 Convention for the assertion that State A's entitlement within 200 miles will inevitably trump State B's entitlement in the continental shelf beyond 200 miles. But that is exactly what Myanmar says when it asserts: "There is no right to maritime areas beyond 200 nautical miles when that would trump indisputable rights within 200 miles."⁵¹

We say this is inconsistent with the plain words of the 1982 Convention. I have examined and re-examined the pertinent articles of that Convention. There is nothing in them that suggests either the EEZ or the continental shelf, whether within or beyond 200 miles, has priority over the other. They sit side by side. The only guidance on how to handle a contest between the two comes from articles 74 and 83, both of which say the same thing: the solution must be an equitable one.

How a court or tribunal gets to such a solution, and the manner in which it apportions rights in order to do so, necessarily involves a degree of judgment that takes account of the particular facts of the case. A substantial margin of appreciation inheres in the very nature of equity. The 1982 Convention gives no basis for concluding that a tribunal's margin of appreciation is limited by a rigid rule that entitlements within 200 miles always defeat

⁴⁷ RM, para. 6.14.

⁴⁸ RM, para. 6.54.

⁴⁹ RM, para. 6.61.

⁵⁰ RM, para. 6.9.

⁵¹ RM, para. 6.58.

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entitlements beyond 200 miles. It cannot be the case that the State with a clear and undisputable potential entitlement in the continental shelf beyond 200 miles should for ever be prohibited from reaching that entitlement solely by virtue of the geographical happenstance that it is located in a concavity and there is a slight wedge of potential EEZ separating it from the outer continental shelf.

Myanmar attempts to enlist the *Barbados/Trinidad & Tobago* decision as support for its position.⁵² It has called that case up on a variety of fronts. But the tribunal there ducked the issue. They awarded that space to the Tobago triangle, which precluded the issue from arising. They deliberately decided not to go further.

Trinidad and Tobago claimed that its rights to the continental shelf cannot be trumped by Barbados' EEZ.⁵³ The tribunal said it had jurisdiction to decide that question but that it did not arise, and I quote:

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 nautical miles” – the tribunal meant beyond 200 nautical miles from Trinidad and Tobago – “The problems posed by the relationship of continental shelf 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.”⁵⁴

Words said, no doubt, with some degree of relief.

I should note further that Myanmar's argument about the alleged priority of its EEZ entitlement over the outer continental shelf Bangladesh entitlement is contradicted by its own position concerning the territorial sea. The boundary Myanmar proposes in the territorial sea departs substantially from an equidistance line. The result is that a proportion of its proposed boundary is within 12 miles of St Martin's Islands but more than 12 miles from Myanmar's coast. You can see it on the screen. It's an area in a shade of red. As the Rejoinder acknowledges, this means that Myanmar's delimitation proposal in part divides the territorial sea of Bangladesh from the EEZ of Myanmar.⁵⁵ It is just fine with Myanmar if its rights in the EEZ trump Bangladesh's rights within 12 miles. That is not a problem. The problem occurs at 200 miles, apparently.

It is worthwhile dwelling on this point. Article 15 of the 1982 Convention, although it connotes a presumption of equidistance, envisages that even within 12 miles the boundary will not necessarily follow the equidistance line. It therefore envisages a situation where a line will divide the territorial sea of one State and the EEZ of another at less than 12 miles from the first State and more than 12 miles from the second. Such a line will be a single maritime boundary, as indeed this is, and it will exclude each State from claiming sovereign rights – of any description – on the other side of the line. The point is this: to delimit a single maritime boundary is at the same time to attribute maritime areas to one State and to exclude the other State from those areas. To delimit is not only to include; it is also to *exclude*.

The point can be illustrated by taking air column rights in the red zone you can see on the screen. We have taken these on the Myanmar side of its claim line, cutting off St Martin's Island, in the wedge which is within 12 miles of the Island. Myanmar has no air column rights in that wedge. Why? Because they are not part of the EEZ regime. Bangladesh doesn't

⁵² RM, paras. A.54-55.

⁵³ *Barbados/Trinidad & Tobago*, para. 367.

⁵⁴ *Ibid.*, para. 368.

⁵⁵ RM, paras. 3.33, 7.3-7.4.

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have them either because it is cut off from the EEZ boundary so drawn. Now that's a situation which Myanmar accepts. The implications for the orphan wedge at 200 miles are clear enough. International law tells you the extent of your sovereign rights consequent upon a delimitation. It does not preclude a delimitation on account of rights not yet ascertained. Myanmar admits that within 12 miles - the air column rights example that I have given you - but it denies it at 200 miles.

Of course, we entirely disagree with Myanmar's proposal for delimiting the territorial sea but that is not the point. Myanmar admits when it suits its own interests that entitlements in zones which are in principle further from the coast, where the coastal State's bag of rights is smaller, may take precedence over entitlements in zones nearer the coast, where a coastal State's bag of rights is larger. Here the right is the right of sovereignty. It is occluded by the sovereign rights in the EEZ. The fundamental rule of delimitation is that it depends on the equities of the case. The same reasoning applicable to the air column rights that I was taking as an example applies, we submit, with at least equal force, it may be said *a fortiori*, to the EEZ and continental shelf at 200 miles.

Mr President, Members of the Tribunal, for these reasons, in our submission:

- (1) In the present case, the appropriate delimitation method is that of an angle bisector drawn so as to mitigate the cut-off effect of the concave coasts on which Bangladesh is situated.
- (2) The appropriate bisector is one drawn at an angle of 215° from the end point of the territorial sea boundary at 12 miles from St Martin's Island and from the Myanmar coast.
- (3) Such a line produces an equitable result as between the parties, having regard to their respective coastal lengths and all other relevant circumstances.
- (4) The so-called grey area problem thereby produced at 200 miles is no reason not to continue the delimitation to the edge of the outer continental shelf at 200 miles from the Myanmar coast – to boldly go where, as Professor Akhavan will now demonstrate, you plainly have jurisdiction to go.

Mr President, Members of the Tribunal, I thank you again for your patient attention. I would now ask you to call on Professor Akhavan.

The President:

Thank you very much.

I call Professor Payam Akhavan to take the floor.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR AKHAVAN
COUNSEL OF BANGLADESH
[ITLOS/PV.11/5/Rev.1, E, p. 17–26]*Mr Akhavan:*

Mr President, distinguished Members of the Tribunal, good afternoon. It is my honour and privilege to appear before you in this hearing on behalf of Bangladesh. With your permission, Mr President, I propose to speak until about half past four, at which point you may wish to have a break.

Professor Crawford's presentation concluded our first-round submissions on delimitation of the EEZ and the continental shelf up to 200 nautical miles. At tomorrow's session, Dr Parson, Admiral Alam and Professor Boyle will make our submissions on delimitation of the continental shelf beyond 200 miles. In advance of that presentation, I shall address the Tribunal's jurisdiction to effect a full delimitation of the maritime boundary between Bangladesh and Myanmar, including in the outer continental shelf.

The delimitation of this final segment of the boundary beyond 200 miles is the only issue in dispute between the Parties. Myanmar maintains that it is beyond the competence of the Tribunal. The Parties are otherwise in agreement that the Tribunal is competent to delimit their boundary in the Bay of Bengal. This sole exception however is highly significant: Bangladesh's claim to the outer continental shelf comprises a substantial portion of its overall maritime space. As Professor Crawford explained, ensuring Bangladesh's access to the outer shelf is also a highly important factor in effecting an equitable delimitation within the inner shelf.

The Tribunal's competence to delimit the entire maritime boundary between the Parties is simple and straightforward. Article 21 of the ITLOS Statute provides that:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

The Tribunal has jurisdiction over this dispute based on the notification of a Special Agreement under article 55 of the Rules of the Tribunal. In particular, Myanmar made a declaration recognizing the Tribunal's jurisdiction on 4 November 2009, and Bangladesh made a reciprocal declaration on 12 December 2009. Both declarations confer jurisdiction on this Tribunal to delimit the boundary in the Bay of Bengal without any exceptions or limitations, nor has Myanmar made any preliminary objections to the exercise of jurisdiction by this Tribunal and, as I shall now discuss, there is no basis for any objections to the Tribunal's exercise of jurisdiction in respect of any part of Bangladesh's case.

Article 288(1) of the 1982 Convention provides that the Tribunal:

shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it.

There can be no doubt in the present case that Bangladesh and Myanmar's conflicting claims to the outer shelf is obviously a "dispute concerning the interpretation or application" of the Convention.

Article 76 of the Convention contains a definition of the continental shelf beyond 200 miles based on "natural prolongation". Article 83 contains the principles applicable to delimitation of the continental shelf between States with opposite or adjacent coasts. Article 83 does not distinguish between an inner or continental outer shelf. The dispute between Bangladesh and Myanmar in this regard plainly concerns "the interpretation or

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application” of those provisions of the Convention, namely articles 76 and 83. As such, it obviously falls within the jurisdiction of the Tribunal.

Myanmar, however, makes extraordinary efforts at preventing this Tribunal from exercising jurisdiction. It raises “objections” that aim to introduce obscurity and complexity where none exists. Myanmar’s first argument is that the delineation of the outer margin by the CLCS is a condition precedent to the Tribunal’s competence to delimit beyond 200 miles. Its second argument is that the Tribunal cannot make a binding delimitation as between Bangladesh and Myanmar because of the claims –whether actual or potential – of third parties.

As I shall set forth shortly, these objections have no merit whatsoever. They smack of desperation to prevent the Tribunal from delimiting the outer shelf under any possible pretext. From the outset, however, it is necessary to emphasize Bangladesh’s claim that, based on “natural prolongation” within the meaning of article 76 of the Convention, Myanmar has no entitlement to an outer shelf beyond 200 miles. Therefore, the Tribunal in our submission only needs to effect a bilateral delimitation up to 200 miles and merely indicate that, as between the Parties to this dispute, only Bangladesh has an entitlement beyond 200 miles. Delimitation on this basis would have no appreciable effect on the rights of third parties. But let us assume hypothetically that Myanmar does have an entitlement beyond 200 miles. Even then, delimitation in the outer shelf would have no effect on third parties. For them, the judgment would be *res inter alios acta* as clearly set forth in article 33(2) of the Tribunal’s Statute. There is simply no bar to the jurisdiction of the Tribunal. None of Myanmar’s two objections can withstand scrutiny.

I shall now address these arguments in greater detail. Myanmar’s first contention is that the Tribunal cannot delimit the outer shelf *until* the CLCS has delineated its outer limits. This is plainly inconsistent with article 76, Part XV, and Annex II of the Convention, as well as the CLCS’s own Rules of Procedure, as I shall shortly explain. These all indicate that delineation of the outer margin is not a precondition to delimitation. It would be absurd to conclude that the Tribunal cannot delimit the maritime boundary until the CLCS delineates the outer margin, and that the CLCS cannot determine the outer margin until the Tribunal has delimited the maritime boundary. The circularity of Myanmar’s argument is self-evident. It would relegate delimitation of the outer shelf to a perpetual limbo. It conjures up an image of two excessively polite gentlemen trying to enter a door, each insists that the other must go first: “After you,” says one, and the other insists “But no, after you.” Several hours later none has entered the door. But it is far worse in this case, where many years rather than a few hours would be wasted.

This argument is not only absurd; it is also irrelevant. The recent CLCS submissions of both Bangladesh and Myanmar, and even that of India, are in complete agreement that the outer margin of the continental shelf in the Bay of Bengal is not even remotely near the areas claimed by the parties in this dispute. Myanmar, however, is not satisfied by this consensus. Instead, it maintains at paragraph 12 of the rather curious Annex to its Rejoinder that hypothetically:

It cannot be excluded that the CLCS will not endorse all of the submissions of the States in the Gulf of Bengal region and that, according to the CLCS recommendations, there will be an ‘area beyond the limits of national jurisdiction’ in the Bay of Bengal.

But Myanmar does not present any evidence whatsoever suggesting that this in fact is the case. There is simply no basis to conclude that delimitation could potentially affect delineation of the International Seabed Area. To the contrary, Myanmar has submitted a

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summary of its own CLCS submission, which places the outer limit of the margin far beyond the overlapping areas claimed by the parties in this proceeding. A conflict between the jurisdiction of the Tribunal and the mandate of the Commission therefore is non-existent; it is so remotely theoretical as to be all but impossible.

Mr President, with your permission, now may be a suitable time for a break, unless you wish me to continue for another ten minutes or so.

The President:

If you feel more comfortable to cut off now, we will take a recess now and come back at 4.55 p.m. to give you more time to complete your statement. The hearing is suspended until 4.55 p.m.

(Short adjournment)

The President:

The hearing continues.

Professor Akhavan, you have the floor.

Mr Akhavan:

Thank you, Mr President, Members of the Tribunal. I began the break by summarizing Myanmar's arguments on the relationship between the CLCS and the Tribunal, and I would now like to continue by considering that, irrespective of where the outer margin is situated, the adjudicative role of Part XV compulsory procedures is in no way diminished by the expert technical advisory role of the Commission. Article 76(8) of the Convention sets forth the mandate of the Commission as follows:

The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding.

This provision clearly indicates that the Commission can only issue recommendations and that these shall be "final and binding" only if the concerned State consents. Article 8 of Annex II of the Convention even stipulates that:

In case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission.

Thus, the Convention expressly contemplates that there may be disagreements between the Commission and States Parties to the Convention. Consequently, the expert advisory role of the Commission does not automatically or necessarily result in a final and binding settlement of the limits of the outer continental shelf, notwithstanding any disputes in relation to delimitation.

A recent example is Brazil's disagreement with the Commission's recommendations concerning its 17 May 2004 submission. Brazil does not accept the recommendations of the Commission, and the Commission is clearly not empowered to impose its decision against Brazil over such objections. Unlike this Tribunal and other Part XV jurisdictions, the CLCS is clearly not a compulsory procedure entailing binding decisions. It has no adjudicative powers whatsoever.

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Article 2(1) of Annex II of the Convention makes it abundantly clear that Commission members are not even called upon to have legal expertise. Rather, they are to be selected as “experts in the field of geology, geophysics or hydrography”. That is exactly why the Part XV procedures must necessarily apply to legal disputes concerning the outer continental shelf. For example, the 2004 report of the International Law Association’s Outer Continental Shelf Committee, which will be familiar to members of Tribunal, emphasizes the exclusively scientific and technical role of the Commission, and it concludes as follows:

If article 76 were to be completely excluded from the procedures of Part XV, the absence of legal expertise in the Commission would seem to be problematic, as there then would be hardly any possibility to submit questions of interpretation raised by a submission to legal scrutiny.¹

An important point to bear in mind, as the number of submissions to the Commission increases dramatically and as this Tribunal may be called upon in the future to subject some of these questions to legal scrutiny. Since it is evident that disputes under article 76 fall within the purview of Part XV compulsory procedures, the ILA report goes on to state that a court or tribunal under Part XV may even “find that a recommendation of the CLCS is invalid”.² As mentioned, there is no conflict between the Tribunal’s jurisdiction and the Commission’s mandate in the present case. But even as a matter of academic interest, there can be no doubt that the Tribunal has jurisdiction over – to once again quote article 288(1) of the Convention – that the Tribunal has jurisdiction over “any dispute concerning the interpretation or application of the Convention”. This applies with even greater force to this Tribunal, in view of its unique role as the ultimate guardian of the law of the sea.

I shall now address Myanmar’s contention that the Commission’s recommendations are a condition precedent to this Tribunal’s jurisdiction. It is revealing that Myanmar cannot point to any provision of the Convention stipulating that the compulsory procedures under Part XV are somehow inapplicable to the outer shelf unless and until the Commission has delineated the outer margin. To the contrary, the Convention makes a sharp distinction between recommendations regarding the delineation of the outer margin and delimitation of the continental shelf between States. Article 76(10) expressly provides that:

The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.

This provision makes it clear that the process of delineating the outer limit does not trump or stop the process of delimitation. Similarly, article 9 of annex II of the Convention provides that:

The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.

The Commission’s Rules of Procedure expressly prohibits delineation of the outer margin where there is a delimitation dispute, unless the parties in dispute expressly agree otherwise. In particular, Annex I, paragraph 5(a) of the 2008 Rules of Procedure of the Commission provides that:

¹ International Law Association, Outer Continental Shelf Committee, *Berlin Conference (2004): Legal Issues of the Outer Continental Shelf*, at p. 4.

² *Ibid.* at p. 12.

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In cases where a land or maritime boundary dispute exists, the Commission shall not examine and qualify a submission made by any of the States concerned in the dispute. However, the Commission may examine one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

Now Myanmar is unhappy with Bangladesh's reliance on this provision. It complains at paragraph 19 of the Annex to its Rejoinder that:

It is only Bangladesh's refusal to consent to the consideration of Myanmar's submission before the CLCS which has forced the Commission so far to defer the establishment of a sub-commission to consider the submission. ...To the extent that Bangladesh is caught in a "catch-22", it is entirely of its own making.

It seems that Myanmar believes that Bangladesh should not exercise its express rights under the Convention, Annex II, and the Commission's own Rules of Procedure. It would perhaps wish to re-write the Convention to make the Commission's recommendations a condition precedent to this Tribunal's jurisdiction, but that is clearly not what the Convention says.

But let us assume that Myanmar is right and that Bangladesh should immediately today withdraw its objection under CLCS Rule 5(a). What would be the consequence? Would this be a happy outcome for dispute settlement? In answering this question, let us consider the workload of the Commission. For example, the 24 July 2009 Report of the Meeting of States Parties to the Convention indicated at paragraph 82 that as at that time in 2009 States had made 51 submissions to the Commission, transmitted 43 sets of preliminary information to the UN Secretary-General, and that many other submissions could be expected in the near future.³ The report indicated at paragraph 83 back in 2009 that, based on this workload, it will take at least until the year 2030 to consider existing submissions. This time-estimate was confirmed at the June 2010 Meeting of States Parties by the CLCS Chairman Mr Albuquerque⁴ and there have been several more submissions since 2009. This includes Bangladesh, which made its submission recently on 25 February 2011. Bangladesh is therefore one of the last States in the queue of submissions and may have to wait until 2035 for a response from the Commission. So if Myanmar's contention is accepted that the Commission must first delineate the outer margin, this Tribunal would have to wait 25 years to delimit the boundary in the outer shelf. Such an absurd situation can hardly be called a trap Bangladesh has laid for itself, or a "catch-22" of Bangladesh's "own making", to quote Myanmar's Rejoinder.

Myanmar's extraordinary argument calls to mind the words of the legendary Bengali poet and mystic, Rabindranath Tagore, who in 1913 became the first non-European to win the Nobel Prize for Literature:

Time is endless in thy hand, my Lord.
There is none to count the minutes.
Days and nights pass and ages bloom and fade like flowers.

³ *United Nations Convention on the Law of the Sea, Meeting of States Parties, Report of the Nineteenth Meeting of States Parties*, U.N. Doc SPL/OS/203 (22-26 June 2009) at para. 82.

⁴ See Chairman of the Commission on the Limits of the Continental Shelf (CLCS) "Presentation on the workload of the Commission on the Limits of the Continental Shelf (CLCS)", 20th Meeting of States Parties, 14-18 June 2010, at p. 8 (available at <http://www.un.org/depts/los/clcs_new/workload/clcs_presentation_workload2010msp20.pdf>).

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Thou knowest how to wait.⁵

Divine patience is enchanting, but the earthly task of this Tribunal is to efficiently and expeditiously resolve disputes, and waiting another 25 years to do so would surely not be an encouraging precedent.

Another problem with Myanmar's argument is that, while it places heavy reliance on the *Barbados v. Trinidad* award to support its claim to an outer shelf, it seems totally oblivious that the Annex VII Tribunal in that case held that it had jurisdiction to delimit the boundary beyond 200 miles. In this respect, it is worth reminding Myanmar that the Tribunal in that case explained that "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf"⁶. The Tribunal then expressly held that "its jurisdiction in that respect includes delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm".⁷ Myanmar does not provide any explanation as to why this Tribunal's jurisdiction should be any less than that of the Annex VII Tribunal in *Barbados v. Trinidad*.

I shall now address Myanmar's second argument that delimitation of the outer continental shelf may prejudice the rights of third parties. Myanmar includes as potential third parties India and the International Seabed Area. In fact, neither India nor the Area could be prejudiced by the delimitation of the maritime boundary between Bangladesh and Myanmar. Article 33(2) of this Tribunal's Statute makes this clear. It provides that: "The decision shall have no binding force except between the parties in respect of that particular dispute."

Furthermore, third-party claims affect only a portion of the outer shelf. The first innermost portion of the outer shelf is only disputed between Bangladesh and Myanmar. This bilaterally disputed area is indicated in Figure R4.1 in Volume II of Bangladesh's Reply, in the green area. It is only the second portion of the area beyond 200 miles that is also claimed by India, and it is clear in any event that any delimitation in that trilaterally disputed area would be *res inter alios acta* with respect to India.

In its Rejoinder, however, Myanmar conjures up a new argument that even the bilaterally disputed area could *potentially* be claimed by India. It now maintains that the Tribunal must treat the entire outer shelf as a trilaterally disputed area. At paragraph 15 of its Annex, it argues that since, in Myanmar's view, the entire area is also *potentially* disputed by India, the Tribunal cannot exercise jurisdiction in this area at all because "[a]ny delimitation between the Parties in this area would prejudice the interests" of third parties. It is based on the contention, at paragraph 14 of the Annex to Myanmar's Rejoinder, that India's CLCS submission is only partial and that it has reserved its right:

to make submissions with respect to other areas, which could potentially overlap entirely with the areas of continental shelf extending beyond 200 nautical miles claimed by the Parties to the present proceedings.

This is a remarkable argument. Myanmar is correct that India has only made a partial submission to the Commission and that it may potentially make claims to other areas. What Myanmar omits to mention is the Indian submission is in no way partial with respect to the northern Bay of Bengal. Myanmar's Annex contains a general reference in footnote 24 to the

⁵ Rabindranath Tagore, *Gitanjali*, poem no. 82 (London: Macmillan, 1913).

⁶ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147 (hereinafter "Barbados/Trinidad & Tobago"), at para. 213. Reproduced in Memorial of Bangladesh (hereinafter "MB"), Vol. V.

⁷ *Ibid.* at para. 217.

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Executive Summary of India's CLCS submission. Had Myanmar specifically referred to page 2, paragraphs 5 and 6, we would clearly see that India reserves the right to make a second submission only in support of its claim in the southern part of the Bay of Bengal pursuant to the Statement of Understanding in Annex II to the Final Act of the Convention. Nowhere does the Executive Summary state that India intends to claim additional areas to any area other than the southern Bay of Bengal. Perhaps counsel for Myanmar can read the mind of counsel for India. Perhaps their power of speculation allows them to predict what unspecified potential claims India could one day hypothetically make in an imaginary world. But in the real world, the express claims of India in its CLCS submissions are sufficiently clear to put such arguments to rest. These claims are indicated in Figure 2 on page 10 of its CLCS submissions and as the Members of the Tribunal will see, it corresponds to the area that is only disputed bilaterally and the other area to the south west which is trilaterally disputed. We would submit that Myanmar's baseless speculation on behalf of India as to what potential claims it could make, when it has clearly made its claims, is surely not the basis for defeating this Tribunal's jurisdiction.

Even where, unlike the present case, a third party's actual claims cannot be determined, international courts and arbitral tribunals have not refrained from exercising jurisdiction. It is apparent that speculation on "potential claims" could be fatal to any form of effective dispute settlement in the vast majority of disputes where third-party interests are involved. In *Qatar v. Bahrain* for example, the ICJ was able to ascertain the actual claims of Iran but not those of Saudi Arabia. But it did not decline to delimit the boundary; and that case is in stark contrast to the situation here where India's actual claims are abundantly clear.

Myanmar dismisses the *res inter alios acta* principle far too casually. It contends at paragraph 16 of the Annex to the Rejoinder that article 33(2) of this Tribunal's Statute is inapposite because "the limited reach of the *res judicata* principle in the international legal system ... does not shield non-parties from delimitation decisions that relate to areas in which they maintain a claim." This is clearly not an issue, at the very least, with respect to the bilaterally disputed area. But even with respect to the trilaterally disputed area, Myanmar has shown no good reason why the Tribunal should not effect a full delimitation. In the *Anglo-French Continental Shelf* case, the arbitral tribunal delimited the entirety of the continental shelf between France and the United Kingdom, notwithstanding overlapping claims by Ireland. That tribunal emphasized that its award "will be binding only as between States to the present arbitration and will neither be binding upon nor create any rights or obligations for any third State, and in particular for the Republic of Ireland, for which the Decision will be *res inter alios acta*".⁸ The Tribunal further observed that:

In so far as there may be a possibility that the two successive delimitations of continental shelf zones in this region, where the three States are neighbours abutting on the same continental shelf, may result in some overlapping of the zones, it is manifestly outside the competence of this Court to decide in advance and hypothetically the legal problem which may then arise. That problem would normally find its appropriate solution by negotiations directly between the three States concerned ...

That case, Mr President, is particularly apposite here. Soon after this Tribunal renders its judgment, an Annex VII Tribunal – three of whose five members (including its President) are also members of this Tribunal – will delimit Bangladesh's maritime boundary with India.

⁸ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter "*Anglo-French Continental Shelf Case*"), at para. 28. Reproduced in MB, Vol. 5.

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The judgment in this case will have no bearing on India's claims. Of course, the Tribunal can do no more, in regard to the trilaterally disputed area, than determine, as between Bangladesh and Myanmar only, which of those two States has the superior claim *vis-à-vis* the other. Whether Bangladesh or Myanmar is determined to have the better claim does not affect India's claims. For example, if Bangladesh is judged by this Tribunal to have a better claim in relation to Myanmar, it must still confront all of India's claims before the Annex VII Tribunal. Thus, at the conclusion of that case, before the Annex VII Tribunal, Bangladesh's boundaries in the outer continental shelf with both Myanmar and India will be definitively established, and beyond dispute.

Why should Myanmar be able to block such an auspicious outcome? If this Tribunal does not adjudicate the full boundary between Bangladesh and Myanmar, it would condemn all three States – Bangladesh, Myanmar and India – to perpetual uncertainty about the areas now in dispute. There are only three ways to settle this dispute, to resolve this problem. The first option is for the parties to negotiate a boundary agreement, but that does not appear very promising in light of their inability to reach an agreement after 37 years of negotiations. In fact, the parties are no closer to an agreement today than they were in 1974. That is why they appear before this Tribunal. The second option is for the three parties to join together in a single case, either before this Tribunal or another jurisdiction; but India has refused Bangladesh's invitation to join these proceedings, or even to transfer the current Annex VII case to ITLOS. And there are no indications that India will ever agree to any tripartite dispute resolution procedure.

This leaves us with the third and only remaining option, which is to avoid perpetual deadlock through consecutive decisions in a judgment of this Tribunal and an award of the Annex VII Tribunal. This would leave fully settled Bangladesh's borders with both Myanmar and India. Only Myanmar's border with India would then remain unresolved by these two consecutive decisions. And of course, if those parties felt the need for resolution and were unable to reach agreement, either of them could initiate a third Part XV or other proceeding. This, of course, is a matter for them to decide, but what is clear is that the only way out of a permanent deadlock is for this Tribunal to establish the entire boundary between Bangladesh and Myanmar. There is no other alternative.

Mr President, distinguished Members of the Tribunal, the final and complete resolution of these disputes between the parties in this case is exactly the outcome that the drafters of the Convention envisaged when adopting Part XV in 1982. The President of the Third United Nations Conference on the Law of the Sea, Tommy Koh of Singapore, asked at that time, in 1982, whether the decade-long negotiations – this being the longest treaty-making conference in history – whether they “achieved [the] fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time”. One of the pillars of that constitution was what he described as the “mandatory dispute settlement” provisions of the Convention.⁹ It is for this Tribunal, created through painstaking negotiations over a decade, to exercise the jurisdiction that we say is granted to it properly, and to finally settle the present dispute between Bangladesh and Myanmar.

Mr President, distinguished Members of the Tribunal, one of Rabindranath Tagore's wise sayings is that “you can't cross the sea merely by standing and staring at the water”. It would seem that when the shores of the Bay of Bengal inspired him to write these words more than a century ago, he could have foretold that one day this Tribunal would do more than stare at the waters; that it would boldly go across the sea and to finally and equitably settle a longstanding dispute between two neighbours.

⁹ “*A Constitution for the Oceans*”, Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, available at: http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

With that in mind, I conclude my remarks. I thank you, Mr President, and distinguished Members of the Tribunal, for your patience. That concludes our submissions for today.

The President:

Thank you, Professor Akhavan.

This brings us to the end of today's sitting. The hearing will be resumed tomorrow morning at 10 a.m. The sitting is now closed.

(The sitting closes at 5.25 p.m.)

13 September 2011, a.m.

PUBLIC SITTING HELD ON 13 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 13 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good morning. To continue the hearing, I give the floor to the first speaker today, Mr Lindsay Parson.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR PARSON
COUNSEL OF BANGLADESH
[ITLOS/PV.11/6/Rev.1, E, p. 1–9]*Mr Parson:*

Mr President, distinguished Members of the Tribunal, good morning. It is an honour and a privilege to appear before you in these proceedings.

My presentation will be the first of three for this final session, all addressed to the outer continental shelf. As a geologist, I will concentrate on the geology and geomorphology of the seabed in the Bay of Bengal and its relationships to the landmasses of Bangladesh and Myanmar, a subject that Mr Reichler introduced in his opening speech last Thursday.¹ My presentation will be followed by that of Rear Admiral Khurshed Alam, who will present the results of the work and analyses, of the last twelve years, undertaken to establish the location of the outer limit of the continental shelf of Bangladesh in the Bay of Bengal. Admiral Alam will explain the technical basis for Bangladesh's claim in the outer continental shelf, as submitted to the Commission on the Outer Limits of the Continental Shelf on 25 February 2011. Finally, Professor Alan Boyle will apply the law to the scientific and technical facts set out in the presentations of Admiral Alam and myself, and present to the Tribunal the basis on which the outer continental shelf of Bangladesh beyond 200 M should be delimited.

Before I start with the substance, I need to make one point clear. In making these presentations today, Bangladesh does not suggest that you are called on to determine the outer limits of the continental shelf as defined in article 76 of the 1982 Convention. That is of course a matter for the Commission on the Limits of the Continental Shelf. Our purpose is altogether more limited. Bangladesh asks this Tribunal to delimit the disputed part of the outer continental shelf as between itself and Myanmar. It is helpful to the Tribunal for it to appreciate that there is an outer continental shelf beyond 200 M in the Bay of Bengal, and further to appreciate that Bangladesh has acted credibly and consistently with its legal responsibilities in this case in making a properly researched and sustainable submission to the Commission on the Limits of the Continental Shelf. The first of these matters I will demonstrate; the second is for Rear Admiral Alam.

This presentation is in four parts:

First, I will describe the geological evolution of the region in terms of plate tectonics; Second, I will provide a description of the Bengal Depositional System and how its pervasive sedimentary effects have shaped the seafloor of the Bay of Bengal;

Third, I will summarize the elements of geological prolongation from the Bangladesh land mass into the Bay of Bengal; and finally, I will introduce the technical provisions of article 76 of the 1982 Law of the Sea Convention, addressing how they are used in the determination of the outer limits of the continental shelf where it extends beyond 200 M.

Mr President, Members of the Tribunal, it is impossible to understand the arrangement of the land and the seafloor in and around the Bay of Bengal without appreciating its geological origin, and in particular its evolution over time. I will present in the following slide sequence the geological development of the Bay of Bengal over the past 130 million years. The sequence, which you will find in your Judges' folders at tab 5.1, will highlight the relevant interactions between the most fundamental components of the earth's geological system – the crustal plates which cloak our planet – and will describe their birth, their development and their movement over time. You will witness their collisions with one another, and in some cases their ultimate death and disappearance.

¹ ITLOS/PV.11/2/Rev.1 (Reichler), p. 12.

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On your screens you can see an image, the first of the images at tab 5.1, depicting a reconstruction of the earth's surface as it would have looked some 130 million years ago². It is this which we use as the starting point for the first phase of geological history relevant to our presentation today. The ancient supercontinent of Pangaea is starting to break up, giving rise to two supercontinents, one in the north and one in the south. Enclosed within the latter, which you can see in purple and highlighted in red, is that part of this supercontinent which will eventually become the continental land mass of India. I invite you to keep your eyes on this piece of the jigsaw as we follow its passage from south to north across the surface of the earth over time. With the next few slides, we will pass through the millennia, step by step, and observe the development of the present day geology and geography of the region.

During the first phases of plate motion, between 130 and 90 million years ago, you can see how India first breaks off from the ancient land mass and then starts its journey drifting northward from its former position south of the Equator. Between 90 and 60 million years ago, the movement of the Indian continental mass is at a rate of over 17 cm per year. If you look at your screens, you will see that as it moves northwards it leaves behind newly-formed oceanic crust; this is generated in a process known as seafloor spreading. This oceanic crust is attached to the Indian continental land mass and, with it, forms the India tectonic plate – or India Plate, for short. As the plate moves northwards, it grows in size as that oceanic crust continues to be added to its southern edge. As you will see, this new part of the plate will eventually underlie the seafloor of the Bay of Bengal.

At this time, along the other side of the India Plate to the north, an area of much older oceanic crust underlying an ancient ocean basin was being compressed against another land mass, part of which was eventually to become the Asian tectonic plate. This collision, indicated by the red arrow, rather than arresting the progress of the India Plate northwards, resulted in the bending down, or subduction, of part of the sea floor of the India Plate beneath the Asian Plate. As the ocean basin there finally began to close, sea floor deposits were carried along in the uplift and deformation of the former sea bed, to initiate the formation of the Himalayas. This is why, Mr President, fossilized sea creatures are found on Mount Everest.

During the next phase, starting around 44 million years ago, the thick, continental crustal masses of the converging India and Asia Plates finally met, in what was to become one of the most significant tectonic events in the region. This collision was of such scale that it resulted in significant uplift at the edge of the Asia Plate, an intense deformation of the region; and this began and continues the development of the Himalayas and the Tibetan Plateau. As the mountain chain was pushed up, the edge of the India Plate was deflected downwards, forming a shallow basin. This basin began to fill as sediment eroded from the rising mountain chain was delivered by forerunners of the great Ganges and Brahmaputra Rivers. It is this process of sedimentary deposition, which commenced more than 50 million years ago, that is responsible for creating the land territory of Bangladesh; and it is from this point in time, and continuously ever since, that, as we heard from Mr Reichler in his introductory speech, the same sedimentary processes have been active ever since as the Bengal Depositional System.³ We shall return to a fuller discussion of this in a few moments, but there is more of a geological journey through time to complete before doing so.

While the rate of motion of the tectonic plates slowed, the effects of the collision were unabated – the Himalayas continued to uplift, leading to extensive erosion of the newly-

² Tung-Yi Lee & Lawrence A. Lawver, "Cenozoic Plate Reconstruction of Southeast Asia", *Tectonophysics*, Vol. 251 (1995), MB, Vol. IV, Annex 39. See also J.R. Curran and Ruth Allen, "Evolution, paleogeography and sediment provenance, Bay of Bengal region, Indian Ocean", in *Golden Jubilee Memoir of the Geological Society of India* (Gupta, Harsh and Fareeduddin eds.) No. 66 (2008), pp. 487-520.

³ ITLOS/PV.11/2/Rev.1 (Reichler), p. 10.

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formed mountains. Elsewhere in the frame, across to the east, the dense oceanic crust of the India Plate was colliding with the predominantly continental crust of the Burma Plate along a line now indicated by the red arrow. The India Plate was bent downwards; it began to sink, or subduct, beneath the Burma Plate. As subduction proceeded, sediments that had been accumulating on the down-going India Plate were scraped off by the overriding Burma Plate and became stuck onto the latter – the Burma Plate – in a tightly-folded series of mountains known as an “accretionary wedge”. An analogy for this is that the edge of the Burma plate is acting here rather like a bulldozer, as though it is scraping mud off a hard surface. As the scrapings build up, they fold and they deform to eventually create what are now the mountain (and hill) ranges of western Myanmar. This process continues to the present day.

The final image of this sequence, and on your screens now, is of the present day arrangement of the earth’s tectonic plates, the edges of which are highlighted in red. The plate boundary between the eastern edge of the India Plate and the western edge of the Burma Plate is clearly visible and is now being pointed out by the arrow. While difficult to display in this image, the passing (or subduction) of one tectonic plate beneath another generally produces a deep trench in the sea floor; this marks the surface line of many tectonic plates elsewhere on the surface of the earth.

In this enlargement, you can see where the deep trench between the India and Burma plates exists, but which is visible in the sea floor only in its southern part. As its trace is followed northwards, the trench is at first filled, and then it is completely blanketed by sediments arriving into the region from the north, as the uplifted Himalayas are eroded. It is these sediments and their pathways that I will describe and discuss in the next part of my presentation.

Before that, Mr President, if you will allow me, I would like to take just a few moments to repeat the previous slide series in its entirety, but this time as an unbroken show and without my interruptions. I think that this will provide you and the Members of the Tribunal with a clearer sense of the continuous process of continental drift and plate motion at play during the development of the Bay of Bengal region over time.

On your screens now, and in your binders at tab 5.2, you will see a more familiar view of the Bay of Bengal, its coastlines and its sea floor bathymetry. This surface view of the planet conceals the three geological provinces in and around the Bay of Bengal resulting from the crustal processes that we have been describing. The next image, at tab 5.3 in your binders, shows these clearly.

First, to the left of our image we see the *continental* crust of the India Plate in purple, comprising almost all of India; second, in yellow, the *oceanic* crust of the India Plate, forming practically the entire sea floor of the Bay of Bengal and almost the entire land mass of Bangladesh; and, third, on the right, the Burma Plate, comprising all of Myanmar and only the extreme southeast Chittagong division in Bangladesh.

In summary, it can be seen that the land territory of Bangladesh lies almost entirely on the oceanic crust of the India Plate⁴. Bangladesh has been formed by the accumulation of sediments over more than 50 million years, and it is underlain by layers of sediment which have been estimated to be as much as 24 km thick. To put that in some sort of context, as Mr Reichler did last Thursday, Mount Everest is a mere 9 km high. It is also readily apparent that the entire sea floor of the Bay of Bengal beyond the land mass of Bangladesh, save for those areas within 50 M or so of the coast of Myanmar, lies on the oceanic crust of the India Plate.

⁴ M. Alam et al., “An Overview of the Sedimentary Geology of the Bengal Basin in Relation to the Regional Tectonic Framework and Basin-fill History”, *Sedimentary Geology*, Vol. 155, No. 3-4 (2003). MB, Vol. IV, Annex 50.

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I now turn to the second part of my presentation, which deals with the sedimentary processes and the features that they form in the Bay of Bengal; together, these are the Bengal Depositional System. This huge, single entity encompasses the transport and deposition of sediment particles – gravel, sand, mud and clay – which have been weathered and eroded from the Himalayas and the Tibetan Plateau, through Bangladesh to the Bay of Bengal. These particles are first transported by the main rivers – the Ganges and the Brahmaputra and their tributaries – into Bangladesh, and then southwards into the Bay. Here, and finally, submarine currents disperse the material into the deep sea.

As you will see on your screens and at tab 5.5 in your binders, the Bengal Depositional System⁵ consists of a continuum of four linked depositional units: the onshore river system; the Bengal Delta; the continental shelf; and the Bengal Fan itself. It is clear from extensive scientific research carried out in the region that the component parts are linked and are the product of a single continuous process from the land territory of Bangladesh in the north to an area well south of the Equator, and beyond the limits of the Bay of Bengal itself.

These inextricably linked features are important to the Bangladesh land territory and form its prolongation into the Bay of Bengal. I will now describe them in more detail.

First, the onshore river-deposited sediments and the Bengal Delta begin in northern Bangladesh. The riverbanks and the adjacent flood plains are characterized by complex processes of sediment transportation, deposition, remobilization and re-deposition. With this enormous sediment supply, the Bengal Delta has extended the shoreline more than 100 km out to sea since the end of the last ice age, some 20,000 years ago.

Second, the submarine part of the Bengal Delta comprises the area offshore of the current low water line, extending up to 80 M from the shore. Sedimentary processes of deposition and re-mobilization characterize this submarine area, as the sediments continue their journey towards the Bay of Bengal. This has been tirelessly researched by Professor Herman Kudrass, a distinguished expert in the field and who is here in the room today. According to his findings, more than one third of the sediment mass transported by the rivers is accumulating in the submarine delta, which is advancing seaward between 1 and 2 km per year.⁶

Third, the continental shelf, which lies beyond the submarine delta and extends at a very low gradient (less than one degree) out to about 150 M from the coast and down to about 150 m water depth.

And finally, we arrive at the Fan itself. Sediments from the Ganges-Brahmaputra River system have formed an enormous depositional feature⁷. This is generally recognized in the scientific community as one of the wonders of the world's oceans – the mighty Bengal Fan.

The Bengal Fan was first delineated and named by Professor Joe Curray, a distinguished academic who has devoted his career to unravelling and defining the geology of the region. He has studied the Bengal Fan more than any other marine scientist, and in 1971 it was he who gave the Fan the name with which it has been known ever since.⁸ Professor Curray is also here in this room today. According to his research, the Bengal Fan is

⁵ Joseph R. Curray, "The Bengal Depositional System: The Bengal Basin and the Bay of Bengal" (23 June 2010) (hereinafter "Curray Expert Report"). MB, Vol. IV, Annex 37.

⁶ K. Michels, H.R. Kudrass, et al., "The submarine delta of the Ganges-Brahmaputra: cyclone-dominated sedimentation patterns", *Marine Geology*, Vol. 149 (1998).

⁷ Joseph R. Curray et al., "The Bengal Fan: Morphology, Geometry, Stratigraphy, History and Processes", *Marine and Petroleum Geology*, Vol. 19, No. 10 (2002) (hereinafter "Curray et al. (2002)"). MB, Vol. IV, Annex 48.

⁸ J.R. Curray and D.G. Moore, "Growth of the Bengal deep-sea fan and denudation in the Himalayas", *Geol. Soc. America Bull.* Vol. 82 (1971).

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enormous, extending more than 1,500 M south from the slope in the Bay of Bengal (defined by the 1,400 metre isobath), to 8 degrees south of the Equator. It covers about 3 million square km – an area larger than the Bay itself – and comprises sedimentary rock ranging in layers from 16 km thick at the continental slope, to 1 km thick south of Sri Lanka⁹.

The volume of material in the Fan is equally difficult to comprehend in terms of its scope and size. The volume is estimated to be in excess of 12.5 billion cubic km. This statistic is difficult to appreciate with numbers alone. Imagine if you will that above this building there is a pile of sediment 1 km thick and that that sedimentary pile does not extend just to the edge of the building, does not extend just to the entire surface of Germany, but if you extend it to the entire surface of Europe, that 1km pile, you get some idea of how much material is in the Fan. It is also clear from recent data compilations and reliable estimations of sediment distribution across the Bay that the thickest sediments lie adjacent to, and beneath the Bangladesh continental margin.

I should add here a few words about the composition of the Fan, which has been built, as we know, over the last 40 to 50 million years. It is composed primarily of eroded Himalayan and Tibetan material – precisely the same material that makes up Bangladesh itself.¹⁰ More than 90 per cent of the material in the Fan has been transported and deposited by the major river systems from Bangladesh, with those of peninsular India accounting for most of the rest. In contrast, Mr President, the contribution of Myanmar's rivers is negligible, because the great rivers of Myanmar drain only into the Andaman Sea, and not into the Bay of Bengal. Sediments from the Ganges and Brahmaputra Rivers enter the Bay from the mouth of the Meghna River. Two thirds of the sediment delivered builds onto the onshore delta and the continental shelf, and seafloor currents sweep the remaining one third of the sediment load via an elaborate system of underwater transportation, to distribute this remainder along the length and breadth of the Fan.¹¹

I now turn to the third part of our presentation, which summarizes the elements of geological continuity between the Bangladesh land mass and the Bay of Bengal. Both geological and geomorphological characteristics of the sea floor are involved, which together establish and define the links and the continuity between the two. I will make these next observations with reference to a short movie sequence, a sample from which is provided in your binders at tab 5.5.

In fact, the land territory of Bangladesh exhibits multiple continuities with the Bengal Fan. They are each composed of the same material; they have each been formed by the same continual process of sedimentary deposition; the land territory of Bangladesh slopes gently towards the sea and continues in an unbroken fashion for hundreds of miles offshore; and the land territory of Bangladesh overlies, at depth, the same oceanic crust which forms the floor of the Bay of Bengal. The connection between the land territory of Bangladesh and that which lies below the sea floor, the floor of the Bay of Bengal, is thus as close as it is possible to be.

By contrast, the land territory of Myanmar is *discontinuous* with the Bengal Fan in a number of ways. In the first place, the two are not formed of the same material. The land territory of Myanmar was not formed by the same processes of sedimentary deposition as Bangladesh, but was in part derived from the effects of intense tectonic deformation caused

⁹ Joseph R. Curray, "Sediment Volume and Mass beneath the Bay of Bengal", *Earth and Planetary Science Letters*, No. 125 (1994). MB, Vol. IV, Annex 38.

¹⁰ A. Pierson-Wickmann, L. Reisberg, C. France-Lanord, and H.R. Kudrass, "Os-Sr-Nd results from sediments in the Bay of Bengal: Implications for sediment transport and the marine Os record", *Paleoceanography*, vol. 16, no. 4 (2001).

¹¹ S. Kuehl, H. Kudrass et al., "The Ganges-Brahmaputra Delta", in *River Deltas – Concepts, Models, and Examples* (L. Giosan & J. Bhattacharya eds., 2005). MB, Vol. IV, Annex 53.

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by the collision between the Burma and India tectonic plates, and in part from older continental crust. Second, the passage from the Myanmar land mass to the sea floor is not characterized by a shelf and slope as it is in Bangladesh but, in contrast, is dominated by a narrow zone of tightly-folded rocks of the accretionary wedge which form the Arakan Hills and Indoburman Ranges, before passing rapidly seaward into the deep water.

Furthermore, no more than 50 M from the Myanmar shore there lies the active subduction boundary between the Burma and India Plates. It has been covered by sediments in its northern section, but the plate boundary is nonetheless there, as we have seen from our plate reconstruction earlier in this presentation. The significance of this geological setting cannot be overstated – plate boundaries are the single most fundamental divide on the surface of the earth.

In summary, it follows from this that Myanmar has no geological prolongation from its land mass into the Bay of Bengal. Any relation to the seabed or subsoil of Myanmar beyond the plate boundary can only be by reason of its adjacency to the Bengal Fan. In no sense can the Bengal Fan, or any part of it beyond the boundary between the Indian and Burma Plates, be considered a geological prolongation of the land territory of Myanmar.

This brings me to the last section of my presentation today, regarding the application of the technical aspects of article 76 of the 1982 Convention, and the implementation of the provisions therein to establish the outer limits of a coastal state's continental shelf beyond 200 M. I speak from the perspective of a scientist, not a lawyer. Professor Boyle will speak from that perspective. I will make reference to the first seven paragraphs of the article.

A straightforward reading of the first and third paragraphs of article 76, on your screens and in your binders at tab 5.6, provides information on key features to be identified or defined during the process of establishing the outer limit of the continental shelf. As well as "continental shelf", other terms such as "continental margin", "continental slope" and "rise" are referred to. There are also references to "natural prolongation" and "submarine prolongation".

A geologist reading article 76 might immediately feel that the terms I have just mentioned are very familiar.

On your screens, and at tab 5.7 in your binders is a cross-section drawing of a simple continental margin, labelled accordingly to highlight these seafloor features, with the names which have been used easily since the early twentieth century. They are now reflected in article 76. There is nothing in the text that is surprising to a scientist. Indeed, to a scientist, the continental shelf is very much a physical feature, which can be defined in geoscientific terms. It is normally a relatively shallow-water, platformal area, immediately adjacent to the shoreline, and exhibiting very low gradients – globally, these average only around one half of one degree. Depending on the geological processes pertinent to the area, the width of the shelf can be very limited, or it may continue for many hundreds of miles oceanwards.

Scientifically, the shelf edge marks the locus of rapid deepening water, where the depth commonly increases to several hundreds or even thousands of metres. This rapid increase in the bathymetry marks the start of the continental slope, which descends at a relatively steep gradient. Global average estimates for this value range from 2 to 7 degrees. It is this feature, the continental slope, that carries all the sedimentary material weathered from the land mass, transported by the rivers and currents across the shelf, and finally sheds them downslope into deeper water.

At the base of the continental slope, a band of sedimentary material may locally accumulate at a very low angle of rest, this is normally much less than one degree; it forms a feature known as the continental rise. The continental rise is not always present at margins, and its characteristic subtle form often means it is difficult to identify at all, or map accurately.

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Beyond the continental rise, if it exists, scientists would add a final ocean floor regime, the abyssal plain. This is not part of the continental margin: it receives negligible material from the land mass, and represents an area with extremely low rate of sedimentation. The abyssal plain is part of the deep sea floor and, as such, is separate from the margin. The Bengal Fan lies beyond the continental slope of Bangladesh, and landward of the deep ocean floor of the Indian Ocean. The Bengal Fan is most certainly not part of the deep ocean floor; it is, in effect, a continental rise of immense proportions.

“Continental margin” is defined in article 76 of the Convention as “consisting of the seabed and the subsoil of the shelf, the slope and the rise”. Two observations about this language can be made. First, the reference to the subsoil reinforces the importance of geology as a characteristic of the margin, since the subsoil is what geology is primarily concerned with. Second, the naming of the three geological components – the shelf, the slope, and the rise – as parts of the continental margin implies a scientific basis for the definition of the term “continental margin” in the article. “Shelf”, “slope” and “rise” are all well-known geological terms, used by marine geologists to identify parts of the continental margin. Paragraph 3 further alludes to the geological basis of article 76 by distinguishing what is not included in the continental margin: the “deep ocean floor with its oceanic ridges or the subsoil thereof”.

It is instructive at this point to consider the continental margins of the Bay of Bengal, in order to review how these real examples may be assessed in practical terms for the implementation of the technical requirements of article 76. What is immediately clear is that striking differences exist between the geomorphology and the geology of the continental margins of Myanmar, on the one hand, and of Bangladesh, on the other. We can summarise these observations using the following graphic, illustrating sketch cross-sections across the margins.

Using the images on the screen, which are provided in your binders at tab 5.8, I can make a number of observations on the continental margin of Myanmar, in contrast to that of Bangladesh. First, and most importantly, there is an extreme differential between the extent of the two physical shelves. Myanmar’s accretionary wedge, as we described earlier, is plastered onto the leading edge of the Burma Plate, and is narrow and very sharply constrained by the plate tectonic boundary just offshore. Second, there is a complete absence of a continental rise derived from the Myanmar continental landmass. The sedimentary feature lying beyond its slope is the eastern edge of the Bengal Fan, a product of the Bangladesh Depositional System and not of Myanmar’s margin. Third, the crustal plate on which Myanmar sits is completely disconnected, in a most fundamental way, from that of the subducting India Plate, over which it rides.

I can conclude this final section of my presentation by following the steps used to determine Bangladesh’s entitlement to a continental shelf beyond 200 M, and then, in application of article 76, paragraphs 4 through 7, to establish the outer edge of the continental margin and the limit of Bangladesh’s continental shelf on that margin.

The physical extent of the Bengal Depositional System, including the Bengal Fan, defines the outer edge of the continental margin. Its boundary with the deep ocean floor confirms this. The distance of 1,500 M from the coastline of Bangladesh at which the Fan is observed in the Bay of Bengal clearly exceeds 200 M. This confirms an entitlement to a continental shelf beyond 200 M.

In a practical implementation of article 76, the outer limit of the continental shelf is established by the application of paragraphs 4 to 7. You will observe the stages of this process in a schematic form on your screens using an annotation of one of our previous graphics, which is also in your binders at tab 5.9.

The steps taken comprise: first, the establishment of points along the foot of the continental slope as defined in paragraph 4(b) of article 76 as the point of maximum change

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of gradient at its base; second, the construction in accordance with paragraph 4(a) of the outer edge of the continental margin by either points at 60 M from the foot of slope, or points at which the thickness of sedimentary rocks is at least one per cent of the distance to the foot of the continental slope; third, the evaluation of whether any of these points delineating the outer edge of the continental margin lies beyond either 350 M from the baselines from which the breadth of the territorial sea is measured, or exceeds 100 M from the 2,500 metre isobath. Points lying inside these constraints define the outer limit of the continental shelf. Points lying beyond the constraints locate the outer edge of the continental margin, and the outer limits of the continental shelf in these cases will be defined by the constraint.

With these points, I conclude my presentation today. May I thank you, Mr President, and distinguished Members of the Tribunal, for your attention, and I invite you to call Rear Admiral Khurshed Alam, the Deputy Agent of Bangladesh, to the podium.

The President:

Thank you, Dr Parson.

I invite the Deputy Agent of Bangladesh, Mr Khurshed Alam, to take the floor please.

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STATEMENT OF MR ALAM
DEPUTY AGENT OF BANGLADESH
[ITLOS/PV.11/6/Rev.1, E, p. 9–14]

Mr Alam:

Mr President, members of the Tribunal, it is a great honour and privilege for me to appear before you today on behalf of my country.

My colleague, Dr Lindsay Parson, has just described to you the geological continuity of Bangladesh into the Bay of Bengal and beyond. I would now like to describe the approach that Bangladesh took to establish the outer limit of its continental shelf in the Bay of Bengal, in accordance with article 76 of United Nations Convention on the Law of the Sea 1982.

Bangladesh delivered its submission to the Commission on the Limits of the Continental Shelf through the Office of the United Nations Division of the Oceans and Law of the Sea on 25 February 2011, and presented it to the 28th session of the Commission on 24 August 2011. The submission comprises the Executive Summary, Main Body, supporting data and documentation, according to the Commission's rules of procedure. The Executive Summary has been published on the Commission's website and has also been submitted to the Tribunal as Annex R3. You can see the front page of this on your screen and under tab 5.10 in your folders. An electronic copy of the full text of the submission has also been deposited with the Registry of this Tribunal.

For the preparation of the submission, Bangladesh assembled a large and complex suite of state-of-the-art geophysical and geological data. This includes bathymetric profiles for measuring water depth, and seismic data for measuring sediment thickness, similar to those used in the petroleum industry to explore for subsurface hydrocarbon deposits.

For the past twelve years, Bangladesh has been working on gathering data in the Bay of Bengal to understand its maritime territory. This map on your screen shows the numerous hydrographic survey programmes collected by the Bangladesh Navy and the Bangladesh Continental Shelf Technical Team, this is under Tab 5.11. They extend from the coastal region and the shallowest waters of the delta out to some of the deepest waters of the Bay of Bengal, providing dense coverage of the foot of slope and the deeper water out to beyond 2,500 metre isobath.

As well as the bathymetric data required to identify the foot of slope, Bangladesh also needed seismic data for the sediment thickness formula of article 76, paragraph 4(a)(i).

This graphic (also under tab 5.11) shows the track lines of the industry-standard seismic reflection profiles used in the submission. These were acquired to provide acoustic slices into the seabed of the Bay, deep enough to identify the base of the sediment layer and hence measure the sediment thickness. This parameter is critical for the determination of the outer edge of the continental margin.

The first stage of analysis is to define the foot of slope, from which all the other measurements are taken. Article 76, paragraph 4(b) states that "the foot of the continental slope shall be determined as the point of maximum change in gradient at its base". Accordingly, the new bathymetric profiles were used for this purpose. This graphic shows the shallow near-shore shelf in pink at a water depth of less than 200 m - the edge of the pink corresponds to the edge of the shelf; southwards we plunge off the edge of the shelf down the continental slope, on to the pale blue area that makes the base of the slope at a water depth of approximately 1,800 metres. This map shows the profiles used to define the base of the continental slope and the foot of slope points; nine were used in the final submission. Mr President, rather than take you through all of these profiles one by one, I will use one representative profile to show you the methodology used. (You will find this map and the others relevant to the analysis of the foot of the slope under tab 5.12).

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Our method of analysis comprised three stages: first, we constructed a regional profile to demonstrate the bathymetric context of the foot of the slope. This profile extends from the shallow shelf area adjacent to the Bangladesh coastline into the deep abyssal plain. There you can see the shallow shelf, the relatively steep continental slope, and the start of the rise that extends throughout the Bay of Bengal, which, as Dr Parson previously stated, corresponds to the Bengal Fan. This regional profile also allowed us to identify the base of the slope zone, within which we could analyze the maximum change of gradient to determine the foot of slope. The next slide will show you in more detail the transition from the shelf to the rise, and I will show you an enlargement of the part of the profile outlined in pink.

This graphic shows a profile from the edge of the shelf, down the slope and into the top of the rise to where we have determined the limits of the base of slope region. By limiting the width of this zone, the analysis of gradient can be more easily focused.

In the final step, we analyzed a small section of the bathymetric profile within the base of slope region to select a foot of slope point. In this case, each selection was based on the maximum change in the gradient in accordance with paragraph 4(b) of article 76. This slide shows a detailed analysis of the foot of slope profile. The bathymetry is shown in green, ranging only from 1,750-1,850 metres water depth. Overlain in red is the analysis of the change of gradient of the sea floor, performed using specialist and highly regarded software.¹ This is fairly uniform across most of this profile, and shows a distinct spike on the right at the distinct break in slope. This is “the maximum change of gradient”. And it is, by definition, the foot of the slope.

We carried out the same analysis for each of the nine base of slope profiles; the plate you can see shows the location of the nine final foot-of-slope points. This is at the back of tab 5.12.

Having established the foot of the slope positions, we proceeded to apply the formulae in article 76, paragraph 4, to delineate the outer edge of the continental margin. The first formula applied here is the “distance” formula as given in article 76, paragraph 4(a)(ii), that is, points not more than 60 M from the foot of the continental slope. Here you can see (and also under tab 5.13) the line drawn using the standard envelope of arcs method showing the control lines connected to the respective foot of slope points.

From the distance formula construction, we now move to the second formula, which defines the edge of the continental margin at the point where the sediment thickness is at least one per cent of the distance to the foot of the continental slope. To remind us of the unusual sediment distribution of the Bay of Bengal, you can see now on your screens a published sediment thickness map². This model, derived from gravity data calibrated by seismic velocities, can be regarded as a generally reliable estimate of sediment thickness. The warmer colours, red and orange, show the thickest parts, here more than 12 km; the green and blue colours show the thinner sediments. Sediment thickness in the central Bay of Bengal, some 400 M from the Bangladesh land mass, generally exceeds 6 km. Such published data were used to help plan the acquisition of a number of seismic profiles. As the lines are designed for the application of the sediment thickness formula, they must demonstrate sufficient sediment to prove both that at each point of the sediment thickness is at least 1% of the distance to the foot of the slope, and that the sediment is continuous back to the foot of slope.

I am now going to show you an example of our seismic data. This is a short line from the south-western part of the survey, highlighted on your screens in red. The survey was designed to measure the sediment thickness points and to demonstrate sediment continuity.

¹ Geocap and CARIS LOTS were used

² Radhakrishna, M., Subrahmanyam, C. & Damodharan, T. (2010). Thin oceanic crust below Bay of Bengal inferred from 3-D gravity interpretation, *Tectonophysics*, 493, 93-105.

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The image that is now on your screens (and at tab 5.14) shows the seismic data itself; this line is approximately 100 km in length and about 15 km in depth. The seafloor lies towards the top of the image and is marked in blue. The top of the basement and the base of the sediment is shown in red. The sediment and underlying basement have a different seismic response and appear here with different textures; the section illustrates the relative uniformity of the thick sedimentary sequence and the clear contrast in character between it and the underlying oceanic basement. You can see the multi-layered nature of the sediment, as layer upon layer of sand and mud have accumulated over millennia. The oceanic basement by comparison is much more rugged and chaotic, with a very irregular surface. The sediment thickness is measured between the top of the basement and the seabed. This is the value that is used for the sediment thickness formula.

Using these seismic profiles, sediment thicknesses were calculated together with the distance from the foot of the slope. This summary map now on the screen (and also under tab 5.15) shows the seven resulting sediment thickness points, used to delineate the outer edge of the continental margin in accordance with article 76, paragraph 4(a)(i). These points lie typically about 500 km (or 280 M) from the foot of the slope and have more than 5 km of sediment, thus satisfying the 1% criterion. All these points clearly lie oceanward of the "distance" formula; accordingly, it is only the sediment formula which Bangladesh needs to use in its continental margin construction.

Having established the outer edge of the continental margin according to the rules of article 76, paragraph 4, I would now like to examine the constraint options provided in paragraph 5 of article 76. This states that the outer limits of the continental shelf

either shall not exceed 350 nautical miles from the territorial sea baselines or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is the line connecting the points lying along the depth of 2,500 metres.

It was recognized during the initial studies that the construction of a 350-M limit would fall some distance landwards of a constraint constructed at 100 M from the 2,500 m isobath. Therefore work proceeded to identify precisely this latter constraint only.

Establishing the exact geometry of the 2,500 metre isobath requires precise surveying, as the seafloor gradient at such depths is generally very low. Moreover, depending on relatively small variations in relief, isobath configuration may be very complex. The dedicated surveys that the Bangladesh Navy carried out to assess the exact position of the 2,500 metre isobath are illustrated here (and in your folders under tab 5.16) as blue lines; the red circles indicate individual surveyed 2,500 metre depth points from which the constraint was accurately constructed. With these data, we were able produce the final outer limit of Bangladesh's continental shelf entitlement in accordance with article 76.

Perhaps it would be helpful to the Tribunal for me to summarize this process, that is, how Bangladesh has applied the requirements of article 76 to determine the final outer limit of our continental shelf entitlement. The following slides sequentially review the methodology for constructing the outer limit of the continental shelf. This first slide provides an overview of the regional context and background bathymetry, on which we have superimposed the nine foot of slope points identified during the analysis of our bathymetric profiles.

Using the foot of slope positions, a series of 60-M arcs generated a potential outer limit to the continental margin in accordance with sub-paragraph 4(a)(ii) of article 76: and this is the distance formula.

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The 1% sediment thickness positions derived from our seismic data are then added, as you can see on this next plate. As these are seaward of the distance lines, they define the outer edge of the continental margin according to article 76 paragraph 4.

We have now added the 2,500 metre sounding locations, and the constructed line 100 M seaward. This constraint is inside - or landward of - the sediment thickness line in all but its very western end. In this way, the line defines the outer limit of our continental shelf in conformity with article 76 of the United Nations Convention on the Law of the Sea, 1982.

Article 76, paragraph 7 requires the outer limit to be defined as a series of fixed points. The 2,500 metre + 100-M constraint line is now converted to a number of points (in this case there are 120) that are no more than 60 M apart. These are shown as points Fixed Point 1 through to Fixed Point 120. You will also find this final map under tab 5.17.

This final map in the sequence (and also under tab 5.17) shows an enlargement of the outer limit showing the 120 fixed points, joined by straight lines (in orange), none of which are greater than 60 M in length. These connect the fixed points and this is the complete definition of Bangladesh's continental shelf.

To conclude, I would now like to show a brief animation depicting a fly-over of the Bay of Bengal, showing the differences between its various margins. This highlights the rather dramatic seafloor features, from the immensity of the Fan itself to its detailed channelling and sediment patterns. It also shows the inherent features which define the various components of the Bangladesh's outer continental shelf entitlement.

As you can see, we fly in northwards across the Bay of Bengal, crossing the vast expanse of the Bengal Fan that extends as an immense apron of sediment hundreds of miles from the coastline. The central parts of the Fan are crossed by numerous active and inactive channels, fed by the major underwater canyon known as the "Swath of No Ground". As we turn back towards the south, we leave the shallow water part of the shelf, to pick up the locations of the nine "foot of slope" points, seen here as yellow dots; the distance formula constructed using these points as a series of red arcs; the outer edge of the continental margin outlined at the 1% sediment thickness point is marked by yellow pyramids; the 2500 metre isobaths picks are indicated in green circles along with the construction of the 100-M constraint arcs. This allows the determination of the outer limit of the continental shelf, shown here in orange, consistent with the provisions of article 76 of the United Nations Convention on the Law of the Sea, 1982. I have extracted some stills from this animation which you will find under tab 5.18, and we will be providing you with a digital copy later this week.

Mr President and Members of the Tribunal, that concludes my presentation regarding Bangladesh's continental shelf. Bangladesh has an easily defined natural prolongation consisting of the thick sediment of the Bengal Fan that extends from the north and throughout the Bay of Bengal. The outer limit of Bangladesh's continental shelf, as established by article 76 and submitted to the Commission, lies well within the continental margin of Bangladesh.

Mr President, and the Members of the Tribunal, I thank you very much for allowing me to make this presentation today. May I now ask you to call Professor Boyle to the podium.

The President:

Thank you for your presentation.

I now give the floor to Mr. Alan Boyle.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR BOYLE
COUNSEL OF BANGLADESH
[TTLOS/PV.11/6/Rev.1, E, p. 14–29]

Mr Boyle:

Mr President, Members of the Tribunal. My task this morning is to set out Bangladesh's case on delimitation of the continental shelf beyond 200 M from the territorial sea baselines. (And I will obviously have to divide this presentation into two, and I will try and find a convenient point at which to do so.) In its Memorial and Reply, Bangladesh argued that pursuant to article 76 of the 1982 Convention, it has an entitlement to a continental shelf beyond 200 M.¹ Bangladesh further argued that Myanmar enjoys no such entitlement because its land territory has no natural prolongation into the Bay of Bengal beyond the 200-M limit.² Alternatively, Bangladesh also argued that even if Myanmar has some entitlement to a continental shelf beyond 200 M, then an equitable delimitation would nevertheless still allocate all or most of the disputed areas of continental shelf beyond 200 M to Bangladesh.³

Myanmar's Counter-Memorial and its Rejoinder argue in response that the question of delimiting the shelf beyond 200 M simply does not arise because an equidistance delimitation would terminate well before reaching the 200-M limit.⁴ In the appendices to its pleading Myanmar goes on to argue firstly that based among other things on the geomorphology of the seabed, Myanmar's continental shelf entitlement extends beyond 200 M regardless of the underlying geology;⁵ and secondly they say that delimitation beyond 200 M is based on the same principles as delimitation within 200 M.⁶ In effect both Parties are claiming the whole area in dispute beyond 200 M. Alternatively, both Parties also agree that if there is any overlapping entitlement beyond that limit, then any boundary delimitation must also result in an equitable solution, but Myanmar has not so far given any indication of what an equitable solution beyond 200 M would look like.

The full extent of Bangladesh's submission to the Commission on the Limits of the Continental Shelf has just been outlined by Admiral Alam, but it may be useful to recall at this point how large an area beyond 200 M is at stake in this case. And you will see the map on the screen and you will find it also at tab 5.19 in your folders. Myanmar does not dispute that Bangladesh's land territory has a natural prolongation beyond 200 M, as required by article 76(1); nor does it say that Bangladesh does not satisfy the conditions set out in article 76(4) and (5) for establishing the outer limits of its continental shelf. And to that extent, both Parties agree that there is a continental shelf extending beyond 200 M from Bangladesh's land territory. Myanmar has also submitted no evidence to the contrary; so no issue arises concerning Bangladesh's entitlement to a continental shelf beyond 200 M. The Tribunal merely has to determine where the boundary line should be drawn between the Parties beyond that limit.

I will address two issues this morning. First, I will argue that there is no overlapping continental shelf beyond 200 M because Myanmar has no natural prolongation from its land territory at that point and therefore no entitlement to extend its continental shelf beyond the 200-M limit. Secondly, and in the alternative, I will argue that, insofar as the continental shelf

¹ Memorial of Bangladesh (hereinafter "MB"), paras. 7.14-7.26.

² *Ibid.*, paras. 7.27-7.36.

³ See *ibid.*, para. 7.42; Reply of Bangladesh (hereinafter "RB"), paras. 4.75-4.89.

⁴ Counter-Memorial of Myanmar (hereinafter "CMM"), para. 1.15; Rejoinder of Myanmar (hereinafter "RM"), paras. 7.7, A.2.

⁵ *Ibid.*, paras. A.28-A.40.

⁶ *Ibid.*, paras. 5.3, 5.110.

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of both Parties does overlap beyond 200 M, then the boundary must be delimited in accordance with article 83(1) in order to achieve an equitable solution.

And in this context the most significant factors in the present case are, firstly, seabed geology and geomorphology, and, secondly, the disproportionate cut-off effect which Myanmar's equidistance line or indeed any equidistance line generates beyond 200 M.

In conclusion, I will sum up Bangladesh's view of the equitable solution required by article 83(1). At this point, before I go any further, it may also be convenient to reiterate that the location of the outer limit of the continental shelf, as defined in article 76(5) of the Convention, is not an issue in these proceedings, and it is not relevant to the delimitation of the maritime boundary between the Parties to this dispute. I hope that Admiral Alam's presentation will have made that very clear. And as Dr Akhavan explained yesterday, each Party delineates the outer limit of its own continental shelf on the basis of the recommendations made by the CLCS. With respect to the shelf beyond 200 M, this Tribunal's role in the present case is simply to delimit the lateral boundary between Bangladesh and Myanmar. There is no question of delineating the outer limit of the shelf nor is that required by the *compromis*: on that issue both Parties agree. The outer edge of the continental margin and the boundary with the international seabed area, wherever that may be, lie well to the south of the area covered by the overlapping claims of the Parties to the present case. And I think again, Admiral Alam's presentation was intended to demonstrate that point.

My first argument, therefore, is that there is no overlapping shelf beyond 200 M. In the present dispute, there is overwhelming and unchallenged evidence of a "fundamental discontinuity" between the land mass of Myanmar and the seabed beyond 200 M. Geologically and geomorphologically, as Dr Parson explained this morning, the tectonic plate boundary between the Indian and Burma Plates is manifestly "a marked disruption or discontinuance of the seabed" that serves as "an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations". I am sure many of you will recognize those as quotations from the International Court judgment in the *Tunisia/Libya Case*.⁷ In contrast, there is complete and undisputed physical continuity between Bangladesh and the seabed beyond 200 M.

Myanmar's claim to a continental shelf beyond that limit can only rest on "natural prolongation", as article 76 requires. Given the geological and geomorphological evidence elaborated this morning by Dr Parson, it seems evident that Myanmar cannot meet the physical test of natural prolongation in article 76(1), and Myanmar itself has not submitted any evidence to challenge this conclusion. That would mean that it is not entitled to a continental shelf beyond 200 M, and the question whether the conditions set out in article 76(4) are met simply does not arise; Myanmar does not get there.

The continental shelf in the Bay of Bengal is thus the natural geological prolongation of Bangladesh and, to a lesser extent, of India, but it cannot be the natural prolongation of Myanmar. There is no geological basis for Myanmar's claim to a continental shelf beyond 200 M. Myanmar's juridical continental shelf can of course extend westwards to the 200 M provided by article 76, but no further. And crucially, and if you look at the map you can see where that is – outlined in orange. And crucially, Myanmar has not contradicted – or even questioned – any of the scientific facts. It admits them in its pleadings⁸ and in its submission to the CLCS.⁹

⁷ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, p. 18 (hereinafter "*Tunisia/Libya*"), para. 66.

⁸ See, e.g., CMM, paras. 2.5, 2.12, A.12, A.32-A.35.

⁹ *Continental Shelf Submission of Union of Myanmar, Executive Summary, 16 December 2008*, p. 2, Annex MCM-16.

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Entitlement to a continental shelf beyond 200 M is of course governed by article 76 of the 1982 Convention. If we look very quickly and remind ourselves what article 76(1) provides, you will see there that it defines the continental shelf of a coastal State:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout *the natural prolongation of its land territory to the outer edge of the continental margin*, or (and this is of course the alternative) to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹⁰

And if we look very quickly also at article 76(3) on the screen, it provides that:

The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.¹¹

Bangladesh takes the view that entitlement to a continental shelf beyond 200 M under article 76(1) requires evidence of “natural prolongation” from the coastal State’s land territory. Article 76(1) defines the continental shelf as the “seabed and subsoil” of the submarine areas beyond the territorial sea. It does not define “natural prolongation”. Nevertheless, in Bangladesh’s view the ordinary meaning of the words “natural prolongation” of the “seabed and subsoil” of the submarine areas beyond the territorial sea is sufficiently clear and unambiguous: both geomorphological and geological continuity must, in Bangladesh’s view, exist between the coastal State’s land mass and the seabed and subsoil beyond 200 M. And indeed, the very composition of the Commission on the Limits of the Continental Shelf about which you heard yesterday – a mixture of geologists, geophysicists and hydrographers – rather speaks for itself on that point.¹²

In this respect the basis of title beyond 200 M is fundamentally different from entitlement within 200 M. Beyond 200 M natural prolongation is essentially a physical concept; it is not an abstract legal one. It must be established by evidence. It cannot be based solely on the geomorphology of the ocean floor alone but must also have an appropriate geological foundation, as Dr Parson has explained. Mere “appurtenance” or proximity to the nearest land mass does not create an entitlement to a continental shelf, as decided by the International Court in the *North Sea* case.¹³

Myanmar disputes Bangladesh’s interpretation of article 76.¹⁴ Put simply, Myanmar argues that where the outer edge of a continental margin can be delimited in accordance with either of the formulae stated in article 76(4), a “natural prolongation” within the meaning of article 76(1) can be presumed.¹⁵ In the words of the Counter-Memorial: “‘Natural prolongation’ is not the criterion; it is the (legal) outcome.”¹⁶ Myanmar also argues that the legal criteria for delineating the outer limit of the continental shelf “do not involve geological

¹⁰ Emphasis added.

¹¹ Emphasis added.

¹² See Art. 2(1) of Annex II to UNCLOS.

¹³ See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports 1969, p. 3 (hereinafter “*North Sea Cases*”), para. 39.

¹⁴ RM, paras. A.23-49.

¹⁵ CMM, paras. A.21-A.22.

¹⁶ *Ibid.*, para. A.10.

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continuity, but are based primarily on concerns of horizontal distance and the shape (or geomorphology) of the seabed.”¹⁷

On Myanmar’s interpretation, article 76(1) and its reference to natural prolongation play almost no role in determining entitlement to an outer continental shelf; only the location of the foot of the slope and the article 76(4) formula lines are relevant.¹⁸ That’s their view. By using paragraph 4 to override paragraph 1, Myanmar gives the concept of natural prolongation a purely geomorphological character, focusing on the superficial character of the ocean floor and ignoring the underlying geology of the seabed and subsoil altogether.¹⁹ It goes on to say that article 76,

refers to a legal concept which takes some account of scientific notions. It is not at all designed to describe necessary natural and scientific characteristics of the continental shelf, but refers only to a legal concept which assesses the legal title of a State to the continental shelf.²⁰

In its view there is simply no need to produce evidence of natural prolongation, and unlike Bangladesh it has not offered you any.

Myanmar’s reliance on article 76(4) rather than article 76(1) is not surprising, since, as Dr Parson showed this morning, Myanmar has no geological extension beyond 200 M (or indeed beyond 50 M). By reading article 76(1) out of UNCLOS, Myanmar is obviously trying to avoid the question whether there is any geological continuity between the seabed and subsoil beyond 200 M and its own adjacent land mass. It wants you to ignore the intervening tectonic plate boundaries and seabed trenches, or any other major geological discontinuity. Even on its own terms, Myanmar goes too far, because of course the application of article 76(4) on which it relies also requires geological evidence concerning the thickness of sedimentary rocks.²¹ Sediment thickness is nothing if it is not geology. As Sherlock Holmes should have said: “Sedimentary, my dear Watson”; so geomorphology does not provide all the answers in article 76.

Bangladesh takes the view that the reference to natural prolongation in article 76(1) cannot be ignored in the way that Myanmar argues, or at all. Article 76 as a whole, as you all know, is a carefully structured package, and proceeds logically from the definition of the “continental shelf” in article 76(1), which expressly includes natural prolongation of the seabed and subsoil, before coming to the rules and procedures for establishing the outer edge of the “continental margin” in article 76(4), and then the legal outer limit of the shelf in article 76(5). Myanmar is thus wrong to claim that the “legal concept of ‘natural prolongation’ must be understood by reference to the formulae of article 76(4)(a) of UNCLOS and their starting point, i.e., the foot of the continental slope ...”²²

The most crucial point to emphasize in response here is that even if Myanmar can draw an outer edge of the continental shelf in accordance with article 76(4), there must still be an intervening physical shelf to constitute natural prolongation from the land territory. Let us just for a moment imagine the outer continental shelf as an egg. Myanmar’s version of the egg has a shell, but it need *not* have a yolk. For Bangladesh, a shell is a shell, but an egg is a shell *and* the yolk. The two go together. So it is with the continental shelf. For the physical

¹⁷ RM, para. A.45.

¹⁸ CMM, para. A.11.

¹⁹ RM, paras. A3-A27.

²⁰ CMM, para. A.9.

²¹ Article 76(4)(a)(i): “a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope...”

²² CMM, para. A.23.

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shelf to reach the outer edge of the margin as defined by article 76(4), and *a fortiori* to reach the outer limit of the legal shelf defined by article 76(5), its physical structure must run continuously from the land territory, as required by article 76(1).

For that most basic of reasons – and really this is a very obvious point – even for a professor – article 76(4) does not help Myanmar establish a continental shelf beyond 200 M. It is not the case, as Myanmar argues – and I quote again – that “article 76(4) is applicable independently of the question whether the continental shelf is or is not the scientific natural prolongation of the land mass”.²³ Yes, they did say that. That dismissive sentence does not really require much of a response from me. But the idea that the continental margin can be the “natural prolongation” of a land mass to which it has no physical connection whatever – even if separated by a black hole – is surely not what the International Court had in mind in the *North Sea Continental Shelf* cases.

I think, Mr President, that is probably the right moment to give you a coffee break, if I may.

The President:

Thank you very much.

I think now we will break for thirty minutes and we will come back at 12 noon.

(Short adjournment)

The President:

Mr. Boyle, you have the floor to resume your statement.

Mr Boyle:

Mr President, Members of the Tribunal, before the coffee break I made the point that the idea that the continental margin can be the natural prolongation of a land mass to which it has no physical connection whatever, even if separated by a black hole, is surely not what the ICJ had in mind in the *North Sea Continental Shelf* cases.

Even if we accept Myanmar’s argument that “the seaward edge of an accretionary wedge ... scientifically speaking, is supposed to represent the edge of the continental margin”,²⁴ the undisputed scientific evidence still shows that in the present case the accretionary wedge simply does not reach beyond 50 M.²⁵ You can see that on the screen and in tab 5.23 of your folders. Article 76(4) therefore does not and cannot define “natural prolongation”. It merely defines the outer edge of the continental margin in cases where there already exists the necessary natural prolongation from the land territory as required by article 76(1).

Myanmar tries to argue that Bangladesh’s interpretation would leave the CLCS with no means for defining the outer limit of the shelf in cases where a major geological discontinuity in the seabed and subsoil exists beyond 200 M.²⁶ Myanmar says that “article 76 does not contain any principles or rules in order to determine the outer limit of the continental shelf in such a case.”²⁷ This is quite wrong. Article 76(4)(b) permits “evidence to the

²³ *Ibid.*, para. A.25.

²⁴ *Ibid.*, para. A.34.

²⁵ MB, paras. 2.22-23, 2.41; RB, para. 1.20. See also Joseph R. Curaray, “The Bengal Depositional System: The Bengal Basin and the Bay of Bengal” (23 June 2010), Annex BM-37; Joseph R. Curaray, “Comments on the Myanmar Counter-Memorial, 1 December 2010” (8 March 2011), Annex BR-4; and Hermann Kudrass, “Elements of Geological Continuity and Discontinuity in the Bay of Bengal: From the Coast to the Deep Sea” (8 March 2011) E68, Annex BR-5.

²⁶ RM, para A.35.

²⁷ *Ibid.*

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contrary” to be used where the foot of the slope cannot be measured by reference to the maximum change in gradient.²⁸ This would allow for geological evidence to be used in such cases.²⁹ Bangladesh’s interpretation of article 76 is no impediment to a determination of the outer limit of the shelf.

Bangladesh’s argument, Mr. President and Members of the Tribunal, thus remains that the ordinary meaning of the term “natural prolongation”, and the context in which it is used in article 76, requires evidence of a geological character connecting the seabed and subsoil directly to the land territory. Both geology and geomorphology are relevant and necessary in applying article 76(1), as they also are when determining the outer edge of the margin under article 76(4). And it’s only the definition of the outer limit of the shelf in article 76(5) that is a purely legal construct – and it is not relevant for the purposes of these proceedings.

The *travaux* of the 1982 Convention, and the jurisprudence, also point to the same conclusion. In the Official Records of the 3rd UN Conference on the Law of the Sea the term “natural prolongation” first appears in a Working Paper submitted by China to the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction.³⁰ Working papers and draft texts submitted at the conference itself also used the term.³¹ The same terminology was used in article 62 of the 1975 Informal Single Negotiating Text³² and article 64 of the 1976 Revised Single Negotiating Text.³³ I am sure that you are all familiar with those. These draft articles are identical to article 76(1) of the 1982 Convention.

The drafting history shows that the term natural prolongation is drawn from the *North Sea Continental Shelf* cases.³⁴ In those cases – you will see the excerpt on the screen – the ICJ understood “natural prolongation” as follows:

More fundamental than the notion of proximity appears to be the principle – constantly relied upon by all the Parties – of the natural prolongation or continuation of the land territory or domain, or land sovereignty of the coastal State, into and under the high seas, via the bed of its territorial sea which is under the full sovereignty of that State ...³⁵

The Court itself used the terminology “natural prolongation”. It is of course true that the Court’s comments have since been overtaken in part by the development of the 200-M

²⁸ Article 76(4)(b): “In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.”

²⁹ See Chapter 6 of the Commission on the Limits of the Continental Shelf, *Scientific and Technical Guidelines*, U.N. Doc. No. CLCS/11 (13 May 1999).

³⁰ UNDOC A/AC.138/SC.H/L.34, reproduced in UN, *Report of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction*, New York, 1973, Vol. III, p. 74, GAOR, 28th Session, Supp. 21 (A/9021).

³¹ See Third United Nations Conference on the Law of the Sea, Canada, Chile, Iceland, Indonesia, Mauritius, Mexico, New Zealand and Norway: working paper, U.N. Doc. No. A/CONF.62/L.4 (26 July 1974), Annex BR-8; Third United Nations Conference on the Law of the Sea, United States of America: draft articles for a chapter on the economic zone and the continental shelf, U.N. Doc. No. A/CONF.62/C.2/L.47 (8 August 1974), Annex BR-10; Third United Nations Conference on the Law of the Sea, Preliminary Study Illustrating Various Formulae for the Definition of the Continental Shelf, U.N. Doc. A/CONF.62/C.2/L.98 (18 April 1978), p. 189, n. 11, Annex BR-13.

³² Third United Nations Conference on the Law of the Sea, Informal Single Negotiating Text (Part II), U.N. Doc. A/CONF.62/WP.8/PART II (7 May 1975), Annex BR-11.

³³ Third United Nations Conference on the Law of the Sea, Revised Single Negotiating Text (Part II), U.N. Doc. A/CONF.62/WP.8/REV.1/PART II (6 May 1976), Annex BR-12.

³⁴ See *North Sea Cases*, paras. 19, 39-40, 43; miles. Nordquist et al., eds., United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II (1993), p. 846, Annex BM-32.

³⁵ *North Sea Cases*, para. 43.

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continental shelf introduced by the 1982 Convention, but that is essentially an artificial legal construct. The Court's view in 1969 of natural prolongation remains equally applicable today to the shelf beyond 200 M. As Professor Crawford explained on Thursday, the *North Sea* cases are a very relevant authority in the present litigation.

The subsequent jurisprudence also supports Bangladesh's interpretation of article 76. In the *Tunisia/Libya* case, the ICJ echoed the *North Sea* cases and it referred to "the physical factor constituting the natural prolongation".³⁶ It also made clear that "a marked disruption or discontinuance of the sea-bed" may constitute "an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations". It is true that it was unable to identify such a discontinuity on the facts of that case³⁷ but that was a matter of evidence.

In the *Libya v. Malta* case, the ICJ again held that a discontinuity in the seabed and subsoil could be "so scientifically 'fundamental', that it must also be a discontinuity of a natural prolongation in the legal sense".³⁸ However, it also found the evidence insufficient to demonstrate such a discontinuity in that part of the Mediterranean.

Throughout the *Libya/Malta* case the ICJ was very careful to refer both to the seabed and the subsoil when discussing arguments based on geology. It appears from both the *Libya v. Malta* and the *Tunisia v. Libya* cases that the Court had something more than geomorphology in mind: a "discontinuance" in the seabed, a "scientifically fundamental discontinuity", suggest not just the surface of the ocean floor but also the underlying geological structure of the subsoil.³⁹ Both cases treat the geological and geomorphological evidence as relevant beyond 200 M.

That conclusion is also shared by the Commission on the Limits of the Continental Shelf. A declaration of principles interpreting article 76 was made by a sub-commission of the CLCS during its examination of the UK's Ascension Island submission and is referred to by Myanmar in its Counter-Memorial.⁴⁰ That declaration of principles contains the following very pertinent paragraph:

- (i) The "natural prolongation of [the] land territory" is based on the *physical extent* of the continental margin to its "outer edge" (article 76, paragraph 1) i.e. "the submerged prolongation of the land mass ..." (article 76, paragraph 3)⁴¹

I will obviously emphasize in particular the words "physical extent of the continental margin".

Contrary to what Myanmar argues, this declaration reflects Bangladesh's view of the continental shelf beyond 200 M. Its existence is essentially a question of fact – a physical concept, based on natural prolongation to the edge of the continental margin, but one whose outer limit – but only the outer limit – is then defined by law.

Taking into account the jurisprudence on natural prolongation⁴² and applying it, in the language of the International Court in *Tunisia v. Libya*, to "the physical circumstances as they are today",⁴³ leaves no doubt that the continental shelf that runs southwards from Bangladesh

³⁶ *Tunisia/Libya*, para. 68.

³⁷ *Ibid.*, para. 66.

³⁸ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya v. Malta*"), para. 41.

³⁹ See also the many references to seabed geology in *Tunisia/Libya*.

⁴⁰ *CLCS Ascension Island Recommendations*, adopted on 15 April 2010, para. 22. Cited by CMM, para. A.25.

⁴¹ *Ibid.* Emphasis added.

⁴² MB, paras. 7.10-7.13.

⁴³ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter "*Tunisia/Libya*"), para. 60.

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into the Bay of Bengal is a natural prolongation of its land mass, as required by article 76(1), and that the outer edge of the margin is far beyond the area in dispute, as my colleagues showed earlier. In the International Court's words, the "submarine area concerned is to be regarded as a natural extension" of the land mass of Bangladesh.⁴⁴ In contrast, as you have heard today from Dr Parson, the evidence amply demonstrates that the Bengal Depositional System and its associated Fan are not the natural extension of Myanmar's land territory.

To summarize the argument so far, if Myanmar has no entitlement to an outer continental shelf in accordance with article 76, then it necessarily follows that Myanmar's claimed entitlement to the bilateral area also covered by Bangladesh's CLCS submission, and to the trilateral area also covered by the CLCS submissions of Bangladesh and India, are invalid. Because Bangladesh, by contrast, *can* demonstrate a legal and scientific basis for natural prolongation from its land territory, it must be entitled to an outer continental shelf beyond 200 M. Any boundary between that shelf and Myanmar's must then lie no further seawards from Myanmar's coast than the 200-M juridical shelf provided for in article 76. There is then no overlapping shelf beyond 200 M from Myanmar.

Many states do not have a physical continental shelf extending beyond or even as far as the 200-M line.

At present there are 162 States Party to the UN Convention, of which 136 appear to be coastal States.⁴⁵ Of the latter, some 48 have made continental shelf submissions to the CLCS.⁴⁶ In addition, another 31 States have submitted preliminary information indicative of the outer limits of the continental shelf beyond 200 M. Thus there are 79 States that believe their continental shelf may extend beyond 200 M. That leaves 57 coastal states that have made no submissions to the CLCS, and for them it would seem that the 200-M limit is likely to be the maximum outer limit for their continental shelf, in most cases because their shelf does not physically extend beyond that limit. However, even among those whose shelf does exceed 200 M, there are, of course, variations and in some cases they too have areas where the outer limit stops at 200 M because the physical shelf does not extend that far everywhere.

Of the submissions made to the CLCS, it has made recommendations on 14. We would like to show illustrative maps for two of these recommendations, Australia and New Zealand. Australia made its submission to the CLCS on 15 November 2004 and received the Commission's recommendation on 9 April 2008. New Zealand made its submission on 19 April 2006 and received the CLCS recommendation on 22 August 2008.

Even for a country that has an extensive continental shelf beyond 200 M, Australia also has areas, which you can see very clearly on the screen, where the 200-M EEZ line is the limit for those parts of the continental shelf that do not extend any further. On the map you will see those illustrated in green.

New Zealand's CLCS recommendation also has areas where the 200-M limit defines the outer limit of the continental shelf, and you will see those highlighted in yellow.

In the situation before this Tribunal it is Bangladesh's firm belief that Myanmar's physical continental shelf extends only about 50 M offshore. Its continental shelf limit would thus be the 200-M limit coincident with the EEZ boundary. In that respect, Myanmar would

⁴⁴ *North Sea Cases*, para. 43.

⁴⁵ See Chronological lists of ratification of, accessions and succession to the Convention and related agreements as at 3 June 2011 at

http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm accessed 12 September 2011.

⁴⁶ There are several countries, such as France, that have made several submissions for different areas. There have also been several submissions made by more than one country. A list of submissions, recommendations, preliminary information documents, executive summaries of submissions, diplomatic notes responding to submissions and other relevant material related to the work of CLCS is found on the Commission's website http://www.un.org/depts/los/clcs_new/clcs_home.htm accessed 12 September 2011.

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be in good company with many other coastal States worldwide whose continental shelf limits in whole or in part fall at the 200-M line.

Let me now turn to the second part of my presentation, which deals with equitable delimitation beyond 200 M. If, contrary to all the evidence and to what Bangladesh believes the correct interpretation of article 76 to be, if the Tribunal were to decide nevertheless that both parties have some entitlement to a continental shelf beyond 200 M – although on what basis is far from clear – the question of an equitable delimitation of the overlapping areas would then arise.

It's important in that respect, to remember that this is a bilateral dispute between Bangladesh and Myanmar, both within 200 M and in the continental shelf beyond 200 M. The Tribunal has no power to adjudicate on whatever boundary India may have with Bangladesh or with Myanmar, and it is not requested to do so here. If we look once more at the map, we can see the bilateral area in dispute between Bangladesh and Myanmar and the larger trilateral area in dispute between all three States, and to the south there is another extensive bilateral area in dispute between India and Myanmar.

Article 83 of the 1982 Convention does not distinguish between delimitation of the continental shelf beyond 200 M and delimitation within 200 M. The objective of delimitation in both cases is “to achieve an equitable solution”. The merits of any method of delimitation in this context can only be judged on a case-by-case basis. It is then for the Tribunal to delimit an equitable boundary with Myanmar throughout the very large area in dispute, both within and beyond 200 M, taking into account all the relevant circumstances.

In the shelf beyond 200 M, the relevant circumstances, in Bangladesh's view, include the encroachment by Myanmar on the natural prolongation of Bangladesh which results from the unusually concave coastal geography; they include also the geology and geomorphology of the seabed and subsoil, and they include further the absence of any natural prolongation from Myanmar's land territory. The Tribunal's task – and it is not an easy one – is to accord each of the parties some access to their potential entitlement beyond 200 M but to do so in a manner which gives full weight to the relevant circumstances and the specific regional context.⁴⁷ As Professor Crawford argued yesterday, the Tribunal must facilitate a solution which will be equitable to all of the states that have entitlements to extend their continental shelf beyond 200 M in the Bay of Bengal. To reiterate the point made yesterday by Mr Reichler, the purpose of an equitable solution is to allow “the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way”.⁴⁸

Myanmar argues that the rules and methodologies for maritime delimitation beyond 200 M are identical to those within 200 M.⁴⁹ It claims that equidistance is the guiding principle within 200 M, and that it must also be the guiding principle in the area beyond 200 M but this insistence on equidistance – an insistence that has bedevilled negotiations between the Parties from the outset – ignores the exaggerated cut-off effect resulting from Bangladesh's pronounced coastal concavity. It ignores Bangladesh's natural prolongation beyond 200 M. It ignores the geological and geomorphological weakness of Myanmar's case for extending its own shelf beyond 200 M. In this context, equidistance is not equitable.

Myanmar also ignores the most fundamental difference in the basis of entitlement to a continental shelf within 200 M and beyond. Within 200 M natural prolongation of the

⁴⁷ See *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252, para. 108; Reproduced in MB, Vol. V; *Libya v. Malta*, para. 69; See also note 57.

⁴⁸ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, para. 201.

⁴⁹ CMM, paras. 5.3, 5.39, 5.110.

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landmass is irrelevant because entitlement is based on distance from the coast [article 76(1)]. Beyond 200 M entitlement depends on natural prolongation – that is, in Bangladesh's view, on the geology and geomorphology of the seabed and subsoil.

For the purposes of an equitable delimitation, Bangladesh need not prove that Myanmar has no prolongation at all in order to establish a superior claim to the disputed areas of continental shelf beyond 200 M. Bangladesh need only show that, *vis-à-vis* Myanmar, it has, in the International Court's words, "the most natural" prolongation.⁵⁰ In its judgment in the *North Sea* cases, the International Court put it this way:

... whenever a given submarine area does not constitute a natural – or the most natural – extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State; – or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.⁵¹

Mr President, we would say that Bangladesh has the most natural extension.

The Court says here that the shelf does not appertain to a coastal state on the basis of proximity or adjacency but on the basis of natural prolongation. Its reference to the "most natural" extension of the land territory suggests that natural prolongation can be a relative concept, and where one State has the more compelling physical connection, like Bangladesh, with the shelf beyond 200 M, that will be very relevant to an equitable delimitation.

The *Tunisia/Libya* case supports this view. While the Court in that case was not persuaded that the evidence before it showed a "marked discontinuity in the seabed", the International Court nevertheless accepted that

[i]n such a situation, however, the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution.⁵²

It is referring there to the marked discontinuity in the seabed, to the geology and geomorphology.

The same conclusion is supported by scholars. Colson, one of the leading authorities in this field, argues that

geological and geomorphological factors will re-emerge in the law of maritime delimitation of the outer continental shelf [...] Presumably, they will work together with the other factors in the case, perhaps prominently or perhaps not, depending of the circumstances, to achieve an equitable solution.⁵³

Keith Hight, another authority in this field, goes further and predicts that, in delimitation of the continental shelf beyond 200 M,

⁵⁰ *North Sea Cases*, para. 43

⁵¹ *Ibid.* Emphasis added.

⁵² *Tunisia/Libya*, para. 68.

⁵³ D.A. Colson, "The Delimitation of the Outer Continental Shelf between Neighboring States," *American Journal of International Law*, Vol. 97, No. 91 (2003), p. 107.

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it is clear that geological and geomorphological factors will not merely be important; they will be of the essence, in accordance with the intricate provisions of article 76 of the LOS Convention.⁵⁴

The evidence before you shows that Myanmar at best enjoys only geomorphological continuity between its own landmass and the outer continental shelf. This “continuity” is based simply on oceanic sediments scraped off the Indian Plate as it subducts under the Burma Plate, filling in the deep trench that marks the divergence of the two plates (you can see that on the screen and at tab 5.29) In contrast, Bangladesh’s entitlement to extend its continental shelf beyond 200 M rests firmly on the Bengal Depositional System, comprising the land territory of Bangladesh, the physical shelf and slope in the Bay of Bengal, and the deep-sea Bengal Fan.⁵⁵ Geologically as well as geomorphologically, the shelf is a natural prolongation of Bangladesh – there is no discontinuity between the land territory of Bangladesh and the entire seabed of the Bay of Bengal. Dr Parson has, I think, made that very clear. From either perspective, the seabed of the Bay of Bengal and the subsoil is “the most natural extension of the land territory” of Bangladesh. That cannot be said of Myanmar.

Concluding this section of my presentation, in Bangladesh’s view, an equitable delimitation consistent with article 83 must necessarily take full account of the fact that Bangladesh has the most natural prolongation into the Bay of Bengal, and that Myanmar has little or no natural prolongation beyond 200 M. If the geology and geomorphology of the seabed and subsoil are to be treated seriously as relevant factors in an equitable delimitation, then this has to be reflected in the boundary which the Tribunal indicates. On this basis, Bangladesh believes that the Tribunal should therefore attribute a substantially greater portion of the disputed shelf beyond 200 M to Bangladesh.

Now let me turn to the second relevant circumstance: the continuing effect of Bangladesh’s concave coast and the cut-off effect generated by Myanmar’s equidistance line, or by any other version of an equidistance line. My colleagues Mr Reichler and Mr Martin have already demonstrated that equidistance is not an appropriate basis for delimiting the maritime boundary between the two Parties within 200 M. They have drawn attention to other precedents and I will not repeat what they said on this point. It suffices, Mr President, to reiterate that if equidistance fails to achieve an equitable solution within 200 M, then *a fortiori* it does not achieve one beyond 200 M. As Bangladesh has already shown, equidistance cuts off Bangladesh’s maritime space well within the 200-M line. You can see that on the screen. The farther an equidistance or even a modified equidistance line extends from a concave coast, the more it cuts across that coast, continually narrowing the wedge of sea in front of it. Even a modified equidistance line adjusted to allow Bangladesh to intersect the 200-M line and to provide some access to the outer shelf will still continue in a direction that inevitably cuts off Bangladesh a short distance beyond the 200-M line. That token piece of outer continental shelf would be very small, and very inequitable to Bangladesh in light of its extensive natural prolongation far beyond 200 M.

Some 17 years ago Jonathan Charney concluded in an important article on this subject that international courts and tribunals in maritime boundary cases have sought “to delimit maritime boundaries so that all disputants are allotted some access to the areas approaching the maximum distance from the coast permitted for each one”.⁵⁶ Given its geographical

⁵⁴ K. Highet, “The Use of Geophysical Factors in the Delimitation of Maritime Boundaries”, in J.I. Charney and L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 1 (1996), p. 196.

⁵⁵ See MB, paras. 7.17-7.18.

⁵⁶ J.I. Charney, “Progress in International Maritime Boundary Delimitation Law,” *American Journal of International Law*, Vol. 88, No. 227 (1994), pp. 247ff. In support of this view, Charney cites the following cases: *North Sea Cases*, para. 81; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras*:

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location within the Bay of Bengal, and the fact that most of the seabed of the Bay is the natural prolongation of its land territory, Bangladesh has no doubt that access to the shelf beyond 200 M is one of the key elements of its case before this Tribunal. An equitable solution will necessarily have to give full effect to this important principle.

The *Barbados/Trinidad & Tobago* case is relevant in this respect. That case was fully explained by Professor Crawford and Mr Martin in yesterday's sitting. I will cite it only for

[t]he 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.⁵⁷

The Arbitral Tribunal, having made that statement, went on to refer to the *North Sea Continental Shelf* cases, the *Gulf of Maine* case, and the *Libya/Malta* case for the same point. The obvious problem for Myanmar is that its continental shelf claim is more than an encroachment on the natural prolongation of Bangladesh; as we have explained throughout these proceedings, it represents the complete cut-off of Bangladesh's prolongation into the outer continental shelf.

Myanmar invites the Tribunal to disregard geography, to disregard geology, and to disregard Bangladesh's otherwise indisputable entitlement to extend its continental shelf beyond 200 M. Its solution would prevent Bangladesh from reaching any part of its entitlement beyond that line, while at the same time permitting Myanmar to reach all of its entitlement, although in fact it has none. As Mr Reichler said yesterday, it seems self-evident that Myanmar's proposed delimitation is plainly not reasonable, it is not balanced and it is not an equitable solution.

On this basis Bangladesh believes that the Tribunal should further adjust the course of the boundary line beyond 200 M in order to reflect the fundamental inequity of cutting off Bangladesh from extending its continental shelf well beyond 200 M. That brings me finally to what Bangladesh regards as its preferred equitable solution beyond 200 M, should the need arise.

Let me recapitulate on the principles which, in Bangladesh's submission, should shape an equitable solution in the circumstances of this case.

First, in the area beyond 200 M, an equitable delimitation consistent with article 83 must reflect

[t]he 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.

It must delimit the maritime boundary so that both parties are allotted some access to the areas approaching the maximum distance from the coast, and in doing so it must necessarily take full account of the geology and geomorphology of the seabed and subsoil of the continental shelf.

Secondly, in the same area, beyond 200 M, an equitable delimitation consistent with article 83 must have regard to the continuing impact of Bangladesh's coastal concavity and the fundamental inequity of cutting off Bangladesh from extending its continental shelf beyond 200 M. In doing so it must also reflect Bangladesh's "most natural" prolongation into

Nicaragua Intervening), Judgment, I.C.J. Reports 1993, p. 351, paras. 415-420; and *Case Concerning Delimitation of Maritime Areas between Canada and France (St. Pierre et Miquelon)*, Decision, 10 June 1992, reprinted in 31 ILM 1149 (hereinafter "*St. Pierre & Miquelon*"), paras. 66-74. Reproduced in MB, Vol. V.

⁵⁷ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147 (hereinafter "*Barbados/Trinidad & Tobago*"), para. 232. Reproduced in MB, Vol. V.

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the Bay of Bengal, and the absence of any comparable basis for Myanmar to extend its continental shelf beyond 200 M.

Thirdly, the proposed delimitation should be reasonable and balanced if it is to be an equitable solution.

Bangladesh therefore proposes the following delimitation in the EEZ and continental shelf if, and only if, contrary to article 76 and all the undisputed evidence, the Tribunal were to conclude that both parties have overlapping entitlements beyond 200 M. You will see that illustration on the screen and at tab 5.31.

Let me briefly explain the basis on which this line has been drawn, after much careful consideration – there are essentially no precedents. First, it originates at the seaward terminus of the 215° bisector in the EEZ outlined yesterday by Professor Crawford.

Second, in order to reflect the relevant factors referred to earlier, the line turns southwards from the 200-M boundary, and continues until it meets the tripoint at the extreme south-east corner of the outer limit of Bangladesh's CLCS submission.

Third, you will notice that the bilateral area in dispute between the Parties to this case is thereby shared with Myanmar in roughly the proportion two thirds to Bangladesh and one third to Myanmar.

Finally, the larger portion of the trilateral area in dispute between Bangladesh and Myanmar and India is left for the Bangladesh/India tribunal to settle, but Myanmar's entitlement in a small sector immediately adjacent to the EEZ boundary is recognized. This of course is the sector which adjoins the much larger area of outer continental shelf disputed only by India and Myanmar.

Mr President, you would want me to explain, I am sure, why Bangladesh has not proposed a simple extension of the 215° bisector beyond 200 M. As yesterday's presentations showed very clearly, even this bisector would not – cannot – compensate fully for the cut-off effect generated by the concavity of Bangladesh's coastal geography. As you have seen, even this bisector produces a narrowing wedge of maritime space for Bangladesh. The wedge becomes narrower and smaller the further the bisector extends seawards. If it were to cross the 200-M line, the wedge would be very narrow and the space available to Bangladesh beyond 200 M would be very small. This, in our submission, does not leave Bangladesh with very much space in the outer continental shelf at all. To prevent this inequity, the bisector must change direction at the point where it reaches the 200-M line.

Most importantly, extending the bisector beyond 200 M would not give any weight to – would ignore – the very factors that are only relevant in the shelf beyond 200 M. Of course, I mean, the geographical and geological factors addressed this morning by Dr Parson and also referred to by the ICJ in the *Libya/Malta* and *Tunisia/Libya* Cases. Within 200 M, the delimitation line is controlled by coastal geography. Beyond 200 M it is controlled by natural prolongation, and coastal geography takes a back seat. The overlapping shelf area beyond 200 M is geologically and geomorphologically the most natural prolongation of Bangladesh, and hardly at all of Myanmar. For all these reasons, as well, the 215° bisector must change direction at the 200-M line in order to avoid a serious inequity to Bangladesh.

For all those reasons, extending the 215° bisector beyond 200 M would not result in an equitable solution between the parties to this dispute.

Mr President, Members of the Tribunal, what I have said this morning constitutes Bangladesh's response to the Tribunal's first question addressed to the Parties on 7 September. In that question you requested that both Parties expand on their views with regard to the delimitation of the continental shelf beyond 200 M. I hope that on behalf of Bangladesh you feel that I have done so adequately this morning.

In conclusion, let me remind the Tribunal again that Bangladesh's first argument remains that there is no need for an equitable boundary to be drawn beyond 200 M because

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Myanmar has no entitlement to extend its continental shelf beyond that distance. There is simply no evidence of the necessary natural prolongation required by article 76(1). Bangladesh invites the Tribunal to decide accordingly, and to declare that, as between Bangladesh and Myanmar, only Bangladesh is entitled to claim the disputed area beyond 200 M. Only if you reject that argument will there be any need for you to make an equitable division between Bangladesh and Myanmar of the areas in dispute beyond 200 M.

Mr President, Members of the Tribunal, that concludes the case for Bangladesh. Thank you for your patience and attention.

The President:

Thank you, Mr Boyle.

This brings us to the end of today's sitting and to the end of the first round of arguments by Bangladesh. We will meet again on Thursday 15 September 2011 at 3 p.m. to hear the first round of oral arguments of Myanmar. The sitting is now closed.

(The sitting closes at 12.40 p.m.)

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

PUBLIC SITTING HELD ON 15 SEPTEMBER 2011, 3.00 P.M.**Tribunal**

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN and PAIK; *Judges ad hoc* MENSAH and OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 15 SEPTEMBRE 2011, 15 HEURES**Tribunal**

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good afternoon. Today Myanmar will begin its first round of oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. Before giving the floor to the first speaker I would like to note that Judge Dolliver Nelson is prevented by illness from sitting on the Bench.

I now invite the Agent of the Republic of the Union of Myanmar, His Excellency Attorney General Dr Tun Shin, to take the floor.

STATEMENT OF MR SHIN – 15 September 2011, p.m.

Argument of Myanmar

STATEMENT OF MR SHIN
AGENT OF MYANMAR
[ITLOS/PV.11/7/Rev.1, E, p. 1–3]

Mr Shin:

Mr President, Members of the Tribunal, it is a great honour for me to appear before you on behalf of my country, the Republic of the Union of Myanmar. This is the first time that Myanmar has taken part in proceedings before the International Tribunal for the Law of the Sea. Indeed, this is the first time that Myanmar has been a party to inter-State proceedings before any international court or tribunal.

Let me first thank the distinguished Agent of Bangladesh, Her Excellency the Honourable Dr Dipu Moni, Foreign Minister of Bangladesh, for her kind words addressed to the delegation of Myanmar last Thursday. As the Minister said, as close neighbours, our two States have long enjoyed strong ties.

Mr President, our decision, together with our friends from Bangladesh, to submit this case to the Tribunal, rather than to arbitration under Annex VII of the Law of the Sea Convention, is a measure of the confidence that we have in you, the Members of the Tribunal.

In its latest resolution on “Oceans and the Law of the Sea” the General Assembly of the United Nations:

Note[d] with satisfaction the continued and significant contribution of the Tribunal to the settlement of disputes by peaceful means in accordance with Part XV of the Convention, and underlines the important role and authority of the Tribunal concerning the interpretation or application of the Convention and the Part XI Agreement.¹

The General Assembly went on in the same resolution to refer to the present case. It noted, and I quote, “the recent referral to the Tribunal of a case concerning the delimitation of a maritime boundary”.²

Mr President, the General Assembly’s interest in the present case is a measure of its significance. This is, of course, the first maritime delimitation case to come before the Tribunal. The Court in The Hague, and *ad hoc* arbitral tribunals, including those under Annex VII, have dealt with, and are currently dealing with, a considerable number of such cases. States with maritime delimitation disputes, and there are many of them, in all parts of the world, will be following the present proceedings with great attention. The case is therefore a historic one, both for the Parties and for the Tribunal.

Mr President, Members of the Tribunal, we in Myanmar have followed closely your efforts to build up the Tribunal. The facilities here in Hamburg are of course first rate, as is the Registry, and your caseload is now taking off. In addition to the present proceedings, we saw in February of this year the important, and unanimous, Advisory Opinion, of which the International Seabed Authority took note with appreciation at its meeting in July.³ On your docket you have two other full-scale cases raising central issues of the law of the sea.

¹ General Assembly resolution 65/37 of 7 December 2010, para. 37.

² *Ibid.*, para. 41.

³ International Seabed Authority, Decision of the Assembly of the International Seabed Authority relating to the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters relating to the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, 25 July 2011, 17th session, ISBA/17/A/9.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

As I have said, our decision to submit this case to the Tribunal is a measure of the confidence that we have in the Tribunal. It is a function of our belief that, with your collective wisdom and expertise, you will reach a decision firmly anchored in the modern international law of the sea, a decision that is firmly anchored in the law on maritime delimitation as it has developed in the case law of international courts and tribunals, culminating in the unanimous judgment of the International Court in 2009 in the case between Romania and Ukraine.⁴

Mr President, Professor Alain Pellet will shortly give a brief overview of our case. All I need do at this stage is to stress the importance of this case for Myanmar. Her Excellency the Foreign Minister of Bangladesh described last Thursday the importance of this case for her country. For Myanmar too, the sea and its resources are a matter of vital concern. The Bay of Bengal is an essential part of the life of our nation. Fortunately, Myanmar has succeeded in reaching delimitation agreements with its other neighbours, India and Thailand.⁵ Only with Bangladesh has such agreement not proved possible. This is why we are here today.

Mr President, Members of the Tribunal, it remains for me to introduce those who will address the Tribunal on behalf Myanmar in this first round of oral pleadings.

This afternoon, Professor Alain Pellet will begin by giving an overview of Myanmar's case. Then Mr Samson will introduce the geographical context.

Next, Sir Michael Wood will refer to the negotiations between the Parties, negotiations that were aimed at agreeing a global delimitation of their respective maritime spaces. He will show that the negotiations in question led to no agreement, including in respect to the territorial sea. In particular, he will show that the 1974 Agreed Minutes were not a maritime delimitation agreement for the territorial sea. Sir Michael will begin his speech this afternoon and continue tomorrow.

Mr Sthoeger will then show that there is nothing in the practice of the Parties that leads to a different conclusion. It is therefore for the Tribunal to draw the boundary line between the territorial waters of the Parties. Mr Lathrop will conclude our presentation tomorrow afternoon by describing the territorial sea delimitation line that we ask the Tribunal to adopt.

On Monday morning, Professor Pellet will address the law applicable to the delimitation of the continental shelf and the Exclusive Economic Zones of the Parties. Professor Forteau will stress the crucial role of equidistance in this case; and Mr Müller will describe the relevant coasts and the relevant areas.

Then, following the three-step method for the delimitation of maritime areas beyond the territorial sea, our counsel will describe the line proposed by Myanmar.

Mr Lathrop will describe the choice of the base points relevant for drawing a provisional equidistance line, and he will describe the equidistance line itself.

Then, Professor Forteau will discuss the "relevant" (and irrelevant) circumstances.

Sir Michael Wood will next show that our line in no way contravenes the disproportionality test.

Professor Pellet will conclude our presentation on Monday afternoon by demonstrating the inadequacy of the bisector line proposed by Bangladesh.

On Tuesday Mr Lathrop will show that the bisector line advocated by Bangladesh is wholly misconceived.

Professor Pellet will then deal with the question of the admissibility of that part of Bangladesh's case that relates to the shelf beyond 200 M.

⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61.

⁵ See *International Maritime Boundaries*, Vol. II, Reports 6.3 and 6.4.

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Mr Müller is our last speaker in the first round. He will show that Bangladesh's argument concerning the continental shelf beyond 200 M is based on a wrong interpretation of article 76 of the United Nations Convention on the Law of the Sea.

Mr President, Members of the Tribunal, I thank you for your kind attention, and may I respectfully ask you, Mr President, to call upon Professor Pellet.

THE PRESIDENT:

The President:

Thank you, Excellency.

I now give the floor to Mr Alain Pellet.

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. PELLET
CONSEIL DU MYANMAR
[ITLOS/PV.11/7/Rev.1, Fr, p. 4–13]

M. Pellet :

Monsieur le Président, Messieurs les Juges, c'est un plaisir et un honneur d'apparaître pour la première fois devant vous dans une affaire qui, elle aussi, constitue une première – pour le Myanmar, notre Agent vient de le dire ; mais aussi pour votre Haute Juridiction dont c'est l'occasion de s'affirmer pleinement comme le Tribunal du droit de la mer, de tout le droit de la mer, en s'acquittant, pour la première fois, de ses fonctions en matière de délimitation maritime. Pour reprendre une expression que vous avez vous-même utilisée dans l'un de vos récents discours, Monsieur le Président, elle « confirme que le Tribunal est en fait véritablement le Tribunal du droit de la mer »¹

Et le Myanmar est convaincu, que cette importante affaire vous permettra, Messieurs les Juges, de contribuer à affermir le droit international de la mer et, plus précisément, celui de la délimitation maritime et que vous le ferez, conformément à vos traditions, dans le souci « d'éviter la fragmentation du droit international et de surmonter les risques de conflits de juridiction » pour reprendre cette fois une formule de votre prédécesseur, Monsieur le Président². Nous avons la conviction que vous vous en tiendrez à cette approche pleine de sagesse, contrairement à la thèse du Bangladesh qui tente de vous convaincre de mettre de côté plusieurs décennies de consolidation coutumière et de précision jurisprudentielle du droit applicable en la matière. Je reviendrai plus longuement dans une autre plaidoirie sur cet aspect de notre affaire, qui en constitue aussi l'un des enjeux d'intérêt général.

Dans l'immédiat, Monsieur le Président, je me bornerai à présenter les grandes lignes et les idées-forces de l'argumentation du Myanmar.

Auparavant, quelques points de clarification :

Premièrement, nous avons pris bonne note des points que le Tribunal voudrait voir étudier par les Parties en vertu de l'article 76 du Règlement, et nous y répondrons dans le cours de nos plaidoiries.

Deuxièmement, nous avons été frappés par la manière dont les conseils du Bangladesh ont fait alterner, je dirais l'encens et la semonce ; ils ont souvent flatté le Tribunal mais ils ont aussi prétendu lui donner des leçons, lui dicter sa conduite – voire lui adresser des menaces à peine voilées. Nous ne ferons ni ceci ni cela. Nous sommes confiants que vous vous acquitterez au mieux de vos fonctions judiciaires et qu'il n'est nul besoin ni de vous cajoler, ni de vous admonester.

Troisièmement nous avons noté avec une certaine surprise, une surprise amusée, que le Demandeur avait, au moins le temps d'une audience, ajouté à la liste de ses conseils, le nom de deux professeurs de géologie – ce qui est son droit – en les qualifiant d'« experts indépendants » ; des experts « indépendants » membres d'une équipe de plaidoirie, voilà qui est intéressant...

¹ Allocution prononcée par M. le Juge José Luis Jesus, Président du Tribunal international du droit de la mer, sur « Le rôle du TIDM dans le règlement des différends relatifs au droit de la mer » à la conférence intitulée « mondialisation et le droit de la mer » (organisée par KMI – COLP – NILOS), Washington D.C., 2 décembre 2010, disponible sur le site Internet du Tribunal :

http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/jesus_washington_021210_fr.pdf

² Communication présentée par S.E. M. Rüdiger Wolfrum, Président du Tribunal international du droit de la mer à la Réunion officielle des conseillers juridiques des ministères des affaires étrangères, New York, 29 octobre 2007, disponible sur le site Internet du Tribunal :

http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_fr.pdf

EXPOSÉ DE M. PELLET – 15 septembre 2011, après-midi

Quatrièmement, à plusieurs reprises³, les avocats du Bangladesh ont, assez lourdement, insisté sur le fait que certains des conseils du Myanmar l'étaient aussi de l'Inde. C'est vrai. Et alors ? Puis-je faire remarquer que ceci est vrai pour quatre d'entre nous – alors que, si je ne me trompe, tous les avocats de la Partie adverse la conseillent également dans son différend avec l'Inde. Je répète ma question : et alors ? Et alors : rien – si ce n'est des allusions « atmosphériques » et un peu déplaisantes... J'ajoute tout de même que la date-limite pour la remise du contre-mémoire de l'Inde dans l'affaire qui l'oppose au Bangladesh est fixée au 31 mai 2012 et que c'est par les écritures du Bangladesh que j'ai découvert la ligne de délimitation que mon autre client défendrait – dans une affaire dont le jugement n'interviendra que bien après que vous aurez prononcé votre arrêt. Je relève aussi qu'avec une préséance qui m'épate, le Professeur Crawford a même cité le contre-mémoire de l'Inde⁴ – alors que, à ma connaissance en tout cas, ce document n'existe pas...

J'en viens, Monsieur le Président, à des choses plus sérieuses et en arrive à la présentation générale de la thèse du Myanmar. Contrairement à celle du Demandeur que nos amis de l'autre côté de la barre, s'emploient à obscurcir – notamment en l'encombrant de considérations qui se veulent scientifiques et sont dépourvues de pertinence, elle tient en quelques propositions simples. Cinq essentiellement – que je développerai brièvement tour à tour.

Première proposition : il n'existe aucun accord en matière de délimitation maritime de l'un quelconque des espaces maritimes revendiqués par les Parties, y compris en ce qui concerne la mer territoriale

A vrai dire, Monsieur le Président, plus que d'une « proposition », il s'agit là d'une constatation qui s'impose comme une vérité d'évidence malgré l'acharnement du Bangladesh à tenter de faire croire que le procès-verbal agréé (*Agreed Minutes*) du 23 novembre 1974 constitue un accord juridiquement obligatoire pour les Parties. Ce document – qui est reproduit à l'onglet 1 du dossier des Juges – ne présente aucun des traits caractéristiques qui permettraient de le qualifier d'accord au sens de l'article 15 de la Convention de 1982 :

- le procès-verbal retrace les points sur lesquels les Parties se sont entendues lors du second *round* de négociations mais, alors qu'il y est dit que la délégation du Bangladesh a exprimé son accord à la délimitation de la mer territoriale ainsi décrite, il n'indique rien de tel s'agissant de la délégation birmane;

- au contraire, il est précisé que le projet de traité établi par le Bangladesh a été présenté à la délégation de la Birmanie -je cite « pour que le Gouvernement birman fasse connaître ses vues à ce sujet »;

- le chef de la délégation birmane (qui n'avait du reste pas les pouvoirs de conclure un traité) a purement et simplement refusé de signer ce projet et même de le parapher et a précisé à plusieurs reprises que l'entente des Parties décrite au paragraphe 2 du procès-verbal était provisoire et qu'elle ne serait acquise qu'une fois un accord global intervenu sur l'ensemble de leur frontière maritime; cela a été répété en plusieurs circonstances par les autorités du Myanmar;

- de plus, ce procès-verbal n'a été ni approuvé conformément aux dispositions constitutionnelles en vigueur dans l'un ou l'autre des deux pays, ni publié, ni enregistré au Secrétariat des Nations Unies conformément à l'Article 102 de la Charte.

Nos contradicteurs ont beau s'obstiner à nommer « accord » ce document, qui ne reflète qu'une étape d'une négociation globale, cette terminologie relève de la méthode Coué ou du *wishful thinking*. Elle ne saurait dissimuler que cette négociation a échoué et qu'un

³ ITLOS/PV.11/2/Rev.1 (E), p. 15, lignes 11-13 (M. Paul Reichler) et ITLOS/PV.11/3 (E), p. 28, lignes 37-39 (M. Philippe Sands), or ITLOS/PV.11/4 (E), p. 23, lignes 4-12 (M. Lawrence Martin).

⁴ ITLOS/PV.11/5 (E), p. 12, lignes 22-23.

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accord n'a été acquis sur aucune portion de la frontière maritime entre les Parties. Du reste, à aucun moment, la conduite ultérieure de celles-ci ne témoigne du sentiment d'une obligation juridique découlant du procès-verbal de 1974 : les seules « preuves » contraires que le Bangladesh prétend donner ou bien sont éminemment suspectes (et je pense en particulier à la série de témoignages forgés sur le même modèle émanant de pêcheurs s'exprimant dans un anglais particulièrement châtié), ou bien ces soit disant preuves ne prouvent rien du tout (tel est le cas de la liste d'incidents qui se seraient produits dans la zone prétendument délimitée qui ne témoignent, au mieux, que d'une chose : l'incertitude persistante de la délimitation).

Les Parties s'accordent pour considérer qu'aucun accord n'est intervenu entre elles au sujet de la délimitation de leur plateau continental et de leurs zones économiques exclusives respectives. Il appartient donc au Tribunal de céans de fixer la frontière maritime unique entre les Parties depuis le point d'aboutissement de leur frontière terrestre – à ce sujet elles ne sont pas en désaccord : il s'agit du point médian de l'embouchure du principal chenal navigable du fleuve Naaf (dont les coordonnées précises ont été fixées par le Protocole supplémentaire de 1980) ; et cette frontière doit se poursuivre jusqu'à la zone où les droits d'un tiers, en l'occurrence l'Inde, peuvent être affectés.

Deuxième proposition : pour tracer cette ligne frontière unique, il convient d'appliquer la méthode standard de délimitation dite « équidistance / circonstances spéciales » ou « pertinentes », applicable aussi bien à la mer territoriale qu'au plateau continental et à la zone économique exclusive.

Cette deuxième proposition porte sur un point particulièrement sensible des divergences d'approche entre les Parties. L'une comme l'autre conviennent que l'article 15 de la Convention des Nations Unies sur le droit de la mer est applicable à la délimitation de la mer territoriale des deux Etats. Il convient donc pour tracer leur frontière maritime de déterminer la ligne médiane dont tous les points sont équidistants des lignes de base compte tenu de circonstances spéciales ou de l'existence de titres historiques (le seul titre qui soit en cause n'est pas proprement spatial – il s'agit du droit de passage sans entrave des navires du Myanmar dans les eaux baignant l'île de Saint Martin).

Malheureusement, là s'arrête l'entente des Parties, qui ne s'accordent ni sur la mise en œuvre des dispositions de l'article 15 en l'espèce – je vais y revenir lorsque j'aborderai ma proposition suivante, ni sur la méthode de délimitation applicable au-delà de la mer territoriale.

En effet, prenant prétexte de la divergence de rédaction entre l'article 15 de la Convention d'une part, et les articles 74 et 83 consacrés respectivement à la délimitation de la zone économique exclusive et du plateau continental d'autre part, le Bangladesh nie l'existence de toute méthode de délimitation établie au-delà de la mer territoriale et ne veut s'appuyer que sur l'objectif d'une solution équitable, énoncé par les paragraphes 1^{ers} de ces deux dernières dispositions. Ce faisant, le Demandeur tente de vous convaincre, Messieurs les Juges, de remettre en cause l'évolution coutumière qui, au fil d'une lente maturation jurisprudentielle, a conduit les juridictions internationales à réinjecter dans le droit de la délimitation une dose d'objectivité et de prévisibilité que la seule mention d'une solution équitable ne permet pas d'assurer⁵. C'est dans cet esprit que, non sans quelques tâtonnements, les cours et tribunaux internationaux ont consacré le principe équidistance / circonstances spéciales (ou pertinentes) en tant que méthode-standard applicable à l'ensemble des opérations de délimitation maritime.

⁵ V. l'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, *R.S.A.N.U.*, Vol. XXVII, p. 212, par. 230.

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Cette méthode a acquis aujourd'hui le statut d'une règle coutumière dont il résulte qu'il convient de procéder en trois temps :

- dans une première phase, en traçant une ligne provisoire d'équidistance entre les côtes des Parties avant de,
- dans une deuxième étape, s'assurer qu'une ou des circonstances spéciales ne doivent pas conduire à ajuster ou déplacer cette ligne, pour,
- finalement, dans un troisième temps, vérifier le caractère équitable de la ligne ainsi tracée en lui appliquant le test de la non-disproportionnalité marquée entre, d'une part, les zones maritimes revenant à chaque Etat et, d'autre part, la longueur respective de leurs côtes.

Cette méthode-standard en trois étapes a été consacrée avec une clarté particulière par la Cour internationale de Justice dans l'arrêt qu'elle a rendu à l'unanimité en 2009, et sans déclaration ni opinion, dans l'affaire relative à la *Délimitation maritime en mer Noire* entre la Roumanie et l'Ukraine⁶ – arrêt qui traduit le dernier état de la jurisprudence et à l'égard duquel le Demandeur témoigne d'un certaine réserve disons d'un intérêt assez limité.

On le comprend d'ailleurs : c'est dans cet arrêt que la Cour a rappelé qu'il convenait d'appliquer cette méthode dans tous les cas où -je cite « des raisons impérieuses »⁷ (*« compelling reasons »*) ne s'y opposent pas. De telles raisons, qui rendraient le tracé de la ligne provisoire d'équidistance impossible⁸ (*not feasible*), n'existent pas en l'espèce – je vais y revenir dans quelques instants. Mais, pour prendre les choses dans l'ordre, Monsieur le Président, un mot d'abord sur ma troisième proposition qui concerne la délimitation de la mer territoriale – le seul segment de la frontière maritime entre le Bangladesh et le Myanmar pour lequel on ne peut retenir purement et simplement la ligne d'équidistance.

Troisième proposition : s'agissant de la mer territoriale, la mise en œuvre du principe de l'équidistance est compliquée par la présence, en face des côtes de Myanmar, de l'île de Saint Martin, qui relève de la souveraineté du Bangladesh

Comme je l'ai dit, contrairement à ce qui est le cas pour le reste de leur frontière maritime, le Bangladesh et le Myanmar conviennent que la ligne séparant leurs mers territoriales respectives doit être tracée en application des règles posées à l'article 15 de la Convention de 1982, dont la construction ne se heurte à aucun obstacle technique particulier : il est parfaitement possible de déterminer les points de base à partir desquels la ligne d'équidistance peut être construite. Les Parties s'accordent d'ailleurs pour considérer qu'au départ, elle doit l'être à partir de points de base situés sur leurs côtes continentales et qu'elle doit se poursuivre par une ligne tracée en fonction de points situés respectivement sur les côtes du Myanmar d'une part, de l'île de Saint Martin d'autre part. Mais – un coup d'œil sur la carte le montre et mon collègue Coalter Lathrop y reviendra – on ne peut continuer cette ligne indéfiniment vers le sud car une telle prolongation entraînerait une distorsion énorme par rapport à la configuration générale des côtes, ce qui constitue la définition même d'une circonstance spéciale⁹.

Cette circonstance est d'autant plus spéciale que l'île de Saint Martin, qui relève de la souveraineté du Bangladesh, est située en face des côtes du Myanmar – pas du Bangladesh. Le Professeur Sands s'est targué de l'avoir visitée mais ses sens ont été abusés s'il a cru voir

⁶ *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, C.I.J. Recueil 2009, p. 61.

⁷ *Ibid.*, p. 101, par. 116.

⁸ *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt, C.I.J. Recueil 2007 (II), p. 745, par. 283.

⁹ V. par ex. : *Frontière Dubai/Sharjah*, sentence du 19 octobre 1981, ILR, Vol. 91, pp. 676-677 ; *Délimitation de la frontière maritime dans la région du golfe du Maine*, arrêt, C.I.J. Recueil 1984, pp. 336-337, par. 222 ; *Newfoundland et Labrador et Nova Scotia, Seconde phase*, sentence du 26 mars 2002, ILR, Vol. 128, par. 4.35.

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les côtes de ce pays lorsqu'il a longé la côte est de l'île. Et ce n'est que s'il s'est posté à la pointe située à l'extrême nord de l'île de Saint Martin qu'il a pu apercevoir, sans torticolis, la côte du Bangladesh.

Il en va ici, à cet égard, de l'île de Saint Martin comme des Îles Anglo-Normandes dans l'arbitrage de 1977 relatif à la *Délimitation du plateau continental entre la République française et le Royaume-Uni*, dans lequel le Tribunal avait estimé que -et je cite :

la présence [de ces îles britanniques] auprès de la côte française doit être considérée, *prima facie*, comme constituant une « circonstance spéciale » justifiant une délimitation autre que celle que constitue la ligne médiane proposée par le Royaume-Uni¹⁰.

Il en va de même dans notre affaire : la présence de cette circonstance très spéciale oblige à interrompre la construction de la ligne d'équidistance au point C afin de rejoindre une ligne dont l'orientation est plus conforme à la configuration générale des côtes des Parties.

C'est pour cette raison qu'à partir du point C – situé à six milles marins de la pointe sud de l'île de Saint Martin, la ligne doit s'infléchir jusqu'à un point E qui est le point d'intersection de la limite de la mer territoriale de l'île avec la ligne d'équidistance entre les côtes des Parties tracée depuis l'embouchure du fleuve Naaf. Au demeurant, si l'on accorde un demi-effet partiel à l'île – comme nous croyons qu'il convient de le faire – tout en lui donnant 12 milles marins là où cela est judicieux – et c'est ce que fait notre ligne au point E – il faut, dans tous les cas, rejoindre la ligne d'équidistance ainsi tracée. Ceci seul permet d'aboutir, pour reprendre formule utilisée par la Cour arbitrale dans la sentence de 1977, à « une solution intermédiaire, qui crée un équilibre plus approprié et plus équitable entre les prétentions et intérêts respectifs des Parties », et d'éviter la « distorsion radicale de la délimitation, créatrice d'inéquités », qui résulterait du prolongement de la ligne B-C au-delà du point C.¹¹

Il n'est peut-être pas inutile de remarquer que nos contradicteurs ne contestent pas le principe même du nécessaire semi-enclavement de l'île de Saint Martin : toute la *jurisprudence* (je dis bien toute la jurisprudence sans exception) sur laquelle s'est appuyée le Professeur Sands dans sa plaidoirie de vendredi dernier¹² y concourt. J'ajoute qu'en aucune manière nous n'entendons « ignorer » l'île de Saint Martin¹³; simplement, l'existence de cette île tout de même relativement modeste (même si nos contradicteurs semblent y voir une sorte d'Australie – ou en tout cas de Bioko...) ne saurait commander toute la délimitation à laquelle il vous est demandé de procéder, Messieurs du Tribunal, au détriment de la configuration générale des côtes, qui constitue le premier facteur à prendre en considération et que, sauf situation tout à fait exceptionnelle, le principe de l'équidistance reflète au mieux.

¹⁰ Affaire de la *Délimitation du plateau continental entre Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et République française*, Décision du 30 juin 1977, *R.S.A.N.U.*, Vol. XVII, p. 229, par. 196.

¹¹ *Ibid.*, p. 230, par. 198.

¹² ITLOS/PV.11/3 (E), p. 21, lignes 13-30 (M. Philippe Sands) et *Délimitation du plateau continental entre Royaume-Uni de Grande Bretagne et d'Irlande du Nord et République Française*, décisions des 30 juin 1977 et 14 mars 1978, *RSA*, Vol. XVIII, p. 95-96, par. 203 ; ITLOS/PV.11/3 (E), p. 22, lignes 1-5 (M. Philippe Sands) et *Frontière Dubaï/Sharjah*, sentence du 19 octobre 1981, *ILR*, Vol. 91, pp. 677-678 ; ITLOS/PV.11/3 (E), p. 22, lignes 7-14 (M. Philippe Sands) et *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada c. Etats-Unis d'Amérique)*, arrêt, *C.I.J. Recueil 1984*, p. 337, par. 222 ; ITLOS/PV.11/3 (E), p. 22, lignes 16-29 (M. Philippe Sands) et *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt, *C.I.J. Recueil 2007*, p.752, par. 305 et p. 754, croquis n° 5 ; /PV.11/3 (E), p. 22, lignes 31-37 (M. Philippe Sands) et *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, *C.I.J. Recueil 2009*, p. 130, par. 218.

¹³ V. ITLOS/PV.11/2/Rev.1 (E), p. 16, l. 43-45 (M. Paul Reichler).

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Quatrième proposition : En revanche, pour ce qui est du plateau continental et des zones économiques exclusives des Parties, aucune circonstance pertinente ne conduit à infléchir la ligne provisoire qui doit être tracée au titre de la première phase de la méthode et qui aboutit en elle-même à une solution équitable.

Au-delà du point E, la ligne d'équidistance, construite à partir des points appropriés des côtes continentales des deux Parties, se poursuit vers le sud-ouest, en subissant, aux points F et G, les inflexions résultant de la configuration générale des côtes qui doit commander la délimitation.

Rien ne s'opposant à la construction de cette ligne d'équidistance, il n'y a aucune raison d'écarter la méthode-standard au profit d'une bissectrice comme le prétend le Bangladesh avec insistance. J'ajoute cependant, pour surplus de droit, que si l'on recourait effectivement à la méthode inusitée de la bissectrice, celle-ci, convenablement appliquée, conduirait à un résultat nettement plus favorable à Myanmar que celle de l'équidistance – la ligne revendiquée par le Demandeur repose en effet pour sa part sur une appréciation fantaisiste de l'orientation générale des côtes des Parties et tout spécialement de celles du Bangladesh. Mais, encore une fois, il n'existe, Monsieur le Président, aucune « raison impérieuse » (« *compelling reason* ») qui puisse justifier la mise à l'écart de la méthode de l'équidistance / circonstances pertinentes ; ce n'est assurément pas là un cas dans lequel il est « impossible » de tracer une ligne d'équidistance.

L'île de Saint Martin ayant été prise en compte au titre de la mer territoriale, la question se pose de savoir si d'autres circonstances pertinentes devraient conduire à infléchir la ligne d'équidistance en faveur du Bangladesh. Il en invoque deux autres :

- la concavité de ses côtes; et -je cite
- « le système détritique du Bengale »

Monsieur le Président, les côtes du Bangladesh sont globalement concaves ; c'est un fait ; mais malgré les lamentations de nos amis bangladais, l'effet d'enclavement en résultant est loin d'être aussi dramatique qu'ils le prétendent. Je reprends l'intéressante animation que M. Martin a projetée lundi matin :

Première étape : pas de concavité. En principe ce n'est pas le cas ici ; je signale tout de même que sur environ 100 kilomètres de part et d'autre du fleuve Naaf, les côtes des deux Etats sont à peu près rectilignes (voire légèrement convexes) – ce qui pourrait avoir une certaine importance si l'on devait avoir recours à la méthode de la bissectrice;

Deuxième étape : concavité légère. Je reconnais que celle du Bangladesh est globalement plus marquée (mais ce n'est pas le cas de la côte pertinente pour tracer une ligne bissectrice si l'on devait recourir à cette méthode en l'appliquant convenablement);

Troisième étape : concavité sévère, nous dit-on. J'admets que cela caractérise la côte du Bangladesh (étant entendu que celle du Myanmar aussi d'ailleurs comme le montrera le schéma que projetera tout à l'heure Benjamin Samson); mais je dis bien : le Bangladesh se trouve dans cette situation-ci;

et non dans celle qui est projetée maintenant (quatrième étape : concavité au sein de la concavité), qui illustrerait plutôt la situation de l'Allemagne dans l'affaire du *Plateau continental de la mer du Nord* – qui aurait été réduite (l'Allemagne) à une zone maritime s'étendant à un maximum de 98 milles de ses côtes, si l'on avait appliqué la règle de l'équidistance, alors qu'en l'espèce la ligne d'équidistance dont se plaint tant le Bangladesh conduit à lui reconnaître une zone maritime s'étendant à près du double ; à moins de « refaire complètement la nature » – ce qui ne saurait être¹⁴ – on ne peut voir dans cette concavité une circonstance propre à entraîner un déplacement de la ligne d'équidistance.

¹⁴ V. not. *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, arrêt, C.I.J. Recueil 2002, p. 443-445, par. 295; voir aussi *Plateau continental de la mer du Nord*, C.I.J. Recueil 1969, p. 49, par. 91; *Délimitation du plateau continental entre le Royaume-Uni de*

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Ce n'est évidemment pas non plus le cas pour la très curieuse troisième circonstance spéciale qui a fait une apparition tardive dans les plaidoiries orales de la Partie bangladaise, qui invoque aujourd'hui, en désespoir de cause, le « système détritique du Bengale »¹⁵, alors même qu'elle admet par ailleurs que « *fw]ithin 200 M, entitlement is, by operation of Article 76, paragraph 1, determined purely by reference to distance from the coast* ».¹⁶

Monsieur le Président, aucune circonstance pertinente n'existe qui pourrait conduire à infléchir la ligne d'équidistance provisoire tracée comme je l'ai indiqué il y a un instant. De même, le test de la proportionnalité – ou plus exactement de l'absence de disproportion trop marquée – confirme le caractère équitable de la solution résultant de la ligne provisoire d'équidistance. En d'autres termes, cette ligne, tracée dans le cadre de la première étape de la méthode standard, qui en comporte trois, répond à l'exigence d'une solution équitable imposée par les articles 74 et 83 de la Convention de Montego Bay ; il n'est dès lors pas nécessaire de la modifier ou de l'infléchir au titre des deux autres étapes.

Cinquième et dernière proposition : la question, posée avec insistance par le Bangladesh, de la délimitation du plateau continental au-delà de 200 milles marins des lignes de base ne se pose pas puisque, de toute manière, le Demandeur ne peut prétendre à une part quelconque de cette zone maritime.

En l'absence de l'Inde, troisième Etat riverain de la partie septentrionale du Golfe du Bengale, il sera impossible au Tribunal de fixer avec précision le point final de la frontière maritime entre le Bangladesh et le Myanmar – c'est la raison pour laquelle celle-ci se termine par une flèche sur le croquis actuellement projeté (et figurant à l'onglet n° 3 du dossier des Juges). (Et je remarque en passant que la ligne présentée avec constance par nos contradicteurs comme représentant la revendication du Myanmar est erronée et ne correspond pas à celle qui fait l'objet de nos conclusions).

Il reste, Monsieur le Président, que, quelles que soient les réclamations de l'Inde – le croquis projeté les figure de manière purement hypothétique en suivant les indications données dans la réplique du Bangladesh sur ce point¹⁷ –, quelles que soient donc les revendications indiennes, le point extrême de la frontière maritime entre les Parties (qui serait aussi le point triple avec l'Inde) sera inévitablement situé à moins de 200 milles marins des côtes du Bangladesh.

Dans ces conditions, la question d'une délimitation du plateau continental au-delà de la limite des 200 milles ne se pose pas¹⁸ : le Tribunal de céans ne saurait reconnaître au Demandeur des droits sur une partie du plateau continental située au-delà de la frontière maritime, complètement tracée, entre les deux Etats. Il n'y a tout simplement plus rien à délimiter.

Et telle est aussi la raison, Monsieur le Président, pour laquelle le Myanmar s'est abstenu de répondre aux arguments véhéments, parfois compliqués, que le Demandeur tente

Grande-Bretagne et d'Irlande du Nord et la République française, RSA, Vol. XVIII, p. 58, par. 101; *Plateau continental (Jamahiriya arabe libyenne/Malte)*, C.I.J. Recueil 1985, p. 45, par. 57; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, C.I.J. Recueil 2007, p. 747, par. 289; *Guyana/Suriname*, décision du 17 septembre 2007, ILM, Vol. 47, 2008, p. 164, par. 373-374 (disponible à l'adresse <http://www.pca-cpa.org/>).

¹⁵ ITLOS/PV.11/2/REV.1 (E), p. 18, lignes 15-22 et p. 19, lignes 11-21 (M. Paul Reichler); ITLOS/PV.11/4 (E), p. 11, lignes 36-41 (M. Philippe Sands) et p. 32-lignes 42-46 (M. Paul Reichler).

¹⁶ RB, p. 82, par. 3.93 ; v. aussi MB, p. 69, par. 6.9, ou ITLOS/PV.11/2/Rev.1 (E), p. 33, lignes 5-16 (M. James Crawford).

¹⁷ V. le croquis R3.2 à la p. 63 de la réplique.

¹⁸ 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, R.S.A.N.U., Vol. XXVII, p. 242, par. 368 (la sentence est reproduite dans MB, p. 329).

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de faire valoir et qui sont fondés exclusivement sur des considérations géologiques. Peu importe, en vérité, qu'elles soient exactes ou fausses : d'une part -et c'est le plus important-, le Bangladesh ne peut revendiquer aucun droit sur le plateau continental au-delà de 200 milles marins ; d'autre part et de toute manière, si le problème se posait, ces considérations ne seraient pas pertinentes.

Le Demandeur les avance en effet en se fondant sur une interprétation de l'article 76 de la Convention de Montego Bay qui n'est pas tenable : il interprète l'expression « prolongement naturel du territoire terrestre » (« *natural prolongation of its land territory* ») comme si celle-ci reprenait la définition - hésitante d'ailleurs - sur laquelle se fondait la Cour internationale de Justice pour procéder à la délimitation demandée ou plutôt pour indiquer les principes applicables à la délimitation demandée dans son arrêt de 1969 dans les affaires du *Plateau continental de la mer du Nord*. Ce faisant, le Bangladesh néglige et le contexte de l'article 76, paragraphe 1, qui doit être interprété à la lumière des paragraphes qui le suivent, et l'évolution de la pratique et de la jurisprudence intervenue depuis lors : ni l'un ni l'autre ne justifient la définition exclusivement géologique du plateau continental (même au-delà des 200 milles marins) qui serait fondée sur un imaginaire test de la continuité géologique à laquelle -s'accroche le Bangladesh.

J'ajoute enfin – et pour surplus de droit – qu'en tout état de cause la requête du Bangladesh invitant le Tribunal à décider qu'il a des droits souverains -pas le Tribunal, le Bangladesh- sur une partie du plateau continental au-delà de la limite de 200 milles marins et que le Myanmar n'en n'a pas, cette demande est irrecevable et que vous ne pouvez, Messieurs du Tribunal, vous prononcer à cet égard aussi longtemps que la Commission des limites du plateau continental n'aura pas déterminé les droits éventuels des Parties dans cette zone. J'aurai l'occasion d'y revenir.

Voici brièvement exposées, Monsieur le Président, Messieurs les Juges, les grandes lignes de la thèse que le Myanmar va vous présenter durant ce premier tour de plaidoiries orales sans, contrairement à la Partie défenderesse tenter de noyer le Tribunal sous un flot d'arguments et de données techniques dépourvus de pertinence pour régler le litige, somme toute assez simple, qui vous est soumis.

Je vous remercie vivement de votre attention, Messieurs les Juges, et je vous prie, Monsieur le Président, de bien vouloir donner la parole à M. Benjamin Samson pour un bref exposé du contexte géographique de l'affaire qui nous réunit.

The President:

Thank you very much.

I now give the floor to Mr Samson.

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. SAMSON
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/7/Rev.I, Fr, p. 13–19]

M. Samson :

Je vous remercie. Monsieur le Président, Messieurs les juges, c'est pour moi un immense honneur d'apparaître et de prendre la parole devant vous. Je tiens à remercier les autorités de la République de l'Union du Myanmar de m'avoir offert l'opportunité de le faire.

Pour continuer la présentation de cet après-midi, il me revient, dans les minutes qui suivent, d'introduire les aspects géographiques de l'affaire portée devant vous. Dès à présent, je peux rassurer nos collègues de l'autre côté de la barre : nous ne contestons nullement la pertinence de la géographie dans la présente instance. Le Myanmar est conscient, et n'a d'ailleurs jamais contesté, que la géographie constitue la donnée sous-jacente à toute entreprise de délimitation. A cet égard, nous souscrivons sans réserve au *dictum* de la Cour internationale de Justice selon lequel –je cite la Cour internationale de Justice dans l'affaire *Cameroun c. Nigeria* :

La configuration géographique des espaces maritimes que la Cour est appelée à délimiter est une donnée. Elle ne constitue pas un élément que la Cour pourrait modifier, mais un fait sur la base duquel elle doit opérer la délimitation.¹

Et le Myanmar admet tout à fait que votre Tribunal peut, le cas échéant, prendre en considération certaines circonstances géographiques particulières pour, au stade approprié de la méthode de délimitation, en corriger éventuellement les effets –étant entendu que, même à ce stade de l'opération de délimitation, et je cite en anglais cette fois le Tribunal dans l'affaire *Guyana c. Suriname* :

*international courts and tribunals dealing with maritime delimitations should be mindful of not remaking or wholly refashioning nature, but should in a sense respect nature*².

Le Bangladesh ne semble pas particulièrement concerné par cette jurisprudence tant sa ligne de délimitation et la « méthode » qu'il s'est proposé d'appliquer tant bien que mal revient à modifier la géographie de la région. Bien qu'il ait alors essayé de tirer un certain profit de la jurisprudence de la Cour internationale de Justice en ce sens, notamment pour réduire l'effet de la présence de l'île May Yu en face de la côte continentale du Myanmar³, la réplique du Bangladesh s'emploie avec persévérance à discréditer le principe de base qui le dérange en le reléguant en un simple « *rather over-used argument* »⁴.

La géographie est cependant ce qu'elle est : un fait qui doit être pris en compte et qu'il faut respecter lors de l'opération de délimitation. Pour ma part, je vous présenterai, d'une façon aussi neutre que possible, les faits géographiques pertinents dans la région en cause, avant de mettre en lumière l'approche géographique largement biaisée choisie par le Bangladesh.

Avant de commencer avec une rapide description de la région du golfe du Bengale, permettez-moi cependant de préciser, Monsieur le Président, que nous n'entrerons pas dans le

¹ *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant)), arrêt, C.I.J. Recueil 2002, p. 443 et 445, par. 295.*

² *Guyana/Suriname*, sentence du 17 septembre 2007, *ILM*, vol. 47, 2008, p. 164, paras. 373-374 (également disponible sur le site internet de la C.P.A. : <http://www.pca-cpa.org/>).

³ V. MB, par. 6.51.

⁴ RB, par. 3.60. V. aussi *ibid.*, par. 3.8.

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jeu dans lequel le Bangladesh a tenté de nous entraîner en exposant dans tous ses détails la géologie du golfe de Bengale. Comme le Professeur Pellet vient de le rappeler, la question de la délimitation du plateau continental au-delà de 200 milles marins ne se pose tout simplement pas dans la présente instance. Pour cette raison, la géologie du golfe ne peut pas avoir la moindre incidence sur la délimitation dont vous êtes chargés (elle ne le pourrait d'ailleurs guère davantage si vous deviez délimiter effectivement le plateau continental au-delà de 200 milles marins). Nous ne sommes pas forcément d'accord avec tous les éléments de la présentation des experts « indépendants » du Bangladesh, mais il ne paraît pas utile de consacrer de longs développements à des éléments sans pertinence.

Monsieur le Président, Messieurs les juges, le golfe du Bengale constitue la partie nord-est de l'océan Indien et est bordé par quatre Etats : le Sri Lanka au sud-ouest, l'Inde à l'ouest, au nord ainsi qu'au sud-est avec les îles Andaman et Nicobar, le Bangladesh au nord et à l'est, et enfin le Myanmar à l'est. A l'est et au sud du Myanmar se trouvent respectivement la Thaïlande, la Malaisie et l'Indonésie.

A l'extrémité nord du golfe du Bengale, le delta du fleuve indien Hooghly à l'estuaire du fleuve Meghna appartenant au Bangladesh. Ce delta a été formé principalement mais non exclusivement par les sédiments charriés par les fleuves Gange et Brahmapoutre et leurs affluents qui prennent leur source dans l'Himalaya, c'est-à-dire au-delà du territoire du Bangladesh.

Avec une surface de 2,2 millions de kilomètres carrés, le golfe du Bengale constitue l'une des plus grandes étendues d'eau au monde. Mais seule une petite partie de cette vaste étendue est pertinente aux fins de la délimitation que les parties vous ont confiée. Il s'agit de la zone couvrant les côtes du Bangladesh et la côte de Rakhine du Myanmar jusqu'au cap Negrais, son extrémité sud. Monsieur Daniel Müller reviendra plus tard sur les caractères de la zone pertinente aux fins de la présente affaire sous un angle plus exclusivement juridique.

Le Bangladesh se situe dans la partie la plus septentrionale du golfe du Bengale. Sa côte peut être divisée en trois régions côtières :

- la portion occidentale du littoral bangladais, de la frontière terrestre avec l'Inde que constitue le fleuve Hariabhanga jusqu'aux alentours du fleuve Tetulia. Cette région est principalement recouverte par la plus grande forêt de mangrove au monde, la forêt des Sundarbans ;

- la région centrale qui s'étend du fleuve Tetulia jusqu'à la ville de Cox's Bazar et traverse l'estuaire du fleuve Meghna. Dans cette région, le littoral est très irrégulier et est marqué par la présence de nombreuses îles. Les régions occidentale et centrale relèvent toutes deux du delta du Bengale ;

- la partie orientale de sa côte qui, quant à elle, s'étend de l'île Sandwip jusqu'au cap Shahpuri, à l'embouchure du fleuve Naaf.

Le littoral du Bangladesh mesure environ 520 kilomètres. Ainsi que Daniel Müller le démontrera également, toutes les côtes du Bangladesh ne sont pas pertinentes aux fins de la présente délimitation.

Entre le Bangladesh et le Myanmar coule le fleuve Naaf. Ce cours d'eau constitue la frontière terrestre entre les deux Parties. Elles s'accordent pour considérer le point terminal de la frontière terrestre comme le point de départ de la délimitation dont vous êtes chargés⁵.

Au sud-ouest de l'embouchure du fleuve Naaf se trouve l'île de Saint Martin. La semaine dernière, les Conseils du Bangladesh nous ont offert une vibrante présentation de cette île⁶, tout en omettant de mentionner certains faits importants qui pourtant se retrouvent

⁵ MB, vol. III, annexe 6 ; v. MB, pp. 35-36, pars. 3.21 et 3.23 et MCM, p. 26, par. 2.29.

⁶ ITLOS/PV.11/2/Rev.1 (E), p. 13, lignes 5-11 et 27-29 et p. 19, lignes 2-9 (M. Paul Reichler) ; ITLOS/PV.11/3 (E), p. 20, lignes 9-17 (Professeur Philippe Sands) et ITLOS/PV.11/4 (E), p. 31, lignes 9-11 (M. Paul Reichler).

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dans certains documents annexés à son mémoire⁷. De la lecture de ces documents, il ressort que cette île, appartenant au Bangladesh mais éloignée de seulement 4,5 milles marins de la côte de Rakhine du Myanmar, est un élément isolé de la géographie du Bangladesh ; qu'elle se compose en réalité de trois petites îles ; qu'un canal étroit, de 2 mètres de profondeur, sépare de manière permanente l'île centrale de l'île située au nord ; que certaines parties de l'île sont submergées à marée haute ; que le littoral de l'île du sud est plus irrégulier que celui de l'île centrale en raison d'une sévère érosion due à l'action des vagues. Il résulte par ailleurs qu'il est possible d'en faire rapidement le tour à pied car l'île ne mesure que 5 km à marée haute et 8 km à marée basse⁸.

Mais, Monsieur le Président, le point le plus important tient cependant au fait que cette petite île fait directement face aux côtes *du Myanmar* -je dis bien du Myanmar- que cela plaise ou non à nos collègues de l'autre côté de la barre⁹. Mes éminents collègues reviendront en détail sur cette question.

Monsieur le Président, j'en viens maintenant à la géographie du Myanmar (et aux quelques points y relatifs laissés de côté par M. Reichler dans sa présentation de la semaine dernière). Plus grand Etat de l'Asie du sud-est avec un territoire de près de 700 000 kilomètres carrés, le Myanmar possède un très long littoral de près de 2 400 kilomètres qui peut être divisé en trois régions côtières :

- formant la façade est du golfe du Bengale, la côte de Rakhine s'étend de la frontière avec le Bangladesh jusqu'au cap Negrals sur près de 740 kilomètres;

- à l'est du golfe du Bengale, la côte de l'Irrawaddy et du golfe de Mottama forme la limite nord de la mer d'Andaman;

- enfin, la côte de Tanintharyi borde à l'est la mer d'Andaman jusqu'à la frontière avec la Thaïlande.

Aux fins de la présente délimitation, seule la première région, la côte de Rakhine, est pertinente.

La partie la plus septentrionale de la côte de Rakhine, du cap Cypress, qui marque l'embouchure du fleuve Naaf, jusqu'à l'embouchure du fleuve May Yu, ne présente pas de particularité notable. Il convient toutefois de noter la présence de l'île May Yu, au sud-ouest de l'embouchure de ce dernier. Cette île, car c'en est indiscutablement une, est caractérisée d'une part par la présence d'un phare et, d'autre part, par le fait qu'un régiment des forces armées du Myanmar y est stationné en permanence.

Au sud du fleuve May Yu et jusqu'au cap Negrals, la bande côtière présente deux particularités :

- la présence de nombreuses îles importantes telles que les îles Myingun, l'île de Yanbye ou l'île de Manaung ;

- et la présence de nombreux cours d'eau tels que le Lay Myo et le Kaladan, à l'embouchure duquel se trouve Sittwe, capitale de l'Etat du Rakhine et le plus important port de la côte de Rakhine. Ces cours d'eau prennent leur source dans les chaînes de Rakhine-Chin-Naga. Ces montagnes, formées par le prisme d'accrétion, s'étendent du nord au sud, le long de la côte de Rakhine. Le prisme d'accrétion et les montagnes qui en résultent se poursuivent d'ailleurs, sous la mer, au-delà de la masse terrestre du Myanmar, émergeant de temps à autres pour former par exemple les îles Preparis et Coco, situées au sud du cap Negrals.

Messieurs les juges, pour compléter cette présentation du contexte géographique général dans lequel s'inscrit notre affaire, il me faut maintenant dire quelques mots des

⁷ Mémoire du Bangladesh, vol. I, par. 2.18 ; vol. III, annexe 36 ; vol. IV, annexe 49.

⁸ *Ibid.*, vol. III, annexe 36, par. 2.

⁹ RB, p. 87, par. 3.110.

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accords de délimitation conclus dans la région. Le présent différend étant strictement bilatéral, je serai bref sur ce point.

Deux points méritent tout de même d'être relevés. Tout d'abord, seule la zone septentrionale du golfe du Bengale reste à délimiter. Deux délimitations maritimes doivent encore être effectuées. Il échet à votre Tribunal de délimiter la frontière maritime entre le Bangladesh et le Myanmar. La seconde, entre l'Inde et le Bangladesh, est actuellement pendante devant un tribunal arbitral constitué sur le fondement de l'Annexe VII de la Convention des Nations Unies sur le droit de la mer de 1982. Dans le reste de la région, étendue jusqu'aux Maldives à l'ouest et à l'Indonésie et à la Thaïlande à l'est, les Etats ont délimité, par voie d'accord, l'ensemble de leurs zones maritimes jusqu'à 200 milles marins ainsi que le prescrit cette Convention.

Dans tous ces accords de délimitation, sans exception, les Parties ont décidé d'appliquer la méthode dites de l'équidistance/circonstances pertinentes, et ce même dans les zones marquées par une forte concavité comme le golfe de Mottama. C'est en vain que le Bangladesh tente de le contester¹⁰. Dans ces accords, les Parties ont systématiquement adopté une ligne d'équidistance stricte ou ajustée¹¹.

Permettez-moi maintenant, Monsieur le Président, d'en venir à mon deuxième point : l'approche géographique aléatoire et biaisée retenue par le Bangladesh.

Le Bangladesh fait preuve d'approximation dans la description des aspects géographiques de notre affaire. Ceci est crucial car, ainsi que le démontreront mes éminents collègues tout au long de cette semaine, c'est principalement sur ces approximations géographiques que sont basés le choix de la « méthode » et la ligne de délimitation proposée par le Bangladesh. Je ferai trois remarques sur le sujet.

Première approximation, le Bangladesh se contente d'affirmer que l'ensemble de son littoral est concave¹². D'un point de vue macro-géographique, il est vrai que la côte du Bangladesh est de forme générale concave¹³, comme toute la partie nord du golfe du Bengale, de Batticaloa au Sri Lanka jusqu'aux îles Prepara et Coco au Myanmar.

En s'approchant davantage des côtes du Bangladesh, on s'aperçoit toutefois que la réalité est plus nuancée et que ce littoral est plus compliqué à représenter qu'il y paraît, comme le reconnaît d'ailleurs, à l'occasion, le Demandeur¹⁴. Ainsi, la partie occidentale du littoral du Bangladesh suit une direction générale ouest/est sans montrer le moindre changement d'orientation. En poursuivant vers l'est, le littoral du Bangladesh suit les rives de l'estuaire du fleuve Meghna jusqu'aux alentours de l'île Sandwip et de la ville de Chittagong. Puis, la côte change radicalement d'orientation pour suivre une direction nord-ouest/sud-est jusqu'à l'île de Sonadia. A partir de l'île de Sonadia, la partie orientale de la côte du Bangladesh se courbe légèrement pour emprunter une direction sud/sud-est jusqu'à la frontière avec le Myanmar. Comme le montre le schéma actuellement projeté à l'écran, cette partie du littoral du Bangladesh est convexe. Je dis bien convexe.

Mais les imprécisions du Demandeur ne s'arrêtent pas là. Nos contradicteurs – et c'est ma deuxième remarque – ont décrit en détail la nature deltaïque du littoral nord-est du golfe du Bengale, du fleuve Hooghly en Inde jusqu'au fleuve Meghna au Bangladesh. Selon eux,

¹⁰ RB, p. 75, par. 3.69.

¹¹ Voir l'Accord Inde-Maldives de 1976, J.I. Charney et L.M. Alexander (ed.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 1394; les Accords Inde-Sri Lanka de 1974 et 1976, *ibid.*, p. 1409 et 1423; les Accords Inde-Indonésie de 1974 et 1977, *ibid.*, p. 1363 et 1373; l'Accord Inde-Indonésie-Thaïlande de 1978, *ibid.*, pp. 1382-1383; l'Accord Inde-Thaïlande de 1978, *ibid.*, p. 1436; et l'Accord Inde-Myanmar de 1986, *RTNU*, Vol. 1484, 1-25390, p. 173 (reproduit également à l'Annexe 11 du Contre-Mémoire du Myanmar).

¹² MB, pp. 12-13, par. 2.7.

¹³ CMM, p. 23, par. 2.14.

¹⁴ MB, p. 91, par. 6.70.

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les forces naturelles qui interagissent dans cette zone ont fait de ce littoral l'un des plus instables du monde¹⁵. Une nouvelle fois, ceci est fort approximatif. Il est plausible que la partie centrale des côtes du Bangladesh, aux environs de l'estuaire du fleuve Meghna, soit en effet très instable. En revanche, la partie occidentale de son littoral recouverte par la forêt des Sundarbans est stable. Les travaux de plusieurs chercheurs bangladais, à l'autorité scientifique reconnue, montrent que la forêt des Sundarbans assure une stabilité certaine au littoral du Bangladesh¹⁶. Certains de ces travaux ont d'ailleurs été présentés par le Bangladesh durant les négociations entre les deux pays. Nous les tenons à la disposition du Tribunal s'il le souhaite.

Ceci n'empêche pas le Bangladesh de postuler sans aucune précision ni preuve que sa côte orientale est sujette à une érosion et à une accrétion si fortes qu'il serait impossible d'y déterminer un point de base stable. Pourtant, cette portion du littoral du Bangladesh est régulière et est protégée par une laisse de vase et des sables immergés.

Des approximations en troisième lieu, Monsieur le Président, dans la très courte description de la géographie du Myanmar donnée par le Bangladesh. Le Bangladesh affirme en effet que la côte de Rakhine « *runs in a relatively straight forward northwest-to-southeast direction* »¹⁷. Un coup d'œil sur la carte projetée actuellement suffit pour s'apercevoir que ce postulat est erroné. Contrairement à ce que soutient le Demandeur, la côte de Rakhine est marquée par une concavité certaine. Suivant une direction nord-ouest/sud-est de l'embouchure du fleuve Naaf jusqu'aux environs de la baie de Gwa, la côte de Rakhine se courbe progressivement pour se diriger vers le cap Negrais selon une direction nord-est/sud-ouest. Cette concavité apparaît encore plus prononcée lorsque l'on suit la côte jusqu'aux îles Preparis et Coco.

Monsieur le Président, voilà ce que sont les « données brutes de la nature »¹⁸ dans notre affaire. Elles sont ce qu'elles sont et rien que ce qu'elles sont et aucune « extrapolation de l'homme »¹⁹ ne saurait conduire à les modifier.

Monsieur le Président, Messieurs les juges, ceci conclut ma présentation. Je vous remercie vivement pour votre patience et votre aimable attention. Monsieur le Président, avec votre permission, Sir Michael Wood présentera le contexte historique de ce différend après la traditionnelle pause café à moins que vous ne souhaitiez l'entendre dès maintenant.

The President:

Thank you. I understand that your intention is to call on Sir Michael Wood to speak after the coffee break. Would you prefer him to take the floor now?

M. Samson :

Maintenant.

The President:

Sir Michael, you have the floor.

¹⁵ MB, p. 16, par. 2.16. Voir également ITLOS/PV.11/2/Rev.1 (E), p. 9, lignes 35-37 et p. 10 lignes 1-2 (M. Paul Reichler).

¹⁶ Hoque M. N., « Legal and Scientific Assessment of Bangladesh's Baseline in the Context of Article 76 of the United Nations Convention on the Law of the Sea », *Nations Unies*, 2006, p. 46.

¹⁷ MB, p.13, par. 2.7.

¹⁸ Affaire de la délimitation de la frontière maritime entre la Guinée-Bissau et le Sénégal, sentence du 31 juillet 1989, opinion dissidente de M. Mohammed Bedjaoui, *RS4*, Vol. XX, p. 193, par. 101.

¹⁹ *Ibid.*

STATEMENT OF MR WOOD – 15 September 2011, p.m.

STATEMENT OF MR WOOD
COUNSEL OF MYANMAR
[ITLOS/PV.11/7/Rev.1, E, p. 17–36]

Mr Wood:

Mr President, Members of the Tribunal, I hope it is not inconvenient if I speak a little bit before the coffee break – I have quite a lot to get through, and it would be helpful.

Mr President, it is an honour to appear before you, and it is an especial honour to do so on behalf of Myanmar. I expect to be speaking for the rest of the afternoon, and I apologise for that. I may have to continue for a short time tomorrow afternoon – we will see.

I can assure you that I shall not be quoting any English poets. There will be no Shakespeare, no Pope, no Blake; there will not even be Rabindranath Tagore. There will be no Sherlock Holmes and there will certainly be no Star Trek.

Indeed, the main subject of my speech will be the absence of any agreement between the parties on the delimitation of the territorial sea.

First I shall cover the negotiations between Myanmar and Bangladesh, which took place between 1974 and 2010. In these negotiations, the Parties sought to reach agreement on a comprehensive maritime delimitation. Regrettably, the negotiations were unsuccessful. No agreement was reached.

In the second section of my speech, I shall explain that, contrary to the repeated assertions of Bangladesh - repeated yet again by Professor Boyle last Friday - there is no agreement between the Parties concerning maritime delimitation in the territorial sea. In particular, the Agreed Minutes of 1974 are not such an agreement.

Mr Eran Sthoeger will then complete the picture. He will explain that none of the so-called “practice” cited by Bangladesh to prop up its claim to the existence of such an agreement in fact does so. On the contrary, Bangladesh’s efforts to rely on such practice only serve to emphasise the weakness of its case based on the Agreed Minutes themselves.

Mr Sthoeger and I will therefore have shown that Bangladesh has failed to establish the existence of any agreement between Myanmar and Bangladesh on maritime delimitation. This will hardly come as a surprise since in its application instituting these proceedings Bangladesh said as much. It said, in terms, and I quote “[t]here is no treaty or other international agreement ratified by Bangladesh and Myanmar delimiting any part of the maritime boundary in the Bay of Bengal”.¹

It will then be for Mr Coalter Lathrop to describe and explain the territorial sea delimitation line which Myanmar requests the Tribunal to draw.

Mr President, by way of introduction let me recall that Myanmar participated actively in the three United Nations Conferences on the Law of the Sea, in 1958, in 1960 and from 1973 to 1982. While it did not become a party to the 1958 Geneva Conventions, its maritime legislation followed the provisions of those Conventions closely. Then in 1977, like many other States at that time, Myanmar enacted a Territorial Sea and Maritime Zones Law.² This provides for the various zones recognized in the modern law of the sea, as that law was evolving at the Third United Nations Conference.

Myanmar signed the 1982 Convention on 10 December 1982. Myanmar ratified the Convention in May 1996, not long after its entry into force. It did so without making any interpretative declarations.

¹ Notification under article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based, 8 October 2009, para. 4.

² Pyithu Hluttaw Law No. 3 of 9 April 1977 (BM, Vol. III, Annex 12).

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Bangladesh ratified the Convention some five years later, in 2001 in fact. It did so with a considerable number of declarations. One of the declarations may be relevant to these proceedings. Bangladesh stated, upon ratification, that

Ratification of the Convention by Bangladesh does not *ipso facto* imply recognition or acceptance of any territorial claim made by a State party to the Convention, nor automatic recognition of any land or sea border.

While I cannot say I fully understand this declaration, it hardly seems consistent with Bangladesh's attempt now to rely on an alleged agreement on a territorial sea border, dating from 1974, some 26 years before the declaration. Indeed, this and other declarations made by Bangladesh seem to cast doubt on Bangladesh's full commitment to the Convention – though they cannot of course qualify its obligations under the Convention. It might be helpful if Bangladesh could explain what was intended.

Mr President, Members of the Tribunal, I now turn to the negotiations between Myanmar and Bangladesh on a comprehensive maritime delimitation agreement. These negotiations form an important part of the background to the present case, and in particular to the 1974 Minutes. They are, in the words of the International Court of Justice, the “particular circumstances in which [the Minutes] were drawn up”³. Bangladesh has been strangely reticent about the negotiations. Professor Boyle scarcely mentioned them last week.

As you are aware, Members of the Tribunal, maritime delimitation negotiations between the Parties stretched over a period of some 36 years, though there was an extended gap between 1986 and 2008. Eight rounds of negotiations took place between 1974 and 1986. Six more rounds (which we refer to as the “resumed rounds”) took place between 2008 and 2010.

We have set out briefly, in Chapter 3 of our Counter-Memorial, what happened at each round. You have our minutes of the meetings,⁴ and you have some of those prepared by Bangladesh⁵. (I should like to emphasize that what we say about the negotiations, both in our written pleadings and here in oral argument, takes account of Bangladesh's records as well as our own.) I do not intend to repeat what we said in the Counter-Memorial. Instead I shall begin by highlighting two general points and I shall then take you through, in a little more detail, what transpired during the negotiations in so far as it is relevant to an understanding of the Agreed Minutes of 1974.

The first general point is this. As you will have noticed, the negotiations began just as the Third United Nations Conference on the Law of the Sea was getting underway. In fact, the first round took place in September 1974, less than a week after the end of the Caracas Session. The first five rounds of negotiations took place in parallel with the very polarized negotiations on delimitation that were taking place at the Conference.

Despite this difficult and uncertain background, Myanmar was conscious, throughout the bilateral negotiations, of the obligation upon States to settle their differences by peaceful means, including negotiation, in accordance with the Charter of the United Nations and the Law of the Sea Convention.⁶

³ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, *I.C.J. Reports 1978*, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1994*, p. 112, at p. 121, para. 23; Ph. Gautier, “Article 2”, in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford University Press, Oxford, 2011, Vol. 1, pp. 34-45.

⁴ MCM, Vol. II, Annexes 2-6, 8-10, 14-15, 18, 23 and 25.

⁵ BM, Vol. III, Annexes 14-16, 18-21.

⁶ *North Sea Continental Shelf cases*, *I.C.J. Reports 1969*, p. 3, at p. 47, para. 85(a); now reflected in UNCLOS art. 74, para. 1 and art. 83, para. 1; see also UNCLOS Part XV

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To this end, Myanmar adopted, throughout the negotiations, a responsible and flexible approach, and sought to achieve a reasonable agreed boundary on the basis of international law, as referred to in the ICJ Statute, in order to achieve an equitable solution.

Bangladesh, on the other hand, approached the negotiations in a rigid manner, ignoring the applicable principles of international law, and even at times making proposals that took the Parties further apart. Considerations of the applicable principles of international law seem to have played little, if any, part in Bangladesh's approach to the negotiations. While, early on, Bangladesh did propose an equidistance line⁷, thereafter it insisted throughout the negotiations on what it termed an "*ad hoc*" or "friendship" line.

The second point concerning the negotiations goes to procedure. Bangladesh's disregard for the substantive norms of international law seems to have gone hand-in-hand with disregard for the normal processes of international negotiation. As we have shown in our written pleadings, and as I shall once again explain, it is clear, both from the course of the negotiations and from the words used, that the 1974 Minutes were no more than a conditional understanding of what could, eventually, and subject to further negotiations and reflection, be included in an overall maritime delimitation agreement, if and when such agreement was reached. Unfortunately, no such agreement was reached, so, to put it colloquially, "all bets were off". Bangladesh's refusal to acknowledge this simple fact shows a wilful disregard of standard negotiating practice.

To conclude a non-binding understanding, which may be reflected in agreed minutes of a meeting, as was done on this occasion, is entirely consistent with the practice of negotiating States, including in maritime boundary negotiations. The parties to a negotiation frequently reach provisional "agreement" on one issue within a complex negotiation conditional on agreement on the remaining issues. They record that provisional or conditional agreement more or less formally, and move on to negotiate the remaining issues. In such circumstances, it is well understood that "nothing is agreed until everything is agreed". Negotiations on a complex matter, where everything is interlinked, may sometimes proceed stage-by-stage, with partial or interim agreements, but this is rare. Where issues are interlinked, the aim is normally to reach at an overall "package deal". The negotiation of UNCLOS itself is an obvious case in point. States are unwilling definitively to agree to one part of the package without seeing how the overall outcome will meet their interests. They may be prepared to make concessions in one area in return for concessions, not yet negotiated, elsewhere. If the parties to a negotiation were too easily held to be bound by provisional "agreements" reached in the course of negotiating a "package deal", that valuable negotiating technique would no longer be possible.

Of course, Mr President, even in the negotiation of extended maritime boundaries, States may sometimes be prepared to agree a boundary step-by-step but then this is done through formal agreement, not through what is effectively a record of a meeting. That is all that Judge Anderson was saying at the end of the passage cited by Professor Boyle last Friday⁸. I shall give one example. As Members of the Tribunal will be well aware, Norway and the Russian Federation held negotiations over their boundary in the Barents Sea for many years. They finally reached agreement in 2010. But before that, in 2007, they reached agreement on a small part of the line in the Varangerfjord area, stretching just short of 40 nautical miles⁹. The important point to note is that, although it was reached in the course of the wider negotiations on the whole line, the agreement of 2007 was entered into with all

⁷ MCM, Vol. II, Minutes of the second round, third meeting, para. 17 (Annex 3).

⁸ ITLOS/PV11/3, p. 7, lines 27-35 (Boyle).

⁹ Agreement between the Russian Federation and the Kingdom of Norway on the Maritime Delimitation in the Varangerfjord area, 11 July 2007: *International Maritime Boundaries (IMB)* Vol. VI, pp. 4479-4487, Report no. 9-6(2). See also *IMB*, Vol. I, pp. Report no. 9-6(1).

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due formality, being signed in due and proper form and entering into force upon exchange of instruments of ratification. It contains detailed provision for the exploitation of joint deposits, and is explicitly without prejudice to the remainder of the negotiation. The contrast with the “Agreed Minutes” invoked by Bangladesh in the present case could not be more stark.

It is obviously important that Parties to negotiations are not bound by positions they take during the negotiation, otherwise negotiation would become impossible. Sometimes they may address this issue directly¹⁰ but even when they do not, the basic principle is clear: a party to a negotiation cannot be held to offers or concessions made in the course of the negotiations. When they reach a provisional or conditional understanding, as they did in our case – one only has to look at the words used; it is clearly conditional – it is just that. It no longer has significance if the negotiations do not succeed.

Mr President, Members of the Tribunal, I shall now take you to what happened during the negotiations in so far as it is relevant to the status and meaning of the Agreed Minutes of 1974. It will be seen that what Bangladesh persists in calling an “agreement on the territorial sea” was no more than (i) a conditional understanding, (ii) at the level of the negotiators, (iii) as to what might be included as part of an eventual maritime boundary agreement covering the whole of the maritime delimitation between them (territorial sea, exclusive economic zone, continental shelf).

As will be seen, it seems to have been a characteristic of the talks that the Bangladesh side constantly sought to press successive Myanmar delegations to agree, on the spot, to proposals which Bangladesh alone had drafted. The Myanmar side equally consistently resisted such pressure. The Myanmar delegations were clear throughout that they did not have authority to conclude an agreement, and that they had to refer all proposals back to higher authority.

This pattern was established at the very first round of negotiations, and continued through to the most recent rounds. The first round, it will be recalled, was held in Rangoon (now referred to by its Myanmar-language version, Yangon) on 4, 5 and 6 September 1974. The Myanmar delegation was led by Commodore Chit Hlaing, who was Vice Chief of Staff, Defence Services (Navy). The leader of the Bangladesh delegation was Ambassador Kaiser. During the first round, Bangladesh suggested an equidistance line to be drawn along the midpoints between St Martin’s Island and the Myanmar main coast¹¹, and it suggested terminating the territorial sea boundary at the median point between St Martin’s Island and May Yu Island (Oyster Island)¹². The Bangladesh side produced a map. What happened was that in response, Commodore Hlaing stated that:

he would submit the map ... to higher authorities and inform them that it was the Bangladesh proposal drawn on the basis of the median line. Whether they would agree or not was another matter¹³.

At the end of the first round, Commodore Hlaing again stressed that he would have first to submit the position to senior authorities¹⁴.

The second round of negotiations was held in Dhaka from 20 to 25 November 1974. It was at this round that the Agreed Minutes were signed. The delegations were headed by the same officials. In the course of the ongoing discussions of the delimitation in the Bay of

¹⁰ D. Anderson, “Negotiating Maritime Boundary Agreements”, in R. Lagoni and D. Vignes (eds.), *Maritime Delimitation*, Nijhoff, Leiden, 2006, pp. 121-141, reproduced and slightly updated in D. Anderson, *Modern Law of the Sea: Selected Essays*, Nijhoff, Leiden, 2008, p. 424.

¹¹ MCM, Vol. II, Minutes of the First Round, second meeting, para. 10 (Annex 2).

¹² *Ibid.*, third meeting, para. 10.

¹³ *Ibid.*, third meeting, para. 11.

¹⁴ *Ibid.*, fourth meeting, para. 16.

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Bengal, the delegations reached a provisional understanding with respect to the delimitation of the first sector of the line, the line between their respective territorial seas. This understanding was clearly conditional on reaching agreement on the whole of the delimitation line, and on resolution of the free and unimpeded access issue. The understanding, and these conditions, were reflected in “Agreed Minutes”, about which you have heard much, and will hear much, I fear, signed by the two heads of delegation¹⁵.

You have already been shown the Agreed Minutes by Professor Pellet. They are at tab 1.1 in your Judges’ folders. It will be necessary to look at them in some detail shortly. For the time being, I would just ask you to note paragraph 5 of the Minutes. Paragraph 5 records that, during the second round, the Bangladesh delegation handed the Myanmar delegation “a draft treaty on the delimitation of the territorial waters boundary”. Paragraph 5, now appearing on your screens, reads:

Copies of a draft Treaty on the delimitation of the territorial waters boundary were given to the Burmese delegation by the Bangladesh delegation on 20 November 1974 for eliciting views from the Burmese Government.

It will be seen that at the same meeting that these Agreed Minutes were signed, Bangladesh itself was putting forward a draft treaty to embody the territorial sea boundary in that form.

Bangladesh’s draft of a treaty, referred to at paragraph 5, was entitled “Agreement Between the Government of the People’s Republic of Bangladesh and the Government of the Socialist Republic of the Union of Burma Relating to the Delimitation of the Boundaries of the Territorial Waters Between the Two Countries”¹⁶. There is a copy of the draft treaty at tab 1.7 in your folders. I just want to contrast for a moment the clarity with which that draft treaty states its aim. The aim of the Bangladesh side was to have a treaty delimiting the territorial sea boundary at the very same meeting that these Agreed Minutes were being signed.

Mr President, I think that would be a convenient moment to stop.

The President:

Thank you.

The Tribunal will withdraw for a period of 30 minutes.

(Short adjournment)

The President:

The hearing is continued, you may go on.

Mr Wood:

Mr President, Members of the Tribunal, before the short break I was taking you through the bilateral negotiations in so far as they may be relevant to understanding the 1974 Agreed Minutes. I thank you for your patience. We were in the middle of the negotiations at the second round, the all-important second round, and I was just referring you to the draft treaty that was prepared by Bangladesh and handed to Myanmar at that round.

I want to emphasize that the draft treaty was entirely a Bangladesh initiative. It was presented to Myanmar on the first day of the second negotiating round, and had obviously been prepared in advance. This Bangladesh draft, if agreed (which it was not), would have

¹⁵ BM, Vol. III, Annex 4.

¹⁶ MCM, Vol. II, Minutes of the Second Round, Annexure C (Annex 3).

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put into legal language the conditional understanding reflected in the minutes. The draft treaty, prepared, as I said, by Bangladesh, provided for ratification and entry into force. Article VII stated, “[t]his Agreement shall be ratified in accordance with the legal requirements of the two countries”¹⁷. Article VIII provided that “[t]his Agreement shall enter into force on the date of the exchange of the Instruments of Ratification”¹⁸. In fact, neither party signed the draft treaty, then or ever.

When the draft treaty was handed over, on 20 November 1974, the leader of the Myanmar delegation, Commodore Hlaing responded immediately, and in the clearest terms. He said:

It was not intended to sign a specific treaty on the territorial sea boundary. The question of delimiting a sea boundary between Burma and Bangladesh would have to be dealt with in totality to cover the territorial sea, the continental shelf and economic zone.¹⁹

Asked later in the same meeting whether he would be willing to initial any agreement, Commodore Hlaing replied with a clear and simple “no”²⁰. This was the consistent position of the Myanmar delegation.

During the third negotiating round, held in Rangoon three months later, in February 1975, Commodore Hlaing recalled that the understanding in the 1974 Minutes was conditioned on the right of “unimpeded passage” to Myanmar ships around St Martin’s Island²¹. He further recalled that this “unimpeded passage” – and I quote – “was a routine followed for many years by Burmese naval vessels to use the channel ...” He added that, in asking for unimpeded navigation, the Burmese side was only asking for existing rights which it had been exercising since 1948²², that is to say, since independence. In response, and according to Bangladesh’s own account, the Bangladesh delegation said that this concern could be addressed in the treaty that would eventually be concluded between the parties:

Bangladesh delegation stated that they did not see any difficulty in accommodating the Burmese position in the future treaty.²³

Once again it was clear, even at this very early stage, that an essential condition for any agreement by Myanmar to the line in the Minutes had not been met. Bangladesh’s own negotiators said the condition could be met “in the future treaty”.

Mr President, this is a convenient point to respond to the second of the two questions which the Tribunal put to both Parties in advance of the hearing. That question reads as follows:

Given the history of the discussions between them on the issue, would the parties clarify their position regarding the right of passage of ships of Myanmar through the territorial sea of Bangladesh around St Martin’s Island?

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, Minutes of the Second Round, first meeting, para. 10; see also, second meeting, para. 4. This exchange is also recorded in the “Brief Report” prepared by Bangladesh following the second round of negotiations: BM, Vol. III, Annex 14, para. 7.

²⁰ *Ibid.*, Minutes of the Second Round, first meeting, para. 11 (Annex 3).

²¹ *Ibid.*, Minutes of the Third Round, first meeting, para. 4 (Annex 4).

²² *Ibid.*

²³ *Ibid.*

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Mr President, the first thing I would say by way of response is that we have taken careful note of what the distinguished Agent of Bangladesh said last Thursday²⁴, together with what counsel for Bangladesh said last Friday²⁵.

Myanmar's position is as follows. Ships of Myanmar traditionally enjoyed the right of free and unimpeded navigation through Bangladesh waters around St Martin's Island to and from the Myanmar section of the Naaf River. They did so since 1948.

As I have already made clear, when the maritime delimitation negotiations started in 1974 it was considered crucially important for Myanmar that this historic right be guaranteed. That is what is recorded in paragraph 3 of the Agreed Minutes of 23 November 1974 but, as is recorded in paragraph 4 of those Minutes, the Bangladesh delegation to the talks merely took note of Myanmar's position.

When pressed on the point during the third round of negotiations, the Bangladesh delegation, as we have seen, said that this was a matter that could be dealt with in an eventual delimitation treaty. As Members of the Tribunal are well aware, there has never been such a treaty. Bangladesh has never given the guarantee that Myanmar sought.

It is no answer to say, as Bangladesh now does, that there have never been problems with access. That is easily explained. In the absence of any guarantee in 1974, or later, Myanmar has not sought to put to the test its right of free and unimpeded navigation, for reasons of discretion which are entirely understandable. They wanted to avoid any possible conflict.

The position on the right of passage of ships of Myanmar through the territorial sea of Bangladesh around St Martin's Island continues to be less than satisfactory. (That is a British way of putting it: "less than satisfactory".) As I have said, we listened very carefully to the various statements made on this subject by the representatives of Bangladesh last week. None of those statements was entirely clear. What is, unfortunately, clear, and what is relevant for an understanding of the status and effect of the 1974 Minutes, is that an essential condition for Myanmar's agreement to incorporating the line described in the Minutes in an eventual overall maritime boundary treaty was not, and has not, been met.

I hope I have answered the Tribunal's question.

I now return, if I may, to my account of the negotiations. Also during the third round, the two delegations proposed starting points for the delimitation of the continental shelf and exclusive economic zone, in terms that make it rather clear that the line described in the Agreed Minutes was open to further negotiation. Myanmar referred to the 235° line and its joining with the median line drawn between the Myanmar main coast and St Martin's Island²⁶. Bangladesh, in response, proposed that the delimitation continue from point 7, the southernmost median point between the territorial sea of Myanmar's main coast and St Martin's Island²⁷. In the alternative, Bangladesh suggested that the point of origin be the median point between St Martin's Island and May Yu Island (Oyster Island)²⁸. Both proposals were rejected by Myanmar²⁹. The fourth and fifth rounds were held in 1976 and 1979, and concentrated on the EEZ and continental shelf.

²⁴ ITLOS/PV11/2/Rev1 (E), p. 5, lines 23-29 (Moni).

²⁵ ITLOS/PV11/3 (E), p. 25, lines 43-45, p. 26, lines 15-17 (Sands).

²⁶ MCM, Vol. II, Minutes of the Third Round, second meeting, para. 3; third meeting, para. 3 (Annex 4).

²⁷ BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

²⁸ BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4).

²⁹ MCM, Vol. II, Minutes of the Third Round, third meeting, para. 12 (Annex 4).

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A sixth round was held in Rangoon in November 1985. This time, the leader of the Myanmar delegation was its Minister for Foreign Affairs. The Foreign Minister recalled the Minutes of 1974, and reiterated Myanmar's position that:

[what] is clearly implied in the text of Agreed Minutes, was that both the territorial sea sector and the continental shelf *cum* economic zone sector of the common maritime boundary should be settled together in a single instrument.³⁰

The seventh and eighth rounds took place in Dhaka in February and June/July 1986. Again, they focused on the EEZ and continental shelf. However, at the eighth round the Myanmar delegation once again restated Myanmar's position that it was only prepared to reach agreement on an overall agreement, not a partial one. The leader of the Myanmar delegation reminded his opposite number, first, that his delegation did not have authority to conclude a treaty; and, second, that a treaty between the Parties could only be concluded when the final delimitation of all the areas in dispute was agreed upon³¹.

After a suspension for over 20 years, the first round of the resumed talks between the Parties was held in March and April 2008. During this round, the two delegation leaders signed Agreed Minutes. These are referred to as the "2008 Agreed Minutes".³² Members of the Tribunal will find the text of the 2008 Minutes at tab 1.8.

I shall return to these Minutes later. For the time being, I would just like to draw attention to paragraph 3, where the word "unimpeded" in the 1974 Minutes was to be replaced by a whole sentence:

Innocent Passage through the territorial sea shall take place in conformity with UNCLOS, 1982 and shall be based on reciprocity in each other's waters.

Paragraph 3 of the 1974 Minutes, even if amended, continued in terms to be no more than a statement of the Myanmar delegation's position. (I would note in passing that it is not clear how the original sentence would have read with the change. You cannot simply replace the word "unimpeded" by the whole sentence which I just read out.) Be that as it may, this change was expressly said to be "ad-referendum"; in other words the signatories of the 2008 Minutes – once again a senior diplomat on the Bangladesh side and a Commodore on the Myanmar side – were not committing their respective Governments even to making this textual change.

In addition, in paragraph 3 of the 2008 Minutes the parties updated – "to a more recent and internationally recognized chart" – the points plotted in the 1974 Minutes.

Professor Boyle suggested last Friday that these changes support the conclusion that the Minutes "articulate a commitment to a clearly defined maritime boundary in the territorial sea".³³ That is simply not the case.

What is particularly noteworthy in the 2008 Minutes is that in three places the Minutes of 1974 are referred to as an "ad-hoc understanding". Paragraph 2 begins: "Both sides discussed the ad-hoc understanding ..." Paragraph 3 refers to the chart "referred to in the ad-hoc understanding ..." and again, later in the same sentence there is another reference to the "ad-hoc understanding".

³⁰ *Ibid.*, Sixth Round, Speeches and statements (Annex 8) (emphasis added).

³¹ MCM, Vol. II. Eighth Round, Report of Myanmar Delegation, para. 11 (Annex 10).

³² BM, Vol. III, Annex 7.

³³ ITLOS/PV11/3(E), p. 7, lines 6-7 (Boyle).

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During the second round of resumed talks, held in Bagan in early September 2008, Myanmar noted that the 2008 Minutes signed at the first resumed round were merely a reiteration of the Agreed Minutes of 1974, and not in any way their ratification³⁴.

Nothing relevant to the status of the 1974 Minutes occurred during the third, fourth or fifth rounds of the resumed negotiations, nor indeed was there any breakthrough in the negotiations.

Mr President, Members of the Tribunal, I have just taken you through the negotiations in so far as they are relevant to the existence or otherwise of an agreement between the Parties on the delimitation of the territorial sea. I now turn to the second part of my statement. I shall show that, contrary to the claim of Bangladesh, repeated last week by Professor Boyle, there is no agreement between the Parties on the delimitation of the territorial sea. In particular, the Agreed Minutes of 1974 are not such an agreement.

Members of the Tribunal may wonder whether this matters. It matters, first, because it raises an important issue of principle: maritime delimitation agreements are not easily to be presumed³⁵. It matters, above all, because it may affect the delimitation of the line as a whole.

Of course, between the opposite coasts of St Martin's Island and the Myanmar mainland, the median line proposed by Myanmar and the line described in the 1974 Minutes are not so different but beyond point 6 the two lines diverge significantly. This divergence is nothing new. The Parties have always differed as to the proper location of the transition point between the territorial sea boundary and the exclusive economic zone boundary. As Mr Lathrop will explain, the proper delimitation in the territorial sea needs to take account of the special circumstance that is St Martin's Island.

Bangladesh's principal contention is that the Agreed Minutes of November 1974 constitute a legally-binding agreement establishing a maritime boundary between the territorial sea of Myanmar and the territorial sea of Bangladesh. In our written pleadings, we have set out in detail why this is not the case³⁶. We propose to highlight the main lines of our argument, responding to Bangladesh's arguments in so far as we can discern them.

We shall concentrate on three basic propositions.

First, the Agreed Minutes of November 1974 were not, contrary to Bangladesh's assertion, a legally-binding agreement; second, in any event, according to their terms, the Minutes did not purport to establish a maritime boundary; they merely recorded the understanding of the Parties at a particular stage of the negotiations as to what could become part of an overall maritime boundary agreed in a future treaty. They were conditional in other respects as well; third, again contrary to the unfounded assertions of Bangladesh, nothing in the practice of the Parties confirms their agreement to a territorial sea delimitation line.

Mr President, the first two of these propositions are best considered together. They each turn on the application of the law of treaties. The third proposition, on which Mr Sthoeger will address you tomorrow, is chiefly a matter of evidence – or, rather, lack of evidence.

Mr President, I shall deal first with two preliminary matters.

One important issue underlying each of these propositions, and particularly the third one, concerns the burden of proof. It is Bangladesh that asserts the existence of an agreement between the Parties effecting a delimitation of the territorial sea. The burden of proof therefore lies on Bangladesh. As the International Court has said, on a number of occasions,

³⁴ BM, Vol. III, Annex 18, para. 5; MCM, Vol. II, Second Round of Resumed Talks, Report of Myanmar Delegation, para. 4 (Annex 14).

³⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 735, para. 253; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68.

³⁶ BCM, paras. 4.09-4.38; BR, paras. 2.7-2.55.

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and as Professor Sands reminded us last week³⁷, “the party asserting a fact as a basis of its claim must establish it”³⁸. The burden of proof in this case is a heavy one. It is our submission that Bangladesh has not begun to discharge that burden. Let me recall the words of the International Court in the *Nicaragua v. Honduras* case, “[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed”³⁹.

The second preliminary matter concerns the word “agreement” in article 15 of UNCLOS. It is clear from the wording and context of article 15 that what is contemplated is an agreement that is binding in international law. In *Romania v. Ukraine* the ICJ had to consider the words “agreement in force” in article 74, paragraph 4, and article 83, paragraph 4, of UNCLOS. In that context, it interpreted the word “agreement” to mean an agreement in force between the parties which establishes a sector of the maritime boundary which the ICJ had to determine (that is to say, a treaty)⁴⁰. It is submitted that a similar meaning attaches to “agreement” in article 15, which serves the same purpose: to preserve existing delimitation agreements.

In his speech last Friday, Professor Boyle seemed to acknowledge that article 15 contemplated a legally binding agreement⁴¹. The point he sought to make was a different one. He repeatedly suggested that Myanmar did not accept that a treaty in simplified form - *un accord en forme simplifiée* - could be an agreement within the meaning of article 15⁴².

That is not our position. That is not at all what we have said. Of course, we do not dispute that an agreement in simplified form may be a binding treaty under international law. Of course, form is not decisive (though it may well be indicative). A treaty in simplified form is just as binding in international law as the most solemn of treaties, for example, one expressed to be made between Heads of State. The commitment is legally just as serious. That is why, Mr President, Members of the Tribunal, States are careful in authorizing persons to represent them in relation to the conclusion of a treaty, whatever form that treaty may take.

Having misrepresented our position, Professor Boyle compounds the error by asserting that “[t]he only authority advanced by Myanmar to justify its contention that such agreements must be formally negotiated treaties” is the *Black Sea* judgment. Professor Boyle made much last Friday⁴³ of the 1949 General Procès-Verbal that was at issue in the *Black Sea* case. He went so far as to assert that the 1974 Agreed Minutes in the present case “are very similar or identical to the procès-verbal in the *Black Sea* case”⁴⁴. That is simply not the case. I shall briefly mention three essential differences.

First, the actual terms of the 1949 Procès-Verbal in the *Black Sea* case are in no way comparable with those of the 1974 Minutes. One striking difference is that the final provision of the Procès-Verbal expressly stated that it was to enter into force immediately after its signature⁴⁵. Another important difference is that the Procès-Verbal was a typical demarcation document comprising three large volumes, with six volumes of annexed Procès-Verbaux of individual demarcation points. It was not a delimitation agreement. It was drawn up by a

³⁷ ITLOS/PV11/3 (E), p. 26, lines 28-29 (Sands).

³⁸ *Romania v. Ukraine*, I.C.J. Reports 2009, p. 61, at p. 86, para. 68 (with further references).

³⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 735, para. 253.

⁴⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 77, para. 40; see also *ibid.*, pp. 78-89, paras. 43-76.

⁴¹ ITLOS/PV11/3 (E), p. 6, lines 11-14; p. 9, lines 21-24; p. 11, lines 36-38 (Boyle).

⁴² ITLOS/PV11/3 (E), p. 9, lines 21-24 (Boyle). See also *ibid.*, p. 2, lines 9-11; p. 6, lines 9-11 (Boyle); p. 10, lines 34-35 (Boyle); p. 10, line 39 (Boyle).

⁴³ ITLOS/PV11/3(E), p. 10 line 38-p. 11 line 34 (Boyle).

⁴⁴ *Ibid.*, p. 11, lines 26-27.

⁴⁵ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Ukraine Counter-Memorial, p. 81, para. 5.41.

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Mixed Soviet-Romanian Commission on the Demarcation of the State Border, whose task was to demarcate the State border. This it did, and the result was incorporated by reference into a State Border Treaty signed just two months later⁴⁶.

Second, the context in which the 1949 Procès-Verbaux were concluded was entirely different. As the International Court explains in its 2009 judgment, the Procès-Verbaux resulted from the work of the Soviet-Romanian Border Commission, as I have said, which was implementing an agreement signed on Moscow in 1948, which itself modified the 1947 Paris Treaty between the Allied and Associated Powers and Romania. The 1949 Procès-Verbal was an integral part of a treaty-based delimitation and demarcation process that reached its conclusion in a treaty⁴⁷.

The third difference is that in the *Black Sea* case the Parties were in agreement that the Procès-Verbal was a legally binding international agreement⁴⁸. As Professor Boyle conceded, “[t]he issue before the Court [in the *Black Sea* case] was not the status of the procès-verbal but whether it ... established a continental shelf/Exclusive Economic Zone boundary ...”⁴⁹. The International Court itself therefore did not need to address its status.

It is, Mr President, perhaps somewhat misleading to say, as Professor Boyle did, that “[t]he *Black Sea* case thus shows that an appropriately worded agreement or procès-verbal between officials is sufficient for the purposes of article 15 ...”⁵⁰. Whether a text is an agreement within the meaning of article 15 does indeed depend on the actual terms of the document – upon whether it is, to use Professor Boyle’s phrase, “appropriately worded” – as well as the particular circumstances in which it was drawn up. The 1974 Minutes, by contrast with the Procès-Verbal in the *Black Sea* case, are not worded appropriately to establish an article 15 agreement.

After these two preliminary matters, I shall now return to examine the Agreed Minutes in a little more detail. The central questions are: are the Agreed Minutes an agreement binding under international law, that is to say, a treaty, and did they, by their terms, establish a maritime delimitation?

Professor Boyle, last Friday, gave four reasons why the Agreed Minutes “evidence the conclusion of an agreement delimiting the territorial sea in 1974.”⁵¹ With all due respect, these reasons are unconvincing. First, Professor Boyle says, “the terms are clear and unambiguous”. This is not much of an argument. In our view too the terms are clear and unambiguous, but not in the sense that Professor Boyle gives to them. Second, he says the object and purpose of the agreement and the context in which it was negotiated was “to negotiate a maritime boundary”. “To negotiate” is a rather strange object and purpose for an agreement, especially an agreement that is alleged to have effected a maritime delimitation. No doubt a successful conclusion is the aim of every negotiation, but that sheds no light on the object and purpose of the Agreed Minutes. Third, Professor Boyle says that “the fact that an agreement is evidenced by the signature of the heads of both delegations and the terminology used, ‘Agreed Minutes’” is relevant. This seems to be two separate arguments. Mere signature is no indication of the legal status of a document, nor is the title “Agreed Minutes”. Fourth, according to Professor Boyle, the Agreed Minutes are “unconditional apart from completing the technicalities.” Even if this were correct, which it plainly is not – there

⁴⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Ukraine Counter-Memorial, pp. 80-81, para. 5.41; p. 94, para. 5.78; CR 2008/24 (8 September 2008), pp. 42-43, para. 29 (Wood).

⁴⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 82, para. 55; CR 2008/24 (8 September 2008), pp. 42-44, paras. 27-33 (Wood).

⁴⁸ *Ibid.*, p. 75, para. 32; p. 81, para. 52.

⁴⁹ ITLOS/PV11/3(E), p. 11, lines 9-10 (Boyle).

⁵⁰ ITLOS/PV11/3(E), p. 11, lines 19-20 (Boyle) (emphasis added).

⁵¹ ITLOS/PV11/3 (E), p. 3, lines 25-35. (Boyle).

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were other important conditions – the condition of determining precise coordinates is hardly a negligible aspect of a boundary agreement.

In approaching these questions, Bangladesh seems to overlook one rather elementary point. In the words of the International Court of Justice when considering the legal nature of the Brussels *Communiqué* in the *Aegean Sea* case, in order to ascertain whether an international agreement has been reached, “the Court must have regard above all to its actual terms and to the particular circumstances in which it was concluded.”⁵² That language was also employed by the International Court in *Qatar v. Bahrain*, when it was considering the status of the 1990 Minutes.⁵³

So, in order to determine the nature of the 1974 Agreed Minutes, we must “have regard above all to [their] actual terms and to the particular circumstances in which [they were] concluded.”⁵⁴ I shall begin with the actual terms. The actual terms used are the starting point for determining the effect of any document. Even Bangladesh seems to accept this, since in its Reply it begins its analysis of the Minutes by referring to their “ordinary language”⁵⁵; but then its only reference to the actual terms of the Minutes is when it points out that the title of the document is “Agreed Minutes” rather than just “Minutes”.⁵⁶ From then on, Bangladesh proceeds to ignore the actual terms of the Minutes, the text, the words used, and quickly moves on to what it claims to be the subsequent practice of the Parties.⁵⁷

Mr President, the title “Agreed Minutes” is often employed in bilateral international relations, as in domestic contexts, for the record of a meeting, or of the main points to emerge from a meeting, agreed between the various participants. What is agreed is the terms of the document recording what happened at the meeting, that is, the account set forth therein of the meeting or its conclusions. By contrast, it is not a common designation for a document that the participants intend to constitute a treaty or a contract, though it is not of course unknown.

Mr President, Members of the Tribunal, could I please ask you to turn once again to the text of the 1974 Agreed Minutes, which can be found at tab 1.1 in the Judges’ folder.

Mr President, we would agree with our friends from Bangladesh that the first thing to note about the Minutes is indeed the title. As I have said, the term “Agreed Minutes” is a perfectly normal term for an agreed record of a meeting. The term “minutes” is one that is well known to those involved in the running of any organization, be it a government or a private entity. The dictionary definition is “an official note of the proceedings of a meeting, conference, convention etc.”⁵⁸ The term is very often used in English to refer to the record of a meeting. “Cabinet minutes”, for example, are the record of meetings of the Cabinet drawn up by the Cabinet Secretary. They record the discussions and conclusions, if any. Such conclusions may be important, but they are not legally binding. If the minutes of a meeting are approved, as is frequently done, they may be referred to as “approved” or “Agreed Minutes”. That does not detract from their status as records of meetings.

Mr President, Members of the Tribunal, you will note that the full title of the 1974 Agreed Minutes reads: *Agreed Minutes between the Bangladesh Delegation and the Burmese Delegation regarding the Delimitation of the Maritime Boundary between the Two Countries*. I repeat, “between the Bangladesh Delegation and the Burmese Delegation”. A legally

⁵² *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 39, para. 96.

⁵³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112 at p. 121, para. 23.

⁵⁴ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 39, para. 96.

⁵⁵ BR, para. 2.16.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, paras. 2.16 ff.

⁵⁸ *Collins English Dictionary* (2007).

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binding treaty between two sovereign States would hardly be expressed, in its title, to be between delegations. Similarly, the Minutes are expressed to be signed by the two delegation leaders, not on behalf of their respective governments, but simply as leaders of the two delegations to the talks.

Likewise, paragraph 1 of the Minutes opens with the words: “The delegations of Bangladesh and Burma held discussions”. Again, the emphasis is on delegations, not governments, not States, and these opening words are clearly the language of a record of a meeting, not of a legally binding agreement.

Paragraph 2 of the Minutes records that with respect to the first sector, that is the territorial sea, the two delegations agreed that the boundary “will be formed” [note the future tense, “will”, not “is” or “shall be”] – “will be formed” by a line, the “general alignment” of which was illustrated on an annexed chart. Also in paragraph 2 they further agreed that “[t]he final coordinates of the turning points for delimiting the boundary of the territorial waters ... will be fixed on the basis of the data collected by a joint survey.” That joint survey, Mr President, has never been conducted, so that element of the Agreed Minutes was never implemented.

As we have already seen, paragraph 3 expressed Myanmar’s position that the understanding was subject to the guarantee that Myanmar’s vessels “would have the right of free and unimpeded navigation through Bangladesh waters around St Martin’s Island to and from the Burmese sector of the Naaf River” – again, a condition that was never met.

Paragraph 4 recorded indeed that “the Bangladesh delegation expressed the approval of their Government regarding the territorial waters boundary referred to in paragraph 2”. Again as we have already seen, paragraph 4 went on merely to record that the “Bangladesh delegation” had “taken note” of the Myanmar Government’s position regarding the guarantee of free and unimpeded navigation. It will be seen that this last sentence refers to the Bangladesh delegation, not the Government, and that the delegation merely “took note” of Myanmar’s position. In diplomatic parlance “taking note” is far removed from “agreement”, despite Professor Boyle’s curious interpretation of the term⁵⁹. So the Minutes clearly did not meet Myanmar’s concerns on this point.

I have already taken you to paragraph 5, which concerns the draft treaty presented by Bangladesh. I will come back to that shortly. The last paragraph of the Minutes, paragraph 6, notes the ongoing discussions concerning the second sector of maritime border, in other words the EEZ and the continental shelf – a reminder that the Minutes are not concerned only with the boundary in the territorial sea.

I pause at this point to note that the 1974 Minutes have none of the hallmarks of an international maritime boundary agreement. Given the “grave importance” of “[t]he establishment of a permanent maritime boundary”⁶⁰, it is unsurprising that virtually all such agreements are solemn treaties (*traités en forme solennelle*), with, among other things, provision for ratification, and they often contain, in addition to precision as regards the delimitation line, provisions on dispute settlement, cooperation between the parties, and navigation and resource rights where necessary.⁶¹ They are, of course, published and registered with the United Nations under article 102 of the Charter, and they usually find their way into *International Maritime Boundaries* (a publication that does have reports on Myanmar’s maritime boundary agreements with other States). None of this happened in our case and for one obvious reason: the Agreed Minutes were not an “agreement” within the

⁵⁹ ITLOS/PV11/3(E), p. 3, line 16 (Boyle).

⁶⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253.

⁶¹ See the agreements collected in the six volumes of *International Maritime Boundaries* published thus far (2011).

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meaning of article 15 of the Convention. This is in stark contrast to Myanmar's practice in its maritime delimitation agreements with India, with Thailand, and on the tripoint.⁶²

An interesting example of practice concerning these two Parties is the land boundary between Myanmar and Bangladesh in the Naaf River, which was fixed by international treaty: an Agreement of 9 May 1966⁶³, and a Supplementary Protocol of December 1980⁶⁴. This treaty you will hear about later; it is relevant to the end point of the land boundary, the starting point of the maritime boundary. That 1966 Boundary Agreement was signed by the two Heads of State. It consists of an Agreement and an annexed Protocol. The Protocol describes the line of delimitation in detail, and it was signed some days before the Agreement itself by persons described as "plenipotentiaries"; even so, it had no legal effect of its own. It had effect only as from the date of the coming into force of the Agreement of which it formed an integral part.

Mr President, to return to the 1974 Minutes. The key point is what the text actually says about their substance. As I have said, paragraph 4 recorded the approval of the Bangladesh Government to points 1 to 7 describing a territorial sea boundary, but it was silent on any approval by the Government of Myanmar. There was no such approval.

Paragraph 5 is of particular importance: it records that a draft treaty was handed to the Myanmar delegation by the Bangladesh delegation "for eliciting the views of the Burmese Government". I described that when I was describing the course of the negotiations. What, Members of the Tribunal, would have been the purpose of preparing a draft agreement, if the Agreed Minutes themselves were already a legally-binding maritime delimitation agreement?

The draft agreement provided for ratification. In fact, of course, the Government of Myanmar never ratified the draft agreement. Indeed, it neither signed nor even initialled it,⁶⁵ nor did the Government of Bangladesh. Moreover, as I have described, no international agreement could be concluded without the express confirmation of the Government of Myanmar, a point that was made clear to Bangladesh from the first round of negotiations⁶⁶. In effect, Bangladesh is attempting to turn the draft of an agreement, which it presented, and which was not even initialled, into a binding document, though – as the arbitral tribunal said in *Guyana/Suriname*, "uncompleted treaties ... do not create legal rights or obligations merely because they had been under consideration"⁶⁷.

Finally, it should further be noted that the Minutes were not published, and indeed were not referred to in public on any of the many occasions when the Parties met to discuss their bilateral relations. This is remarkable if, as Bangladesh now says, for the purposes of these proceedings, they constitute a legally binding maritime delimitation agreement.

Mr President, I will now turn to the 2008 Minutes. Bangladesh seeks to bolster its claim that the 1974 Minutes constitute a delimitation agreement by reference to the 2008 Minutes. Again, it is also necessary to look first at their "actual terms"⁶⁸, something

⁶² See MR, paras. 3.27-3.29.

⁶³ *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 9 May 1966, United Nations, *Treaty Series (UNTS)*, Vol. 1014, I-14848, p. 4 (MCM, Vol. II, Annex 1).

⁶⁴ *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 17 December 1980 (MCM, Vol. I, Annex 7).

⁶⁵ MCM, para. 4.15.

⁶⁶ MCM, paras. 3.13-3.14, 4.16.

⁶⁷ *Guyana/Suriname*, Award of 17 September 2007, *International Legal Materials (ILM)*, Vol. 47, 2008, p. 208, para. 312 (also available on <http://www.pca-cpa.org/>); see also *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, Judgment, *I.C.J. Reports 1959*, p. 229.

⁶⁸ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court*, Judgment, *I.C.J. Reports 1978*, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1994*, p. 121, para. 23.

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Bangladesh studiously avoids. If I could invite Members of the Tribunal to turn to the text of the 2008 Minutes, which will be found at tab 1.8 in the folders, there are a number of points to be made about the text.

As with the 1974 Minutes, the first thing to note about the 2008 Minutes is the title. It reads: “Agreed Minutes of the meeting held between the Bangladesh Delegation and the Myanmar Delegation regarding the delimitation of the Maritime Boundaries between the two countries.” So even the title makes it clear that these are minutes of a meeting, no more and no less. Once again the reference is to the two delegations, not to governments or States. Once again the text begins with the words: “The Delegations of Bangladesh and Myanmar held discussions ...” Once again the language is that of a record of discussions, not of treaty commitments. This is clear in each and every paragraph.

Second, Bangladesh seeks to play down the fact that the 2008 Minutes refer to the 1974 Minutes as an “*ad hoc* understanding” by saying that this is merely a matter of form rather than substance.⁶⁹ As I have already pointed out, the 2008 Minutes refer to the 1974 Minutes as an “*ad-hoc* understanding” no less than three times⁷⁰. This can hardly have been an oversight. Rather, the term accurately reflects the way both sides viewed the 1974 Minutes. (I would note in passing that the French translation of the 2008 Agreed Minutes prepared by the Registry is perhaps a little misleading in that it translates “understanding” by “*accord*”; “*entente*” might have been more accurate – or perhaps even that very good French word – understanding – *tout simplement*.) An “understanding”, a term generally reserved in diplomatic usage for a non-binding document, is a good description of what the 1974 Minutes were: they were a conditional understanding reached at the level of the negotiators as to what could be included in an eventual overall maritime delimitation agreement.

Third, as we have already seen, our friends from Bangladesh appear to attach great significance to the fact that in paragraph 2 of the 2008 Minutes both sides agreed *ad referendum* that the word “unimpeded” be replaced by a whole sentence, which I read out earlier. In doing so, Bangladesh simply passed over in silence the words “*ad referendum*”, a term which clearly indicates that the two delegations intended to refer the matter back to their respective governments. According to Bangladesh, this change “merely served to modernize the language” used in 1974, and somehow – it is not explained how – this proves that the 1974 Minutes were indeed an “agreement”.

Mr President, Members of the Tribunal, I have taken you to the actual terms of the 1974 Minutes (as well as those of the 2008 Minutes), and it is now necessary to turn to “the particular circumstances in which [they] were concluded”⁷¹. There are many ways in which the circumstances of the conclusion of the 1974 Minutes confirm that they were never intended to be a legally-binding instrument. On the contrary, they were, to use the language of the earlier cases, “a simple record of a meeting”⁷². As I said, Bangladesh has said very little about the course of the negotiations. In particular, Bangladesh has told you very little about the circumstances under which the Agreed Minutes came to be signed and what the negotiators said about them. This is hardly surprising, as these circumstances confirm that the Minutes were no more than an *ad hoc* conditional understanding, reached at an initial stage of the negotiations, which never ripened into a binding agreement between the two negotiating sides.

⁶⁹ BR, para. 2.43.

⁷⁰ 2008 Agreed Minutes, BM, Vol. III, Annex 7, para. 2; para. 3 (twice). See MCM, para. 3.42.

⁷¹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Jurisdiction of the Court, Judgment*, I.C.J. Reports 1978, p. 3, at p. 39, para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at p. 121, para. 23.

⁷² *Bahrain (Qatar v. Bahrain)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 1994, p. 112, at p. 121, para. 25.

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I would urge you, Mr President and Members of the Tribunal, to read carefully the records of the November 1974 round of negotiations that each side has annexed to its written pleadings⁷³. These are contemporaneous accounts of what actually happened during the second round. They refer to three documents: the draft minutes produced by the Bangladeshi delegation; the 1974 Minutes themselves as signed; and the draft treaty produced by Bangladesh. You will see the following points that emerge from these records of the meeting:

First, Commodore Hlaing, the head of the Myanmar delegation, for his part, was explicit that navigational passage should be embodied in a treaty.⁷⁴ The head of the Bangladeshi delegation, Ambassador Kaiser, also suggested a treaty to this effect, and merely stated that Myanmar's concerns on passage would be kept "in advisement"⁷⁵.

Second, at the commencement of the third meeting of the second round, Bangladesh introduced draft minutes entitled "Agreed Minutes between the Bangladesh and Burmese Delegations regarding the Delimitation of the Boundaries of Territorial Waters between the two Countries"⁷⁶. It was at this point that the Myanmar delegation took the position that "the agreed minutes should deal with the subject matter *en toto*", a statement quoted by Professor Boyle last Friday⁷⁷. Bangladesh's own account recalls the negative reaction of the Myanmar delegation "to conclude a separate treaty/agreement on the delimitation of the territorial waters"⁷⁸. (You will find the full text of the Bangladesh record of the second round of negotiations at tab 1.9 in your folders). Professor Boyle disregarded this position as inconsequential, yet obviously it was considered seriously, as the signed minutes' title was changed to refer not only to territorial waters but to "the Delimitation of the Maritime Boundary".

Paragraph 6 of the initial draft minutes, the draft prepared by Bangladesh, stated that the Myanmar delegation indicated its government's agreement to the plotted points in the territorial sea⁷⁹. This passage was removed from the minutes as signed.

The next point is that Bangladesh's own records of the second round also make clear that the Bangladesh delegation had "taken note" of Myanmar's position on navigational passage, and no more⁸⁰.

Similarly, Bangladesh "took note" of Myanmar's concern on point 8 of its straight base lines, located on St Martin's Island⁸¹. To this day, point 8 has not been altered.

Finally, Mr President, Members of the Tribunal, if you look at paragraph 10 in tab 1.9 of Bangladesh's own account, you will see that it records that:

An Agreed minutes was signed at Dacca by the Leaders of the respective delegations on 23rd November 1974 which briefly recorded the summary of their discussions⁸².

Myanmar could not agree more with Bangladesh's account and statement of the true status, object and purpose of the 1974 Minutes.

⁷³ MCM, Vol. II, Minutes of the Second Round (Annex 3) and BM, Vol. III, Annex 14.

⁷⁴ MCM, Vol. II, Minutes of the Second Round, first meeting, para. 6 (Annex 3).

⁷⁵ *Ibid.*, para. 5.

⁷⁶ MCM, Vol. II, Minutes of the Second Round, third meeting, and Appendix I (Annex 3)

⁷⁷ ITLOS/PV11/3(E), p. 4, lines 1-2 (Boyle).

⁷⁸ BM, Vol. III, Annex 14, para. 7.

⁷⁹ MCM, Vol. II, Minutes of the Second Round, Appendix I (Annex 3)

⁸⁰ BM, Vol. III, Annex 14, para. 4.

⁸¹ *Ibid.*, para. 6.

⁸² BM, Vol. III, Annex 14, para. 10 [emphasis added].

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Mr President, it is a little early, but that would be a convenient place for me to break and then I would have about twenty minutes more to finish tomorrow, if that is convenient to the Tribunal.

The President:

Your proposal is acceptable. Therefore, we shall now break and conclude your statement tomorrow.

This brings us to the end of today's sitting. The hearing will be resumed on Friday, 16 September 2011 at 3 p.m. The sitting is now closed.

(The sitting closes at 5.54 p.m.)

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

PUBLIC SITTING HELD ON 16 SEPTEMBER 2011, 3.00 P.M.**Tribunal**

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 16 SEPTEMBRE 2011, 15 HEURES**Tribunal**

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good afternoon. Today Myanmar will continue its oral arguments on the dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. I call on Sir Michael Wood to continue his presentation.

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STATEMENT OF MR WOOD (CONTINUED)
 COUNSEL OF MYANMAR
 [ITLOS/PV.11/8/Rev.1, E, p. 1–5]

Mr Wood:

Thank you, Mr President. Mr President, Members of the Tribunal, yesterday I took you through the bilateral negotiations between Myanmar and Bangladesh in so far as they shed light on the nature and meaning of the 1974 Agreed Minutes. I invited you to apply the test laid down by the International Court: to consider the actual terms of the Agreed Minutes and the particular circumstances of their conclusion. I ended yesterday evening by showing you Bangladesh's own account, which states that the 1974 minutes briefly recorded the summary of their discussions.

Mr President, the remainder of my speech in the next few minutes will cover some miscellaneous points concerning the conclusion of the 1974 minutes. I shall briefly address five matters: (i) the conditionality of the 1974 minutes; (ii) Bangladesh's curious emphasis in its Reply on the fact that the boundary was "settled"; (iii) Commodore Hlaing's authority in relation to the conclusion of a treaty; (iv) the absence of ratification of any "agreement" by the Myanmar authorities; and (v) the subsequent discussions concerning "point 7".

Mr President, first, Myanmar and Bangladesh seem to agree that one of the conditions put by Myanmar for the conclusion of a maritime delimitation agreement was that the whole of the boundary should be settled in a single treaty. Bangladesh itself states that the two sides disagreed on "whether there should be a treaty with respect to the territorial sea or an omnibus treaty that included the entire maritime area to be delimited"¹. This condition was repeatedly made clear by Myanmar delegations to their counterparts during successive negotiating rounds². It was most certainly clear at the second round in 1974, the round at which the minutes were signed, as I explained yesterday, and I read out yesterday what the Foreign Minister of Myanmar said on this subject at the sixth round.³

Bangladesh simply ignores the basic fact that no comprehensive agreement was ever reached.

The second point is very brief. Bangladesh, throughout its Reply, and solely by reference to one of its own reports, repeatedly asserts that the territorial sea boundary was "settled" in the 1974 minutes⁴. Professor Boyle did not refer to this argument last week, so I need not deal with it now. I would refer you to our Rejoinder. I would however ask you to note that the only basis for this repeated assertion is paragraph 3 of Bangladesh's own "*Brief Report*" of the third round of the negotiations⁵. When read carefully, this does not even purport to reflect an actual discussion that took place during the third round of negotiations between the Parties⁶.

I thirdly come to the question of the authority, or rather lack of authority, of the members of the Myanmar delegation to the talks in November 1974 to commit their Government to a legally-binding treaty. As we saw, the leader of the Myanmar delegation was Commodore Hlaing. He was Vice Chief of Staff in the Myanmar Defence Services (Navy). Commodore Hlaing, a naval officer, could not be considered as representing Myanmar for the purpose of expressing its consent to be bound by a treaty. He was not one of those holders of high-ranking offices in the State referred to article 7, paragraph 2, of the

¹ BR, para. 2.33.

² BR, para. 2.20; BM, Vol. III, Annex 19; BR, paras. 2.29-2.30; MCM, paras. 3.13-3.14, 3.20, 3.34, 3.40.

³ MCM, para. 3.34; MCM, Vol. II, Sixth Round, Speeches and statements (Annex 8).

⁴ BR, para. 2.23.

⁵ BR, para. 2.23; BM, Vol. III, Annex 15.

⁶ (emphasis added).

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Vienna Convention on the Law of Treaties, who are considered as representing their State for certain specified treaty purposes by virtue of their functions.

In the alternative, according to paragraph 1 of article 7, a person may express the consent of the State to be bound if he or she produces full powers, or if it appears that the intention of the States concerned was to dispense with full powers. Neither of these circumstances applied in our case. Commodore Hlaing did not have full powers issued by the Government of Myanmar and there were no circumstances to suggest that it was the intention of Myanmar and Bangladesh to dispense with full powers.

Quite the opposite: Commodore's Hlaing's statements throughout the negotiations made it abundantly clear that he had no authority to commit his Government. As I said yesterday, from the very first round, Commodore Hlaing made it clear that the discussions between the delegations and their results were subject to the approval of the appropriate authorities of Myanmar⁷.

There is one further point regarding the lack of authority of Commodore Hlaing to bind his State. Professor Boyle argued that, even if the Commodore lacked "the authority to sign [the 1974 minutes], he would only make the agreement voidable, not void" and that the 2008 minutes confirmed the Commodore's signature⁸. Professor Boyle also in this context referred to article 45 of the Vienna Convention on the loss of the right to invoke a ground of invalidity of a treaty⁹. On that, it is clear from the articles listed in the chapeau of article 45 that it does not apply in the circumstances of this case. What the Commodore lacked was the power to express Myanmar's consent to be bound, whether by signature or otherwise. The Commodore could not have made that clearer to the Bangladesh delegation.

Professor Boyle's conclusion, we respectfully suggest, is based on a misreading of article 8 of the Vienna Convention on the Law of Treaties. Article 8 provides that an act by a person who cannot be considered as representing a state for the purposes of concluding a treaty is "without legal effect unless afterwards confirmed by that State". What has to be confirmed is the act of the unauthorised person. That act by itself has no legal effect. It does not establish an agreement that is voidable¹⁰. This is clear from the very fact that article 8 is placed in Part II of the Vienna Convention on the conclusion and entry into force of treaties, and not in Part V¹¹.

This is perhaps a convenient moment to mention the two cases relied upon so heavily by Bangladesh in its written pleadings: *Cameroon v. Nigeria* and *Qatar v. Bahrain*. Since they have not relied upon them so much at this hearing, I can do so very briefly.

Bangladesh's reliance on the ICJ's findings in *Cameroon v. Nigeria* fails on several grounds. You will recall that the ICJ found that the Maroua Declaration constituted an international agreement because the recognised elements of what constitutes a treaty¹² were met, in particular, the consent of both Nigeria and Cameroon to be bound by the Maroua Declaration. The signatures of the Heads of State of both countries were clearly sufficient to express their consent to be bound. That is not our case.

Commodore Hlaing cannot have been understood to have committed his State to a legally-binding agreement by signing the 1974 minutes. This was clear from his official position as a member of the Navy, and from what he himself stated throughout the

⁷ MCM, Vol. II, Minutes of the First Round, third meeting, para. 11, fourth meeting, para. 16 (Annex 2); see also MCM, Vol. II, Minutes of the Second Round, first meeting, para. 11 (Annex 3).

⁸ ITLOS/PV11/3(E), p. 9, line 1-2 (Boyle).

⁹ ITLOS/PV11/3(E), p. 9, Fn. 29 (Boyle).

¹⁰ N. Angelet and T. Leidgens, "Article 8", in O. Corten and P. Klein, *The Vienna Conventions on the Law of Treaties. A Commentary*, Oxford University Press, Oxford, 2011, Vol. I, p. 159.

¹¹ *Ibid.*, p. 156.

¹² Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 2.1(a).

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negotiations. There is no comparison between signature of the 1974 Agreed Minutes by the two heads of delegations, Commodore Hlaing and Ambassador Kaiser, and signature of the Maroua Declaration by the Heads of State of Cameroon and Nigeria.

Bangladesh has also sought to compare the 1974 Agreed Minutes with the 1990 Agreed Minutes in *Qatar v. Bahrain*. Bangladesh points to the fact that in *Qatar v. Bahrain* the ICJ concluded that the minutes signed by the two Foreign Ministers were a text recording the commitments of their respective governments which was to be given immediate application¹³.

We have dealt with this case fully in our written pleadings, and I need not repeat what we said there. I shall just make two points.

First, as it did in *Cameroon v. Nigeria*, in *Qatar v. Bahrain* the ICJ relied on the fact that the officials involved were those inherently invested with full powers to bind the State according to the law of treaties¹⁴. In *Qatar v. Bahrain* it was the Foreign Ministers of both parties who were the signatories. Foreign Ministers are among those holders of high office, the so-called *troika*, who, according to the Vienna Convention, possess inherent full powers.

The second point is this: the conditionality of the 1974 minutes distinguishes them from those in *Qatar v. Bahrain*. In *Qatar v. Bahrain* the ICJ stressed that the commitments made by the Foreign Ministers were to have immediate effect. The 1974 minutes, on the other hand, as we have seen, were conditional in a number of important respects. The nature and content of the 1974 minutes were thus quite different from that at issue in *Qatar v. Bahrain*.

Mr President, Members of the Tribunal, neither *Cameroon v. Nigeria* nor *Qatar v. Bahrain* support the position of Bangladesh. On the contrary, the differences in content and context, distinguishing the instruments in those cases from the minutes in our case, shed light on the true nature and status of the 1974 minutes: the 1974 minutes were a conditional understanding, lacking any binding force.

I turn to the next point. In its written pleadings, but again not orally, Bangladesh suggested that the Government of Myanmar had somehow ratified the 1974 minutes by a Cabinet decision. Since Bangladesh seems to have abandoned this point, I simply refer you to what we said in our Rejoinder¹⁵.

Fifthly and lastly, I will say a word about the subsequent discussions after the ad-hoc Agreed Minutes concerning point 7.

The *ad hoc* and conditional nature of the 1974 minutes is apparent from the disagreement that very quickly emerged in the talks with respect to points supposedly agreed upon in the 1974 minutes, in particular point 7. As I have already noted, Bangladesh repeatedly asserts that points 1 to 7 were “settled” until Myanmar had a “change of heart”, as they put it, in September 2008. In fact, what followed in the immediate aftermath of the signing of the 1974 minutes paints a very different picture.

One would normally expect the last point of a territorial sea boundary to be the starting point of an EEZ/continental shelf boundary but even after signing of the 1974 minutes, both sides continued to suggest alternatives to point 7 as the starting point for the delimitation of the EEZ/continental shelf boundary¹⁶. Just three months after the 1974 minutes were signed, during the third round of negotiations, Bangladesh itself proposed an alternative to point 7¹⁷. Even the 2008 minutes, the very same minutes that supposedly reinforce the “binding” nature of the 1974 minutes, contain in paragraphs 4 and 5 alternatives

¹³ BR, para. 2.39.

¹⁴ Vienna Convention on the Law of Treaties, 1969, art. 7(2)(a), *UNTS*, Vol. 1155, I-18232, p. 331.

¹⁵ MR, paras. 2.29-2.32.

¹⁶ MCM, paras. 4.29-4.34.

¹⁷ *Ibid.*, para. 4.30.

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to point 7¹⁸, alternatives proposed by both sides. These and the other examples set out in our Counter-Memorial¹⁹ show that the points described in the 1974 minutes, and especially point 7, were tentative at best, conditional, and subject to change in further talks between the Parties.

Mr President, Members of the Tribunal, in summary, it is clear from the actual terms of the Agreed Minutes of 1974 and from the particular circumstances of their conclusion that they were not an agreement that is binding upon Myanmar and Bangladesh under international law. It is, moreover, clear from their terms that they did not effect a maritime delimitation between Myanmar and Bangladesh. The minutes were simply a brief record of the discussions, which, among other things, set out a conditional understanding as to what an eventual treaty establishing an overall maritime delimitation line might contain.

Mr President, Members of the Tribunal, that concludes what I have to say on the absence of agreement between the Parties on the delimitation of the territorial sea. I thank you for your attention and I would now ask you to invite Mr Sthoeger to address you on Bangladesh's arguments concerning practice in the territorial sea.

The President:

Thank you.

I now give the floor to Mr Eran Sthoeger.

¹⁸ *Ibid.*, para. 4.31.

¹⁹ *Ibid.*, paras. 4.30-4.31.

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STATEMENT OF MR STHOEGER
 COUNSEL OF MYANMAR
 [ITLOS/PV.11/8/Rev.1, E, p. 5–13]

Mr Sthoeger:

Mr President, Members of the Tribunal, it is an honour to appear before you on behalf of the Republic of the Union of Myanmar. I am grateful to the Myanmar authorities for giving me this opportunity to address this distinguished Tribunal.

Mr President, Sir Michael has explained that there is at present no agreement between the Parties regarding the delimitation in the territorial sea. In the 1974 minutes the Parties reached no more than a conditional understanding as to what could be included in an eventual treaty.

In its Memorial Bangladesh appeared to make two arguments based on practice: first that the practice establishes a tacit agreement¹; and second, that the practice confirms the existence of the 1974 agreement. In its Reply, and last Friday in its oral presentation, Bangladesh did not pursue the tacit agreement argument. We have dealt with this argument in our Counter-Memorial², and see no need to elaborate further today.

In its written submissions, Bangladesh further argued that the subsequent practice of the Parties supports the assertion that the 1974 minutes were viewed as a binding agreement by both Parties. In his very brief comments on practice last Friday, Professor Boyle asserted that, and I quote, “of course there is plenty of evidence to show that Bangladesh has policed its side of the boundary without challenge from Myanmar”³. With respect, as I will show, this claim has no basis in fact. The “evidence” produced by Bangladesh in its Reply is irrelevant at best. At times, it undermines Bangladesh’s own position. It demonstrates that the Parties were oblivious to any so-called “agreement”.

Professor Boyle has also highlighted the lack of conflict over navigational and fishing rights over the years⁴. I will not repeat comments made yesterday by Sir Michael on the restraint shown by Myanmar regarding its right to free and unimpeded navigation. What I will say is that such restraint and responsibility shown by the Parties should be commended and not used to the detriment of Myanmar or Bangladesh.

Mr President, Members of the Tribunal, Sir Michael has quoted the words of the International Court of Justice in the *Nicaragua v. Honduras* case that “[t]he establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed”⁵. International courts and tribunals have applied this approach repeatedly when dealing with claims of a tacit agreement based on the practice of the Parties⁶. As Sir Michael explained, it is established in international law that the burden of proof lies on “the party asserting a fact”⁷, and Bangladesh has not met this burden.

¹ BM, para. 5.19.

² MCM, paras. 4.47-4.42.

³ ITLOS/PV11/3(E), p. 12, lines 7-8 (Boyle).

⁴ ITLOS/PV11/3(E), p. 12, lines 1-3, 15-17 (Boyle).

⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253; see also *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68.

⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 735, para. 253; *Maritime Boundary between Cameroon and Nigeria*, Judgment, I.C.J. Reports 2002, p. 31, pp. 447-448, para. 304; *Gulf of Maine*, Judgment, I.C.J. Reports 1984, p. 246, at p. 310, para. 150; *Guyana/Suriname*, Award of 17 September 2007, ILM, Vol. 47, 2008, para. 371-391; *Newfoundland and Labrador and Nova Scotia*, Award Second Phase (2002), para. 3.5; *Barbados/Trinidad and Tobago*, ILM, Vol. 45, p. 798 (2006), para. 364.

⁷ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 86, para. 68, with further references.

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Mr President, I shall deal in turn with the following matters: first, I shall recall the approach of international courts and tribunals to the kind of “evidence” placed before you by Bangladesh, particularly the affidavit evidence; second, I shall examine the affidavits of the Bangladeshi fishermen and naval officers; third, I shall look briefly at the Bangladeshi navy patrol logs. I shall then take you to the Bangladeshi coastguard patrol logs and, finally, I shall turn to Myanmar’s *Note Verbale* of 16 January 2008.

Now, before examining what Bangladesh claims to be evidence of subsequent practice in application of the 1974 minutes, it is helpful to recall the approach of international courts and tribunals towards affidavit evidence. A full presentation of the approach taken is given in Myanmar’s Rejoinder⁸. At this stage, I shall just highlight some key points necessary to correctly evaluate the alleged evidence that Bangladesh has presented before the Tribunal.

The Rules of the Tribunal, like those of the ICJ, do not address the issue of admissibility of affidavits. Yet, as an eminent author has written in the *Max Planck Encyclopedia*, “In recent cases, affidavits have been treated as admissible evidence. However, on the level of their evidentiary value, the ICJ has expressed scepticism ...”⁹

The case law shows that international courts and tribunals have generally attached little or no weight to such evidence¹⁰.

As has been noted, in the context of evidence, “the rules of the International Tribunal for the Law of the Sea closely resemble those of the ICJ”¹¹, so the practice of the ICJ is of particular interest.

The ICJ summarized its position on the value of affidavit evidence in its 2007 judgment in *Nicaragua v. Honduras*. What the ICJ said is so relevant to the affidavits presented by Bangladesh that I shall quote the relevant passage in full. You will find the relevant passage from the judgment in tab 2.1 of your folders. The Court noted:

Witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purpose of a litigation if they attest to personal knowledge of facts by a particular individual. The Court will also take into account a witness’s capacity to attest to certain facts, for example, a statement of

⁸ MR, paras. 2.50-2.55.

⁹ R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 31, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

¹⁰ C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, pp. 195-201; G. Niyungeko, *La Preuve devant les Juridictions Internationales*, Bruylant, Bruxelles, 2005, pp. 144-145, 362-367, 402-403; A. Riddell, B. Plant, *Evidence before the International Court of Justice*, British Institute of International and Comparative Law, London, 2009, pp. 279-283.

¹¹ R. Wolfrum, *International Courts and Tribunals, Evidence*, para. 5, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edition).

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a competent government official with regard to boundary lines may have greater weight than sworn statements of a private person.¹²

Having examined the fishermen's affidavits produced in that case, attesting to their view of where the maritime boundary lay, the ICJ rejected the affidavits' evidentiary value¹³.

I would like to stress the first few words of the ICJ in that passage that "witness statements produced in the form of affidavits should be treated with caution"¹⁴. In particular, Mr President, the Tribunal should be cautious in giving weight to *pro forma* affidavits containing testimony with virtually identical language, produced wholesale and not in the language of the individual providing the information¹⁵.

Moreover, when determining the value of admissible affidavits, the Tribunal should take into account their credibility and the interests of those providing the information concerned¹⁶.

To recap, among the relevant questions to ask when assessing the affidavits are the following: Are they in identical language and form? Do they go to the existence of facts as opposed to personal opinion? What are the interests of those who made the affidavits? Are they contemporaneous accounts? And, lastly, were the statements "influenced by those taking the deposition"?

I now turn to the four sets of materials that Bangladesh has presented as subsequent practice supposedly confirming the status of the 1974 minutes as a binding international agreement: first, the affidavits of fishermen and naval officers; second, the Bangladeshi naval logs; third, the coastguard logs; and fourth, the *Note Verbale*.

I shall begin by addressing the affidavits of Bangladeshi fishermen and naval officers, found respectively in Annex R16 and Annex R17 to Bangladesh's Reply. An examination of the affidavits submitted by Bangladesh raises several questions as to their relevance and genuineness, and accordingly the weight that the Tribunal should give to the affidavits, if any.

Mr President, it will be seen that the affidavits presented by Bangladesh in the present case are remarkably similar to those produced by Honduras in the *Nicaragua v. Honduras* case. It is our submission that the ICJ's approach to Honduras's affidavits in that case is equally applicable to those of Bangladesh before this Tribunal.

The eight affidavits of the fishermen are all eerily similar in language, form and substance.¹⁷ You will recall that Professor Boyle claimed last Friday that these affidavits attest to the knowledge of Bangladeshi fishermen concerning the alleged "boundary" in the territorial sea. Let us examine these affidavits closely¹⁸. Mr President, Members of the Tribunal, by way of example, I refer you to tab 2.2 which places side by side two of the affidavits found in Annex R16 to Bangladesh's Reply. The affidavits can also be seen on the screens in front of you. On the left, you will find affidavit R16-2 and on the right affidavit

¹² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at pp. 731-732, para. 244.

¹³ *Ibid.*, p. 65, para. 245.

¹⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at pp. 731-732, para. 244.

¹⁵ D.V Sandifer, *Evidence before International Tribunals*, rev. ed., University Press of Virginia, Charlottesville, 1975, pp. 262 and 266-267, referring to statements of the commissioner on the Turkish Indemnity to be paid under the American-Turkish Agreement of 25 October, 1934; see also C.F. Amerasinghe, *Evidence in International Litigation*, Nijhoff, Leiden, 2005, p. 200, on affidavits which were not "individual and spontaneous".

¹⁶ *Ibid.*

¹⁷ BR, Vol. III, Annex R16, Affidavits 1 to 8.

¹⁸ ITLOS/PV11/3(E), p. 12, lines 13-14 (Boyle).

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R16-3. These two affidavits illustrate the striking similarities to which we draw your attention. First, just from looking at the affidavits one cannot help but notice the similarity in their content. As you can see, they are very difficult to tell apart from one another.

Let us look closer at some of the statements contained in these two affidavits. In particular, I will go through point 7. I will begin with point 7a of both affidavits, now on your screens. These two fishermen, as the other six fishermen, were supposedly sworn to “have always been aware of the location of the maritime boundary” between St Martin’s Island and Myanmar. This quote appears in both affidavits, and in virtually identical language in all other affidavits.

Moving on to point 7b, the text magnified on the screen before you now can be found in point 7b of both affidavits. The two fishermen were, again in very similar terms, aware that this boundary runs “approximately halfway between the east coast of St Martin’s Island and the mainland coast of Myanmar”.

In point 7c of both affidavits, now on your screens, the two fishermen were similarly aware that further to the south the boundary continues “approximately halfway between St Martin’s Island and Oyster Island”. You will have noticed the striking similarity with which both fishermen describe this boundary; and these are just examples of the virtual identical language in all the affidavits in Annexes R16 and R17 to Bangladesh’s Reply.

Members of the Tribunal, you will have also noticed that the fishermen’s and the naval officers’ affidavits appear to have been drawn up and signed in English, not Bengali, the native language of those sworn in the affidavits. If the affidavits were in fact taken in Bengali, Bangladesh has failed to submit to the Tribunal the original affidavits. Absent the original affidavits, the affidavits produced in English are of even lesser value.

I now turn to the issue of facts, as opposed to expressions of personal opinion. As in *Nicaragua v. Honduras* before the ICJ, the fishermen’s affidavits cannot be viewed as real evidence as to the existence of an agreement setting the boundary in the territorial sea. Even if one were to assume that their contents are true, the affidavits of the fishermen only attest to the fishermen’s subjective opinion on the existence of a boundary, rather than a first-hand statement of a fact.

In *Nicaragua v. United States of America*, the ICJ addressed these kinds of affidavits, and I quote from that judgment:

The Court has not treated as evidence any part of the testimony given which was not a statement of fact, but a mere expression of opinion as to the probability or otherwise of the existence of such facts, not directly known to the witness. Testimony of this kind, which may be highly subjective, cannot take the place of evidence... Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight¹⁹

Myanmar fully subscribes to this approach, Mr President. None of the affidavits presented by Bangladesh claims that the fishermen ever saw the actual text of the 1974 minutes. Rather, the fishermen claim that they are subjectively “aware of the location of the maritime boundary between Bangladesh and Myanmar”²⁰. Yet the only source of such information provided for in the fishermen’s affidavits is “the Government officials and Bangladesh Naval Authorities”²¹, unsurprisingly, as this is the exact same source arguing that

¹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 42, para. 68.

²⁰ BR, Vol. III, Annex R16-3, at point 7.a, and similarly in point 7.a of all of the affidavits therein

²¹ *Ibid.*, Annex R16-3, point 7.h.

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there is an agreement in force between the Parties before the Tribunal. Faced with this issue, the ICJ in *Nicaragua v. Honduras* concluded that,

Occasional references in the affidavits to the boundary running along the 15th parallel is of the nature of a personal opinion rather than the knowledge of a fact.²²

It follows that the existence of an alleged agreed boundary is not a matter “within the direct knowledge” of the fishermen. On the contrary, it could only be information known to the fishermen from hearsay, with the source of the alleged information being Bangladeshi officials.

This brings me to the next factor mentioned in *Nicargua v. Honduras*, that of the interests of those sworn in the affidavits, particularly the naval officers of Bangladesh. The naval officers, officials of Bangladesh and organs of the state, have a clear interest in supporting the position of Bangladesh on the location of the maritime boundary. As the ICJ has noted on more than one occasion, a state official “will probably tend to identify himself with the interests of his country”²³. This being the case, the affidavits in Annex R17 (those of the naval officers) are of little value to these proceedings²⁴.

I also note the fact that all of the affidavits were produced specifically for the current case, and more particularly for the Reply, not even for the Memorial. All of the affidavits, without exception, in Annexes R16 and R17 were taken in February of this year. None are contemporaneous accounts of the alleged practice in the area of St Martin’s Island.

Finally, as the language of these affidavits is strikingly similar, almost word for word, the Tribunal should view them for what they are, that is statements “influenced by those taking the deposition”, to adopt the language of the ICJ in *Nicaragua v. Honduras*. As such, in our submission, they are of no probative value whatsoever.

In short, the affidavits produced by Bangladesh in Annexes R16 and R17 are of no evidentiary value.

Mr President, Members of the Tribunal, I now turn to the Bangladeshi naval patrol logs, produced by Bangladesh at Annex R18 of its Reply. We fail to understand how these contribute in any way to Bangladesh’s position. The incidents supposedly recorded therein do not and cannot demonstrate acceptance on the part of Myanmar to the existence of an agreement on the delimitation of the territorial sea.

If anything, they are merely a reiteration of Bangladesh’s position stated before the Tribunal and nothing more. Even assuming the content of the naval patrols is true, it is unfortunate that Bangladesh has not cared to share its position on what it persists in referring to as the “1974 agreement” with the Myanmar authorities but rather opted to keep its position known only to its own naval officers.

In any case, Myanmar is at a loss as to how the information contained in the naval logs supports Bangladesh’s claim. Mr President, Members of the Tribunal, these incidents have not been reproduced on a map by Bangladesh. Their location and relevance is hard to discern. In an attempt to make sense of the content of these logs, Myanmar has worked out that, with the exception of two incidents, all of these naval incidents took place in the vicinity

²² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, at p. 732, para. 245.

²³ See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, at p. 203, para. 63; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at pp. 42-43, paras. 69-70.

²⁴ *Ibid.*

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of St Martin's Island, in an area that the current delimitation lines put forward by both countries allocate to Bangladesh. Hence, these incidents do not give support to Bangladesh's position over that of Myanmar's on the delimitation of the territorial sea.

Finally, Mr President, regarding the naval logs, I wish to point out that Bangladesh's so-called "practice" regarding the 1974 minutes is a mirror image of the lack of corresponding practice of Myanmar and its fishermen. In fact, this same information could be used to demonstrate, with equal clarity, that Myanmar's fishermen, intercepted on Bangladesh's side of the supposed line, were unaware of the existence of an agreed boundary. The "practice" allegedly recorded in the naval logs tends to undermine Bangladesh's own position that both sides respected the 1974 minutes and treated them as an agreement binding on the Parties.

Mr President, Members of the Tribunal, I now turn to the third element of so-called evidence. This is the coastguard logs of Bangladesh found in Annex R15 of the Reply. These are equally, if not more, unhelpful to Bangladesh.

The Bangladeshi Teknaf police station arrest records contain 34 incidents that do not prove any of Bangladesh's assertions on subsequent practice. If anything, they demonstrate that no such practice existed. The vast majority of the incidents in the logs are completely irrelevant. They have no connection with the dispute between the Parties. I will explain this by referring, again by way of example, to the first page of Annex R15 in Bangladesh's Reply, found in tab 2.3 of the Judges' folders.

Going through the incidents contained in Annex R15, some are listed as taking place in the Naaf River. For example, case 10/81, at the top of the page in tab 2.3, places the fishing boat at the "Naaf River Basin". At the bottom of the same page, case 06/196 places two fishing boats encountered at the "Naaf River Basin" as well. This location is irrelevant to this dispute.

Other incidents are reported as taking place in areas completely unrelated to the dispute as well. Looking still at the page you have before you at tab 2.3, in between the two cases that took place in the Naaf River, case 15/92 locates an "illegal fishing trawler" on the "north side of St Martin's Island" – *north side* – an area not in dispute between the Parties. This incident, as others recorded in the Bangladesh coastguard log, are entirely unconnected to the present proceedings.

Moreover, several items listed in the log presented in Annex R15 are poorly located and impossible to pinpoint. Case 10/123, for example, recalls an incident that occurred off St Martin's Island "near about 16 miles east", most likely placing this incident somewhere on land. For a more detailed analysis of the irrelevance of the content of this log I refer to Myanmar's Rejoinder, paragraphs 2.63 and 2.64.

To summarize on this point, most of the incidents recorded in the Bangladesh coastguard logs are entirely irrelevant to demonstrating any practice of respecting the line described in the 1974 minutes. Hence, both the coastguard logs and the naval logs fail to establish the existence of any agreement or practice, and are totally irrelevant to the current dispute.

Finally, Mr President, I turn to the *Note Verbale* of 16 January 2008²⁵, to which Bangladesh attaches such importance. In fact this was the only element of practice to which Bangladesh devoted any time during its oral presentation²⁶ on Friday. For that reason, it seems appropriate to look closer at the *Note Verbale* and appreciate it for its true value. According to Bangladesh, and I quote, "[i]n that note, which stated the position that Myanmar and Bangladesh had not yet formally delimited a maritime boundary, Myanmar

²⁵ BR, Vol. III, Annex R1.

²⁶ ITLOS/PV11/3(E), p. 12, lines 19-27 (Boyle).

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nevertheless reiterated the consistent position it had taken for the prior 14 years: namely that St Martin's was entitled to a 12 M territorial sea²⁷.

As the Tribunal will see, Bangladesh ignores the actual terms of the *Note Verbale*. Mr President, Members of the Tribunal, you will find a copy of Myanmar's *Note* at tab 2.4 in your folders, and now also on the screen before you. The relevant passage reads:

The Ministry wishes to stress that although Myanmar and Bangladesh have yet to delimit a maritime boundary, as States Parties to the UNCLOS 1982 Myanmar and Bangladesh are both entitled to a 12 miles territorial sea in principle. It is in this neighbourly spirit that the Myanmar side has requested the kind cooperation of the Bangladesh side since the streamer/receiver of the said survey vessel is expected to enter the 12-mile territorial sea which Bangladesh's St Martin's Island enjoys in principle in accordance with UNCLOS, 1982²⁸.

On this note Myanmar was careful precisely not to say that St Martin's Island was in fact entitled to a full 12-M territorial sea. It twice included the words "in principle", and referred to the relevant body of law that both Parties agree governs the matter, article 15 with its equidistance/special circumstances rule. It emphasized that the request for cooperation was made in a "neighbourly spirit" and not because of any legal obligation. It was explicitly a request for cooperation, not for consent as might have been required under the 1982 Convention for such activity within the territorial sea.

Not only does the *Note Verbale* refer to entitlement in principle rather than entitlement in practice, but, very significantly, it refrains from relying upon the agreed boundary. If such a boundary based on the 1974 minutes had existed, in practice if not formally, why not refer to that agreement and the boundary established thereby, rather than to a principle found in an international treaty? The reliance on article 15 of UNCLOS rather than on a maritime agreement supposedly in existence between the Parties – as Bangladesh would have it – speaks for itself: Myanmar had never viewed the 1974 minutes as carrying any legal significance.

Mr President, Members of the Tribunal, It is true that the *Note Verbale* mentions the 1974 minutes in its penultimate paragraph, now enlarged on the screen in front of you. Yet the *Note Verbale* refers to the 1974 minutes as containing a "conditional line" which was "conditionally agreed".²⁹ Furthermore, the context in which the 1974 minutes were referred to is of the essence. It is only after the reliance placed on article 15 that the *Note Verbale* refers to the 1974 minutes in this paragraph. In this paragraph, after a short explanation of the content of the minutes, the drafter concludes at the end of the paragraph, and I quote, that "the current survey area lies well within Myanmar's waters"³⁰. And so it happens that Myanmar sent this *Note Verbale* informing Bangladesh of the survey, despite the fact that the drafter of the *Note Verbale* understood the area in question to be on Myanmar's side of the line described in the conditional understanding which is the 1974 minutes. Contrary to Bangladesh's assertion, the *Note Verbale* is entirely consistent with Myanmar's position in the present case, and it is entirely consistent with Myanmar's concern to avoid difficulties and to proceed in a cooperative and good neighbourly spirit pending – *pending* – the establishment of a boundary.

Mr President, Members of the Tribunal, I have explained why Bangladesh's assertion that there is subsequent practice to support the binding force of the 1974 minutes is without

²⁷ BR, para. 2.94 (emphasis added).

²⁸ BR, Vol. III, Annex R1 (emphasis added).

²⁹ BR, Annex R1.

³⁰ *Ibid.*

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merit. The evidence put forward by Bangladesh is of no irrelevance both in form and content, and at times even counterproductive to Bangladesh's case. The same goes for all of Bangladesh's assertions regarding the 1974 minutes, as Sir Michael explained yesterday and today. Neither the form nor the content of the minutes support Bangladesh's thesis that the 1974 minutes established a maritime boundary between the Parties. These, along with the context in which the minutes were signed, make clear that the line described therein was subject to certain conditions, in particular the guarantee of free and unimpeded passage and on reaching agreement in the form of a treaty, on the whole of the delimitation line.

Mr President, Members of the Tribunal, this concludes my presentation. I thank you very much for your attention. May I request that you now call on Mr Coalter Lathrop.

The President:

Thank you.

I now give the floor to Mr Coalter Lathrop.

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STATEMENT OF MR LATHROP
COUNSEL OF MYANMAR
[ITLOS/PV.11/8/Rev.1, E, p. 14–28]

Mr Lathrop:

Mr President, distinguished Members of the Tribunal, it is a pleasure to appear before you for the first time today, and an honour to do so on behalf of Myanmar.

Mr President, I will not be able to complete my presentation before the break. With your permission I would propose to speak until approximately 4:30, and resume again after the break.

Mr President, as Myanmar has demonstrated throughout the written and oral pleadings, there is no agreed boundary separating the territorial sea of Myanmar from that of Bangladesh. Nothing that Bangladesh presented in the first round of these hearings changes this fact, and in the absence of any such agreement, it falls to this Tribunal to delimit the boundary separating the maritime zones of the Parties, including their territorial seas.

My task today is to present Myanmar's position on the proper delimitation of the maritime zones lying within 12 M of the coasts. It should be noted at the outset that, in this area the delimitation between the Parties is primarily a delimitation of their territorial seas, but there is also a part of the delimitation that will divide the territorial sea of Bangladesh from the exclusive economic zone and continental shelf of Myanmar. During this presentation I will focus on the territorial sea delimitation. My colleagues and I will present the delimitation beyond 12 M in subsequent presentations.

I will begin my presentation by blowing away some of the smoke left over from Bangladesh's territorial sea presentation. Once we can all see clearly again, I will follow with a brief review of the law applicable to territorial sea delimitations. Because delimitation is a function of coastal geography, I will then review the geography in this part of the delimitation area before describing the Parties' proposed delimitation lines. That description of the lines will reveal that there is only one material disagreement - whether St Martin's Island constitutes a special circumstance in this delimitation within the meaning of article 15 of the Law of the Sea Convention. As I will demonstrate, St Martin's Island is indeed a special circumstance. Accordingly, I will conclude my presentation by describing how its presence should be treated in this delimitation.

Allow me first to touch on several preliminary matters, beginning with the concept of mainland-to-mainland delimitation. Bangladesh's team repeatedly attacked the notion of a mainland-to-mainland delimitation during its first round of pleadings, calling it "curious"¹, "the fruit of fertile and creative legal imaginations"², and "a wholly novel creature of international law"³. Mr Reichler even declared: "This is a new concept, as far as we can tell, developed by Myanmar for the purposes of this case."⁴ But, as I will demonstrate, the mainland-to-mainland equidistant line has a respectable pedigree. Neither the phrase nor the concept is original to Myanmar or to this litigation. Perhaps counsel for Bangladesh has been watching too much Star Trek or reading too much Sherlock Holmes - who, I might add, was not an authority on maritime boundary delimitation.

By contrast, the late Sir Derek Bowett was, and the phrase, "mainland-to-mainland equidistant line" was both known to him and used by him. In Volume I of *International Maritime Boundaries*, Sir Derek used the phrase to describe several negotiated boundaries. In one instance, Sir Derek wrote: "The island of Halul was ignored ... in constructing the

¹ ITLOS/PV11/3 (E), p. 14, line 34–35 (Sands).

² ITLOS/PV11/2 (E), p. 16, line 43 (Reichler).

³ ITLOS/PV11/3 (E), p. 14, line 8–9 (Sands).

⁴ ITLOS/PV11/2 (E), p. 16, line 39–40 (Reichler).

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mainland-to-mainland equidistant line”⁵. In another: “Various small islands were ignored in drawing a mainland-to-mainland equidistant line.”⁶ In yet a third: “Several islands ... were ignored and a mainland-to-mainland equidistant boundary adopted.”⁷ Apart from Sir Derek, at least seven other authors have used this phrase since 1985.⁸

Just as the phrase, “mainland-to-mainland” is not a “novel creature”, neither is the concept. State practice is full of examples, and so too are the cases. In the *Anglo-French Continental Shelf* case, the Court of Arbitration considered the position of the Channel Islands relative to “a median line drawn between the two mainlands”⁹, ultimately adopting the mainland-to-mainland line and fully enclaving those islands. The tribunal in *Eritrea/Yemen* held that the boundary, after diverting to accommodate the territorial seas of several small islands, should subsequently “rejoin the mainland coast median line” and “[t]hence ... resume[] as a median line controlled by the two mainland coasts”¹⁰. Most recently, in the *Black Sea* case, a similar mainland-to-mainland line was proposed by Romania,¹¹ and ultimately adopted by the Court.¹² It was described as a “provisional equidistance line ... drawn between the relevant mainland coasts of the Parties”¹³.

Finally, in *Nicaragua/Honduras*, because it was, to quote the Court, “impossible for the Court to identify base points and construct a provisional equidistance line ... delimiting maritime areas off the Parties’ mainland coasts”¹⁴ the Court turned to a different delimitation methodology and bisected “the angle created by lines representing the relevant mainland coasts”¹⁵. Unlike equidistance, which may take account of insular features, the angle bisector method is inherently a mainland-to-mainland delimitation method. For this reason alone, the mainland-to-mainland delimitation concept should be familiar to Bangladesh - the Party that purportedly advocates for an angle bisector delimitation.

Moving on from mainland-to-mainland delimitation, let me turn to a second preliminary matter – May Yu (or Oyster) Island. To be very clear, May Yu Island does not factor into the delimitation of the territorial sea, because the 12-M territorial sea of May Yu

⁵ Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 1, p. 131 (2005), at p. 136.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Coalter G. Lathrop, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, in *American Journal of International Law*, Vol. 102, p. 113 (2008), at p. 119; J.I. Charney & L.M. Alexander (eds.), *Australia-New Zealand Boundary Report*, in *International Maritime Boundaries*, Vol. 5, p. 3759 (2005), at p. 3763; Steven Wei Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, in *Chinese Journal of International Law*, Vol. 3, p. 385 (2004), at p. 412; Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, in *Ocean Development & International Law*, Vol. 30, p. 235 (1999), at p. 246; Hiran Wasantha Jayewardene, *The Regime of Islands in International Law* (1990), at p. 429; L.A. Willis, *From Precedent to Precedent: The Triumph of Pragmatism in International Maritime Boundaries*, *Canadian Yearbook of International Law*, Vol. 24 p. 3 (1986), at p. 28; Jan Schneider, *The Gulf of Maine Case: The Nature of an Equitable Result*, 79 *American Journal of International Law* p. 539 (1985), at p. 557, fn. 79.

⁹ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, *R.I.A.A.*, Vol. 18 (hereinafter “*Anglo-French Continental Shelf*”), p. 88, para. 183.

¹⁰ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *R.I.A.A.*, Vol. 22 (hereinafter “*Eritrea/Yemen*”), p. 371–372, para. 163.

¹¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009* (hereinafter “*Black Sea*”), p. 55, para. 182.

¹² *Ibid.*, para. 187.

¹³ *Ibid.*, para. 182.

¹⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007* (hereinafter “*Nicaragua/Honduras*”), p. 76, para. 280.

¹⁵ *Ibid.*, para. 287.

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does not overlap any possible territorial sea entitlement of Bangladesh.¹⁶ Why then does Mr Sands even mention May Yu in a speech on the delimitation of the territorial sea? He does so to confound three separate issues: first, the effect of May Yu Island on the delimitation within 12 M – none; second, the effect of May Yu Island on the delimitation beyond 12 M, and third, the status of May Yu Island under article 121, a non-delimitation provision of the Law of the Sea Convention. The first of these issues I have just addressed, but to be very clear on the second issue, May Yu Island would be given full effect in any *island-to-island* delimitation beyond 12 M.

As for the third issue, May Yu Island is an island not only in name but also in law, with entitlements to an exclusive economic zone and continental shelf pursuant to article 121(2). This distinction between the use of a maritime feature in the delimitation of overlapping maritime areas and the potential entitlement of that feature to certain maritime zones in the absence of competing claims is one that Bangladesh muddles throughout its written and oral pleadings, not only with respect to May Yu Island but also with respect to St Martin's Island.¹⁷

The third preliminary matter is the notion that coastal oppositeness may transition to coastal adjacency. Mr Sands had some difficulty with this concept last week, accusing Myanmar of “rather bizarre reasoning”¹⁸. Because this is a fundamental concept of maritime boundary delimitation and because I refer to it throughout my presentation, it may be worth taking a few moments to focus on it. Addressing this issue, the Court of Arbitration in the *Anglo-French Continental Shelf* case wrote

The appreciation of the effect of individual geographical features on the course of an equidistance line has necessarily to be made by reference . . . to the actual relation of the two coasts to th[e] particular area [to be delimited].¹⁹

A Chamber of the International Court later wrote in the *Gulf of Maine* case,

It is also obvious . . . that . . . the coasts of two States may be adjacent at certain places and opposite at others.²⁰

What these statements mean is that the same features can have both opposite coasts and adjacent coasts simultaneously. These characterizations are dependent on the relationship of the coasts not only to each other but also to the area to be delimited. If Mr Sands is still confused by this in the second round, I will be happy to come back to it then.

The final preliminary matter is the question of cartographic manipulation. Last week, even as he moved St Martin's Island 11 M across the screen, Mr Sands accused Myanmar of “refashioning geography”²¹. Mr Reichler drew the newfound Bangladeshi coastal façade: he added 23,000 square kilometres of non-existent Bangladeshi territory, and he proceeded to draw an equidistance line between this recently discovered “coast” and Myanmar's actual mainland coast.²² In fact, he did this twice in a single speech²³. Finally, Professor Crawford

¹⁶ Rejoinder of Myanmar (hereinafter “MR”), para. 3.3, n. 154; ITLOS/PV11/3 (E), p. 15, line 18 (Sands).

¹⁷ See Reply of Bangladesh (hereinafter “BR”), paras. 2.75–2.76; ITLOS/PV11/2 (E), p. 14, lines 47–48, and p. 15, lines 1–3 (Sands); ITLOS/PV11/3 (E), p. 35, line 18 (Crawford).

¹⁸ ITLOS/PV11/3 (E), p. 28, lines 41–45 (Sands).

¹⁹ *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 112, para. 240.

²⁰ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984* (hereinafter “*Gulf of Maine*”), p. 324, para 187.

²¹ ITLOS/PV11/3 (E), p. 17, lines 11–18 (Sands).

²² ITLOS/PV11/2 (E), p. 16, lines 9–14 (Reichler) (describing Exhibit 1.13 in the Judges' folders).

²³ *Ibid.*, p. 17, lines 46–48 (describing Exhibit 1.15 in the Judges' folders).

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created “Eastern Bioko”, brought it to the Bay of Bengal, and invited the people of Equatorial Guinea to visit on a holiday.²⁴

Mr President, Members of the Tribunal, I simply wish to observe that these are cartographic manipulations. I urge you to remain vigilant, to be aware of them, and to reject these attempts by Bangladesh to confuse the geographic facts in this case.

Mr President, I will now turn to issues that are more directly related to the topic at hand: the delimitation of the territorial sea.

The applicable law for this part of the delimitation is found in article 15 of the 1982 Law of the Sea Convention. There is no dispute between the Parties on this point²⁵. Instead, the dispute arises from the application of this provision to the geographic facts and other circumstances in this case.

Although the Members of the Tribunal are, of course, familiar with article 15, I would like to take a moment to review the text of this two-part provision, which was taken nearly verbatim from article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone.²⁶

The first sentence of article 15 sets out the general rule that States are not entitled to extend their territorial seas beyond the equidistance line. Bangladesh would, apparently, like article 15 to end there but it does not. The general rule of equidistance has two exceptions, which the second sentence of article 15 sets out:

The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.²⁷

This is the equidistance/special circumstances rule of article 15. As a formal matter, this rule arises from a different source than the equidistance/special circumstances rule of article 6 of the 1958 Continental Shelf Convention and the equidistance/relevant circumstances method as applied to the delimitation of maritime zones beyond the territorial sea. Although the sources of these rules are different, the approaches to delimitation of these different zones are, in practice, nearly identical²⁸. As the Court of Arbitration noted in the *Anglo-French* case, they “reflect differences of approach and terminology rather than of substance.”²⁹ The primary concern of both approaches is coastal geography and, in particular, the distorting effect of specific coastal features on the course of an equidistance line. The treatment of small distorting features that have a disproportionate effect on the boundary is, for all practical purposes, the same under both approaches. Nonetheless, because these approaches pertain formally to the delimitation of different maritime zones, they will be treated separately in these pleadings. I will focus here on the equidistance/special circumstances rule as it should be applied to the delimitation of the territorial seas. The delimitation beyond 12 M will be addressed in subsequent presentations.

²⁴ ITLOS/PV11/2 (E), p. 26, line 29–30 (Crawford).

²⁵ See Memorial of Bangladesh (hereinafter “BM”), para. 5.6; Counter-Memorial of Myanmar (hereinafter “MCM”), para. 4.5; ITLOS/PV11/3 (E), p. 14, line 39–40 (Sands).

²⁶ Convention on the Territorial Sea and Contiguous Zone, 1958, art. 12, U.N.T.S., Vol. 516, p. 205.

²⁷ United Nations Convention on the Law of the Sea, 1982, art. 15, U.N.T.S., Vol. 1833, p. 397 (emphasis added).

²⁸ See BM, para. 6.18 (“[A]lthough the jurisprudence recognizes a nominal distinction between the approaches for delimiting the territorial sea, on the one hand, and the EEZ/continental shelf within 200 M, on the other, those approaches are, in fact, ‘closely interrelated.’”). See, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001* (hereinafter “*Qatar v. Bahrain*”), p. 111, para. 231; *Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea Intervening), Merits, Judgment, I.C.J. Reports 2002* (hereinafter “*Cameroon v. Nigeria*”), p. 441, para. 288.

²⁹ *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 75, para. 148.

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Mr President, before I turn to a presentation of the coastal geography, allow me to summarize this part of the delimitation case as it stands today. First, there is no delimitation agreement between the Parties. Second, neither Party claims, for the purpose of delimitation, historic title to areas beyond the median line. Third, both Parties agree that equidistance is the appropriate starting point for the delimitation of zones within 12 M. Fourth, both parties start the equidistance line from their land boundary terminus, agreed in 1966 and delimited with precise coordinates in 1980³⁰. In the territorial sea, the only outstanding disagreement between Myanmar and Bangladesh is whether there are any special circumstances that affect the territorial sea delimitation within the meaning of article 15. In particular, the Parties dispute whether the presence of Bangladesh's St Martin's Island immediately opposite and in close proximity to Myanmar's mainland coast constitutes a special circumstance. Ultimately, this is a question of coastal geography.

The map now on the screen and at tab 2.5 of your Judges' folders shows the geography of the area of the delimitation within 12 M. It includes the configuration of the charted low and high-water lines, the position of Bangladesh's St Martin's Island and Myanmar's May Yu Island, and of low-tide elevations in the area. I should point out that on our maps and the maps presented by Bangladesh, territory that is above water at high tide is shown in yellow, while areas that dry at low tide, but that are covered at high tide are shown in green. The low tide elevations in the area include both Cypress Sands and Sitaparokia Patches. As noted, May Yu Island is located more than 24 M from St Martin's Island and therefore can have no effect on the territorial sea delimitation. In addition to these coastal features, the map shows the location of the land boundary, the land boundary terminus, and the boundary river, the Naaf River. It also shows the arcs forming the outer limits of the undisputed parts of the Parties' territorial seas. The map on the screen shows only undisputed geographic facts. The existence of and the absolute locations of the features shown on this map are not in dispute. Nonetheless, there remains a question about the position of St Martin's Island relative to the coasts of the Parties. Does it sit opposite the coast of Bangladesh or the coast of Myanmar?

Bangladesh argued in the Reply that if St Martin's Island "can be characterized as 'in front of' Myanmar's coast, it can equally be characterized as being in front of the Bangladesh coast"³¹. Mr Sands said again on Friday that, "St Martin's is as much 'in front of' Bangladesh's coast . . . as it is 'in front of' Myanmar's coast"³² but the map before you very clearly contradicts this characterization. For its entire length, St Martin's Island lies just offshore and immediately opposite the mainland coast of Myanmar. No sleight-of-hand mapping or "pseudo-geographic artifice"³³ is required to demonstrate this basic point. If one were to stand on the shore in any place along Myanmar's coast from Cypress Point to the small headland near the town of Kyaukpandu and look seaward – not up the coast or down the coast, but seaward – one would be looking toward the east-facing coast of St Martin's Island. The same cannot be said of the seaward view from Bangladesh's mainland coast.

Because of the spatial relationship among Bangladesh's mainland coast, Myanmar's mainland coast and St Martin's Island, Bangladesh's island sits on Myanmar's side of any delimitation line constructed between mainland coasts. In other words, St Martin's Island is on the wrong side of the line. Bangladesh has repeatedly denied this truth, while at the same

³⁰ *Agreement between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 1966, U.N.T.S., Vol. 1014, 1-14848, p. 4 (BM, Annex 1); *Supplementary Protocol between Burma and Bangladesh to the Protocol between Burma and Pakistan on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River*, 1980 (BM, Annex 7).

³¹ See BR, para. 3.111.

³² ITLOS/PV11/3 (E), p. 16, lines 27–28 (Sands).

³³ See BR, para. 2.64.

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time providing incontrovertible proof of it. Myanmar showed in the Rejoinder that Bangladesh's own mainland equidistance line and angle bisector run north of St Martin's Island.³⁴ However, Bangladesh is still in denial³⁵, and Myanmar must again point out the error. On Friday, Mr Sands showed us that St Martin's Island is within 12 M of Bangladesh's mainland. Of course, St Martin's Island is also within 12 M of Myanmar, as shown on the screen and at tab 2.7. The two States' territorial seas overlap, as shown here in the darkest blue. When this area of overlap is divided from the land boundary terminus to the intersection of the outer limits, St Martin's Island is once again on Myanmar's side of the line. Once again, the actual geographic facts contradict Bangladesh's strained characterizations.³⁶

Mr President, I would like to emphasize that the location of St Martin's Island on the wrong side of the line does not mean that St Martin's Island lacks a territorial sea. Quite the contrary; St Martin's Island is surrounded on all sides by Bangladesh's territorial sea but, because the territorial sea around St Martin's is overlapped by the territorial sea generated by Myanmar's dominant mainland coast, the maritime zone around St Martin's Island will be semi-enclaved. In other words, it will in turn be surrounded on three sides by the maritime zones generated by Myanmar's mainland coast.

Mr President, we have revisited the location of St Martin's Island relative to the Parties' coasts. I can turn to a description of the Parties' proposed delimitation lines, beginning with Bangladesh's preferred line.

Bangladesh, acknowledging that the Tribunal may find that there is no territorial sea agreement between the Parties, has developed an equidistance line for delimiting the territorial sea³⁷. The Bangladesh line begins at the agreed land boundary terminus at a point designated 1A. The first section of Bangladesh's line from 1A to 2A is an equidistance line drawn between the adjacent mainland coasts of Myanmar and Bangladesh, specifically from single base points located on the headlands of the Naaf River at Shahpuri Point and Cypress Point. At point 2A, base points on St Martin's Island begin to affect the line. The adjacent coastal relationship switches abruptly to an opposite coastal relationship between St Martin's Island and Myanmar's mainland coast. This opposite relationship is maintained from point 2A through several segments to point 6A. Point 6A is the last point on Bangladesh's line formed by base points on purely opposite coasts, specifically a base point on Myanmar's mainland near Kyaukpandu and a base point on the southern tip of St Martin's Island. Beyond point 6A, the line is constructed from increasingly adjacent coasts until it reaches Bangladesh's point 8A at the intersection of 12 M arcs drawn from St Martin's Island and Myanmar's mainland.

It should be noted while this map is on the screen that Bangladesh's entire line beyond point 6A is driven by two base points on the charted low water line south of St Martin's Island within a few hundred metres of each other. In contrast, base points along five or six kilometres of Myanmar's mainland coast push against the distorting effect of this attenuated promontory. So, while the lengths of the coasts that determine the course of the line between point 2A and point 6A are approximately equivalent, the coasts that determine the course of Bangladesh's line between point 6A and point 8A stand in a highly disproportionate ratio of approximately 1:20. It should be noted here that, in the *Jan Mayen* case, the International Court held a smaller coastal disparity of 1:9 to be a special circumstance that called for an adjustment of the equidistance line.³⁸

³⁴ See sketch-map No. R3.1.

³⁵ ITLOS/PV11/3 (E), p. 16, lines 27–28 (Sands).

³⁶ *Ibid.*

³⁷ See BR, para. 2.102.

³⁸ See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993 (hereinafter "*Jan Mayen*"), pp. 65 and 68, paras. 61 and 68.

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From a technical perspective, there is nothing objectionable about Bangladesh's proposed territorial sea line. It is a straightforward exercise, once the relevant coastal features have been determined, to calculate an equidistance line from the nearest points on the baselines of the two States. Bangladesh has undertaken this exercise to construct what it calls a "simplified strict equidistance line"³⁹. Myanmar understands this phrase to mean that, as its first step, Bangladesh has constructed a strict equidistance line by blindly using all possible base points irrespective of their legal validity. Then, in a second step, Bangladesh has eliminated many of the resulting turning points on the line in order to reduce the complexity of that strict equidistance line. The result is that some 100 turning points, and their associated base points, are reduced to Bangladesh's eight. This, we assume, is the meaning of the phrase "simplified strict".

This method of simplification is, in principle, entirely acceptable and it accords with the general practice and with Myanmar's approach. On the screen, we have now added the construction lines generated by a strict equidistance calculation in this area. As you can see, there are many. For obvious reasons, some simplification is necessary and desirable. The problem with Bangladesh's proposed delimitation of the territorial sea is not a technical one but a legal one. Bangladesh fails to take into consideration the second half of the equidistance/special circumstances rule as it applies to St Martin's Island.

Mr President, Bangladesh asks, "Why should St Martin's Island be treated as [a special circumstance]?"⁴⁰ After all, according to Bangladesh, "[f]ishing is a significant economic activity on the island," it is a tourist destination, and it "produces enough food to meet a significant proportion of the needs of its residents"⁴¹. We are told St Martin's has a permanent population and is host to both economic and military activities⁴². In sum, Bangladesh has forcefully argued that St Martin's Island can sustain both human habitation and an economic life of its own.

However, this is a *non sequitur*. Indeed, Bangladesh completely confuses the question of whether St Martin's Island is an article 15 special circumstance with the question of whether it is an article 121 island⁴³.

But the distinction between the effect of a maritime feature in a territorial sea delimitation (which is an article 15 question) and the zones to which a maritime feature might be entitled in the absence of competing claims (which is an article 121 question) is very important and should not be blurred. The status of St Martin's Island under article 121 has no bearing whatsoever on whether St Martin's Island constitutes a special circumstance for the purpose of delimiting the territorial sea. A maritime feature can certainly be both an island and a special circumstance, and in fact many of them are. Bangladesh simply ignores this truth when it draws its territorial sea delimitation and gives full effect and more to St Martin's Island under the guise of article 121.

In contrast, Myanmar carries the application of article 15 to its necessary conclusion. Like Bangladesh's line, Myanmar's line starts at the land boundary terminus at a point designated point A. Like Bangladesh's line, Myanmar's line extends seaward from point A to point B as an equidistance line drawn between the adjacent mainland coasts of Myanmar and Bangladesh. Like Bangladesh's line, Myanmar's line turns abruptly at point B as the dominant coastal relationship is interrupted by St Martin's Island. This point, point B, is where the second sentence of article 15 must first be considered.

³⁹ BR, para. 2.106.

⁴⁰ *Ibid.*, para. 2.76.

⁴¹ *Ibid.*

⁴² ITLOS/PV11/3 (E), p. 18, lines 10–11 (Sands).

⁴³ See BR, paras. 2.74–2.75; ITLOS/PV11/3 (E), p. 14, lines 47–48 (Sands); ITLOS/PV11/2 (E), p. 35, line 18 (Crawford).

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However, before I turn to the second sentence of article 15, and while this image is on the screen, it may be useful to address a complaint raised by Bangladesh in the Reply and again on Friday⁴⁴. The Tribunal will recall that Bangladesh took issue with the location of Myanmar's point B and the direction of line segment A-B, arguing that Myanmar chose "incorrect base points for the calculation of the inshore median line"⁴⁵. Bangladesh continued, asserting that "Myanmar has ignored the nearest points on the Bangladesh low water line, which are located on the final spit on the northern shore of the Naaf River as charted on British Admiralty Chart 817"⁴⁶. Of course, Bangladesh is aware from the simplification of its own strict equidistance line that if Myanmar used every possible base point on the headlands of the Naaf River, the resulting line would have tens if not hundreds of turning points. Here, Myanmar engaged in the same simplification process with only slightly different results.

Yet Bangladesh turns an unimportant technicality into an accusation that Myanmar deliberately chose an incorrect base point and drew segment A-B so that "its extension seaward would pass north of St Martin's Island." Bangladesh characterizes this as another attempt by Myanmar to "bolster" the claim that "the island is located on the 'wrong side' of a mainland-to-mainland equidistance line"⁴⁷. The technical variation in the Parties' results is minor and requires no additional response, but the other part of this accusation – that Myanmar acted in bad faith to deceive the Tribunal as to the location of St Martin's Island relative to the equidistance line – merits further investigation. The hypothetical seaward extension of segment A-B, to which Bangladesh referred, has been added to the map. It does run north of St Martin's Island, but what will be clear to the Tribunal is that the seaward extension of Bangladesh's *own* first segment – segment 1A-2A – *also* passes north of St Martin's Island. One look at Bangladesh's own first segment reveals its accusations to be as unfounded as they are nonsensical. Bangladesh's own line provides yet more proof that St Martin's Island is indeed on Myanmar's side of any delimitation line drawn between the mainland coasts of the Parties. Myanmar did not rig the location of its base points in order to create this result, nor would that have been necessary. Bangladesh's own "properly plotted modern equidistance line"⁴⁸ is sufficient for the task.

Let me return to point B. Point B is where St Martin's Island first comes into play and is therefore the point where the second sentence of article 15 enters this delimitation. In the absence of St Martin's Island, the delimitation line would continue from point B on a course to point E and beyond. From point B to point E and out to point F, the line would be an equal distance from the nearest base points, $\beta 1$ and $\mu 1$ on Shahpuri Point and Cypress Point. In the absence of St Martin's Island, this would be the boundary between the Parties. However, St Martin's Island *does* exist and must be accommodated. Accordingly, Myanmar fully accepts that St Martin's Island must be allowed to drive the delimitation for the short distance that it runs between the opposite coasts of the parties. Subsequently, the delimitation should rejoin the equidistance line where the coastal relationship returns to one of adjacency.

Like Bangladesh's line, Myanmar's line runs from point B to point B5 as an equidistance line between the opposite coasts of Myanmar's mainland and St Martin's Island. In this section, both Parties have applied the equidistance method, but for very different reasons. Bangladesh uses this method in a blind application of only half of the equidistance/special circumstances rule. Myanmar applies the same method in this section because to do so allows the special circumstance to be taken into account. These apparent

⁴⁴ BR, para. 2.98; ITLOS/PV11/3 (E), p. 27, lines 28–36 (Sands).

⁴⁵ BR, para. 2.98.

⁴⁶ *Ibid.*, para. 2.100.

⁴⁷ *Ibid.*, para. 2.62.

⁴⁸ *Ibid.*, para. 2.100.

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similarities mask the major difference in the legal justifications underlying the two lines. Beyond point B and in particular at point C, the diverging lines express the Parties' different perspectives on the role of St Martin's Island in this coastal geography. Bangladesh gives St Martin's Island full effect throughout the territorial sea delimitation despite the significant distortion that this relatively small feature creates as against the dominant Myanmar mainland coast. Myanmar takes account of these factors as the coastal relationship transitions from pure oppositeness to pure adjacency.

Mr President, if it is convenient for you, this would be a good time for me to stop and I shall be happy to resume my presentation after the break.

The President:

I thank you.

We will now withdraw for a break of 30 minutes. We shall continue the hearing at 5 p.m.

(Short adjournment)

The President:

Mr Lathrop, you may now wish to conclude your statement.

Mr Lathrop:

Thank you, Mr President. Before the break I had finished discussing the Parties' lines and I will now turn to St Martin's Island as a special circumstance.

Mr President, St Martin's Island is indeed the epitome of a special circumstance. As Myanmar noted in the Rejoinder, there are three practical factors that together determine whether an island creates such an exaggerated distortion in an equidistance line that the island must be considered a special circumstance⁴⁹. The first factor is the predominant coastal relationship between the States, that is, whether the States' coasts are opposite or adjacent.

As a general matter, islands create more exaggerated distortions when the dominant coastal relationship is an adjacent relationship. In opposite coastal relationships, by contrast, distortions are much less extreme. As the International Court noted in *Libya/Malta*:

In the ... situation [of adjacent coasts], any distorting effect of a salient feature might well extend and increase through the entire course of the boundary whilst in the ... situation [of opposite coasts], the influence of one feature is normally quickly succeeded and corrected by the influence of another, as the course of the line proceeds between more or less parallel coasts.⁵⁰

The reason for the difference is simple geometry. Where mainland coasts are predominantly opposite one another, an island will create a transverse displacement. Where mainland coasts are predominantly adjacent, an island will create an angular displacement. Of the two, an angular displacement usually creates the more exaggerated distortion. This difference between angular and transverse displacements was identified by the Chamber in the *Gulf of Maine* case⁵¹. In that case, the Chamber wrote that the "practical impact" of a

⁴⁹ See MR, paras. 3.15–3.17.

⁵⁰ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya/Malta*"), p. 51, para. 70.

⁵¹ *Gulf of Maine*, I.C.J. Reports 1984, p. 337, para. 222.

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transverse displacement was relatively “limited”, as compared with that of an angular displacement.⁵² That was the first factor.

This first factor is closely related to the second factor, which is the proximity of the island to the land boundary terminus. In the case of opposite coastal configurations, the relevant measurement is the distance between the island and its mainland coast: the farther from the coast the larger the distortion. Proximity to the coast matters less in adjacent configurations. As long as the island is not near the boundary, its distance from the coast is not in issue. In the case of adjacent coastal configurations, the primary concern is the proximity of the island to the boundary and in particular to the land boundary terminus. Where mainland coasts are adjacent, the closer the island is to the land boundary terminus, the greater the angular displacement will be on the equidistance line. The distorting effect is strongest when an island is located (as it is in this case) not just near but beyond the land boundary terminus hard against the coast of another State. This is because the angular displacement of the line starts at, or very near, the land boundary terminus and grows larger as the line moves away from the coast.

Finally, the third practical factor is the presence or absence of balancing islands. In Volume I of *International Maritime Boundaries*, Sir Derek Bowett describes a principle that we have already discussed, our first practical factor: “that offshore islands have a greater potential for distortion of any equidistant line in situations of adjacency than in situations of oppositeness”⁵³. But then Sir Derek goes on to identify an exceptional case – the 1980 Myanmar-Thailand agreement – where the two adjacent States had offshore islands that offset each other and eliminated the distortion that would otherwise have occurred.⁵⁴ As Sir Derek recognized, a balancing island can neutralize the effect of an island that would otherwise have constituted a special circumstance.

To summarize, the three practical factors that determine the level of geometric distortion caused by an island are as follows: the predominant coastal relationship, the relative location of the island, and the presence or absence of balancing features. When a confluence of these factors produces a substantial distortion of the equidistance line, the island creating the distortion constitutes a special circumstance under article 15.

Let us now leave the abstract discussion of these three factors and turn to the case before the Tribunal. Before directly applying our three-factor analysis to St Martin’s Island, I want to speak a bit about its surroundings.

Myanmar and Bangladesh have a predominant coastal relationship of adjacency and an agreed land boundary terminus in the mouth of the Naaf River. From the mouth of the Naaf River, Myanmar’s coast stretches, generally, toward the southeast and Bangladesh’s, generally, toward the northwest. To either side of the land boundary terminus, both States’ mainland coasts are accompanied by several coastal islands. For example, Myanmar’s Myingun Island and Bangladesh’s Sonadia Island would be considered coastal islands as that term is used in the case law⁵⁵. These islands are in line with the general direction of the coast, they form an integral part of the general coastal configuration⁵⁶, they are not “scattered islands”⁵⁷, and most importantly, they are under the same sovereignty as the proximate

⁵² *Ibid.*

⁵³ Derek Bowett, *International Maritime Boundaries*, Vol. I, at p. 135.

⁵⁴ *Ibid.*, p. 135, fn. 31.

⁵⁵ See, e.g., *Anglo-French Continental Shelf*, *R.I.A.A.*, Vol. 18, p. 79, para. 159; *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *R.I.A.A.*, Vol. 19 (hereinafter “*Guinea/Guinea-Bissau*”), pp. 183–185, paras. 95(a), 97; *Black Sea*, *I.C.J. Reports 2009*, p. 45, para. 149.

⁵⁶ *Eritrea/Yemen*, *R.I.A.A.*, Vol. 22, p. 367, para. 139.

⁵⁷ *Guinea/Guinea-Bissau*, *R.I.A.A.*, Vol. 19, p. 184–185, para. 97.

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mainland territory⁵⁸. As such, they can be considered to form integral parts of the predominant coastal geography of these two coastal States.

Side by side, the relatively straight, slightly convex but largely unremarkable coasts of the Parties face toward the southwest. As we have seen, any delimitation between these coasts would run, as a general matter, in a south-westerly direction. In particular, the properly constructed bisector, which is constructed on the basis of the general direction of these coasts, runs in this direction. This line represents a simplified lateral delimitation line between the adjacent mainland coasts of Myanmar and Bangladesh.

Into this straightforward coastal relationship comes St Martin's Island. St Martin's Island is, in this geography, the exception. St Martin's Island is hardly a "major geographic feature" as Mr Reichler claims⁵⁹, but it certainly is an exceptional geographic feature. This feature, St Martin's Island, sits opposite the mainland territory of a different sovereign, Myanmar, lying to the south of every version of a lateral delimitation, even the most ill-conceived. In the context of this overall configuration, it is an extraneous element. In a word, St Martin's Island is "special".

Moreover, because of the three practical factors described previously, St Martin's Island has a grossly distorting effect on the course of the delimitation. Because the mainland coasts of the Parties are adjacent, St Martin's Island creates an angular displacement of the equidistance line. Because St Martin's Island is on the wrong side of the land boundary terminus, this angular displacement is quite considerable. Finally, because of the distance of May Yu Island from St Martin's Island, there are no balancing islands to counteract this substantial angular distortion within the territorial sea. In this context, St Martin's Island is a very special circumstance.

Mr President, none of this analysis is revolutionary or innovative. Recent commentary confirms its correctness, as do older authorities. Writing in *International Maritime Boundaries*, Professors Victor Prescott and Gillian Triggs (not Sir Derek) note that, "[a] *prima facie* circumstance leading to possible inequity in a delimitation arises where an island off the coast of one State is subject to the sovereignty of another"⁶⁰. They go on to list the ways in which distortions are caused by islands, writing that a "distortion might be caused when the detached islands of one country lie very close to the coast of an opposite or adjacent neighbor"⁶¹. After a thorough review of delimitation case law and state practice, Professors Prescott and Triggs also identify the solution to this distortion. They say:

[T]he most common method of making a distorted median line more equitable involves discounting the effect of the island or islands that cause the distortion.⁶²

Moreover, in the 1953 session of the International Law Commission, the same example was raised and the same solution was proposed. Even then, five years before the conclusion of the 1958 Conventions, special circumstances where "a small island opposite one State's coast belonged to another" were recognized to necessitate a departure from the "general rule" of equidistance.⁶³

Bangladesh argues that the geography here is distinguishable from the geography in the case law and examples of state practice. Indeed, there are very few situations in the world

⁵⁸ *Anglo-French Continental Shelf, R.I.A.A.*, Vol. 18, p. 79, para. 159.

⁵⁹ ITLOS/PV 11/2 (E), p. 13, line 5 (Reichler).

⁶⁰ Victor Prescott and Gillian Triggs, *Island Rocks and their Role in Maritime Delimitation*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 5, p. 3245 (2005), at p. 3274.

⁶¹ *Ibid.*, p. 3275.

⁶² *Ibid.*

⁶³ *I.L.C. Yearbook*, 1953, Vol. 1, 204th meeting, 29 June 1953, p. 128, para. 37.

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that share this extreme confluence of distorting factors: coastal adjacency with a small feature lying on the wrong side of the delimitation line without any balancing feature. Sir Derek Bowett wrote:

Occasionally an island will lie on or near a lateral boundary between adjacent coasts. In either case the potential for distortion is considerable.⁶⁴

I submit that the distortion is that much more “considerable” when the island lies beyond the lateral boundary, as in the exceptional case of St Martin’s Island. Like the state practice, the maritime delimitation case law contains few examples of territorial sea delimitations that are directly on point. Of the delimitation cases decided by international courts and tribunals the majority either contained no island issues or did not concern a territorial sea delimitation. In other words, most of the cases are distinguishable on the basis of coastal geography or jurisdictional scope.

Nonetheless, there are cases that are directly relevant to this delimitation. As indicated by Bangladesh, *Nicaragua/Honduras* and the *Black Sea* cases are both highly relevant⁶⁵. Not only are they the two most recent international maritime delimitation cases, they both delimit between adjacent States in the vicinity of islands that are near or on the wrong side of the delimitation line. But, contrary to Bangladesh’s assertion, neither of these cases “relate to the question of the weight to be accorded islands in the territorial sea”⁶⁶. Instead they both relate to the question of the weight to be accorded islands *beyond* the territorial sea. The answer, as we all know, is none; no weight. But the treatment of islands in delimitations beyond the territorial sea is for my colleague Professor Forteau to address next week.

In fact, the most directly relevant case when it comes to the treatment of islands in the delimitation of the territorial sea is *Guinea/Guinea-Bissau*. Although the expansive macro-geographic considerations underlying the delimitation in the offshore area were bizarre and have never been followed, in the near-shore area this case demonstrates that islands that distort the equidistance line should be treated as special circumstances and given less than full effect in the delimitation. In *Guinea/Guinea Bissau* the “scattered islands” - in the words of the tribunal⁶⁷ - located in front of the land boundary terminus were given no effect on the delimitation of the territorial sea.⁶⁸

Mr President, the location of St Martin’s Island requires a delimitation that accounts for this special circumstance. Bangladesh ignores this and delimits on the basis of its so-called “strict simplified” equidistance line out to point 8A. In contrast, Myanmar acknowledges the legal requirements of article 15 and proposes a delimitation that responds to the geographic facts of this case.

From point B5, the last point between the purely opposite coasts of the Parties, the delimitation extends to point E, the first equidistance point on the boundary separating the exclusive economic zones and continental shelves of the Parties. Myanmar’s line from point B5 to point C continues to give effect to St Martin’s Island to account for its presence in the delimitation area. Beginning at point C, a point 6 M from both St Martin’s Island and the Myanmar mainland coast, the effect of St Martin’s Island (now in an increasingly adjacent relationship with the dominant Myanmar coast) is reduced incrementally while still allowing St Martin’s Island to enjoy a full territorial sea to the south-west. Between point C and

⁶⁴ Derek Bowett, *International Maritime Boundaries*, Vol. 1, at p. 141.

⁶⁵ BR, paras. 2.88–2.91; ITLOS/PV11/3 (E), p. 23, lines 1–3 (Sands).

⁶⁶ BR, para. 2.88.

⁶⁷ *Guinea/Guinea-Bissau*, R.I.A.A., Vol. 19, p. 184, paras. 95(c) and 97.

⁶⁸ *Ibid.*, para. 111(a).

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point D the effect of St Martin's Island is reduced from full effect to half effect. It should be noted that, in contrast to the 12-M arcs drawn around Serpents' Island and the Honduran Cays (which created boundaries between the territorial sea and exclusive economic zone), segment C-D divides the territorial sea of St Martin's Island from the territorial sea of Myanmar's mainland coast. Beyond point D, St Martin's influence on the direction of the line is further reduced while at the same time giving the feature a full 12 M territorial sea at point E.

This line reflects the law of maritime boundary delimitation as applied to the coastal geography of this case. The use of straight lines to reattach to the mainland equidistance line is not uncommon and has been used by a variety of international courts and tribunals, including the International Court in *Cameroon v. Nigeria*, an Annex VII tribunal in *Guyana/Suriname*, and an *ad hoc* tribunal in *Eritrea/Yemen*. In *Cameroon v. Nigeria*, the Court drew a straight line to re-attach an agreed non-equidistance line to the mainland equidistance line⁶⁹. In *Guyana/Suriname*, the tribunal drew a straight line to connect from the end of a non-equidistance, special circumstance line to the first point on the mainland equidistance line between the Parties⁷⁰. In *Eritrea/Yemen*, the straight-line connectors between points 13, 14, and 15 of that delimitation cut across a Yemeni island's territorial sea in order to reattach to the mainland equidistance line, thus giving that island less than 12 M as against Eritrea's exclusive economic zone⁷¹.

Although straight lines have been used on many occasions, arcs may also be employed to achieve the same goals of mitigating the distorting effect of a special circumstance while reconnecting to the equidistance line. For example, from point C, the boundary could follow the 6 M arc drawn from base points on St Martin's Island until it reconnected with the equidistance line.

It will be noted that segment D-E represents a boundary between the territorial sea of St Martin's Island and Myanmar's exclusive economic zone. In a formal sense, the applicable law in these circumstances is the law pertaining to the delimitation of areas beyond 12 M, an issue that Professor Pellet will take up momentarily. As mentioned earlier, the treatment of distorting features is the same under both rules and so the distinction is, for all practical purposes, without difference. The more important point is that point E - an equidistance point measured from the nearest points on the mainland coasts of the Parties - is the appropriate starting point for the delimitation of areas beyond 12 M.

Mr President, Members of the Tribunal, this concludes my presentation on the delimitation of zones within 12 M. I will leave you at point E, the start of the exclusive economic zone and continental shelf boundary. I thank you for your patience and kind attention and ask you to please call on Professor Pellet.

The President:

Thank you.

I now call on Professor Pellet.

⁶⁹ *Cameroon v. Nigeria*, I.C.J. Reports 2002, p. 431, para. 268.

⁷⁰ *Delimitation of Maritime Boundary between Guyana and Suriname*, Award, 139 I.L.R. 566, 17 September 2007, paras. 323, 325.

⁷¹ *Eritrea/Yemen*, R.I.A.A., Vol. 22, p. 371, para. 160-162.

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. PELLET
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/8/Rev.1, Fr, p. 31-39]

M. Pellet :

Monsieur le Président, Messieurs les Juges, il peut paraître singulier qu'à ce stade tardif de l'affaire, il soit nécessaire de revenir sur la question du droit applicable. Ce l'est cependant car, si les Parties semblent à peu près d'accord en ce qui concerne les règles relatives à la délimitation de la mer territoriale, elles demeurent profondément divisées au sujet de celles qui s'appliquent au plateau continental et de la zone économique exclusive.

Certes, il existe un certain nombre de points d'accord entre elles en ce qui concerne les principes applicables, mais cette entente s'évanouit aussitôt que l'on passe des principes à leur mise en œuvre. Tant et si bien qu'à part peut-être l'idée que le Tribunal est appelé à tracer une ligne unique de délimitation¹, je ne vois pas très bien ce sur quoi elles s'accordent réellement pour ce qui est du droit applicable :

- elles sont en profond désaccord sur les sources mêmes de ces règles, que le Bangladesh voudrait circonscrire à certaines dispositions de la seule Convention des Nations Unies sur le droit de la mer, et qu'il interprète essentiellement –pour ne pas dire exclusivement– à la lumière, maintenant très vacillante, de l'arrêt rendu par la CIJ en 1969 dans les affaires du *Plateau continental de la mer du Nord*, sans attacher la moindre importance aux précisions coutumières et jurisprudentielles qui ont été apportées par la suite;

- elles ont également un désaccord fondamental sur le rôle respectif que doivent jouer l'équidistance d'une part, l'équité d'autre part.

Monsieur le Président, Messieurs les Juges, il ne fait aucun doute que la Convention des Nations Unies sur le droit de la mer de 1982 – et tout particulièrement ses articles 74 (pour la zone économique exclusive) et 83 (s'agissant du plateau continental) – sont applicables à la délimitation à laquelle il vous est demandé de procéder. Les Parties en conviennent². Mais alors que le Myanmar vous invite à appliquer et à interpréter le texte de ces articles à la lumière des compléments et des précisions qui lui ont été apportés par la pratique et la jurisprudence postérieures, le Bangladesh s'accroche à la seule lettre de certaines des dispositions de la Convention, dont il fait une lecture sélective et tournée vers le passé, qui repose presque exclusivement sur l'arrêt rendu par la CIJ il y a plus de quarante ans dans les affaires du *Plateau continental de la mer du Nord*.

La thèse du Bangladesh toute entière tient en quatre mots : « solution équitable » d'une part et « prolongement naturel » d'autre part. Je m'intéresserai lundi à la première de ces formules (« solution « équitable ») et je m'attacherai aujourd'hui à l'expression « prolongement naturel du territoire terrestre » sur laquelle le Demandeur polarise l'attention, étant entendu que cette expression figure dans l'article 76, paragraphe 1, de la Convention, mais nos amis de l'autre côté de la barre font peu de cas du contexte de cette disposition, qu'ils interprètent comme si le temps s'était arrêté en 1969 avec l'arrêt de la Cour de La Haye.

Monsieur le Président, toute la thèse développée mardi par le Professeur Boyle est fondée sur l'idée –audacieuse, pour ne pas dire téméraire– que le plateau continental d'un Etat est constitué, et ne peut être constitué que, par sa « prolongation géologique naturelle »³ (*its natural geological prolongation*)). Naturelle oui – mais géologique, non - en tout cas pas

¹ V. MB, pp. 71-72, par. 6.17 et CMM, p. 9, par. 1.2, et p. 87, pars. 5.1-5.2.

² V. not. MB, p. 68, pars. 6.4-6.6, et pp. 69-70 ; CMM, p. 57, pars. 4.3-4.4 ; p. 89, pars. 5.5-5.7, p. 90, pars. 5.9-5.10, et pp. 94-95, par. 5.18.

³ V. not. ITLOS/PV.11/6 (E), p. 16, lignes 18-25 [La traduction française du procès-verbal omet le mot « naturelle » - v. p. 18, ligne 16] et p. 17, lignes 4-23 (M. Alan Boyle).

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nécessairement ! Et l'article 76 de la Convention de 1982, qui ne concerne en aucune manière la délimitation latérale entre Etats, n'impose assurément rien de tel.

Nos contradicteurs et amis n'en n'ont cure : ils croient posséder un atout maître, un joker - toujours le même - qu'ils sortent de leur manche comme un talisman guérissant tous les maux et palliant toutes les faiblesses de leur thèse. Et de s'écrier en chœur : « Il y a l'arrêt de 1969 ! »⁴. Il est exact que la CIJ, dans cette décision, a mentionné – prudemment d'ailleurs – la géologie comme l'un des facteurs qui « *semblent* devoir être pris en considération »⁵ – « semblent devoir être pris en considération ». Voici, Monsieur le Président, la seule source qui donne un semblant de vraisemblance à la conception géologique du plateau continental défendue envers et contre tout par le Bangladesh⁶. Or cette source hésitante est à la fois fragile et dépassée.

Fragile pour bien des raisons, dont celles-ci :

1° S'il est exact que l'arrêt de 1969 mentionne le facteur géologique, il ne s'agissait que d'un élément parmi d'autres, que la CIJ citait aux fins de la délimitation « pour autant que cela soit connu ou facile à déterminer »⁷ ; et elle s'y référerait sans en faire un élément de la définition du plateau continental. Or, tel Chimène pour Rodrigue⁸ dans la tragédie du Cid de Corneille, le Bangladesh n'a d'yeux que pour lui. Le professeur Crawford s'est fait la Chimène du Demandeur pour déclarer sa flamme à une CIJ artificiellement pétrifiée dans ses *dicta* de 1969 dont il s'emploie à vanter l'actualité – la « *continuing validity* »⁹ – alors que la Cour elle-même a pris ses distances à l'égard de ces positions devenues obsolètes à maints égards.

2° Tout en n'excluant pas la prise en considération de facteurs géologiques, dans son arrêt de 1969, la CIJ a également mis en avant des considérations géographiques et géomorphologiques ; mais – je le répète – tout cela aux fins non pas de la définition du plateau continental mais en vue de sa délimitation (ce n'est d'ailleurs pas davantage d'actualité sous cet angle aujourd'hui). Je relève en outre que le seul exemple de rupture du prolongement naturel qu'elle donne est celui de la « fosse norvégienne » qui constitue à l'évidence une rupture de nature morphologique et non géologique, et je cite ce que dit la Cour à cet égard :

Sans se prononcer sur le statut de la fosse, la Cour constate que les zones du plateau continental de la mer du Nord, séparées de la côte norvégienne par une fosse de quatre-vingts à cent kilomètres de large, ne sauraient être considérées, au point de vue géographique, comme étant adjacentes à cette côte ou comme constituant son prolongement naturel¹⁰ ;

3° La zone concernée par cette délimitation ne s'étendait pas au-delà de 98 milles nautiques – bien en-deçà de 200 milles marins – et l'application stricte de la ligne d'équidistance aurait conduit à reconnaître à l'Allemagne 16 500 kilomètres carrés¹¹ alors qu'elle permet au Bangladesh de recevoir un plateau continental plus de quatre fois plus étendu pour une longueur de côtes supérieure de moins de 30 % (262 kilomètres pour les

⁴ V. ITLOS/PV.11/6 (E), p. 21, lignes 7-8 et p. 17, ligne 23 (M. Alan Boyle).

⁵ CIJ, arrêt, 20 février 1969, *Plateau continental de la mer du Nord, Recueil 1969*, p. 50, par. 94 – italiques ajoutées.

⁶ V. not. ITLOS/PV.11/2 (E), p. 8, lignes 43-45 et p. 14, lignes 9-12 (M. Reichler) ; ITLOS/PV.11/4 E, p. 6, lignes 25-28 (M. Sands) ; ou ITLOS/PV.11/6 (E), p. 21, lignes 12-18 (M. Alan Boyle)

⁷ *Plateau continental de la mer du Nord, Recueil 1969*, p. 54, par. 101.D.2) ; v. aussi p. 51, par. 94.

⁸ See Pierre Corneille, *Le Cid*.

⁹ ITLOS/PV.11/2/Rev.1 (E), p. 19, ligne 46 (M. Crawford).

¹⁰ *Ibid.*, p. 32, par. 45 – italiques ajoutées.

¹¹ V. ITLOS/PV.11/2/Rev.1 (E), p. 22, ligne 43 (M. Crawford).

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côtes allemandes pertinentes de la mer du Nord ; 364 pour celles du Bangladesh). De toute manière, le problème ne se pose aujourd'hui nullement en ces termes, s'agissant en tout cas des droits souverains des Etats côtiers jusqu'à cette distance:

To be sure, natural prolongation as such is no longer relevant to a coastal State's title over the continental shelf within 200 M. UNCLOS article 76(1) makes clear that coastal States enjoy a presumptive entitlement to a continental shelf of 200 M regardless of whether or not they can establish the physical continuation of their land territory out to that distance.

Ce n'est pas moi qui le dis, Monsieur le Président, c'est le Demandeur¹². Ceci rend hasardeuse toute déduction que l'on voudrait faire à partir de la conception du plateau continental véhiculée par l'arrêt de 1969, que la Convention de 1982 remet profondément en question.

4° Du reste, la Cour elle-même avait mis en garde par avance contre la généralisation des positions qu'elle a prises dans les affaires du *Plateau continental de la mer du Nord* que je cite à nouveau :

Il serait [...] contraire à l'histoire de systématiser à l'excès une construction pragmatique dont les développements se sont présentés dans un délai relativement court¹³.

Et ceci était en effet prémonitoire : non seulement l'article 76 de la Convention de Montego Bay – sur lequel je vais revenir dans un instant – ne reprend qu'en partie les formules de l'arrêt de 1969, mais encore la jurisprudence ultérieure a pris ses distances vis-à-vis sinon de la notion même de prolongement naturel du territoire, du moins de sa définition géologique, et en exclut en tout cas largement les considérations de nature géologique. En cela la « jurisprudence » de 1969 – si l'on peut parler de jurisprudence à propos d'un arrêt resté (sur ce point en tout cas) largement isolé – est également dépassée.

Dès 1977, dans l'affaire franco-britannique de la *Délimitation du plateau continental*, la Cour d'arbitrage a refusé de considérer que la Fosse Centrale et la Zone de failles de la Fosse Centrale exerçaient une influence quelconque sur le tracé de la frontière maritime entre les Parties. Je cite la sentence : « L'axe de la Fosse Centrale et de la Zone de failles de la Fosse Centrale se trouve où il est par un simple accident de la nature, et il n'y a en soi aucun motif pour que cet axe constitue la limite qui pourrait justifier les circonstances spéciales... »¹⁴.

La sentence arbitrale du 11 avril 2006 concernant la délimitation maritime entre la Barbade et la Trinité-et-Tobago décrit de manière exacte et claire la situation à cet égard, et je vais la citer dans sa langue originale, la seule dans laquelle elle existe, je crois

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.

¹² MB, p. 69, par. 6.9 – italiques dans le texte ; v. aussi p. 6, par. 1.15, p. 97, par. 7.7 ou RB, p. 82, par. 3.93 ; v. aussi, ITLOS/PV.11/2/Rev.1 (E), p. 31, lignes 25-34 ; ou p. 33, lignes 5-15 ou p. 34, lignes 16-18. (M. Crawford).

¹³ *Plateau continental de la mer du Nord, Recueil 1969*, p. 53, par. 100.

¹⁴ Affaire de la *Délimitation du plateau continental entre Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et République française*, Décision du 30 juin 1977, *R.S.A.N.U.*, vol. XVII, p. 192, par. 108.

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- I repeat: based upon distance from the coast -

*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.*¹⁵

Dans l'affaire *Libye/Malte* – la seule que cite le Bangladesh, tant par écrit qu'en plaidoiries¹⁶, pour étayer l'attachement supposé de la jurisprudence à la notion géologique du plateau continental – la Cour de La Haye s'est bornée à constater que certains arrêts antérieurs avaient – je cite : « reconnu la pertinence de particularités géophysiques présentes dans la zone de délimitation quand ces particularités aident à identifier une ligne de séparation entre les plateaux continentaux des Parties »¹⁷ – Je répète : « particularités géophysiques, quand ces particularités aident à identifier une ligne de séparation entre les plateaux continentaux des Parties » -ce qui, soit dit en passant, ne correspond guère aux circonstances de fait de notre affaire ; mais ayant constaté que cette situation n'était susceptible de jouer aucun rôle dans la zone litigieuse (la distance entre les côtes des Parties étant inférieure à 400 milles marins), la C.I.J. ne prend aucune position sur la pertinence de tels critères au-delà de 200 milles marins.

Il est du reste intéressant que le Bangladesh – qui ne cite aucune autre affaire à l'appui de ses dires – affirme *expressis verbis* que : « No court or tribunal has yet had any occasion to decide a case involving analogous issues in the continental shelf beyond 200 M. »¹⁸ C'est reconnaître qu'il ne peut invoquer aucun précédent jurisprudentiel à l'appui de sa théorie originale – ou passéiste ? – de la « prolongation géologique naturelle du territoire terrestre ».

Cette notion ne trouve pas davantage de soutien dans l'article 76 de la Convention des Nations Unies sur le droit de la mer, dont le Professeur Boyle a donné mardi dernier une interprétation aventureuse. (Vous connaissez peut-être cette disposition par cœur, Messieurs les Juges, mais, pour votre commodité, elle est reproduite à l'onglet 2.14 de vos dossiers). Sans doute le paragraphe 1^{er} de l'article 76 décrit-il le plateau continental comme le « prolongement naturel du territoire terrestre ». Mais, contrairement aux dires du Bangladesh : « Article 76 of UNCLOS [does not provide] that entitlement is determined by the geological and geomorphological factors that inform the juridical concept of "natural prolongation". »¹⁹ Cette disposition ne fait strictement aucune allusion à ces facteurs (géologiques et géomorphologiques), et elle ne renvoie en aucune manière à je ne sais quel test du « prolongement naturel géologique ».

Monsieur le Président, on connaissait l'œuf de Colomb ; il y a maintenant l'œuf de Boyle²⁰ - a « *boyled egg* ? »... Mais un œuf est un œuf, qu'il soit cru, dur, à la coque ou même gobe – et je suis certain, Messieurs les Juges, que vous ne pouvez pas savoir si cet œuf – que je vous montre – contient un jaune (ou un blanc d'ailleurs ou les deux) ou s'il n'en contient pas ; s'il est cuit ou pas – mais c'est un œuf. Et de même, la Convention ne définit pas l'œuf/plateau continental en fonction de son contenu ; la coquille et son épaisseur lui

¹⁵ 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, *RSA*, Vol. XXVII, p. 211, pars. 224-225.

¹⁶ V. MB, pp. 99-100, pars. 7.11 et 7.12 ou ITLOS/PV.11/6 (E), p. 21, lignes 12-30 (M. Alan Boyle).

¹⁷ *Plateau continental (Jamahiriya arabe libyenne/Malte)*, arrêt, C.I.J. Recueil 1985, p. 35, par. 40.

¹⁸ RB, para. 3.87; see also MB, para. 6.16.

¹⁹ MB, p. 6, par. 1.15, p. 98, par. 7.9 ; v. aussi RB, p. 82, par. 3.93 ; ou ITLOS/PV.11/6 E, p. 17, lignes 17-23 ; p. 25, lignes 39-45 et note de bas de page 67 ; p. 29, lignes 8-12 (M. Boyle).

²⁰ ITLOS/PV.11/6 (E), p. 18, lignes 33-42.

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suffisent. Exactement comme il a suffi que je vous montre la coquille de mon œuf pour que vous sachiez que c'en était un, l'article 76 de la Convention se contente de la morphologie pour reconnaître l'existence d'un prolongement naturel et ne fait appel à la géologie – au jaune ou au blanc de l'œuf – que subsidiairement à titre de preuve « supplémentaire » et facultative.

Le paragraphe 1^{er} de l'article 76 de la Convention décrit certes le plateau continental comme le « prolongement naturel du territoire terrestre jusqu'au rebord externe de la marge continentale » ; mais il ne parle pas de géologie, et il ne peut être lu « en isolation clinique » ; son sens ne peut être compris qu'à la lumière des dispositions qui le suivent. Le paragraphe 1^{er} désigne l'extension du plateau continental mais ne définit que partiellement ce qu'il faut entendre par l'expression « prolongement naturel » : tout ce que l'on sait en lisant cette disposition est que, lorsque la distance entre les lignes de base et le rebord externe de la marge continentale est supérieure à 200 milles marins, ce « prolongement naturel » s'étend jusqu'à ce rebord externe. Mais c'est tout ; le rebord externe n'y est pas défini dans le paragraphe 1^{er}. Le paragraphe 3 décrit (à la fois positivement et négativement) les éléments les composantes morphologiques de la marge continentale (ici encore sans faire la moindre allusion à une imaginaire continuité géologique) – et il faut attendre les paragraphes 4 à 6 pour avoir une idée plus précise de la notion de rebord externe en fonction de laquelle est définie l'étendue du plateau continental auquel peut prétendre l'État côtier – seule question se posant à nous ici²¹.

Le paragraphe 4 n'est pas une disposition particulièrement engageante ou poétique et j'avoue, malgré les mises en garde de Sir Michael Wood, préférer Corneille, Rabindranath Tagore ou ... Conan Doyle (même si je ne le classe pas dans la même catégorie). Mais c'est le dur lot des juristes de devoir s'accommoder de ce genre de formules jargonantes, peut-être scientifiquement approximatives, mais qui font droit. Il s'agit ici des formules alternatives dites « Hedberg » et « Gardiner » ; la première, Hedberg, qui correspond au sous-alinéa (ii)) est fondée sur la seule distance ; quant à la formule Gardiner (de l'alinéa a) (i)), elle fait bien intervenir un élément géophysique, puisqu'elle mentionne l'épaisseur des roches sédimentaires – mais cela s'arrête là : en aucune manière elle ne fait intervenir ni l'origine, ni la nature des sédiments.

Je sais bien, Monsieur le Président, que l'alinéa b) du paragraphe 4 de l'article 76, qui pose le principe de la coïncidence du « pied du talus continental avec la rupture de pente la plus marquée à la base du talus » autorise à administrer la « preuve contraire » et que, le cas échéant, cette preuve contraire reposera alors sur des facteurs géologiques²². Toutefois, aux termes du point 5.4.6 des directives scientifiques et techniques de la CLPC (Commission des limites du plateau continental) – et je cite, « en règle générale, lorsque la base du talus continental peut être située de façon précise au moyen de données morphologiques et bathymétriques, la Commission recommande que l'on utilise ces éléments de preuve » (bathymétriques et morphologique). Les données géologiques et géophysiques ne sont donc que des éléments de preuve supplémentaire que peuvent utiliser les États côtiers sans y être aucunement tenus. Dès lors, comme le relève le Professeur Boyle, cette formule permet de recourir à des preuves géologiques²³, mais (et quel « mais » !), mais ce n'est, pour autant, nullement une obligation. La géologie peut, exceptionnellement, être pertinente elle n'est

²¹ V. le point 2.2.6 des Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la CLPC le 13 mai 1999 à sa cinquième session, doc. CLCS/11. (<http://daccess-ds.ny.un.org/doc/UNDOC/GEN/N99/171/08/IMG/N9917108.pdf?OpenElement>).

²² *Ibid.*, Chapitre 6.

²³ JTLOS/PV.11/6 (E), p. 19, lignes 35-40 et p. 20, lignes 1-3 (M. Boyle).

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nullement nécessaire, contrairement à ce que proclame mon contradicteur et néanmoins ami²⁴.

En tout état de cause – et ceci est sans doute plus important encore, une fois que le pied du talus continental a été défini, conformément à la règle posée à l’alinéa b) du paragraphe 4 de l’article 76, on applique les formules de l’alinéa a) et, comme je l’ai noté, celles-ci ne font, décidément, aucune place ni à l’origine des sédiments, ni à leur nature.

C’est ainsi, Monsieur le Président, qu’est défini aujourd’hui le plateau continental ; c’est ainsi que doit être entendue la notion de « prolongement naturel ». Dans cette conception le principe de continuité *géologique* n’a pas la moindre place.

Et c’est justice : si on la lui accordait, c’est aux Etats que traversent le Gange et le Brahmapoutre qu’il faudrait reconnaître une part du plateau continental que réclame le Bangladesh ; la Chine, le Népal, le Bhoutan en seraient sûrement bien aise – sans parler de l’Inde – mais elle n’a pas besoin de cela : elle est riveraine : c’est à ces Etats que les sédiments charriés par ces grands fleuves et leurs affluents sont arrachés ; mais je crains que la thèse peu orthodoxe du Bangladesh les berce d’un faux espoir... D’ailleurs, Monsieur le Président, définit-on le territoire (terrestre) de l’Etat par la géologie ? Assurément non ! Sinon, que de conséquences surprenantes ! Ainsi, par exemple, j’ai visité au Brésil, il y a deux ans, l’une des plus belles merveilles naturelles du monde : les Lençois Maranhenses ; il s’agit de dunes formées de sable transporté par les vents depuis le Sahara ; le Brésil et l’Algérie sont des pays qui me sont chers à des titres divers, mais je dois dire que, si l’Algérie ou un autre Etat saharien revendiquait les Lençois, je « sentirais » plutôt mieux la défense du Brésil que la réclamation algérienne – or la thèse du Bangladesh est à peine moins excentrique.

Avant d’en terminer pour aujourd’hui, Monsieur le Président, je voudrais donner la réponse du Myanmar à la première question posée aux Parties par le Tribunal – que je lis : « Sans préjuger de la position du Tribunal sur sa compétence pour délimiter le plateau continental au-delà de 200 milles marins, les parties pourraient-elles développer leurs vues sur la délimitation du plateau continental au-delà des 200 milles marins ? ».

Et, je comprends, Messieurs les Juges, que vous soyez perplexes puisque le Bangladesh a affirmé successivement et avec autant de conviction apparente,

- d’une part que, et je cite son mémoire pour commencer (*Continued in English*): “article 83(1) [of the 1982 Convention] applies with equal force to delimitation within and beyond 200 M.”²⁵ On the other hand – and now I quote from its Reply – it says that “recourse to different delimitation methodologies in the two areas is appropriate”²⁶.

(*Poursuit en français*) Pour notre part, nous nous rallions à la première de ces deux positions : il n’existe qu’un seul plateau continental ; l’article 76 qui le définit pose des règles différentes pour la fixation de ses limites extérieures – de sa « délimitation » pour parler français – selon que la marge continentale s’étend ou non au-delà de 200 milles marins des lignes de base ; mais, s’agissant de la délimitation latérale, entre États dont les côtes sont adjacentes ou se font face, l’article 83 ne fait pas la moindre différence entre les deux situations – ce que le professeur Boyle a admis dans sa présentation de mardi²⁷. Les mêmes règles doivent donc trouver application et ni la géologie ni la géomorphologie n’ont rien à voir à l’affaire.

Mais, avec tout le respect dû au Tribunal, je tiens à rappeler de la manière la plus ferme la position du Myanmar – que Daniel Müller (qui est fort savant sur ces choses même si sa grande science n’est guère utile en l’espèce !) et moi exposerons pour surplus de droit,

²⁴ *Ibid.*, p. 20, lignes 5-11.

²⁵ MB, para. 7.3 and RB, para. 4.77.

²⁶ RB, p. 52, par. 3.4.

²⁷ ITLOS/PV.11/6 (E), p. 23, lignes 46-47 (M. Alan Boyle).

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plus en détail la semaine prochaine. Le problème ne se pose pas en l'espèce. Il n'appartient pas au Tribunal de céans de délimiter le plateau continental entre les Parties au-delà de 200 milles puisque la ligne qu'il tracera en appliquant les articles 74 et 83 de la Convention des Nations Unies sur le droit de la mer s'arrêtera inévitablement avant cette limite des 200 milles. C'est pour cette raison suffisante que vous n'aurez de toute manière pas à vous prononcer sur l'interprétation erronée que fait le Bangladesh des règles applicables à la fixation des limites extérieures (à la « délinéation », si l'on veut) du plateau continental au-delà de 200 milles. De toute manière, vous ne pourriez exercer votre juridiction à cet égard dans l'attente des recommandations de la CLPC, mais, ici encore, et pour la même raison dirimante, le problème ne se pose pas.

Monsieur le Président, si vous le voulez bien, je continuerai, lundi matin notre présentation des règles applicables à la délimitation du plateau continental et de la zone économique exclusive, en discutant le second joker que tente d'utiliser le Bangladesh : la recherche (d'ailleurs nécessaire) d'une « solution équitable ». Je suis sûr, Messieurs les Juges, que ce très relatif suspense, ne gâchera pas votre week-end, que je vous souhaite excellent – ainsi qu'à nos amis du Bangladesh, et je vous remercie vivement de votre attention.

The President:

That brings us to the end of today's sitting. The hearing will be resumed on Monday, 19 September 2011 at 10 a.m. I wish you all a good weekend. The sitting is now closed.

(The sitting closes at 5.55 p.m.)

19 September 2011, a.m.

PUBLIC SITTING HELD ON 19 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 19 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Today Myanmar will continue its oral arguments in the dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I call on Mr Alain Pellet to make his presentation.

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. PELLET (SUITE)
 CONSEIL DU MYANMAR
 [TTLOS/PV.11/9/Rev.1, Fr, p. 1-11]

M. Pellet :

Merci, Monsieur le Président. J'espère que le week-end a été bon. Pour nous, il a été studieux. Nous n'avons pas du tout profité de la fête foraine !

Avec votre permission, Monsieur le Président, je vais continuer ce matin la présentation de droit applicable commencée vendredi.

Monsieur le Président, comme un joueur prêt à miser toute sa fortune sur deux numéros, le Bangladesh fonde toute sa thèse sur deux slogans : « prolongement naturel » – j'en ai parlé vendredi – et « solution équitable ». C'est à cette formule qui veut tout dire et à laquelle on peut, en effet, faire dire à peu près n'importe quoi si on ne la rapporte pas à des règles de mise en œuvre claires, que je consacrerai la première partie de cet assez bref exposé, avant de dire quelques mots du rôle respectif de l'équidistance et de l'équité dans l'opération de délimitation.

Monsieur le Président, il n'est pas douteux qu'en fixant la délimitation à laquelle il est prié de procéder le Tribunal devra aboutir à une solution équitable, conformément aux dispositions des paragraphes 1^{er} des articles 74 et 83 de la Convention de Montego Bay, qui doivent trouver pleine application dans cette instance. Je reviendrai dans un instant sur le rôle que l'équité est appelée à jouer dans notre affaire. Dans l'immédiat, c'est davantage ce que ne disent pas ces dispositions qui me retiendra.

Pour l'interprétation de ces formules très générales, la décision rendue par la CIJ dans les affaires du *Plateau continental de la mer du Nord* constitue, semble-t-il, l'horizon indépassable du Demandeur. Loin de moi l'idée de contester que l'Arrêt de 1969 soit un « *leading case* »¹ ; il l'est, pour ce qui nous intéresse, en ce qu'il est à l'origine de la formule utilisée aux articles 74 et 83 de la Convention de 1982, qui impose d'« aboutir à une solution équitable » sur la base du droit. Mais, comme le relève le Bangladesh lui-même, et je cite sa réplique « *Articles 74 and 83 of UNCLOS provide only that the goal of the delimitation process is an "equitable solution"* »². Du fait des dissensions entre les participants à la Troisième Conférence des Nations Unies sur le droit de la mer, ces deux dispositions ne donnent aucune indication sur la méthode à suivre pour arriver à ce résultat. Toutefois, cette lacune a été largement comblée depuis lors.

Pour reprendre les termes, pleins de sagesse et de bon sens, du Tribunal arbitral qui s'est prononcé sur la *Délimitation de la frontière maritime entre la Barbade et la Trinité-et-Tobago*, que je cite dans sa langue, en anglais :

*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. ... 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)*³.

¹ RB, p. 53, par. 3.8.

² RB, p. 52, par. 3.6 ; v. aussi MB, p. 72, par. 6.18.

³ 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, R.S.A.N.U., Vol. XXVII, p. 212, par. 230.

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Dès lors, comme l'a constaté ce même Tribunal, dans son apparente simplicité, la formule utilisée par les articles 74 et 83 de la Convention de 1982 est fort imprécise et, je cite à nouveau le Tribunal :

*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*⁴.

L'article 293, paragraphe 1, de la Convention de 1982, ainsi que les paragraphes 1^{er} des articles 74 et 83 qui renvoient tous deux « au droit international tel qu'il est visé à l'Article 38 du Statut de la Cour internationale de Justice », permet, et même permettent, et même imposent de recourir à cette riche jurisprudence. Mais, ici encore, le Bangladesh arrête la montre à 1982, voire à 1969, et fait l'impasse sur l'évolution et les précisions et clarifications que le droit a connues grâce à la pratique et à la jurisprudence internationales.

Pourtant, entre 1969/1982 et aujourd'hui, bien des choses se sont produites :

- la méthode de l'équidistance/circonstances spéciales, retenue à l'article 15 de la Convention pour la délimitation de la mer territoriale, a été transposée à celle du plateau continental et des zones économiques exclusives – les circonstances en question étant qualifiées dans ce cas de « pertinentes » plutôt que de « spéciales », mais sans que cette nuance terminologique ait d'incidence sur l'application de la méthode en question ;
- la généralisation de l'applicabilité de cette méthode-standard a été affirmée, que les côtes des Etats concernés soient adjacentes ou qu'elles se fassent face – comme cela ressort d'ailleurs de l'intitulé même des articles 74 et 83;
- les modalités de sa mise en œuvre ont fait l'objet de précisions croissantes qui excluent heureusement toute détermination arbitraire, et constituent des directives précieuses tant pour les Etats concernés que pour les cours et tribunaux appelés à se prononcer sur le tracé d'une frontière maritime.

Tout ceci, nos contradicteurs l'ignorent superbement.

Sans doute ont-ils semblé admettre que, et je cite leur mémoire :

*In both cases, the standard approach is now to begin by provisionally drawing an equidistance line and then to consider whether there are "special" or "relevant" circumstances which require an adjustment to – or abandonment of [a possibility which, from our point of view simply does not exist] – that line. Virtually all of the most recent cases, whether before the ICJ or international arbitral tribunals, have adopted this approach...*⁵.

Mais j'ai parlé au passé en disant « a semblé admettre », Monsieur le Président, car, si le Demandeur « a semblé admettre » ceci, il l'a fait dans son mémoire, et il est largement revenu sur ces positions réalistes dans sa réplique et durant les audiences. Ainsi, par exemple, au paragraphe 3.28 de sa réplique, le Demandeur critique le Myanmar pour avoir transposé au plateau continental et aux zones économiques exclusives la méthode de délimitation incluse

⁴ 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, *RSA*, Vol. XXVII, p. 210, par. 222 ; see also Guyane/Suriname, Décision du 17 septembre 2007, *ILM*, Vol. 47, 2008, p. 212, par. 333.

⁵ MB, p. 72, par. 6.18 – notes de bas de page omises.

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dans l'article 15 de la Convention⁶ – ce qu'il avait pourtant lui-même expressément admis quelques mois plus tôt lorsqu'il écrivait dans son mémoire, je cite, que : « Les deux règles sont toutefois essentiellement identiques » (« *The two rules, however, are substantially the same* »⁷).

De même, sur la question plus précise de l'applicabilité de la méthode de l'équidistance/circonstances pertinentes à la délimitation des espaces maritimes relevant d'États dont les côtes sont adjacentes, le Bangladesh en est resté à l'attitude dubitative de la CIJ dans son arrêt de 1969 et continue à affirmer qu'elle est plus adaptée à la délimitation du plateau continental entre États dont les côtes se font face que lorsque celles-ci sont adjacentes⁸. Cette position étrange est abandonnée depuis longtemps. Comme le Tribunal qui a eu à connaître de l'affaire *Barbade/Trinité-et-Tobago* l'a relevé, je cite : « *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* »⁹.

Du reste, jamais une juridiction internationale n'a refusé d'appliquer cette méthode standard au prétexte de l'adjacence des côtes des Parties, et le Myanmar a cité dans la note 357 de son contre-mémoire nombre d'affaires dans lesquelles des juridictions internationales l'ont appliquée à des États dont les côtes sont adjacentes.

Dans une perspective plus générale, il est un peu accablant de constater que, pour le Bangladesh, je cite, « *[t]he most pertinent cases in the jurisprudence are and remain the North Sea and Guinea/Guinea-Bissau cases* »¹⁰. La sentence arbitrale rendue dans cette affaire en 1985, *Guinée/Guinée-Bissau*, retient une méthode de délimitation assez saugrenue – qui n'est d'ailleurs pas celle de la bissectrice comme le prétend le Demandeur¹¹, mais qui ressemblerait plutôt à celle de la perpendiculaire à la direction (très) générale des côtes continentales; d'ailleurs, dans le tableau récapitulatif l'« Issue des affaires tranchées » qu'il a inclus sous l'onglet 1.18 du dossier des Juges du jeudi 8 septembre, le Pr Crawford a classé cette sentence parmi celles reposant sur une méthode *sui generis* (il est vrai qu'il a fait machine arrière lundi après-midi¹² – mais c'est jeudi qu'il avait raison !); au demeurant cette décision est demeurée à cet égard complètement isolée. Quant à l'arrêt de la CIJ – qui remonte, je le rappelle, à plus de quarante ans, je ne nie nullement qu'il fut fondateur en son temps, mais la jurisprudence de la Cour elle-même l'a rendu en grande partie obsolète, comme le montre le tableau que vous trouverez sous l'onglet 1 de votre dossier de ce matin.

Ce tableau, nous l'avons établi sur la base de celui de James Crawford que je viens de mentionner, en lui apportant quelques corrections qui nous paraissent mieux correspondre à ce qui a été décidé dans certains cas. Il parle de lui-même et n'appelle pas de très longs commentaires. Juste trois remarques :

- d'abord, premièrement, la méthode de l'équidistance/circonstances pertinentes est très largement prédominante (elle l'était déjà dans le tableau Crawford – 12 cas sur les 21 qu'il prétendait recenser mais qui, en réalité, ne sont que 19) ;

- deuxièmement, elle devient *exclusive* à partir de l'arrêt de la CIJ de 1993 dans l'affaire de *Jan Mayen* – et cela fait tout de même près de vingt ans ;

⁶ RB, p. 59, par. 3.28; v. aussi, par ex. : ITLOS/PV.11/2/Rev.1 (E), p. 34, lignes 20-23 (M. Crawford).

⁷ MB, p. 72, par. 6.18.

⁸ MB, p. 73, par. 6.19.

⁹ 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, *RSA*, Vol. XXVII, pp. 232-233, par. 316 ; v. aussi *Guyane/Suriname*, Décision du 17 septembre 2007, *ILM*, Vol. 47, 2008, p. 213, par. 338.

¹⁰ RB, p. 67, par. 3.51 ; v. aussi ITLOS/PV.11/2/Rev.1 (E), p. 15, lignes 38-41 (M. Paul Reichler).

¹¹ ITLOS/PV.11/2/Rev.1 (E), p. 16, lignes 1-4 (M. Paul Reichler).

¹² ITLOS/PV.11/5 (E), p. 3, lignes 17-19 et 22-23 (M. Crawford).

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- troisièmement, la seule exception étant l'arrêt de 2007 dans *Nicaragua c. Honduras*, qui s'explique pour des raisons très particulières sur lesquelles nous aurons l'occasion de revenir et qui ne se retrouvent pas dans notre espèce ; en tout cas, il est faux que « *the bisector method has been used in a number of recent judgments* »¹³ (« la méthode de la bissectrice a été utilisée dans nombre d'arrêts récents ») : un, c'est vraiment un très petit nombre !

A vrai dire, Monsieur le Président, loin de constituer le point d'aboutissement des règles applicables, l'Arrêt de 1969 a été le point de départ d'une longue évolution qui conduit à relativiser sa pertinence – notamment en ce qui concerne l'incertitude quant à la méthode à suivre pour aboutir à la solution équitable qui demeure l'objectif à atteindre ; mais pas n'importe quelle équité, ni par n'importe quel moyen.

Monsieur le Président, Messieurs les Juges, l'Etat demandeur essaie de vous présenter l'affaire qui nous réunit comme le combat de l'équité contre l'équidistance. C'est une vision un peu simpliste – ou plutôt abusivement simplificatrice de la position du Myanmar car, pour ce qui est de celle du Bangladesh, il n'est malheureusement que trop exact qu'il n'a qu'une seule obsession – dont il fait parfois l'aveu, au détour d'une phrase : il vous enjoint d'« écarter l'équidistance » (« *to set equidistance aside* »¹⁴).

Notre thèse est plus équilibrée. Je tiens à le répéter : pour le Myanmar, il ne s'agit ni de s'arc-bouter sur une conception politico-morale de l'équité comme le font nos contradicteurs, ni d'écarter l'équité au profit d'une équidistance mécaniquement appliquée. L'objectif est d'arriver à une solution équitable en suivant la méthode en trois temps, maintenant éprouvée, que quasiment toutes les décisions intervenues en matière de délimitation maritime au cours des deux dernières décennies ont mises en œuvre. On doit considérer aujourd'hui que cette méthode a acquis une valeur coutumière : visant à l'adoption d'une solution équitable, cette méthode – est-il encore nécessaire de le rappeler ? – impose de tracer d'abord une ligne d'équidistance provisoire, que l'on corrige ensuite, le cas échéant, pour empêcher que des circonstances pertinentes particulières aboutissent à une inéquité grossière et mesurable.

Permettez-moi, Monsieur le Président, de reprendre ces deux points, que l'on pourrait baptiser respectivement « L'équité sans l'équidistance » selon le Bangladesh et « L'équité par l'équidistance » selon le Myanmar.

L'opposition de l'équité à l'équidistance à laquelle le Demandeur tente de réduire cette affaire symboliserait aussi celle entre le grand méchant Myanmar – grand par l'étendue de ses côtes en tout cas – et le pauvre petit Bangladesh que marâtre nature a indument défavorisé en le dotant de côtes concaves, instables et menacées par tous les maux résultant de la colère des éléments ou créés par l'incurie des hommes – autant de facteurs, diète alimentaire des Bangladais¹⁵ et réchauffement climatique inclus¹⁶, qui devraient conduire ce Tribunal à accorder des « compensations » au Demandeur¹⁷. Peut-être malheureusement – je ne me suis jamais défendu d'être « tiers-mondiste » ; quoique, après tout, le Myanmar aussi soit un pays pauvre et ses côtes largement concaves... – peut-être malheureusement disais-je, en dépit des lamentations et des appels du Bangladesh aux bons sentiments¹⁸, ni l'équité

¹³ ITLOS/PV.11/4 (E), p. 9, lignes 38-39 (M. Sands); v. aussi ITLOS/PV.11/5 (E), p. 1, lignes 43-48 (M. Crawford).

¹⁴ MB, p. 86, par. 6.55.

¹⁵ MB, pp. 81-82, par. 6.39 ; ITLOS/PV.11/2/Rev.1(E), p. 5, lignes 8-10 (Mme. Moni).

¹⁶ V. RB, p. 85, par. 3.104.

¹⁷ V. par ex. ITLOS/PV.11/2/Rev.1 E, p. 15, ligne 37 ou p. 17, ligne 47 (M. Reichler); ITLOS/PV.11/6 E, p. 28, ligne 47 (M. Boyle).

¹⁸ V., parmi de très nombreux exemples : MB, p. 78, par. 6.30 ou RB, p. 62, par. 3.39; p. 84, par. 3.100 ou p. 86, par. 3.105 RB, p. 69, par. 3.57; p. 70, par. 3.59; v. aussi ITLOS/PV.11/2 (E), p. 15, lignes 18-35 (M. Reichler), ITLOS/PV.11/4 (E), p. 14, lignes 39-41 (M. Martin) et ITLOS/PV.11/5 (E), p. 10, lignes 26-27 (M. Crawford).

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compensatrice ni la « justice distributive »¹⁹ n'ont de place dans le droit de la délimitation maritime. Il ne saurait être question de « refaire entièrement la nature » – une expression qui a sur nos amis de l'autre côté de la barre un peu l'effet que produit un chiffon rouge sur un taureau²⁰; mais, que cela leur plaise ou non, c'est l'un des éléments-clés du droit de la délimitation maritime²¹. Il ne peut davantage être question de répartir, sur une base subjectivement équitable, la zone dans laquelle les réclamations des Parties se chevauchent, contrairement aux demandes insistantes du Bangladesh²². Comme l'a fermement rappelé la CIJ dans l'arrêt qu'elle a rendu à l'unanimité dans l'affaire *Roumanie c. Ukraine* en 2009, je cite :

La délimitation ne vise pas à découper un secteur en parts égales, ni même en parts proportionnelles (...). L'objet de la délimitation est en effet de parvenir à un résultat équitable et non à une répartition égale des espaces maritimes²³.

Et ce résultat doit être apprécié en fonction de la configuration générale des côtes²⁴, pas de revendications subjectives des Parties.

Or, bien qu'il s'en défende, toute la stratégie du Bangladesh vise en réalité à réintroduire dans le droit applicable à la délimitation maritime la trop grande subjectivité dont quarante années d'évolution de la jurisprudence ont progressivement permis de le libérer. Gommant à son habitude ces évolutions jurisprudentielles, le Demandeur n'hésite pas à écrire dans sa réplique, que je lis :

*Under the law today, as before, the Tribunal retains a significant margin of appreciation to fashion an equitable solution in light of the particulars of the case before it*²⁵.

« En vertu du droit contemporain, comme précédemment... » (« *Under the law today, as before...* ») – rien n'a changé donc dans le droit de la délimitation maritime; l'indétermination de 1969 (et, dans une large mesure, de 1982) demeure la règle. Et cela revient, évidemment, à appeler le juge à faire prévaloir une conception subjective de l'équité, faite de bons sentiments et de ressentiments contre une nature injuste, sur celle, strictement encadrée par le droit, qui prévaut aujourd'hui dans toutes les enceintes compétentes en matière de délimitation maritime, y compris celle de l'auteur de l'arrêt de 1969, je veux dire la Cour internationale de justice.

¹⁹ C.I.J., arrêt, 3 juin 1985, *Plateau continental (Jamahiriya arabe libyenne/Malte)*, Recueil 1985, p. 40, par. 46.

²⁰ V. not. RB, pp. 52-53, par. 3.8, p. 70, par. 3.60 et p. 71, par. 3.62; v. aussi : ITLOS/PV.11/5 E, p. 8, lignes 27-32 (M. Crawford).

²¹ C.I.J., arrêt, 10 octobre 2002, *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, Recueil 2002, pp. 443-445, par. 295; voir aussi C.I.J., arrêt, 20 février 1969, *Plateau continental de la mer du Nord*, Recueil 1969, p. 49, par. 91; *Délimitation du plateau continental entre le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et la République française*, sentence du 10 juin 1977, RSA, Vol. XVIII, p. 58, par. 101; C.I.J., arrêt, 3 juin 1985, *Plateau continental (Jamahiriya arabe libyenne/Malte)*, Recueil 1985, p. 45, par. 57; C.I.J., arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, Recueil 2007, p. 747, par. 289; *Guyana/Suriname*, sentence du 17 septembre 2007, ILM, Vol. 47, 2008, p. 164, pars. 373-374 (disponible à l'adresse <http://www.pca-cpa.org/>).

²² V. ITLOS/PV.11/2/Rev.1 (E), p. 21, lignes 38-41 (M. Crawford) ; v. aussi MB, p. 81, par. 6.37 et pp. 81-82, par. 6.39.

²³ V. C.I.J. Recueil 2009, pp. 99-100, pars. 110-111 de l'arrêt.

²⁴ V. not. C.I.J., arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, Recueil 2009, p. 89, par. 77 ; ou, arrêt, 10 octobre 2002, *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, Recueil 2002, pp. 443-445, par. 295.

²⁵ RB, p. 58, par. 3.26.

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Je vois mal, Messieurs les Juges, en quoi cet appel à la fabrication subjective d'une solution équitable se distingue d'une incitation à vous prononcer *ex aequo et bono*, ce que pourtant le Demandeur dit refuser au même titre que le Défendeur²⁶. Et c'est aussi à une décision *ex aequo et bono* que vous conduirait cette autre curieuse position du Bangladesh lorsqu'il semble considérer que les points de base permettant de tracer la ligne provisoire d'équidistance peuvent être choisis à bien plaisir. Ils doivent être choisis certes – déterminés serait peut-être un mot plus approprié – mais pas au hasard ou en fonction des intérêts subjectifs d'une partie ; ils doivent l'être sur la seule base de critères juridiques progressivement précisés par une jurisprudence de plus en plus rigoureuse. Monsieur Lathrop l'établira plus précisément tout à l'heure.

J'ajoute qu'au nombre des succès dont le Pr Crawford peut s'enorgueillir – et qu'il qualifie, trop modestement, de « modestes »²⁷ – il y en a eu un, obtenu d'ailleurs à mes dépens, dans l'affaire *Cameroun c. Nigéria*, dans laquelle mon contradicteur et ami a développé à peu près l'argumentation que je viens de faire valoir²⁸. J'avais plaidé le contraire au nom du Cameroun ; mais, malheureusement pour moi et pour le Cameroun, c'est au Nigéria que la Cour a donné raison, en appliquant strictement la méthode de l'équidistance malgré la situation du Cameroun, autrement plus désavantageuse que celle dont se lamente le Conseil du Bangladesh – alors même que le Cameroun était, assurément, un « étranger dans la foule »²⁹. (Je ne sais pas très bien pourquoi M. Crawford voulait chanter ceci³⁰ mais je dois dire que j'attends avec impatience qu'il chante sa prochaine plaidoirie). Quoi qu'il en soit, et pour en revenir au sujet plus grave qui nous occupe, le cas du Demandeur est, comme je l'ai dit, moins dramatique que ses avocats veulent le faire croire – beaucoup moins, assurément, que celui de l'Allemagne dans les affaires de 1969. Et, dans cette perspective, il n'est pas sans intérêt de noter que, lors de la Troisième Conférence, le Bangladesh ne faisait pas même partie du groupe des Etats sans littoral ou géographiquement désavantagés³¹, pas davantage qu'il ne fait partie de ce groupe aujourd'hui au sein de l'Autorité³² ; voici, Monsieur le Président, un indice assez révélateur.

En s'attachant exclusivement au caractère équitable de la solution à retenir et en faisant fi des règles les mieux établies pour y parvenir, l'Etat demandeur inverse toute la logique des règles de délimitation patiemment consolidées par la jurisprudence de la Cour de La Haye et des tribunaux arbitraux : d'objectif, la solution équitable devient méthode de délimitation et tient lieu d'alpha et d'oméga à toute son argumentation.

Au demeurant, Monsieur le Président, que l'équité ait son rôle à jouer, nul – et sûrement pas le Myanmar – n'en disconvient. Mais elle ne saurait être à la fois le point de départ, la méthode et le point d'aboutissement de toute l'opération de délimitation. Dans la méthode en trois temps, dont le Bangladesh concède du bout des lèvres qu'elle est aujourd'hui la « méthode standard »³³ (*the « standard approach »*) (bien qu'il se fût

²⁶ V. ITLOS/PV.11/2/Rev.1 (E), p. 21, lignes 27-30 (M. Crawford); ITLOS/PV/11/4 (E), p. 9, lignes 18-24 (M. Sands); v. aussi : CMM, p. 89, par. 5.6 ou p. 101, par. 5.36, RB, p. 53, par. 3.10, ou p. 57, par. 3.23.

²⁷ Cf. TLOS/PV.11/2/Rev.1 (E), p. 26, lignes 40-42 (M. Crawford).

²⁸ CR 2002/13, p. 55, pars. 13-14, p. 56, pars. 15-17, pp. 56-57, para. 19, p. 57, para. 20, pp. 58-59, para. 29 et p. 59, para. 30.

²⁹ ITLOS/PV.11/2/Rev.1 (E), p. 25, lignes 32-33 (M. Crawford).

³⁰ *Ibid.*

³¹ V. M. Nordquist et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, 1985, Vol. II, pp. 72-73.

³² <http://www.isa.org.jm/files/documents/EN/16Sess/Assembly/ISBA-16A-CRP2.pdf>.

³³ MB, p. 72, par. 6.18 et RB, p. 54, par. 3.17 et p. 60, par. 3.33; ITLOS/PV.11/4 (E), p. 9, lignes 28-30 (M. Sands).

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également rétracté sur ce point la semaine dernière, puisque M. Reichler a parlé d'« approche *soi-disant standard* » (« so-called *standard approach*»³⁴), l'équité intervient à deux reprises :

- dans la deuxième phase, lorsqu'il faut se demander si des circonstances pertinentes ne devraient pas induire un déplacement de la ligne d'équidistance provisoire établie durant la phase 1;

et,

- à nouveau, durant la troisième et dernière phase, qui consiste à s'assurer qu'il n'existe pas de disproportion marquée entre le rapport des longueurs des côtes de chaque Etat et celui des espaces maritimes situés de part et d'autre de la ligne de délimitation.

J'ai réellement quelques scrupules, Monsieur le Président, à rappeler ces données, maintenant élémentaires du droit de la délimitation maritime qui résultent d'une lente maturation coutumière dont attestent unanimement « les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations », dont je rappelle qu'il s'agit de « moyens auxiliaires, auxiliaires mais privilégiés, de détermination des règles de droit » international, cela aux termes de l'Article 38 du Statut de la CIJ, auquel renvoient les articles 74 et 83 de la Convention de Montego Bay, disposition dont le Demandeur ne fait aucun cas.

Cette quasi-unanimité jurisprudentielle et doctrinale et les références précises figurant à cette méthode en trois temps dans les écritures du Myanmar³⁵, me dispensent de m'appesantir – sauf, tout de même, à rappeler un point, qui concerne la première phase, celle dans laquelle l'équité, justement, n'a pas son mot à dire.

Pendant longtemps, la jurisprudence s'est montrée incertaine sur le caractère prioritaire du recours à l'équidistance en vue de tracer la ligne initiale de délimitation. Le Bangladesh, fidèle à sa superbe indifférence à l'égard de la chronologie, joue de ces incertitudes passées pour affirmer qu'il n'existe pas de présomption en faveur de l'équidistance. Mais ce qui pouvait être exact en 1969 ne l'est assurément pas en 2011. D'ailleurs, comme le faisait remarquer la CIJ dans un passage de son arrêt de 1985 dans *Libye/Malte*, curieusement cité par le Pr Crawford la semaine dernière, et que je cite également, « la convention fixe le but à atteindre, mais elle est muette sur la méthode à suivre pour y parvenir. Elle laisse aux Etats et aux juges le soin de lui donner un contenu précis »³⁶. C'est ce qui s'est passé, les juges ont donné un contenu précis à la méthode et, selon les termes du Tribunal arbitral qui s'est prononcé sur la *Frontière maritime entre la Guyane et le Suriname*, je cite

*In the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflect special or relevant circumstances*³⁷.

Et le Tribunal de préciser qu'il y a là « une présomption en faveur de l'équidistance » (*a « presumption in favour of equidistance »*) – l'expression y est.

Cette présomption, certes, n'est pas irréfragable ; et il peut y avoir des cas dans lesquels, le recours à l'équidistance étant impossible, on est obligé de se rabattre sur des

³⁴ ITLOS/PV.11/4 (E), p. 27, ligne 39.

³⁵ CMM, pp. 99-100, pars. 5.30-5.32, p.121, par. 5.76 and DM, p. 82, par. 4.3.

³⁶ C.I.J., arrêt, 3 juin 1985, *Plateau continental (Jamahiriya arabe libyenne/Malte)*, Recueil 1985, pp. 30-31, par. 28; cité in ITLOS/PV.11/2/Rev.1, p. 30, lignes 27-30 (M. Crawford).

³⁷ *Guyane/Suriname*, Décision du 17 septembre 2007, *ILM*, Vol. 47, 2008, pp. 212-213, par. 335.

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méthodes de substitution. C'est ce qui s'est produit dans l'affaire de la *Délimitation maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes*, affaire dans laquelle la CIJ s'est trouvée, je la cite, « face à des circonstances spéciales qui ne lui permettent pas -qui ne lui permettent pas- d'appliquer le principe de l'équidistance »³⁸. Dans son arrêt de 2007, la Cour de La Haye, tout en rappelant que, je cite également, « [c]e dernier [principe] n'en demeure pas moins la règle générale » a considéré qu'

[a]yant conclu à l'impossibilité de construire une ligne d'équidistance à partir du continent, [elle devrait] envisager l'applicabilité des autres méthodes proposées par les Parties³⁹.

En revanche, comme l'a dit très clairement la CIJ dans son arrêt de 2009 dans *Roumanie c. Ukraine*, en l'absence de « raisons impérieuses » (« *compelling reasons* ») (ce faisant, la Cour faisait référence à *Nicaragua c. Honduras*), en l'absence de raisons impérieuses, c'est bien une ligne d'équidistance qui doit être tracée lors de la première étape, je cite à nouveau :

Lorsqu'il s'agit de procéder à une délimitation entre côtes adjacentes, une ligne d'équidistance est tracée, à moins que des raisons impérieuses propres au cas d'espèce ne le permettent pas⁴⁰.

Mais il va de soi que l'éventuelle inéquité de la ligne d'équidistance ne constitue pas une telle « raison impérieuse » puisque c'est précisément pour la corriger le cas échéant qu'interviennent les circonstances pertinentes de la deuxième phase et le test de non-disproportionnalité de la troisième.

C'est que la méthode de délimitation des espaces maritimes entre Etats dont les côtes sont adjacentes ou se font face est à la fois solidement établie et complexe (elle comporte plusieurs phases dans lesquelles l'équité et l'équidistance jouent chacune le rôle qui leur revient – un rôle complémentaire qui garantit qu'aucune ne sera « phagocytée » par l'autre).

Monsieur le Président, dans une allocution, à laquelle il m'a été donné d'assister, que vous avez prononcée devant les Conseillers juridiques réunis dans l'enceinte des Nations Unies en octobre dernier, vous avez déclaré, je me permets de vous citer :

... le Tribunal a, à l'occasion, eu recours à la jurisprudence de la CPJI et de la CIJ, pour vérifier l'existence du droit coutumier et de principes généraux de droit dans des situations où la Convention ne donnait pas suffisamment d'indications. Cela montre sans équivoque possible que le Tribunal se fie à la jurisprudence d'autres cours internationales pour ce qui est de certaines questions, et cela prouve clairement que, du moins dans le cas du Tribunal, les craintes relatives à la possible fragmentation de la jurisprudence des cours et tribunaux internationaux sont injustifiées⁴¹.

Monsieur le Président, Messieurs les Juges, nous n'avons pas ces craintes : nous sommes convaincus que votre décision ne constituera pas le retour en arrière auquel le

³⁸ Arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, Rec. 2007 (II), p. 745, par. 281.

³⁹ *Ibid.*, par. 283.

⁴⁰ C.I.J., arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, Recueil 2009, p. 101, par. 116.

⁴¹ Allocution prononcée par M. le Juge José Luis Jesus, Président du Tribunal international du droit de la mer, à la Réunion officielle des conseillers juridiques des ministères des affaires étrangères, New York, le 25 octobre 2010; disponible à l'adresse suivante:

http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/jesus/legal_advisors_251010_fr.pdf.

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Bangladesh vous invite et que, loin de remettre en cause les compléments et les précisions que quarante ans de pratique étatique et de jurisprudence ont apportés au droit hésitant, esquissé par l'Arrêt de la CIJ de 1969 et par la Convention de 1982, conformément à votre pratique constante⁴², vous appliquerez les normes maintenant coutumières traduisant ces évolutions. Car – et c'est à nouveau à votre allocution de l'an dernier que j'emprunte le mot de la fin de ma présentation, Monsieur le Président, je vous cite :

L'application des normes de droit coutumier et de principes généraux de droit devient pertinente, comme le démontre la jurisprudence du Tribunal, dans des situations où, pour reprendre la terminologie d'un groupe de travail de la Commission du droit international, les dispositions de la Convention sont 'obscur[e]s] ou ambiguë[s]'; '[l]es termes utilisés dans [la Convention] ont une signification reconnue en droit international coutumier ou selon les principes généraux de droit'; ou lorsque la Convention ne fournit pas d'indications suffisantes⁴³.

C'est en partie le cas s'agissant des règles applicables en matière de délimitation maritime – tout particulièrement au-delà de la mer territoriale.

Merci, Messieurs les Juges, pour votre écoute attentive. Puis-je vous prier, Monsieur le Président, de bien vouloir donner la parole au Professeur Mathias Forteau qui va revenir plus précisément sur le rôle que joue l'équidistance dans la présente affaire.

The President:

Thank you.

I give the floor to Professor Mathias Forteau.

⁴² V. not. avis consultatif, 1^{er} février 2011, *Responsabilités et obligations des États qui patronnent des personnes et des entités dans le cadre d'activités menées dans la Zone (Demande d'avis consultatif soumise à la Chambre pour le règlement des différends relatifs aux fonds marins)*, p. 57, p. 22.

⁴³ *Ibid.*; v. aussi ITLOS/PV.11/2/Rev.1 (E), p. 21, lignes 32-46 (M. Crawford).

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 [ITLOS/PV.11/9/Rev.1, Fr, p. 11–19]

M. Forteau :

Merci Monsieur le Président.

Monsieur le Président, Messieurs du Tribunal, c'est un très grand honneur, c'est aussi un insigne privilège, c'est enfin un immense plaisir que d'apparaître pour la première fois devant votre haute juridiction.

Monsieur le Président, le Professeur Pellet vient de rappeler que la méthode applicable à la délimitation des zones économiques exclusives et du plateau continental est celle de l'équidistance et des circonstances pertinentes, laquelle, je n'ai plus besoin de le rappeler maintenant, se décline en trois étapes :

- établissement de la ligne provisoire d'équidistance,
- recherche de circonstances éventuellement pertinentes,
- enfin, examen du test de la non-disproportionnalité.

Dans les exposés qui vont suivre, les conseils du Myanmar détailleront, en suivant scrupuleusement cette méthode, les raisons pour lesquelles la ligne d'équidistance aboutit en l'espèce à la solution équitable envisagée aux articles 74 et 83 de la Convention sur le droit de la mer.

Avant de développer ces raisons, il est important toutefois de rappeler de manière préliminaire les points fondamentaux qui gouvernent en l'espèce l'application de la méthode de l'équidistance et des circonstances pertinentes dans le cas particulier de notre affaire. C'est ce à quoi je vais m'employer dans les vingt minutes qui suivent, en ordonnant ces points fondamentaux autour de deux axes principaux :

- je commencerai par présenter les éléments géographiques pertinents qui conditionnent l'opération de délimitation ;
- puis, dans un second temps, j'indiquerai les raisons pour lesquelles en la présente affaire la ligne d'équidistance reflète équitablement la géographie côtière.

Les éléments géographiques sont évidemment fondamentaux. Chacun sait que dans toute opération de délimitation, il convient de partir du principe incontesté selon lequel « la terre domine la mer ». Cette considération fondamentale exerce un double effet sur l'opération de délimitation, un premier effet de nature positive, un second effet de nature négative.

La délimitation dépend tout d'abord –c'est là le premier aspect du principe– de la configuration côtière : c'est elle en effet qui dicte le tracé. La Cour internationale de Justice a eu l'occasion de le rappeler dans l'affaire *Roumanie c. Ukraine* :

[!]e titre d'un Etat sur le plateau continental et la zone économique exclusive est fondé sur le principe selon lequel la terre domine la mer du fait de la projection des côtes ou des façades côtières.

La Cour a rappelé à ce propos également que :

[d]ans l'affaire du Plateau continental (*Tunisie c. Jamahiriya arabe libyenne*), la Cour a fait observer que « c'est la côte du territoire de l'Etat qui est déterminante pour créer le titre sur les étendues sous-marines bordant cette côte » (arrêt, *C.I.J. Recueil 1982*, p. 61, par. 73)¹.

¹ Arrêt du 3 février 2009, *C.I.J. Recueil 2009*, p. 89, par. 77.

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Consécutivement, et c'est là l'aspect négatif du rôle joué par la configuration côtière, la délimitation ne peut pas conduire à refaire la nature, comme les juridictions internationales, de nouveau, l'ont rappelé à de très nombreuses reprises. Les éléments géographiques sont un donné que le juge international doit prendre en compte tel qu'il est en réalité, et non tel qu'il devrait être dans le monde rêvé. Les termes employés par la Cour internationale de Justice dans son arrêt du 10 octobre 2002 en l'affaire *Cameroun c. Nigeria*, qui vous sont si bien connus que j'hésite à les rappeler, l'expriment clairement :

La configuration géographique des espaces maritimes que la Cour est appelée à délimiter est une donnée. Elle ne constitue pas un élément que la Cour pourrait modifier, mais un fait sur la base duquel elle doit opérer la délimitation².

A ce titre, il est bien entendu que la délimitation doit refléter la géographie côtière ; elle n'a pas vocation à la redessiner. L'aspect constitutif du principe selon lequel « la terre domine la mer » ne doit jamais être séparé de son aspect limitatif : l'un et l'autre sont les deux faces d'une seule et même médaille : la côte crée le titre, sa configuration en dicte les limites.

Messieurs les Juges, quels sont, en l'espèce, les éléments géographiques pertinents ?

Tout d'abord et nous n'avons jamais eu de désaccord sur ce point avec nos contradicteurs, le golfe du Bengale est de nature indiscutablement concave. Il est concave mais ceci, en soi, ne dispose pas de la question.

Tout d'abord, il faut souligner que le Bangladesh n'est pas le seul Etat à être affecté par la concavité du golfe du Bengale. Comme cela est illustré par le croquis projeté à l'écran, l'Inde, dans sa relation avec le Sri Lanka, à l'ouest, ou le Myanmar dans sa relation avec l'Inde, à l'est, sont eux aussi, à des degrés divers, affectés par la concavité du golfe. Cela pourtant n'a nullement conduit les Etats de la région à rejeter l'équidistance.

Tout à l'inverse, il est significatif de constater que les accords de délimitation conclus à ce jour par les Etats bordant le golfe du Bengale n'ont pas utilisé d'autre méthode que celle de l'équidistance³. Par ailleurs, ces accords y ont fait recours y compris lorsque cela pouvait créer des effets d'amputation. C'est le cas par exemple de la délimitation opérée, au sud-ouest du golfe, entre les Maldives, l'Inde et le Sri Lanka.

Plus généralement, ce croquis des délimitations dans la région montre que ces délimitations reflètent la géographie côtière, y compris les inégalités naturelles qu'elle peut générer (en particulier du fait de la présence au sud-est du golfe des îles indiennes). Mais l'opération de délimitation n'a précisément pas pour objet de compenser ces inégalités naturelles. Nous ne contestons pas que la main de l'équité, si elle avait eu ce pouvoir, eût pu redistribuer différemment l'ensemble de ces délimitations. Mais l'équité, ce n'est pas le résultat équitable qu'impose le droit et la convention dont votre Tribunal est l'organe. A la différence de l'équité, le résultat équitable est géographiquement conditionné.

S'agissant plus précisément maintenant de la zone pertinente à délimiter, il importe de souligner en premier lieu que la côte du Myanmar est, dans cette zone pertinente, elle aussi de nature concave — c'est en effet sa forme générale du point d'arrivée de la frontière terrestre avec le Bangladesh jusqu'à Cap Negrais, le dernier point de la côte pertinente du Myanmar.

La concavité générale du golfe du Bengale ne constitue pas en second lieu un élément intrinsèquement pertinent aux fins de la présente délimitation entre les deux Etats parties au différend. Ce qui est déterminant, c'est la configuration géographique des côtes qui contrôlent la délimitation. Je le rappelle, la côte crée le titre, sa configuration en dicte les limites. C'est

² Arrêt du 10 octobre 2002, *CIJ Recueil 2002*, pp. 443-445, par. 295.

³ V. contre-mémoire du Myanmar, pars. 2.31-2.44.

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donc à la configuration géographique de la côte des deux Etats partie au litige qu'il faut s'intéresser avant tout.

La Cour internationale de Justice l'a souligné d'une manière particulièrement claire dans l'affaire *Cameroun c. Nigeria*. Dans cette affaire, la Cour a rejeté l'argument de la concavité invoqué par le Cameroun au motif que « les secteurs de côte pertinents aux fins de la présente délimitation ne présentent aucune concavité particulière ».

Je note ici que la Cour en 2002 ne dit pas ce que lui a fait dire le professeur Crawford selon qui la Cour aurait décidé que les côtes n'auraient pas été concaves du tout (« *were not concave at all* »⁴). La Cour dit que les secteurs de côtes pertinents ne présentent pas de concavité « particulière ». Selon la Cour toujours, dans son arrêt de 2002 :

[J]a concavité des côtes camerounaises se manifeste en effet essentiellement [je souligne que la Cour ne dit pas ici exclusivement, elle dit essentiellement] dans le secteur où elles font face à Bioko⁵.

Nous avons représenté ceci sur un croquis pour mieux restituer la portée de la décision de la Cour que le professeur Crawford vous a présentée de façon incomplète lors de sa première plaidoirie du jeudi⁶. Vous trouverez ce croquis à l'onglet n° 3 de l'audience de ce matin.

Vous y voyez tout d'abord que la configuration côtière générale dans cette zone, et singulièrement la côte camerounaise, est indiscutablement de nature concave. La Cour internationale de Justice a considéré néanmoins que la concavité de la côte camerounaise située à l'est de l'île de Bioko, laquelle est sous la souveraineté d'un Etat tiers, ne relevait pas de la zone pertinente à délimiter.

Selon la Cour, les côtes pertinentes du Cameroun –elles sont surlignées en bleu foncé sur le croquis– s'arrêtent, dans sa relation au Nigeria, au Cap Debundsha. La Cour en a tiré la conséquence qu'il n'y avait pas lieu de prendre en compte la concavité située plus à l'est. Cela veut dire –et c'est un premier enseignement important de cet arrêt– que la Cour a exclu toute approche régionale de la configuration côtière et de la délimitation. Elle s'est concentrée sur la seule configuration côtière des deux Etats parties au litige –et d'eux seuls uniquement.

Le professeur Crawford en a dit un mot il y a dix jours⁷, mais il a cependant manqué de préciser que la Cour n'a pas non plus estimé devoir tenir compte de deux autres concavités qui étaient présentes pourtant dans le secteur pertinent à délimiter.

D'une part, la côte pertinente du Cameroun –celle qui selon la Cour s'arrête au Cap Debundsha– est elle aussi concave. Elle est en effet d'abord dans une relation d'adjacence droite avec la côte du Nigeria avant de subir une concavité secondaire et de se diriger ensuite vers le sud-est quasiment à angle droit jusqu'au Cap Debundsha. Selon la Cour, je le rappelle, il n'y a ici aucune concavité « particulière ».

D'autre part, la côte ouest de l'île de Bioko crée une concavité qui entraîne un effet d'enclavement drastique pour le Cameroun. Le Nigeria avait souligné lors de ses plaidoiries dans cette affaire que « Les côtes nord et ouest de Bioko constituent la troisième côte pertinente de cette zone »⁸. Bien entendu, il ne s'agissait pas d'une côte pertinente au sens strict du terme puisque l'île de Bioko relevait d'un Etat tiers. Mais cette affirmation venait expliciter à très juste titre l'effet produit par la côte nord et ouest de l'île de Bioko sur la ligne

⁴ ITLOS/PV.11/2/Rev. 1, p. 24, lignes 29-30.

⁵ Arrêt du 15 octobre 2002, *CJ Recueil 2002*, p. 445, par. 297.

⁶ ITLOS/PV.11/2/Rev.1 (E), par. 24-26.

⁷ *Ibid.*

⁸ CR 2002/13, audience publique du 7 mars 2002 (matin), p. 38, par. 47 *in fine* [www.icj-cij.org].

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de délimitation à opérer entre le Cameroun et le Nigeria. Cette concavité entre les trois Etats produit un effet d'enclavement manifeste. La Cour a jugé néanmoins que cette concavité manifeste n'entraîne pas en ligne de compte. Selon la Cour, il n'y avait pas lieu d'ajuster la ligne d'équidistance stricte en faveur du Cameroun, malgré l'effet d'amputation que cette ligne lui occasionne. Autrement dit, la Cour s'en est tenue au caractère d'adjacence des côtes des deux Etats de part et d'autre du point d'arrivée de leur frontière terrestre sans se préoccuper ni de la configuration côtière régionale, ni de la concavité et de l'effet d'amputation subi par le Cameroun du fait de la présence de l'île de Bioko qui relevait de la souveraineté d'un Etat tiers⁹.

Cette solution vaut *a fortiori* dans la présente affaire. De nouveau, nous avons affaire à une configuration côtière qui, à l'échelle du golfe, il est vrai, est globalement concave. Mais les côtes du Bangladesh et du Myanmar qui contrôlent la délimitation sont « essentiellement », elles, dans un rapport d'adjacence droite, et même légèrement convexe, comme cela ressort du croquis projeté maintenant à l'écran.

Le point de départ de la délimitation maritime ne se situe nullement, en effet, dans la concavité. Vous trouvez ce croquis par ailleurs sous l'onglet 3.4 de l'audience de ce matin. Le point de départ de la délimitation maritime ne se situe nullement, vous le voyez donc, en effet, dans la concavité. Le point de départ de notre délimitation maritime se situe bien plus au sud, à l'endroit où les côtes des deux parties sont dans une relation d'adjacence droite, orientée vers le sud-ouest. M. Martin a négligé cet élément déterminant dans ses croquis abstraits sur la concavité¹⁰. La frontière terrestre entre le Myanmar et le Bangladesh (les Etats A et B sur les croquis de M. Martin) n'aboutit pas dans la concavité. Le point d'arrivée de la frontière terrestre se situe bien au-delà de cette concavité, et ne pas le prendre en compte, c'est refaire la géographie.

Contrairement à ce qu'a affirmé M. Martin lundi dernier¹¹, cette relation d'adjacence droite est tout à fait significative puisqu'elle se poursuit de part et d'autre de la frontière terrestre sur plus de 100 kilomètres (je précise, plus de 100 kilomètres de part et d'autre de la frontière terrestre et donc du point de départ de la délimitation maritime). Et en raison précisément de ce caractère principalement adjacent des côtes des deux Etats, la plus grande partie de la ligne d'équidistance n'est pas influencée par la partie nord de la côte du Bangladesh. La partie nord de la côte du Bangladesh ne commence à influencer la ligne d'équidistance qu'à l'extrémité de cette ligne, lorsque les prétentions des Parties à la présente instance risquent de se heurter à celles de l'Inde, Etat tiers au présent différend. M. Lathrop y reviendra plus précisément dans un instant¹².

Pour reprendre les termes adoptés par la Cour de La Haye en 2002, la concavité de la côte du Bangladesh ne se fait donc pas « essentiellement » sentir dans le secteur à délimiter. A dire vrai, nous sommes ici dans une situation bien plus adjacente, si je peux le formuler ainsi, que dans l'affaire *Cameroun c. Nigéria* : c'est un fait géographique déterminant.

Cette relation d'adjacence droite dans le secteur pertinent à délimiter s'accompagne d'un autre facteur géographique important. Le Bangladesh n'a cessé de protester contre le fait qu'un seul point de base sur sa côte contrôle la ligne d'équidistance sur la majeure partie de son tracé. Il s'agit du point β1, situé à proximité de la frontière terrestre et que vous présenterez tout à l'heure M. Lathrop. La plainte du Bangladesh est extrêmement singulière : ce point de base en effet lui est extrêmement favorable : il s'avance plus à l'ouest que les points de base situés sur la côte du Myanmar¹³. A ce titre, il avantage le Bangladesh, qui est

⁹ V. aussi duplique du Myanmar, par. 6.41.

¹⁰ Session du 12 septembre 2011, Tab. 3.7.

¹¹ ITLOS/PV.11/4 (E), p. 15, l. 13-32 (Martin).

¹² V. aussi duplique du Myanmar, par. 5.15

¹³ V. duplique du Myanmar, par. 5.13.

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mal venu de s'en plaindre. J'ajouterai que si ce point de base exerce cet effet à l'avantage du Bangladesh, c'est précisément aussi parce que dans la zone pertinente, le caractère adjacent des côtes est prédominant¹⁴.

Enfin, si la configuration des côtes est déterminante, leur longueur entre également en ligne de compte sous l'angle de la vérification de l'absence de disproportionnalité.

A l'échelle du golfe à laquelle le Bangladesh a tendance à se placer abusivement, il n'y a rien de comparable entre la longueur des côtes du Bangladesh, d'une part, et la longueur des côtes de l'Inde et du Myanmar d'autre part. Contrairement à l'affirmation répétée du Demandeur, nous ne sommes certainement pas dans la situation de trois États situés dans une situation de quasi-égalité géographique. Les longueurs respectives de leurs littoraux respectifs ne sont tout simplement pas comparables.

Cela vaut également lorsque l'on passe à l'échelle qui est la seule pertinente en droit, celle de la zone à délimiter. Comme l'expliquera dans un instant M. Müller, les côtes pertinentes des deux parties aux fins de la présente délimitation sont dans un rapport de 1 à 2 en faveur du Myanmar. Conscient de la difficulté, le Bangladesh en est venu à soutenir lors de son premier tour de plaidoiries que les côtes pertinentes du Bangladesh seraient en réalité plus longues que celles du Myanmar¹⁵. Nous vous laissons apprécier la crédibilité d'une telle prétention – même dans sa réplique, le Bangladesh n'avait osé défendre pareille idée. En moins de six mois, entre le dépôt de la réplique et l'ouverture des audiences, la côte du Bangladesh s'est agrandie de 72 kilomètres, la côte du Myanmar d'un petit kilomètre uniquement...¹⁶ A ce rythme, Messieurs les Juges, la côte du Bangladesh atteindra bientôt le cap Négrais !

J'en viens, Monsieur le Président, à mon deuxième point, dans lequel j'indiquerai plus brièvement les raisons pour lesquelles la ligne d'équidistance reflète équitablement en l'espèce la géographie côtière.

Il me faut pour cela commencer par rappeler que les deux parties au litige semblent d'accord pour considérer que la ligne unique de délimitation qu'elles vous invitent à tracer vise à séparer des espaces maritimes qui sont la projection des masses continentales des deux États. Autrement dit, il s'agit, fondamentalement, d'une délimitation de masse continentale à masse continentale (a « mainland-to-mainland delimitation »). Les avocats du Bangladesh se sont offusqués, certes, lors de leur premier tour de plaidoiries, de l'emploi de cette expression dont M. Lathrop a rappelé vendredi qu'elle n'avait pourtant rien d'inédit, au contraire¹⁷. Cela n'enlève rien au fait de toute manière que l'expression correspond parfaitement à ce qu'est, en l'espèce, la délimitation qu'il vous appartient de tracer.

Le Myanmar estime qu'aucun effet ne peut être donné à ce titre à l'île de Saint Martin au-delà de la mer territoriale dès lors qu'il s'agit d'une singularité géographique et qu'elle se trouve du mauvais côté de la ligne d'équidistance, ce que le professeur Sands a expressément reconnu la semaine passée en indiquant que le Bangladesh « has not disputed that Saint Martin's Island lies south » de la « mainland-to-mainland delimitation line »¹⁸. En vertu de la jurisprudence contemporaine, une île dans la situation géographique singulière qu'occupe celle de l'île de Saint Martin ne peut pas être intégrée à la côte du Bangladesh et, de ce fait,

¹⁴ *Ibid.*, par. 5.15.

¹⁵ ITLOS/PV.11/5 (E), p. 7, lignes 30-31 (Crawford).

¹⁶ V. mémoire du Bangladesh, par. 6.75 (et réplique du Bangladesh, par. 3.166) : « Point-to-Point, Bangladesh's coastal front measures 349 km ; Myanmar's measures 369 km » ; ITLOS/PV.11/5 (E), p. 7, lignes 30-31 (Crawford) : « The relevant coastal lengths are therefore 421 kilometers for Bangladesh and 370 kilometers for Myanmar ».

¹⁷ ITLOS/PV.11/2/Rev.1 (E), p. 16, lignes 36-43 (Reichler) ; ITLOS/PV.11/3 (E), p. 14, lignes 8 et s. (Sands).

¹⁸ ITLOS/PV.11/3 (E), p. 16, lignes 30-31 (Sands).

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ne peut pas servir de point de référence pour la construction de la ligne de délimitation au-delà de la mer territoriale. J'y reviendrai cet après-midi.

Le Bangladesh a protesté contre ceci mais, à dire vrai, cette protestation relève du grand écart avec ses propres positions.

- le Bangladesh en effet n'a pas inclus l'île de Saint Martin dans la définition de ses côtes pertinentes : tous les croquis projetés par le professeur Crawford lundi dernier sont parfaitement clairs et univoques¹⁹ : aucun n'inclut l'île dans les côtes pertinentes du Bangladesh ;

- le Demandeur ne l'a pas non plus prise en compte dans la définition des façades côtières aux fins du tracé de la ligne de délimitation qu'il revendique – alors pourtant qu'il souhaite donner un plein effet à l'île de Saint Martin²⁰.

Cette exclusion est parfaitement justifiée : l'île de Saint Martin n'est pas une île que l'on pourrait intégrer à la côte du Bangladesh sans refaire la géographie côtière. Dans ces circonstances, et conformément à la jurisprudence présentée par le Professeur Sands que je commenterai dans ma seconde plaidoirie²¹, il n'est pas possible de donner à l'île de Saint Martin davantage d'effet que celui qu'elle doit recevoir au titre de la délimitation de la mer territoriale.

Les écritures du Bangladesh n'ont pas remis en cause par ailleurs le fait que l'application du test de l'absence de disproportion conduit, en l'espèce, à constater que la ligne d'équidistance satisfait ce test, ce qui confirme encore une fois que la ligne d'équidistance reflète équitablement la géographie côtière.

Cela prive bien entendu de tout fondement la réclamation du Bangladesh selon laquelle la ligne d'équidistance aboutirait à un résultat inéquitable. De fait, les circonstances que le Bangladesh invoque pour s'opposer à cette ligne ne sont pas de nature à la rendre inéquitable.

Premièrement, la concavité du golfe n'a rien d'une circonstance devant conduire à l'ajustement de la ligne d'équidistance. C'est ce dont témoigne la jurisprudence internationale, en particulier dans les dix dernières années les solutions adoptées dans les affaires *Cameroun c. Nigeria* et *La Barbade c. Trinité-et-Tobago*.

Deuxièmement et en application de la jurisprudence contemporaine toujours, le fait qu'un Etat n'ait pas accès à tous les espaces maritimes qu'il revendique et en particulier aux espaces situés au-delà des 200 milles nautiques n'a rien non plus d'une circonstance devant conduire à ajuster la ligne d'équidistance – à plus forte raison lorsque cette réclamation est tout à fait hypothétique.

Monsieur le Président, je souhaiterais résumer tout ceci très brièvement. La ligne d'équidistance reflète équitablement en l'espèce la géographie côtière pour les motifs suivants principalement :

- dans le secteur pertinent, la délimitation est essentiellement dictée par des côtes dans un rapport d'adjacence droite, et même légèrement convexe ;
- la ligne de délimitation est largement contrôlée, du côté du Bangladesh, par un point de base qui l'avantage ;
- la ligne d'équidistance accorde en conséquence au Bangladesh un accès atteignant environ 182 milles nautiques ;
- le caractère équitable de ce résultat est en tous points conforme aux solutions retenues dans la jurisprudence contemporaine, je le montrerai cet après-midi ;
- la ligne d'équidistance satisfait enfin le test de l'absence de disproportionnalité.

¹⁹ ITLOS/PV.11/5 (E), pp. 5 et s. (Crawford).

²⁰ V. duplique du Myanmar, par. 5.30.

²¹ ITLOS/PV.11/3 (E), p. 21, lignes 13-30 (Sands).

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Avec votre permission, Monsieur le Président, nous démontrerons tout ceci aujourd'hui en trois temps successifs, non sans qu'au préalable M. Daniel Müller aura défini les côtes et la zone maritime pertinentes.

Monsieur le Président, Messieurs les Juges, cette présentation des exposés qui vont suivre vient conclure le mien. Je vous remercie de votre écoute et je vous serais très reconnaissant si vous pouviez appeler maintenant à cette barre M. Daniel Müller pour vous présenter les côtes et la zone pertinentes. Je vous remercie.

The President:

Thank you.

I give the floor to Mr. Daniel Müller.

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EXPOSÉ DE M. MÜLLER
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/9/Rev.1, Fr, p. 19–30]

M. Müller :

Monsieur le Président, Messieurs les Juges, c'est un honneur de me présenter aujourd'hui devant vous et de me trouver pour la première fois à cette barre.

Lors de sa présentation de lundi dernier, le Professeur Crawford a présenté les côtes que le Bangladesh considère comme pertinentes pour l'exercice de délimitation dont vous êtes saisis par les Parties. Nous l'avons écouté avec un intérêt tout particulier parce que, malgré deux tours de plaidoiries écrites, l'Etat demandeur ne s'est jamais vraiment livré à cette étape importante et tout à fait préliminaire à toute délimitation maritime¹. L'identification des côtes pertinentes, et de la zone pertinente qui en résulte, n'est pas un simple exercice superfétatoire ou purement technique, qui n'aurait d'incidence qu'au dernier stade du processus, à savoir lors de l'examen de l'absence de toute disproportion. Ces côtes ne sont pas un simple élément de mesure. Elles constituent l'assiette même de l'opération de délimitation, comme le professeur Forteau vient de le rappeler il y a un instant. La situation géographique terrestre – les côtes – constitue le point de départ pour déterminer les droits d'un Etat sur des espaces maritimes et, par conséquent, les zones où ces titres – ou *entitlements* en anglais – se chevauchent avec ceux d'un autre Etat. « [C]est la terre qui domine la mer »².

Lundi dernier, la position du Bangladesh a considérablement évolué. Lors de sa plaidoirie qui, en partie, a été dédiée à cet aspect préliminaire de l'exercice de délimitation, le Pr. Crawford a soigneusement évité de projeter le croquis n° 6.12 qui se trouve dans le volume II du mémoire du Demandeur et que vous voyez actuellement sur vos écrans. Vous pouvez constater sur ce croquis, et dans le texte du mémoire de l'Etat demandeur³, que le Bangladesh n'avait pas utilisé la longueur de ses côtes ou celle des côtes du Myanmar pour le test d'absence de disproportion. Dans son mémoire⁴, mais aussi dans sa réplique⁵, seule la longueur de façades côtières utilisées – de manière indéfendable – pour la construction de la ligne bissectrice à laquelle nos amis de l'autre côté de la barre attachent tant d'importance a été prise en compte pour l'examen du test de disproportionnalité.

Pourtant, ce ne sont pas les façades maritimes d'un Etat côtier qui déterminent ses côtes pertinentes, comme ce ne sont pas les points de base choisis pour la construction de la ligne provisoire d'équidistance qui identifient, d'une façon ou d'une autre, ces côtes pertinentes. C'est dans l'autre sens qu'il convient de raisonner : il faut d'abord établir les côtes pertinentes pour, ensuite, en tirer les conclusions nécessaires pour l'application de la méthode de délimitation, c'est-à-dire, identifier les points de base appropriés.

Mais, inutile de polémiquer longuement sur cette erreur méthodologique du Bangladesh. La sagesse du Pr. Crawford a remis l'Etat demandeur dans le droit chemin – ou le chemin du droit, plutôt – en s'écartant très nettement de la position défendue lors de la

¹ *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt, C.I.J. Recueil 2009, p. 747, par. 289 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*, fond, arrêt, C.I.J. Recueil 2001, p. 94, par. 178 ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenant))*, arrêt, C.I.J. Recueil 2002, p. 442, par. 290.

² *Plateau continental de la mer du Nord*, C.I.J. Recueil 1969, p. 51, par. 96 ; *Plateau continental de la mer Égée*, C.I.J. Recueil 1978, p. 36, par. 86 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn)*, fond, arrêt, C.I.J. Recueil 2001, p. 97, par. 185.

³ MB, par. 6.75.

⁴ *Ibid.*

⁵ RB, par. 3.166.

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phase écrite. La méthode et, évidemment, les chiffres ont changé. L'opération a été d'ailleurs bénéfique pour le Bangladesh qui gagne 72 kilomètres ; le bénéfice pour le Myanmar est nettement plus modeste : on ne lui accorde qu'un petit kilomètre de plus – nous avons reproduite les deux positions du Bangladesh à l'onglet 3.5 de vos dossiers de Juge d'aujourd'hui. En effet, au lieu d'utiliser purement et simplement les façades côtières en tant que côtes pertinentes, le Professeur Crawford s'est employé à déterminer des côtes pertinentes – et je dis bien des côtes, et pas des façades côtières, bien que ces côtes soient extrêmement simplifiées par des lignes droites.

Le Myanmar ne peut que saluer ce changement de méthode. Il n'en reste pas moins que l'identification, par le Bangladesh, des côtes pertinentes respectives des Parties et de la zone pertinente pour la délimitation souffre toujours d'importantes approximations. Je vais donc revenir, assez brièvement sur les unes et sur l'autre, tour à tour.

Les Parties sont, maintenant, d'accord que l'identification des côtes pertinentes n'est pas une simple opération géographique, mais un exercice juridique qui suit ses propres règles.

La jurisprudence a clairement établi quand et pourquoi une partie de la côte est pertinente, et le Professeur Crawford s'est, à juste titre, référé à l'arrêt unanime de la Cour internationale de Justice dans l'affaire de la *Délimitation maritime en mer Noire* entre la Roumanie et l'Ukraine⁶. Dans son arrêt, la Cour a non seulement défini la notion juridique de côte pertinente, elle a également expliqué le test qui rend une côte géographique pertinente dans le sens juridique du terme. Elle a souligné – et je cite la Cour :

[L]a côte doit, pour être considérée comme pertinente aux fins de la délimitation, générer des projections qui chevauchent celles de la côte de la partie adverse. Dès lors, –poursuit la Cour en citant son arrêt dans l'affaire du *Plateau continental entre la Tunisie et la Libye*– 'tout segment du littoral d'une Partie dont, en raison de sa situation géographique, le prolongement ne pourrait rencontrer celui du littoral de l'autre Partie est à écarter de la suite du présent examen'⁷

Afin de déterminer si une partie de la côte est pertinente pour la délimitation en question ou pas, il faut vérifier si elle génère des titres sur des espaces maritimes, des projections dans la mer, qui empiètent sur celles générées par la côte de l'autre État en question. Ce n'est donc ni la direction, ni la distance de la côte par rapport au point de départ de la délimitation qui importe, mais seulement la relation des projections de cette côte avec les projections de la côte de l'autre Partie.

Monsieur le Président, je crois que nous pouvons dire que les Parties s'accordent, à ce stade de la procédure, sur plusieurs portions des côtes pertinentes, côtes dont les projections se chevauchent mutuellement.

D'abord, le Bangladesh accepte de considérer que la côte de Rakhine de l'embouchure du fleuve Naaf, le point de départ pour la ligne de délimitation maritime, jusqu'à un point se trouvant à 200 milles marins de ce point de départ près du cap Bhiif sont pertinentes pour la délimitation.

- Puis, en ce qui concerne les côtes du Bangladesh, l'accord entre les Parties comprend la côte s'étendant de l'embouchure du fleuve Naaf jusqu'à l'entrée orientale de l'estuaire du fleuve Meghna, d'une part, et la côte qui se trouve à l'ouest de cet estuaire jusqu'au point terminal de la frontière terrestre de l'Etat demandeur avec l'Inde, d'autre part.

- Ces parties des côtes pertinentes, dont les Parties conviennent que les projections respectives se chevauchent, sont marquées sur le croquis qui est actuellement sur l'écran. Le Myanmar a, par ailleurs, représenté les côtes des deux Parties non pas par des lignes droites

⁶ ITLOS/PV.11/5 (E), p. 4, lignes 27-34 (Crawford).

⁷ C.I.J. Recueil 2009, p. 97, par. 99.

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connectant leurs points les plus extrêmes, mais d'une façon plus fidèle à la géographie côtière. Ceci n'implique aucunement, comme le Bangladesh l'insinue⁸, que les cartographes du Myanmar ont appliqué un double standard afin de mesurer la longueur des côtes du Myanmar, d'une part, et celle des parties de la côte bangladaise, d'autre part. Comme nous l'avons expliqué dans notre contre-mémoire, nous avons suivi les recommandations contenues dans le *Manuel sur les aspects techniques de la Convention des Nations Unies sur le droit de la mer* préparé...⁹. Par conséquent, pour mesurer la longueur des côtes, le Myanmar a calculé la somme de la longueur de lignes droites reliant un certain nombre de points représentant la côte. Comme l'a fait la Cour internationale dans l'affaire entre la Roumanie et l'Ukraine, les côtes « qui bordent les eaux situées à l'intérieur de golfes ou de profondes échancrures n'ont pas ... été prises en compte »¹⁰. Dans l'application de cette méthode, le Myanmar n'a fait aucune différence entre les côtes bangladaises et les siennes. Bien évidemment, nous convenons, avec la Cour internationale de Justice, que –et je cite toujours « [c]es mesures sont nécessairement approximatives »¹¹. Pourtant, il ne s'agit aucunement d'établir un rapport mathématique exact ni à ce stade, ni au stade de la vérification de l'absence de disproportion – qui se borne à un contrôle de la disproportion flagrante.

De surcroît, je constate que M. Crawford n'a pas inclus, dans sa définition des côtes pertinentes, celles de l'île de Saint Martin du Bangladesh. Le Myanmar ne l'a pas fait non plus.

Un différend existe cependant toujours quant à la partie méridionale de la côte de Rakhine que le Professeur Crawford a exclue de la côte pertinente du Myanmar, d'une part, et les rives, ou la ligne de clôture, devrais-je dire après avoir écouté la plaidoirie de lundi dernier¹², donc la ligne de clôture de l'estuaire du fleuve Meghna, que le Bangladesh inclut dans ses propres côtes pertinentes. Il est donc nécessaire de revenir sur la non-pertinence de cette ligne fantôme – parce qu'il s'agit d'une ligne purement artificielle qui ne correspond aucunement à une côte du Bangladesh, et sur la pertinence, au contraire, de la partie méridionale de la côte de Rakhine du Myanmar jusqu'au cap Négrais. Je vais commencer avec cette dernière.

Monsieur le Président, c'est à tort que le Bangladesh veut priver le Myanmar de ce tronçon côtier de quelques 275 kilomètres.

Cette amputation de la côte pertinente du Myanmar apparaît d'ailleurs seulement avec l'application très imaginative de la méthode de la bissectrice dans le mémoire de nos contradicteurs. Lors des négociations qui ont eu lieu en novembre 2008 entre les deux Etats, la Partie bangladaise a, en vertu de son propre compte-rendu, reconnu que –et je cite en anglais : « *the relevant coastline for Myanmar in the Bay of Bengal is up to Cape Négrais* »¹³. On ne peut être plus explicite. Mais, un an et demi plus tard, cette position semble déranger, et le mémoire bangladais comme le Pr. Crawford s'efforcent de trouver des arguments afin de justifier pourquoi, en 2008, les représentants du Bangladesh se sont visiblement trompés. Mais c'est en vain ; le Myanmar l'a d'ores et déjà montré dans sa duplique¹⁴.

Le principal argument que nos contradicteurs opposent maintenant à la pertinence de la partie méridionale de la côte de Rakhine consiste dans l'affirmation qu'elle –je cite le

⁸ RB, par. 3.176-3.177. V. aussi ITLOS/PV.11/5, p. 6, lignes 22-32 (Crawford).

⁹ *Manual on Technical Aspects of the United Nations Convention on the Law of the Sea*, publication spéciale n° 51, 4^e éd., Bureau hydrographique international, Monaco, 2006 (chap. 6.3.2).

¹⁰ *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, C.I.J. Recueil 2009, p. 129-130, par. 214.

¹¹ *Ibid.*

¹² ITLOS/PV.11/5, p. 5, lignes 14-19 (Crawford).

¹³ MB, vol. III, Annex 19, par. 21. V. aussi CMM, par. 5.68 et DM, par. 6.82 et 6.83.

¹⁴ DM, par. 6.76-6.81.

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mémoire : « se trouve à plus de 200 milles marins du point terminal de la frontière terrestre avec le Bangladesh de sorte qu'elle cesse d'avoir une quelconque pertinence plausible aux fins de la présente délimitation »¹⁵. Dans sa réplique, l'argument a changé un peu pour utiliser des termes plus appropriés découlant de la jurisprudence internationale. Le Bangladesh a ainsi noté que –et je cite la réplique en anglais :

*since the entire length of Myanmar's coast below Bhiff Cape is more than 200 M from Bangladesh (i.e., beyond any possible projection the Bangladesh coast might generate), the projection of Myanmar's coast between Bhiff Cape and Cape Negrais could not possibly overlap with that of Bangladesh*¹⁶.

Le Pr. Crawford a fait sien cet argument lors de sa plaidoirie du lundi dernier¹⁷, mais, je regrette de devoir le dire, cela ne l'a pas rendu plus crédible.

Poliment dit, il est erroné et en droit et, surtout, en mathématiques. S'il était acquis que les *projections* de 200 milles marins des côtes pertinentes doivent se chevaucher, des côtes qui se trouvent à une distance de moins de 400 milles marins sont en effet tout à fait susceptibles de produire un tel chevauchement. 200 plus 200 est égal à 400, et non pas à 200. Etant donné que le cap Negrais est à une distance de moins de 300 milles marins du premier point de la côte du Bangladesh, le chevauchement n'est aucunement exclu. Ce sont les projections qui doivent se chevaucher entre elles, pas la projection d'une côte avec l'autre côte.

Sur ce point, les arguments du Bangladesh et la présentation du Professeur Crawford de lundi dernier sont tout simplement erronés. Ce n'est pas la zone pertinente qui détermine les côtes pertinentes, mais ce sont ces côtes pertinentes qui circonscrivent la zone de délimitation. Seules les projections des côtes sont à cet égard déterminantes. Si on établit, comme le Professeur Crawford l'a lui-même fait, des arcs de cercles le long de la côte méridionale de Rakhine –un exercice cartographique simple–, il ne peut plus rester aucun doute quant au fait que cette partie de la côte est pertinente. Sa projection chevauche la projection des côtes du Bangladesh, et c'est tout ce qu'il faut prouver.

Confronté à l'évidence, le Bangladesh a cependant mis en doute la pertinence de cette partie de la côte en raison du fait que – et je cite encore une fois la réplique :

*Every point on Myanmar's coast south of Bhiff Cape is further from either of the Parties' proposed delimitation lines than any point north of Bhiff Cape. Accordingly, no portion of Myanmar's coast between Bhiff Cape and Cape Negrais can or does affect either of the proposed delimitation lines within 200 M*¹⁸.

Comme si la répétition pouvait rendre cette proposition plus plausible – et sur ce point nos amis de l'autre côté de la barre tombent eux-mêmes sous la critique que M. Reichler nous a adressée¹⁹ –, le Bangladesh revient à maintes reprises sur cet argument en soutenant que cette partie de la côte « est simplement trop éloignée de la zone à délimiter pour être considérée comme pertinente en l'espèce »²⁰, ou « se trouve pour l'essentiel à une distance de plus de 200 milles d'une quelconque ligne de délimitation »²¹, ou encore « est trop éloignée

¹⁵ MB, par. 6.69.

¹⁶ RM, par. 3.151.

¹⁷ ITLOS/PV.11/5, p. 7, lignes 23-27 (Crawford).

¹⁸ RB, par. 3.152 (italiques dans le texte).

¹⁹ ITLOS/PV.11/2/Rev.1 (E), p. 17, lignes 22-23 (Reichler).

²⁰ RB, par. 3.169.

²¹ RB, par. 3.156.

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de toute délimitation possible, que ce soit celle proposée par le Myanmar ou celle suggérée par le Bangladesh, qui sont en fait l'une et l'autre déterminées par des secteurs plus proches de la côte du Myanmar »²².

Pourtant, les côtes pertinentes ne peuvent pas dépendre ou être déterminées en fonction de la ligne de délimitation. Elles la précèdent logiquement et c'est la ligne de délimitation qui doit, elle, être déterminée en fonction des côtes pertinentes et des projections qu'elles génèrent. Le Bangladesh met la charrue avant les bœufs.

A cet égard, il suffit de considérer rapidement un argument semblable de la Roumanie dans l'affaire de la *Délimitation maritime en mer Noire*. La Roumanie avait soutenu qu'une grande partie de la côte septentrionale de l'Ukraine entre le point S près de l'estuaire du Dniestr jusqu'au cap Tarkhankut n'était pas pertinente. Selon la Roumanie, la partie septentrionale de la côte de l'Ukraine était non seulement éloignée de la zone pertinente, mais était de surcroît « éclipée » par d'autres côtes ukrainiennes plus proches. En conséquence, cette partie septentrionale n'affectait pas la ligne de délimitation. Les conseils de la Roumanie ont invoqué les mêmes arrêts de la Cour²³ que nos collègues de l'autre côté de la barre.

Et pourtant, la Cour n'a pas donné raison à la Roumanie, mais a inclus cette partie de la côte de l'Ukraine dans les côtes pertinentes. Le croquis projeté le montre. La Cour a noté dans la partie pertinente de son arrêt que – et je cite la Cour :

La partie nord-ouest de la mer Noire (où la délimitation est à effectuer) mesure, dans sa portion la plus large, légèrement plus de 200 milles marins et n'excède pas 200 milles marins du nord au sud. Du fait de cette configuration géographique, la côte de l'Ukraine orientée au sud génère des projections qui chevauchent les projections maritimes de la côte roumaine. En conséquence, la Cour considère ces segments de la côte ukrainienne comme des côtes pertinentes²⁴.

Il n'y a aucune raison qu'il en aille autrement de la partie sud de la côte du Myanmar bordant le golfe du Bengale. Elle génère des projections qui chevauchent des projections de la côte du Bangladesh. C'est le seul critère déterminant.

En conséquence, Monsieur le président, c'est donc l'ensemble de la côte du Myanmar, de l'estuaire du fleuve Naaf jusqu'au cap Negrais qui est pertinente pour la délimitation.

Ceci m'amène, Monsieur le Président, à la partie de la côte du Bangladesh qui, selon nous, ne devrait pas être incluse dans la côte pertinente de l'Etat demandeur, pour la simple raison que les côtes concernées ne produisent pas de prolongements chevauchant ceux des côtes du Myanmar. Il s'agit des rives de l'estuaire du fleuve Meghna. Pour le Bangladesh, l'exclusion de ces deux segments de la côte bangladaise « *would punish Bangladesh twice for the configuration of its coast* »²⁵. Puis-je préciser que la nature ne « punit » personne, elle est, tout simplement. Pourtant, le premier jour de ces plaidoiries, M. Reichler lui-même a entièrement négligé cette partie de la côte du Bangladesh lors de sa description de la géographie côtière²⁶. Et pour cause ! Ce que M. Crawford veut inclure dans les « côtes » pertinentes du Bangladesh n'est même pas une côte, mais une ligne dans la mer sans aucune côte pertinente derrière. Certes, comme le suggèrent William Blake et le Professeur

²² RB, par. 3.159.

²³ V., par exemple, CR 2008/18, 2 septembre 2008, p. 64-67, par. 15-17, et p. 69-70, par. 26 et 27 (1) (Crawford) et CR 2008/19, 3 septembre 2008, p. 16, par. 22 (Crawford).

²⁴ *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, C.I.J. Recueil 2009, p. 97, par. 101.

²⁵ BR, par. 3.171.

²⁶ ITLOS/PV.11/2/Rev.1 (E), pp. 9-10 (Reichler).

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Crawford²⁷, dans un grain de sable, on peut voir le monde ; mais là il n'y a que de l'eau, pas de sable, ni de côte !

Les côtes dans l'estuaire, les vraies côtes géographiques, ne créent aucune projection qui chevauche celle d'une quelconque côte du Myanmar. La côte est de l'estuaire est très nettement orientée vers l'ouest et ne projette que sur l'autre rive. Les côtes ouest de l'estuaire, de même, ne génèrent pas de projections qui, même potentiellement, peuvent chevaucher celles de la côte du Myanmar. Ses projections visent soit l'autre rive de l'estuaire, soit la côte bangladaise.

A cet égard, la situation est tout à fait comparable à celle des côtes du golfe de Karkinit'ska dans l'affaire relative à la *Délimitation maritime en mer Noire*, dans laquelle la C.I.J. a exclu les côtes de ce golfe en notant – je cite la Cour internationale de la Justice :

Les côtes de ce golfe se font face et leur prolongement ne peut rencontrer celui de la côte roumaine. Elles ne se projettent pas dans la zone à délimiter. Partant, ces côtes sont écartées de la suite du présent examen.²⁸

Les côtes – et j'insiste « les côtes » – du golfe de Karkinit'ska ne se projettent pas dans la zone à délimiter, comme les côtes de l'estuaire du fleuve Meghna ne se projettent pas dans la zone à délimiter, mais vers d'autres côtes du Bangladesh. A cet égard, elles sont tout à fait comparables à celles du golfe ukrainien et doivent, par conséquent, être exclues des côtes pertinentes.

Certes, l'ouverture du golfe de Karkinit'ska elle-même fait face à d'autres parties de la côte ukrainienne et non à la zone à délimiter, tandis que l'ouverture de l'estuaire du fleuve Meghna est face à la zone à délimiter. La Cour a pourtant très nettement souligné en 2009 qu'une ligne de fermeture, comme celle que le Professeur Crawford veut ajouter aux côtes pertinentes du Bangladesh – et je cite : « n'est source d'aucun droit »²⁹; seules les côtes peuvent générer des espaces maritimes, pas des lignes fantômes et imaginaires³⁰. C'est décidément la terre qui domine la mer.

En aucun cas le Bangladesh ne peut d'ailleurs bénéficier d'un traitement comparable à celui du Canada dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, et plus particulièrement, du traitement réservé par la chambre aux côtes dans la baie de Fundy. Bien sûr, la Cour a inclus certaines parties des côtes nord et sud de cette baie de Fundy dans les côtes pertinentes bien qu'elles se fassent face et appartiennent entièrement au Canada³¹. Mais ce n'est pas parce que l'ouverture de cette baie était face à la zone de délimitation. Le point décisif était la situation particulière du point terminal de la frontière terrestre entre les États-Unis et le Canada immédiatement à l'entrée de la baie de Fundy. La situation de l'estuaire du fleuve Meghna est très différente. Si la frontière terrestre entre le Bangladesh et le Myanmar – par pure hypothèse politico-géographique – avait été située quelque part aux environs de l'île Kutubdia, que vous apercevez à présent à l'écran, les côtes, de part et d'autre de l'estuaire, auraient sans conteste été pertinentes. Mais ce n'est pas là que se trouve la frontière. Elle se situe bien plus au sud.

Il n'y a donc aucune raison d'intégrer les côtes de l'estuaire du fleuve Meghna dans les côtes pertinentes des Parties, et, encore moins, d'intégrer une ligne purement hypothétique qui ne peut générer aucun droit maritime.

²⁷ ITLOS/PV.11/5, p. 6, ligne 27.

²⁸ *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, C.I.J. Recueil 2009, p. 97, par. 100.

²⁹ *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, arrêt, C.I.J. Recueil 2009, p. 97, par. 100.

³⁰ Voir aussi *Délimitation de la frontière maritime dans la région du golfe du Maine*, arrêt, C.I.J. Recueil 1984, p. 270, par. 31.

³¹ *Ibid.*, p. 336, par. 221.

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Pour récapituler, Monsieur le Président, Messieurs les Juges, les côtes pertinentes pour la délimitation entre le Myanmar et le Bangladesh sont les suivantes :

- du côté du Myanmar, la côte pertinente s'étend de l'embouchure du fleuve Naaf jusqu'au cap Negrals.

- du côté du Bangladesh, les côtes pertinentes s'étendent de l'embouchure du fleuve Naaf jusqu'à la limite orientale de l'estuaire du fleuve Meghna, d'une part, et de l'entrée occidentale de l'estuaire jusqu'au point terminal de la frontière terrestre avec l'Inde, d'autre part.

La côte pertinente du Myanmar a, par conséquent, une longueur totale d'environ 740 kilomètres. Les deux parties de la côte bangladaises qui sont pertinentes pour la délimitation mesurent 161 kilomètres et 203 kilomètres respectivement. La longueur des côtes pertinentes du Bangladesh est donc de 364 kilomètres. Nous avons inclus ce croquis sous l'onglet 3.6 de vos dossiers de plaidoiries.

Monsieur le Président, il me faut encore dire quelques mots sur la zone maritime pertinente.

Monsieur le Président, j'en ai pour 10 minutes, je pense qu'on peut faire la pause café.

The President:

Since you are going to start a new section, I was going to suggest that we take a 30-minute coffee break and return at noon, unless you would wish to continue your statement.

M. Müller :

Je propose d'arrêter mon discours ici et de revenir après la pause.

(Short adjournment)

The President:

We shall continue now.

Mr Müller, you have the floor.

M. Müller :

Monsieur le Président, Messieurs les Juges, avant la pause j'ai expliqué quelles sont en droit les côtes pertinentes pour l'opération de délimitation entre le Bangladesh et le Myanmar.

Maintenant, il me faut encore dire quelques mots sur la zone pertinente car les positions des Parties concernant l'étendue de cette zone divergent toujours. Bien que la présentation du professeur Crawford ait rendu la position du Bangladesh plus juridiquement correcte, elle reste toujours loin de l'objectivité que l'orateur a promise³².

La zone maritime pertinente est fonction des côtes pertinentes, d'une part, et des projections de ces côtes pour autant qu'elles se chevauchent, d'autre part. Ceci a été dit également lundi dernier³³.

Vous voyez sur l'écran la zone pertinente telle que la Partie bangladaise l'avait définie jusqu'à la fin de la procédure écrite. Elle n'est pas fonction des côtes pertinentes, mais des façades côtières établies par nos contradicteurs. La zone pertinente que le Bangladesh réclame depuis lundi dernier est différente. Comme vous pouvez constater sur le croquis sur vos écrans qui ne fait que reproduire la zone pertinente projetée lundi dernier, celle-ci inclut

³² ITLOS/PV.11/5, p. 11, lignes 36-37 (Crawford).

³³ ITLOS/PV.11/5, p. 12, lignes 1-10 (Crawford).

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cette fois-ci les espaces maritimes qui se trouvent directement devant les côtes géographiques. Le Myanmar avait critiqué la position du Demandeur sur ce point³⁴; la nouvelle thèse du Demandeur reconnaît le bien-fondé de nos critiques.

Il reste cependant deux points sur lesquelles les Parties ne sont toujours pas d'accord. Ces divergences concernent d'une part, dans la région plus au sud, les conséquences de la pertinence de la partie méridionale de la côte de Rakhine quant à l'étendue de la zone pertinente; et, d'autre part, plus au nord-ouest, l'étendue exacte de la zone pertinente.

En effet, comme il l'a expliqué dans ses pièces de procédure écrite lundi dernier³⁵, le Bangladesh n'a pas inclus dans la zone pertinente des espaces maritimes qui, selon les dires du Bangladesh, font actuellement l'objet d'une réclamation de la part de l'Inde. Il a donc étendu la zone pertinente uniquement jusqu'à la ligne de réclamation de cet Etat tiers, tout en la changeant dans sa réplique pour tenir compte de nouvelles informations qu'il aurait obtenues concernant les prétentions de l'Inde, Etat tiers à la présente instance³⁶. Par ces calculs le Bangladesh n'exclut pas seulement une zone maritime de plus de 11 000 kilomètres carrés, il fait également dépendre sa délimitation avec le Myanmar des prétentions d'un Etat tiers, qu'il dit changeantes et qui ne sont nullement acquises en droit et en fait. Mais on voit mal pourquoi il ne faudrait pas inclure ces espaces maritimes sur lesquelles le Bangladesh peut, potentiellement, faire valoir ses droits souverains une fois la délimitation avec l'Inde effectuée. J'ai du mal à croire, par ailleurs, que le Bangladesh ait définitivement renoncé à ces espaces et ne les réclame point dans le cadre de l'arbitrage qui est actuellement en cours avec l'Inde. C'est pour cette raison que cette zone doit être ré-incluse dans la zone pertinente jusqu'à la ligne équidistante de la côte des deux Etats en question, à savoir l'Inde et le Bangladesh. Cette façon de procéder est tout à fait conforme à la jurisprudence de la Cour internationale de Justice. Dans l'affaire de la délimitation entre la Roumanie et l'Ukraine, elle a réintroduit une partie de l'espace maritime réclamée par la Bulgarie vis-à-vis de la Roumanie dans la zone maritime³⁷.

Le croquis qui se trouve à l'onglet 4.19 du dossier de plaidoirie du Bangladesh confirme d'ailleurs que le Bangladesh demande, potentiellement, une zone bien plus grande. La ligne de délimitation demandée par l'Inde n'est, en fin de compte, qu'un prétexte pour réduire la zone pertinente et veut dramatiser la situation géographique et juridique de l'Etat demandeur.

Finalement, la zone pertinente du Bangladesh ne tient pas non plus compte de la côte pertinente méridionale du Myanmar qui s'étend jusqu'au cap Negrais. Comme je l'ai montré tout à l'heure, il s'agit d'une côte pertinente dont le prolongement chevauche celui de la côte du Bangladesh. Il convient donc d'inclure les espaces maritimes en face de cette côte pertinente dans la zone pertinente. Dans l'affaire de la délimitation entre la Roumanie et l'Ukraine toujours, la Cour a fait de même pour la côte la plus septentrionale de l'Ukraine dont je vous ai parlé tout à l'heure. Cette côte a été considérée comme faisant partie des côtes pertinentes malgré son éloignement par rapport à la zone de délimitation. La Cour a noté :

Le segment de la côte ukrainienne situé au nord de la ligne qui relie le point S au cap Tarkhankut est une côte pertinente aux fins du processus de délimitation. Relève ainsi de la zone à délimiter la zone située immédiatement au sud, donc devant cette côte ...³⁸.

³⁴ CMM, par. 5.75.

³⁵ ITLOS/PV.11/5, p. 12, lignes 22-25 (Crawford).

³⁶ RB, par. 3.36 (note 49) et par. 3.186.

³⁷ *Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 100, par. 114.

³⁸ *Ibid.*, p. 100, par. 113.

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La zone pertinente ainsi définie, Monsieur le Président, est légèrement plus petite que celle dont le Défendeur a fait état dans ses écritures. En effet, selon les explications données par le Professeur Crawford lundi dernier, le Bangladesh estime que nous ne pouvons pas inclure certains espaces maritimes dans la région sud-ouest parce que, les projections des côtes du Bangladesh ne chevauchent, dans cette région, celles du Myanmar. Nous prenons acte de cette position du Demandeur. Je ne ferai qu'une remarque à ce sujet : si le Bangladesh a raison, la seule conséquence qui en découle est que la portion d'espaces maritimes attribuée au Myanmar par la délimitation s'en trouve diminuée ce qui renforce alors le *ratio* en sa faveur. Sir Michael va y revenir cet après-midi.

Pour le moment, il me suffit de constater que la zone pertinente telle que définie par le Bangladesh et corrigée par le Myanmar, la zone, donc, dans laquelle les titres (*entitlements*) du Bangladesh et ceux du Myanmar se chevauchent réellement, n'inclut pas la zone grise. À vrai dire, la zone pertinente ne s'étend pas jusqu'à la limite des 200 milles marins mesurées à partir des lignes de base du Myanmar, limite auquel le Bangladesh demande cependant l'accès. Mais, Monsieur le Président, soit ces espaces font parties de la zone pertinente, soit elles ne le font pas. De même qu'il n'y a pas deux sortes de côtes pertinentes, il n'y a qu'une zone pertinente.

Pour conclure rapidement sur ce point, Monsieur le Président, le Myanmar considère que la zone maritime pertinente pour la délimitation, définie en application des règles dégagées par la jurisprudence internationale en la matière, est celle que vous voyez à l'écran. Cette zone maritime, dans laquelle la délimitation doit être effectuée, couvre une superficie d'environ 214 300 kilomètres carrés. Là aussi, vous trouvez le croquis sur l'écran dans vos dossiers de plaidoirie, à l'onglet 3.7.

Monsieur le Président, Messieurs les Juges, je vous remercie pour votre bienveillante attention. Monsieur le Président, je vous prie de bien vouloir donner la parole à M. Coalter Lathrop pour qu'il poursuive la présentation du Myanmar.

The President:

I now give the floor to Mr Coalter Lathrop.

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COUNSEL OF MYANMAR
[ITLOS/PV.11/9/Rev.1, E, p. 26–34]

Mr Lathrop:

Mr President, Members of the Tribunal, this morning Professor Pellet set forth the law applicable to maritime delimitations beyond 12 M. In that presentation he discussed the role of the equitable principles/relevant circumstances rule and the three-stage equidistance/relevant circumstances method.

My task today is to present the first of the three stages – the construction of the provisional equidistance line. My colleagues, Professor Forteau and Sir Michael Wood, will present the second and third stages of the equidistance/relevant circumstances method in subsequent presentations. In my presentation, I will first review the case law on the determination of base points. In that review, I will focus on the *Black Sea* case for two reasons. First, it is the most recent in a long line of cases that have applied the same approach to this first stage. Second, the coastal geography of that case shares much in common with the case before you today. I will then turn to the determination of base points in the case between Myanmar and Bangladesh and conclude with a description of the resulting provisional equidistance line.

Although the case between Romania and Ukraine in the Black Sea is the most recent international maritime boundary decision from any international court or tribunal, it is not particularly special¹. Indeed, it is one in a long line of cases in which the Court and other tribunals have taken the same approach to delimitation. The outcome in the *Black Sea* case was not surprising, nor was the method used to achieve it.

As in most previous cases, the Court applied the three-stage equidistance/relevant circumstances method in order to delimit an equitable equidistance boundary between the mainland coasts. The Court gave no effect to a prominent Ukrainian island in the area, Serpents' Island, beyond its own territorial sea. The map on the screen is from the Court's judgment in the *Black Sea* case. It shows the coastal geography in the area and the lateral boundary extending from the adjacent coasts. Like the geography in the present case, the predominant coastal relationship between the Parties was one of adjacency, with an incongruous island situated in the vicinity of the delimitation. There are minor differences between the geography in the two cases. For example, the Ukrainian island in question was not situated in front of the other state's coast. Nonetheless, the geography is similar enough that strong parallels can be drawn. The line delimited by the Court in those geographic circumstances is similar to the outcome that Myanmar argues for here – equidistance from adjacent mainland coasts with no effect given to St Martin's Island.

Other than the unanimity of the Court, what set the *Black Sea* decision apart from previous delimitation decisions was the clarity with which the Court explained the standard delimitation methodology, including the first stage of that method – the determination of the base points and the construction of the provisional equidistance line therefrom.

Before I explain the Court's first-stage analysis in the *Black Sea* case, I would like to clarify some concepts and terminology. It should be understood that, as a technical matter, the construction of an equidistance line is a purely objective exercise involving trigonometric calculations on the surface of an ellipsoid. That may sound complicated, and as a matter of mathematics it is certainly beyond my abilities, but as a matter of process it is really quite straightforward. The inputs are the coasts (or base lines) of both States, represented by a

¹ *Maritime Delimitation in the Black Sea, Judgment, I.C.J. Reports 2009* (hereinafter "*Black Sea*"), p. 67, para. 219.

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series of points, or “base points”, along the charted low-water line. The output is an equidistance line – a line that is an equal distance from the nearest points on the coasts of both States. Once the coasts, or base lines, have been determined, it is only a matter of plugging them into computer software to perform the calculation. What comes out is a line, every point of which is an equal distance from the nearest points on the chosen baselines of each State. These “nearest points” are most accurately called not simply base points, but *relevant base points*, that is, base points that are relevant for the calculation of the equidistance line. There may be many base points on the base lines that are farther from the equidistance line than the “nearest points”. Those are still base points but those base points are not mathematically relevant base points.

The principle here is that once the coastal inputs, or base lines, are determined, there are no further decisions to be made about the relevant base points. The choice of relevant base points is entirely a matter of objective measurements.

By contrast, determination of the baselines is a matter of international law. To identify the appropriate coastal inputs, a court or tribunal must consider each coastal feature in turn and assess whether the feature should or should not influence the course of the provisional equidistance line on the basis of previous judicial decisions and state practice. Once the tribunal has done so, the base points used in the equidistance calculation are simply the remaining relevant points – that is, the nearest points – located on the base lines of the legally controlling coastal features.

To illustrate the distinctions between coastal features, base lines, and base points, allow me to read a quote regarding Ukraine’s contentions with respect to base points on Serpents’ Island. The Court wrote:

Ukraine maintains that because Serpents’ Island has a coast, it follows that it has a baseline. As a result, it states that there are base points on that baseline that can be used for plotting the provisional equidistance line².

To paraphrase or rephrase that quotation: the coastal feature – Serpents’ Island – has a base line along which lie innumerable base points, some of which could be relevant in the construction of the provisional equidistance line. But when it came time for the Court to consider the role of Serpents’ Island in the delimitation, it was not concerned about whether base points on Serpents’ Island might be *relevant* as a matter of computation. Instead, the Court was concerned about whether that coastal feature itself should be allowed to influence the delimitation, as a matter of law.

The Court decided that Serpents’ Island should not. The Court wrote:

To count Serpents’ Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine’s coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes. The Court is thus of the view that Serpents’ Island cannot be taken to form part of Ukraine’s coastal configuration.

For this reason, the Court considers it inappropriate to select any base points on Serpents’ Island for the construction of the provisional equidistance line between the coasts of Romania and Ukraine.³

² *Ibid.*, para. 126.

³ *Ibid.*, para. 149. See also Memorial of Bangladesh (hereinafter “BM”), para. 6.51.

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Twenty-four years earlier, the International Court made the same determination about a similar feature when constructing the first-stage provisional equidistance line. The Court wrote, in *Libya/Malta*:

An immediate qualification of the median line which the Court considers must be made concerns the base points from which it is to be constructed... In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain 'islets, rocks and minor coastal projections'. The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya.⁴

The Tribunal will recall from Bangladesh's Memorial that Filfla was a Maltese island located less than 3 M from Malta's main island⁵. Clearly, mere proximity to the coast is not the sole determinant of whether or not to include a feature in the calculation of the line.

In *Eritrea/Yemen*, the tribunal went through a similar process of identifying the appropriate coastal features before plugging their base lines into the equidistance line calculation. As that tribunal noted,

[t]here do arise some questions about what is to be regarded as the 'coast' for these purposes, especially where islands are involved; and these questions ... require decisions by the Tribunal⁶.

In the process of making those decisions, the tribunal eliminated several coastal features from the calculation on the grounds that they were either not above water at low tide⁷ or not part of the mainland coast⁸.

The International Court in *Qatar v Bahrain* went through the same process, devoting over twenty-five paragraphs of its judgment to an analysis of which features should and should not be used to construct the provisional equidistance line⁹. After the construction of the provisional line, the Court eliminated additional features, but this was in the second-stage consideration of relevant circumstances¹⁰, which is a topic that Professor Forteau will address.

Although courts and tribunals write about determining or identifying *base points*, this is simply shorthand for the process of assessing whether the *base line* of a particular coastal feature, such as an island, is an appropriate source of base points as a matter of law. If the answer is "yes, the feature is an appropriate source of base points", then the relevant base points (if any) on that feature are identified through a mathematical calculation. If the answer is "no, the feature is not an appropriate source of base points", then the base points on that feature are not used in the calculation of the provisional equidistance line.

Of course, the reverse situation does arise. Even if a given coastal feature is an appropriate source of base points from a legal perspective, it is often the case that the coastal feature provides no relevant base points from a technical perspective because no point along the baseline of that feature is "nearest" to the provisional equidistance line. This possibility is

⁴ *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, Judgment, I.C.J. Reports 1985, p. 48, para. 64.

⁵ See BM, para. 6.54.

⁶ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, R.I.A.A., Vol. 22, p. 366, para. 133.

⁷ *Ibid.*, paras. 143-145 (eliminating Negileh Rock from consideration as part of the relevant coast).

⁸ *Ibid.*, paras. 147-148 (eliminating the island of al-Tayr and the island group of al-Zubayr from consideration as part of the relevant coast).

⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits*, Judgment, I.C.J. Reports 2001 (hereinafter "*Qatar v Bahrain*"), pp. 97-103, paras. 184-209.

¹⁰ See *ibid.*, paras. 217-223 and 245-249.

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illustrated by another example from the *Black Sea* case. On the Ukrainian coast, just north of the land boundary terminus, the Court identified two features – the islands of Tsyganka and Kubansky – both of which the Court found to be legally appropriate sources of base points¹¹; but only the base point at the southeastern tip of Tsyganka was mathematically relevant. The Court noted that the nearest base point on Kubansky did

not produce any effect on the equidistance line plotted by reference to [nearer base points on the coasts of both states]... This base point is therefore to be regarded as irrelevant for the purposes of the present delimitation¹².

The same was true of base points north of Kubansky as well.

Continuing this iterative process in the *Black Sea* case, the Court found several more coastal features that were both legally appropriate sources of base points and prominent (or seaward) enough to provide mathematically relevant base points. On the Romanian coast, those features were Sacalin Peninsula and the landward end of Sulina Dyke. On the Ukrainian coast, those features were Tsyganka Island, Cape Tarkhankut, and Cape Kherones. Altogether, the Court designated five base points for the construction of the provisional equidistance line in this case. The map on the screen illustrates those five base points, the provisional equidistance line, and the construction lines connecting the equidistance turning points with the relevant base points. (Those equidistance turning points are designated A, B and C on this map.) The Tribunal will undoubtedly note that from Tsyganka Island to Cape Tarkhankut there are no mathematically relevant *base points*, even though much of this coast was deemed to be relevant coast. It should also be noted that from the land boundary terminus to point B, the provisional equidistance line is constructed between adjacent coasts. Then, at point B, this relationship changes. Through point C and to the south, this becomes a boundary between opposite coasts. A somewhat similar geographic configuration is present in the case now before this Tribunal—a point to which I will turn in a moment. For now, what can also be seen on this map is that base points on Serpents' Island were not used to construct the provisional equidistance line despite their relative proximity to that line. Serpents' Island and its base points were not used because, as the Court wrote, their use would have been “a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes”.¹³

In the Bay of Bengal Myanmar followed this standard approach, constructing the provisional equidistance line using the nearest points on appropriate features. In the process, Myanmar identified five base points that were both mathematically relevant to the construction of the provisional equidistance line and located on features that, as a legal matter, were appropriate sources of base points.

Before I describe those base points in further detail, let me respond to an argument Bangladesh raised in the written pleadings and again during the first round of these hearings¹⁴. Bangladesh opposes, as a general matter, the use of an equidistance line for this boundary delimitation, but also has a specific problem with “the fact that its direction is controlled by a total of just five base points on both Parties’ coasts, three on Myanmar’s side ... and only two on Bangladesh ...”¹⁵. Bangladesh goes on to tell us that “[i]t would be remarkable to base a maritime boundary line ... on such a small sampling of points”¹⁶.

¹¹ *Black Sea*, I.C.J. Reports 2009, p. 44, paras. 143-144.

¹² *Ibid.*, para. 144.

¹³ *Ibid.*, para. 149.

¹⁴ See Reply of Bangladesh (hereinafter “BR”), para. 3.99; ITLOS/PV11/2(E), p. 14, lines 42-44, and p. 17, lines 32-34, 37-40 (Reichler); ITLOS/PV11/4(E), p. 23, lines 14-17 (Martin).

¹⁵ BR, para. 3.99.

¹⁶ *Ibid.*

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But would it really be remarkable to use just five base points to construct the provisional equidistance line in this case? As just demonstrated, five base points were sufficient to delimit a boundary in the Black Sea stretching well over 100 M from start to finish. In other delimitations, especially those between adjacent coasts, even fewer base points have been used. Just three base points were used for the 170 nautical mile western section of the boundary in the *Anglo-French case*,¹⁷ and just two base points were used to construct the provisional equidistance line in *Cameroon v Nigeria*.¹⁸ Clearly, five base points are more than enough in the geography of this case. Not only are they enough, the five base points presented by Myanmar are the only base points that influence the course of the equidistance line. In other words, these five are the only mathematically and legally relevant base points.

On the Bangladesh coast, there are two relevant base points: we have designated them $\beta 1$ on Bangladesh's mainland coast at Shahpuri Point just north of the land boundary terminus, and $\beta 2$ on the southern tip of Mandabaria Island near the land border with India. On Myanmar's coast, there are three relevant base points, all on Myanmar's mainland coast. The first, $\mu 1$, is on the coast just south of the land boundary terminus at Cypress Point. The second, $\mu 2$, is on the small promontory near Kyaukpandu. The third, $\mu 3$, is located on the northern headland of the May Yu River.

Of course, as was the case with potential base points on Ukraine's coast between Tsyganka Island and Cape Tarkhankut, here there are an infinite number of base points located on baselines that, because of their distance from the provisional equidistance line, are not relevant to the construction of that line. For example, north of the land boundary terminus, many base points on Bangladesh's mainland coast and coastal islands could be considered legally appropriate base points, but because $\beta 1$ is nearer to the provisional equidistance line, then those other potential base points are not relevant. On Myanmar's side, the same is true of base points on the coastal features south of base point $\mu 3$. These potential base points on both coasts were eliminated on the objective basis of a distance measurement. They are not nearest.

Several other base points were eliminated for legal reasons, leaving us with the five final base points used to construct the equidistance line. Allow me to briefly explain the basis for eliminating those other base points.

First, South Talpatty - which is present in the upper image on the screen - is a potential source of relevant base points because of its relatively seaward location. Yet, as a legal matter, South Talpatty cannot be a source of base points for two reasons. First, the sovereignty of this feature is disputed between Bangladesh and India. Second, as the Tribunal can see on the images provided by Bangladesh in its Memorial and now shown on the screen, it is not clear whether the coastal feature - which may have existed in 1973 - still exists. The next nearest base point on an appropriate coastal feature is found at $\beta 2$ on the southern coast of Mandabaria Island, which is also shown on the screen.

While we are here, the Tribunal will recall that $\beta 2$ is the base point that Bangladesh claims is "located on a coast characterized by a 'very active morpho-dynamism'"¹⁹. Bangladesh expresses concern that "the location of base point $\beta 2$ this year might be very different from its location next year"²⁰. Based on the images on the screen from Bangladesh's memorial, it is difficult to detect any change in the location of $\beta 2$ in the sixteen years from

¹⁷ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, R.I.A.A., Vol. 18, Annex, Technical Report to the Court, pp. 128-129.

¹⁸ *Land and Maritime Boundary between Cameroon and Nigeria (Equatorial Guinea Intervening)*, Merits, Judgment, I.C.J. Reports 2002, p. 443, para. 292.

¹⁹ BR, para. 3.104.

²⁰ *Ibid.*

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1973 to 1989. I mention this only in passing, because nautical charts not satellite images are used to determine the location of baselines. In any event, these images, contrary to Bangladesh's concerns, indicate that the area of $\beta 2$ is quite stable.

Here is a second example of a set of coastal features that are potential sources of relevant base points, but that were nonetheless excluded from the calculation of the equidistance line. I refer to the low-tide elevations around the mouth of the Naaf River, the Cypress Sands, and Sitaparokia Patches, off Myanmar's coast, all shown in green on the map now on the screen. Neither Party used base points on those low-tide elevations, despite the fact that they are legitimate sources of base points for measuring the breadth of the territorial sea and are nearer to the territorial sea equidistance line than the base points on the mainland coasts. These low-tide elevations are also nearer the provisional equidistance line than either base point $\beta 1$ or $\mu 1$. Why, then, did neither Party make use of the technically relevant base points on these prominent features to construct their lines? The reason is that they cannot be used, as a legal matter, for that purpose. The International Court in *Qatar v Bahrain* noted that "low-tide elevation[s] ... situated in the overlapping area of the territorial sea of two States"²¹ "must be disregarded" for the purpose of drawing the equidistance line²².

Finally, two other coastal features must be eliminated as sources of base points: Myanmar's May Yu Island and Bangladesh's St Martin's Island. Both of these features are legitimate sources of normal baselines for measuring the breadth of the territorial sea, and both would otherwise have provided the nearest base points – that is, the relevant base points – for the construction of the provisional equidistance line. However, the technical qualities of these features cannot overcome their legal deficiencies. These features must be eliminated from the construction of the provisional equidistance line, as a legal matter, for the same reasons that Serpents' Island, an otherwise legitimate source of relevant base points, was disregarded by the Court in the *Black Sea* case. These two outlying features are extraneous elements relative to the predominant coastal geography of the Parties. They cannot be grafted onto those coasts and cannot be taken to form part of the coastal configuration of the Parties without refashioning geography²³.

The use of these anomalous features in the construction of the provisional equidistance line would create a line that would be, to borrow a phrase from Bangladesh, "wholly inconsistent with the dominant geographic realities in the area"²⁴. Myanmar could not agree more. Bangladesh is correct in arguing that, if these islands were used in the construction of the provisional equidistance line, the entire course of that line would be determined by these two features alone²⁵. It would be as if the mainland coasts of the Parties did not exist. From this observation, with which Myanmar agrees, Bangladesh then leaps to the conclusion that the only remedy for this situation is the application of a method other than equidistance²⁶. This is, to say the least, a wild overreaction.

Even when faced with extraneous maritime features, international courts and tribunals have consistently applied the three-stage equidistance/relevant circumstances method and eliminated those features in question. Myanmar advocates the same approach here, while Bangladesh takes the opposite view.

Mr President, as I noted earlier in this presentation, once the coastal inputs have been decided, the rest is left to trigonometric calculations. The correct coastal inputs consist of points along the low-water lines of all coastal features of both Parties except those features

²¹ *Qatar v Bahrain*, I.C.J. Reports 2001, p. 101, para. 202.

²² *Ibid.*, para. 209.

²³ *Black Sea*, I.C.J. Reports 2009, p. 44, paras. 149.

²⁴ *BM*, para. 6.47.

²⁵ See *ibid.*, paras. 6.47-6.55.

²⁶ *Ibid.*, para. 6.55.

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that were eliminated for the legal reasons as described above. Here, the location of the low-water line was determined using the most up-to-date British Admiralty charts. The output of the trigonometric calculations is the provisional equidistance line generated from the nearest base points on the baselines of both states. The map on the screen shows the result of this calculation. From the agreed land boundary terminus, Point A, the line extends through point E to point F: a point equidistant from $\beta 1$, $\mu 1$ and $\mu 2$, thence to point G: a point equidistant from $\beta 1$, $\mu 2$ and $\mu 3$, and, finally, to point Z: a point equidistant from $\beta 1$, $\mu 3$ and $\beta 2$.

Before I conclude my presentation and while this map is still on the screen, I would like to make two final points. First, Bangladesh notes an inequality in the number of base points along the Parties' adjacent coasts and casts itself as disadvantaged. Bangladesh writes,

because of the absence of additional Bangladesh base points north of $\beta 1$, there is nothing to counteract the effects of Myanmar's coast between base points $\mu 1$, $\mu 2$, and $\mu 3$ ²⁷.

Three against one: Bangladesh, apparently, feels unfairly outnumbered. But in fact the reason that $\beta 1$ is the only relevant base point along this part of the Bangladesh coast is that it is situated on the most prominent feature in the area - Shahpuri Point. No other features along the Bangladesh coast are more prominent than Shahpuri Point. Indeed, no features along the Myanmar coast are as prominent. It takes three successive features along the Myanmar coast to counteract the overwhelming effect of the single base point on Shahpuri Point on the direction of the provisional equidistance line.

My second point concerns the coastal geography that affects the line at point Z and beyond. Mr President, I promised earlier that I would return to address the transition from coastal adjacency to oppositeness in this case. You will recall that we saw this transition occur at point B in the *Black Sea* case where the opposite Crimean coast of Ukraine begins to affect the delimitation, turning the line toward the south. We have a similar coastal configuration here. The provisional equidistance line is governed by the purely adjacent coasts of the Parties from the land boundary terminus, through points F and G and out to point Z. It is at point Z that the purely adjacent relationship begins to take on an element of oppositeness as Bangladesh's $\beta 2$ influences the course of the line. Bangladesh complains that this transition occurs "not so coincidentally ... at precisely the point it meets India's claim line"²⁸. In fact, at or near point Z, the relationship between the adjacent coasts of Myanmar and Bangladesh ceases and the relationship between the opposite coasts of Myanmar and India begins. As Bangladesh implies, this is not a coincidence. Instead, it is a function of the actual coastal geography of the Bay of Bengal. Bangladesh has very little coastline west of $\beta 2$ and, it goes without saying, it has no coastline west of its land border with India. The fact that Myanmar, Bangladesh, and India share a tripoint in the vicinity of point Z is a geographic fact. Bangladesh must learn to live with that fact, as have many other similarly situated coastal states around the world.

Mr President, Members of the Tribunal, this concludes my presentation on the construction of the provisional equidistance line. I thank you for your kind attention and, with your permission, I am quite sure that Professor Forteau, will be happy to begin now in the remaining time to present the second stage of the equidistance/relevant circumstances method.

²⁷ BR, para. 3.105.

²⁸ *Ibid.*, para. 3.103.

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The President:

Thank you.

I call on Professor Forteau to take the floor.

EXPOSÉ DE M. FORTEAU – 19 septembre 2011, matin

EXPOSÉ DE M. FORTEAU
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/9/Rev.1, Fr, p. 39–44]

M. Forteau :

Merci, Monsieur le Président, je vous suis très reconnaissant de me donner à nouveau la parole.

Monsieur le Président, Messieurs les Juges, conformément à la méthode fermement établie en jurisprudence, j'examinerai maintenant la seconde étape du processus de délimitation. Je le ferai pendant les quinze minutes qui nous séparent de la pause du déjeuner, et je poursuivrai durant une cinquantaine de minutes cet après-midi.

Une fois la ligne provisoire d'équidistance tracée, il appartient à la juridiction internationale au titre de cette deuxième étape du processus d'« examiner s'il existe des facteurs appelant un ajustement ou un déplacement [et pas un abandon], un ajustement ou un déplacement de cette ligne afin de parvenir à un "résultat équitable" » – je cite ici les termes employés en 2009 par la Cour internationale de Justice dans l'affaire *Roumanie c. Ukraine*.¹

Il n'existe pas de différend entre les Parties quant à la nécessité de procéder, au titre de cette seconde étape du processus, à la recherche d'éventuelles circonstances pertinentes. Un profond désaccord subsiste néanmoins entre elles à l'égard de la nature des circonstances qui peuvent être valablement invoquées à ce titre.

Il résulte de ce désaccord que les Parties s'opposent aussi sur le caractère équitable de la ligne d'équidistance. Le Myanmar considère qu'aucune circonstance n'exige d'ajuster cette ligne car celle-ci aboutit dans la présente affaire à la solution équitable. Le Bangladesh, quant à lui, conteste cette conclusion en s'offusquant du caractère selon lui « dramatique » et « arbitraire » de la délimitation fondée sur l'équidistance. Selon le Bangladesh, la ligne d'équidistance serait inéquitable en ce qu'elle ne lui laisserait qu'un « tout petit bout de zone maritime triangulaire »² (« *just a small, wedge-shaped area of maritime space* »).

Monsieur le Président, Messieurs du Tribunal, j'ordonnerai mon intervention autour de ces deux sources d'opposition entre les Parties : après avoir rappelé quels sont les principes applicables en matière de circonstances pertinentes, j'indiquerai comment ceux-ci s'appliquent en la présente affaire. Je montrerai qu'à ces deux égards, l'Etat demandeur confond systématiquement, et vous demande de confondre, solution en équité et solution équitable. Ce que le Bangladesh réclame, c'est un partage proportionnel de la zone à délimiter ; ce n'est certainement pas une délimitation aboutissant à un résultat équitable au sens de la jurisprudence contemporaine.

En réponse aux arguments que fait valoir le Bangladesh sur le premier point, la nature des circonstances qui peuvent être valablement invoquées, je développerai, en réponse aux arguments du Demandeur, deux propositions :

Je rappellerai tout d'abord que toute circonstance ne peut pas être valablement invoquée au soutien d'un ajustement de la ligne provisoire d'équidistance, autrement dit, toute circonstance n'est pas nécessairement une circonstance « pertinente » ;

Je soulignerai ensuite qu'une ligne d'équidistance peut parfaitement aboutir au résultat équitable prescrit par la Convention sur le droit de la mer y compris, je le souligne, lorsqu'elle crée des effets d'amputation.

Commençons par le premier point, qui devrait nous conduire jusqu'à la pause-déjeuner. Dans son mémoire³ et lors de ses plaidoiries⁴, le Bangladesh a affirmé qu'il

¹ *CIJ Recueil 2009*, p. 112, par. 155.

² ITLOS/PV.11/2 (F), p. 6, ligne 43 (M^{me} Moni).

³ Mémoire du Bangladesh, par. 6.26.

⁴ ITLOS/PV.11/4 (E), p. 11, lignes 22-34 (Sands).

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n'existait aucune liste prédéfinie de circonstances pouvant être qualifiées de circonstances pertinentes. C'est effectivement ce qu'a constaté le Tribunal arbitral en 2007 dans l'affaire *Guyana/Suriname* que le Bangladesh évoque dans ses écritures.

Mais ce n'est pas parce que la liste des circonstances pertinentes resterait ouverte que toute circonstance peut pour autant devenir une circonstance pertinente. La jurisprudence contemporaine, relativement étoffée, a circonscrit le champ du possible en la matière.

Le Bangladesh a lui-même d'ailleurs implicitement admis que toute circonstance n'est pas nécessairement une circonstance pertinente, en invoquant dans son mémoire une circonstance économique qui a significativement disparu de la réplique du Demandeur et n'a pas réapparu lors des plaidoiries – ce dont il faut déduire que le Bangladesh admet aujourd'hui qu'elle n'était effectivement pas pertinente. Dans son mémoire, l'Etat demandeur, en effet, avait prétendu que les besoins économiques de sa population constitueraient une circonstance pertinente aux fins de la délimitation. Et le Bangladesh estimait alors que le priver d'un accès aussi étendu que celui qu'il réclame aux espaces maritimes aurait été source d'« inéquité » au motif que le poisson du golfe du Bengale serait une composante clef du régime alimentaire national⁵.

Il ressortait cependant, sur le plan factuel, des documents annexés à cet effet par le Bangladesh dans son mémoire, que les poissons mangés par la population du Bangladesh sont essentiellement des poissons de rivière et des produits de l'aquaculture et que si la consommation de poisson devait augmenter au Bangladesh, l'accent devait être placé surtout sur l'exploitation des plaines inondables et le développement de l'aquaculture⁶. Il va de soi par ailleurs que les habitants du Myanmar, dont le régime alimentaire comporte davantage de poissons de mer et de crustacés, ont tout autant besoin de l'accès aux ressources halieutiques.

Mais quoi qu'il en soit de ces besoins, il s'agit là de considérations hors sujet. De tels besoins économiques sont étrangers à l'opération de délimitation maritime. La jurisprudence a rejeté l'idée que des considérations économiques puissent constituer une circonstance pertinente. Le Myanmar l'avait rappelé dans son contre-mémoire⁷ et il ne peut que prendre acte avec satisfaction de l'abandon entretemps par l'Etat demandeur de cette prétention.

J'ajouterai que les remarques qui précèdent valent tout autant pour l'accès aux ressources du plateau continental. Que le Bangladesh souhaite pouvoir y avoir accès, c'est une chose, cela ne transforme pas ce souhait en un droit qu'il faudrait à tout prix lui reconnaître. La délimitation dépend, à tort ou à raison, de la configuration côtière, et d'elle uniquement.

L'exemple des besoins économiques que je viens d'évoquer n'est qu'une illustration parmi d'autres du fait que toute circonstance n'est pas nécessairement une circonstance pertinente. De fait, la notion est une notion juridique qui, en cette qualité, est enserrée dans des limites juridiques, comme l'a très clairement rappelé le Tribunal arbitral dans l'affaire *La Barbade c. La Trinité-et-Tobago*, en 2006, en précisant que les facteurs qui peuvent être invoqués sont

*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 (...)*⁸.

Autrement dit, la jurisprudence est déterminante sur ce point.

⁵ Mémoire du Bangladesh, par. 6.39.

⁶ Mémoire du Bangladesh, vol. III, annexe 35.

⁷ Contre-mémoire du Myanmar, par. 5.143.

⁸ *RSA*, vol. XXVII, p. 215, par. 243.

EXPOSÉ DE M. FORTEAU – 19 septembre 2011, matin

Trois critères fondamentaux permettent en particulier à ce titre de cerner aujourd'hui les contours des circonstances qui peuvent être considérées comme pertinentes. Ces trois critères, et je le montrerai, le Bangladesh n'a pas cessé de s'en affranchir dans la présente affaire en dépit des directives on ne peut plus claires de la jurisprudence contemporaine.

Au titre du premier critère, je me dois de rappeler qu'une délimitation maritime ne peut pas aboutir à refaire la nature. Il en résulte de cette contrainte fondamentale qu'une circonstance dont la prise en compte aboutirait à refaire la nature ne pourrait pas être qualifiée de circonstance pertinente. Il est indiqué dans ma première plaidoirie, en 2002, dans l'affaire *Cameroun c. Nigeria*, la Cour internationale de justice avait rappelé que

La configuration géographique des espaces maritimes que la Cour est appelée à délimiter est une donnée. Elle ne constitue pas un élément que la Cour pourrait modifier, mais un fait sur la base duquel elle doit opérer la délimitation.

La thèse du Bangladesh est aux antipodes de ce principe fondamental. Le Bangladesh n'a cessé de répéter durant son premier tour de plaidoiries que l'élément géographique critique dans notre affaire serait la concavité du golfe du Bengale. Mais le Bangladesh en tire la mauvaise déduction : il considère que les effets de la configuration géographique doivent être *compensés* ; la Cour internationale de Justice réaffirme, elle, que « [l]a configuration géographique des espaces maritimes à délimiter est une donnée ... [et] pas un élément que la Cour pourrait modifier ».

Le Bangladesh voit toutefois dans ce principe, pourtant bien établi, un « truisme », lequel prouverait « *too much* ». Selon la réplique du Bangladesh, en effet, si ce truisme était exact, on ne peut pas refaire la nature, « on ne pourrait jamais s'écarter d'une équidistance rigoureuse »⁹

Le Bangladesh confond toutefois ici deux choses de nature très différente. L'ajustement de la ligne d'équidistance peut parfaitement découler du poids différent attribué à des éléments distincts de la géographie côtière. Il est clair, notamment, qu'une configuration côtière aboutissant à un résultat en flagrante disproportion avec la longueur des côtes des deux parties peut exiger un ajustement de la ligne en faveur de l'Etat dont la longueur des côtes est sans comparaison avec celle de son voisin.

Ce n'est toutefois dans ce cas que lorsqu'il existe une disproportion flagrante qu'il y a lieu à ajustement. Ainsi, dans l'affaire *Jan Mayen*, la Cour internationale de Justice a-t-elle procédé à un tel ajustement au motif, dit la Cour, que le rapport entre la côte de Jan Mayen et celle du Groenland était « si disproportionné »¹⁰ qu'il y avait lieu à ajustement (en l'occurrence le rapport entre les côtes était de 1 à 9)¹¹. L'un des Etats avait les côtes neuf fois plus longues que l'autre Etat.

Dans ce genre de situations, l'ajustement ne refait pas la géographie côtière ; il vise uniquement à la refléter sans disproportion flagrante. La Cour de La Haye l'a clairement signifié dans la même affaire en suivant le raisonnement suivant :

La question que doit résoudre la Cour est donc la suivante (je cite l'extrait de l'Arrêt) : la différence entre les longueurs des côtes pertinentes est frappante. Compte tenu des effets générés par une telle disparité, celle-ci constitue-t-elle ... une « circonstance pertinente », aux fins des règles du droit coutumier, appelant l'ajustement ou le déplacement de la ligne médiane ? Une délimitation par la ligne médiane entraînerait, de l'avis de la Cour, une *méconnaissance de la*

⁹ Réplique du Bangladesh, par. 3.8.

¹⁰ *CIJ Recueil 1993*, p. 67, par. 65.

¹¹ *CIJ Recueil 1993*, p. 65, par. 61.

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géographie côtière des façades maritimes du Groenland oriental et de Jan Mayen¹².

Autrement dit, de bout en bout, on le voit, c'est bien la configuration côtière qui dicte la délimitation y compris lorsque l'on ajuste la ligne d'équidistance. A aucun moment le juge ne refait la nature, et c'est précisément la raison pour laquelle le test de non-disproportionnalité met en balance des éléments géographiques.

Cette manière de procéder n'a strictement rien de comparable avec celle dans laquelle l'effet désavantageux produit par la nature serait corrigé au nom de considérations cette fois-ci de nature extra-géographique, *a fortiori* au nom du simple fait que l'un des deux Etats s'estimerait *désavantagé* par la nature – n'oublions pas d'ailleurs en passant que si un Etat côtier est désavantagé par la nature, il est toujours en meilleure position qu'un Etat privé d'accès à la mer.

Or, c'est très précisément ce que réclame le Bangladesh qui se plaint ainsi dans son mémoire d'être « désavantagé par sa géographie côtière unique »¹³. Autrement dit, c'est sa configuration côtière elle-même que le Bangladesh conteste. Il ne peut se prévaloir devant vous d'un désavantage naturel sans contrevenir à la règle selon laquelle la délimitation ne peut pas refaire la nature. Les directives fixées en jurisprudence sont claires – et je terminerai sur ce point pour ce matin. Dans son Arrêt de 2002, dans l'affaire *Cameroun c. Nigéria*, la Cour précise que l'objectif de la délimitation maritime est de « s'employ[er] à tracer une ligne de délimitation » et non de « trouver une compensation équitable à une inégalité naturelle »¹⁴.

Monsieur le Président, avec votre permission, j'arrêterai là pour ce matin, en vous souhaitant, ainsi qu'à la délégation du Bangladesh, bon appétit. Monsieur le Président, Messieurs les Juges, je vous remercie de votre bienveillante attention.

The President:

You will continue your statement this afternoon? Thank you very much.

This brings us to the end of this morning's sitting. The hearing will be resumed this afternoon at three o'clock. The sitting is now closed.

(Luncheon adjournment)

¹² *CLJ Recueil 1993*, p. 68, pars. 67-68.

¹³ Mémoire du Bangladesh, par. 2.46 (f).

¹⁴ *CLJ Recueil 2002*, p. 446, par. 299.

19 September 2011, p.m.

PUBLIC SITTING HELD ON 19 SEPTEMBER 2011, 3.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 19 SEPTEMBRE 2011, 15 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

We will continue the oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I call on Professor Forteau to continue his presentation.

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EXPOSÉ DE M. FORTEAU (SUITE)
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/10/Rev.1, Fr, p. 1-20]

M. Forteau :

Merci beaucoup, Monsieur le Président.

Ce matin, j'avais entamé la présentation des trois critères fondamentaux qui limitent aujourd'hui l'invocation de circonstances en tant que circonstances pertinentes et j'avais rappelé, au titre du premier de ces critères, qu'il n'est pas possible, sous couvert d'une circonstance pertinente, d'une circonstance, de refaire la nature.

Je reprendrai ici ma présentation en faisant une dernière remarque sur ce premier critère. Cette remarque prend la forme, en réalité, d'un *caveat*.

Si un Tribunal ne peut pas refaire la nature, il va de soi, bien entendu, que c'est à la portée en revanche d'un accord politique. Mais c'est précisément la raison pour laquelle de tels accords n'ont alors aucune valeur probante devant un tribunal. Lundi dernier, M. Martin a estimé utile de vous présenter à cet effet quatre accords – quatre seulement – qui ont accordé des corridors à des Etats souffrant d'un effet d'amputation¹ (je note entre parenthèses qu'en revanche la référence au prétendu « corridor » de Saint-Pierre-et-Miquelon a disparu : le Bangladesh a sans doute été convaincu des arguments de notre duplique sur ce point²).

Selon M. Martin, ces accords témoigneraient « de ce que des Etats en Afrique, en Europe, dans les Amériques et dans les Caraïbes reconnaissent largement que la méthode de l'équidistance ne vaut pas quand des Etats sont coincés au milieu d'une concavité »³ M. Martin a parlé à cet égard d'une « *broad recognition* ». Des Etats reconnaissent largement qu'il en irait ainsi.

« *A broad recognition* », c'est évidemment exagéré ! Quatre accords seulement, cela fait, si je compte bien, une moyenne inférieure à un accord par continent. Insignifiants par leur nombre, ces accords sont par ailleurs dépourvus de toute pertinence sur le fond. Ils présentent tous en effet une originalité qui a échappé à la sagacité de M. Martin et qui les rend sans portée dans notre affaire : à chaque fois, je dis bien à *chaque fois*, l'Etat subissant un effet d'amputation à qui un corridor a été accordé par la voie conventionnelle est enclavé de part et d'autre *par un seul et même Etat* : la Gambie est encerclée au nord et au sud par le Sénégal, l'île de la Dominique au nord et au sud par deux îles françaises ; Monaco à l'ouest et à l'est par la France ; et le Brunei à l'ouest et à l'est par la Malaisie. Ce n'est évidemment pas le cas dans notre affaire : le Myanmar n'est pas l'Inde !

Au demeurant, Monsieur le Président, nous avons indiqué dans notre duplique⁴ que les circonstances dans lesquelles ces quelques accords octroyant un corridor avaient été conclus confirmaient qu'il s'agissait de toute manière de concessions *politiques* – dont d'ailleurs le caractère praticable, en termes d'exploitation concrète des droits sur la zone maritime, est peu évident.

Le rapporteur au Parlement français sur la ratification de la convention conclue avec Monaco indiquait par exemple que la France avait accepté une concession que, je cite, « les règles du droit international ne l'obligeaient pas à accepter »⁵. On ne peut pas être plus clair et le Bangladesh n'a d'ailleurs rien eu à objecter sur ce point.

J'en viens au second critère qui encadre l'invocation de circonstances pertinentes. Ce second critère est le suivant : le but d'une délimitation maritime n'est pas le partage équitable

¹ ITLOS/PV.11/4 (E), p. 21, lignes 11-14 (M. Martin).

² Duplique du Myanmar, par. 6.29.

³ *Ibid.*, p. 21, lignes 11-14.

⁴ Pars. 6.21-6.33.

⁵ Duplique du Myanmar, par. 6.28.

EXPOSÉ DE M. FORTEAU – 19 septembre 2011, après-midi

de la zone contestée. Le Bangladesh de nouveau n'en tient aucunement compte dans ses écritures. Selon lui,

En tant qu'Etats côtiers dont les côtes adjacentes face à la haute mer sont essentiellement comparables, il n'y a aucune raison de principe pour laquelle le Bangladesh et le Myanmar ne devraient pas avoir des droits généralement comparables d'étendre leur juridiction maritime aussi loin vers le large que l'autorise le droit international⁶.

Toujours selon le Bangladesh, lui refuser une « répartition équitable des eaux du golfe du Bengale » (« *an equitable apportionment of the waters of the Bay of Bengal* ») reviendrait à refuser à sa population « une part équitable » (« *a fair share* ») d'une ressource dont sa population serait lourdement tributaire⁷.

Ce n'est de nouveau pas l'approche correcte : les juridictions internationales l'ont rappelé de manière constante, il ne s'agit aucunement de procéder à un partage équitable, à un partage proportionnel, de la zone à délimiter. Le partage des espaces maritimes résulte de la délimitation et non l'inverse. Comme cela a été rappelé dans l'affaire *Libye/Malte* en 1985, il ne saurait être question de se livrer à un exercice de « justice distributive »⁸.

Dans l'affaire *Jan Mayen*, la Cour a également rappelé en 1993, je cite, que :

Le contentieux de la délimitation maritime n'a pas pour objet d'assurer le partage d'une indivision ... le droit ne prescrit pas une délimitation fondée sur la recherche d'un partage d'une zone de chevauchement selon une comparaison des longueurs des façades côtières et des étendues que celles-ci génèrent (j'insiste sur ce dernier point). Une cour a pour tâche de définir la ligne de délimitation entre les zones qui relèvent de la juridiction maritime de deux Etats ; c'est donc le partage de la région qui résulte de la délimitation et non l'inverse⁹.

Le troisième et dernier critère général, que j'ai déjà eu l'occasion d'évoquer, je serai donc plus bref à son propos, est celui selon lequel la délimitation maritime n'a pas vocation à satisfaire les « besoins » des Etats. Le Bangladesh prétend pourtant à ce titre que « la nécessité » pour lui d'avoir accès au secteur du plateau continental au-delà de 200 milles marins (le Bangladesh évoque son « *need for access to its entitlement* ») constituerait en soi une circonstance pertinente justifiant l'application d'une méthode autre que l'équidistance¹⁰.

Le Bangladesh n'a jamais expliqué cependant en quoi, *en droit*, cette « nécessité » serait pertinente aux fins de la délimitation. Et il n'aurait pas pu le faire : l'objet d'une délimitation consiste à tracer une limite en fonction de la géographie côtière des zones maritimes qui se chevauchent, comme les jurisprudences que j'ai déjà citées le rappellent amplement.

Si l'on tient compte de ces trois principes, aucune circonstance ne justifie en la présente affaire l'ajustement de la ligne d'équidistance. Je le montrerai cet après-midi, non sans avoir au préalable cependant rappelé ce qui constitue une autre évidence lorsque l'on compulse la jurisprudence contemporaine relative à la méthodologie de la délimitation. Cette seconde évidence tient à ceci : une concavité produisant un effet d'amputation ne constitue pas en soi une circonstance pertinente comme croit pouvoir l'affirmer le Bangladesh.

⁶ Mémoire du Bangladesh, par. 6.37.

⁷ *Ibid.*, par. 6.39. V. aussi duplique du Myanmar, par. 6.1.

⁸ *CIJ Recueil 1985*, p. 40, par. 46 ; contre-mémoire du Myanmar, par. 5.117.

⁹ *CIJ Recueil 1993*, pp. 66-67, par. 64.

¹⁰ Mémoire du Bangladesh, par. 6.43 ; v. aussi par. 6.45.

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Le fait qu'une concavité produisant un effet d'amputation ne constitue pas en soi une circonstance pertinente a été mis en relief par la Cour internationale de Justice en 2002 lorsque dans l'affaire *Cameroun c. Nigéria*, elle a indiqué –je cite– qu'elle « ne conteste pas que la concavité des côtes puisse constituer une circonstance pertinente pour la délimitation »¹¹; « puisse constituer », prend bien soin de dire la Cour, et non pas « constitue intrinsèquement ». D'ailleurs, j'y reviendrai, la délimitation que la Cour a concrètement consacré dans cet arrêt en 2002 montre définitivement que la concavité au sens où le Bangladesh l'invoque dans notre affaire ne constitue pas une circonstance pertinente.

Nos contradicteurs ne sont d'ailleurs pas d'une très grande cohérence d'ailleurs sur ce point :

- tantôt ils affirment que la concavité serait « intrinsèquement inéquitable » et que l'équidistance aboutirait « par définition » (« *by definition* ») à un résultat inéquitable dans le cas d'une concavité entre trois Etats¹² ;

- tantôt ils reconnaissent –et il est difficile de faire autrement au vu de la jurisprudence contemporaine, j'y reviendrai dans un instant– tantôt ils reconnaissent que la concavité n'est pas en soi inéquitable, en soutenant alors que ce serait l'effet d'amputation qui le serait¹³.

Mais cette allégation est tout aussi incomplète que la précédente : un effet d'amputation n'est jamais inéquitable en soi ; il l'est s'il aboutit à un résultat inéquitable au regard de la géographie côtière, ce que le Bangladesh ne démontre jamais concrètement et en particulier pas en utilisant le test de l'absence de disproportionnalité qui sert pourtant précisément à cela.

Pour toute démonstration, le Bangladesh invoque deux affaires datées, celles du *Plateau continental de la mer du Nord* et de l'arbitrage *Guinée/Guinée-Bissau*, ainsi qu'une série de croquis abstraits sur les effets de la concavité¹⁴.

Je dirai un mot tout d'abord de ces croquis abstraits sur les effets de la concavité dont vous vous souvenez certainement et que M. Martin nous a présentés il y a dix jours¹⁵. Une fois encore, le Demandeur ne respecte pas la géographie côtière. Ces croquis sont censés illustrer notre affaire. Ils la travestissent de trois points de vue :

- l'équidistance octroie au Bangladesh un accès à une limite d'à peu près 182 milles nautiques; le croquis de M. Martin en accorde à peine 100 à l'Etat B sur le croquis animé commenté par le Professeur Pellet jeudi dernier;

- la ligne de délimitation ne part pas dans notre affaire de la concavité, mais, je l'ai montré ce matin, plusieurs centaines de kilomètres plus au sud d'un endroit où les côtes des parties sont adjacentes, droites et même légèrement convexes ; rien de ceci ne figure sur les croquis de M. Martin;

- enfin, l'effet de rétrécissement dénoncé par M. Martin est tout à fait biaisé : d'un croquis à l'autre, la côte de l'Etat B, celui qui est enclavé au milieu, la côte de l'Etat B garde la même longueur tandis que les côtes de l'Etat A et de l'Etat C s'allongent. M. Martin compare d'un croquis à l'autre des situations qui ne sont pas comparables, pour mieux créer une fausse impression de disproportion.

Quant aux deux précédents de la *Mer du Nord* d'une part, et *Guinée/Guinée-Bissau* d'autre part, mon collègue Alain Pellet l'a rappelé ce matin : ils ne reflètent pas la méthodologie applicable. Par ailleurs, la Cour internationale de Justice n'a jamais délimité les

¹¹ *CJ Recueil 2002*, p. 445, par. 297.

¹² ITLOS/PV.11/2/Rev.1 (E), p. 18, lignes 43-45 (Reichler); ITLOS/PV.11/4 (E), p. 22, lignes 16-17 (Martin).

¹³ Réplique du Bangladesh, par. 3.39.

¹⁴ ITLOS/PV.11/4 (E), p. 14, l. 4-41 (Martin).

¹⁵ 12 septembre 2011, Tab. 3.7.

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frontières maritimes de l'Allemagne dans la mer du Nord et il est hautement spéculatif d'imaginer ce qu'elle aurait concrètement fait.

Quant à la sentence de 1985 dans l'affaire *Guinée/Guinée-Bissau*, je relèverai simplement que l'un des membres du Tribunal arbitral, plus tard Président de la Cour de La Haye, a qualifié la sentence de 1985 de « cas d'espèce » en se désolidarisant officiellement moins de quatre années seulement après son adoption, de la méthode qui y avait été utilisée – je renvoie ici à l'opinion dissidente de l'arbitre Bedjaoui dans la sentence *Guinée-Bissau/Sénégal* de 1989¹⁶ et en particulier au paragraphe 104 de son opinion dissidente.

Sur le plan factuel ensuite,

- la géographie côtière n'avait rien de comparable à celle de la présente affaire : en 1969 comme en 1985, les trois Etats concernés par la délimitation avaient la même longueur de côtes¹⁷ : ce n'est pas le cas ici;

- dans ces deux affaires, les Etats avantagés par la concavité bénéficiaient de côtes convexes qui renforçaient cet avantage¹⁸ : c'est l'inverse qui prévaut ici : la côte pertinente du Myanmar est concave, elle n'est pas convexe;

- enfin, dans notre affaire, le point de départ de la frontière maritime ne part pas de la concavité : il part, bien plus au sud, encore une fois, d'un endroit où les côtes pertinentes des Parties sont dans une relation d'adjacente droite et même convexe, orientée vers le sud-ouest, ce qui change tout.

Monsieur le Président, Messieurs Membres du Tribunal, les décisions rendues dans les dix dernières années par les juridictions internationales sont, elles, autrement plus probantes, à commencer par le fait qu'elles ont été adoptées dans le respect de la méthodologie désormais solidement consacrée. Ces décisions sont doublement pertinentes :

- elles le sont d'abord en elles-mêmes, par les solutions qu'elles ont adoptées ;
- mais elles le sont aussi rétrospectivement : ces décisions ont rejeté en effet l'argument, lorsqu'il a été invoqué devant elles, consistant à se prévaloir du *Plateau continental de la mer du Nord* pour tenter d'échapper à un effet d'amputation causé par une concavité entre trois Etats.

Permettez-moi, Monsieur le Président, de passer à ce titre en revue trois affaires récentes en particulier.

Dans l'affaire *Cameroun c. Nigéria* tout d'abord – vous trouverez le croquis qui est projeté maintenant dans le dossier des Juges de ce matin, sous l'onglet 3.2, dans l'affaire *Cameroun c. Nigéria*, la Cour internationale de Justice a décidé qu'il n'existait aucune circonstance de nature à rendre nécessaire l'ajustement de la ligne d'équidistance. En particulier, la Cour a rejeté l'argument du Cameroun selon lequel la concavité des côtes, qui entraînait un effet d'enclavement à son détriment, devait conduire à déplacer vers l'ouest la ligne d'équidistance de manière à lui ouvrir un accès à une zone maritime plus étendue.

Malgré cet effet d'enclavement, la Cour a estimé –je cite– que « la ligne d'équidistance [non ajustée] aboutit à un résultat équitable aux fins de la délimitation du secteur dans lequel la Cour a compétence pour se prononcer »¹⁹.

Je tiens à préciser ici que c'est à juste titre que la Cour précise ce dernier point (celui selon lequel la ligne d'équidistance aboutit à un résultat équitable dans le « secteur dans

¹⁶ Opinion dissidente de l'arbitre M. Bedjaoui dans l'affaire de la *Délimitation maritime entre la Guinée-Bissau et le Sénégal*, sentence du 31 juillet 1989, *RSA*, vol. XX, p. 194, par. 104 et note 109.

¹⁷ CIJ, arrêt du 20 février 1969, *Plateau continental de la mer du Nord*, *CIJ Recueil 1969*, p. 50, par. 91; sentence du 14 février 1985, *Délimitation maritime entre la Guinée et la Guinée-Bissau*, *RSA*, vol. XIX, p. 185, par. 98 *in fine*.

¹⁸ CIJ, arrêt du 20 février 1969, *Plateau continental de la mer du Nord*, *CIJ Recueil 1969*, p. 17, par. 8; sentence du 14 février 1985, *Délimitation maritime entre la Guinée et la Guinée-Bissau*, *RSA*, vol. XIX, p. 187, par. 103.

¹⁹ Arrêt du 10 octobre 2002, *CIJ Recueil 2002*, p. 448, par. 306.

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lequel la Cour a compétence pour se prononcer »). Il se trouve qu'effectivement une délimitation maritime ne concerne que les Etats parties au litige et doit par conséquent être – je cite – « déterminée en fonction de la côte et des formations maritimes des deux Parties » en litige, comme la Cour de La Haye a encore eu l'occasion de le rappeler le 4 mai 2011²⁰ dans l'affaire opposant le Nicaragua et la Colombie.

Cela condamne du même coup l'argument de l'enclavement avancé par le Bangladesh selon qui votre Tribunal devrait prendre en considération l'effet de la délimitation à venir entre l'Inde et le Bangladesh pour opérer la présente délimitation. C'est un argument que la Cour internationale de Justice a expressément rejeté dans l'affaire *Cameroun c. Nigeria*. Je cite :

En l'espèce, l'île de Bioko relève de la souveraineté de la Guinée équatoriale, un Etat qui n'est pas partie à l'instance. La question des effets de l'île de Bioko sur la projection de la façade maritime camerounaise vers le large se pose dès lors entre le Cameroun et la Guinée équatoriale et non entre le Cameroun et le Nigéria, et n'est pas pertinente aux fins de la délimitation qui occupe la Cour²¹.

Il en va exactement de même en la présente affaire : la question des effets de la présence de l'Inde sur la projection de la façade maritime du Bangladesh vers le large se pose entre le Bangladesh et l'Inde et non entre le Bangladesh et le Myanmar. Elle n'est donc pas pertinente aux fins de la délimitation qui occupe le Tribunal.

Le 3 février 2009, la Cour internationale de Justice a de nouveau retenu comme frontière maritime la ligne d'équidistance dans l'affaire de la *Délimitation maritime en mer Noire* qui a opposé la Roumanie à l'Ukraine. Selon la Cour, aucune des circonstances invoquées par les Parties n'était pertinente en l'espèce et par conséquent, la ligne d'équidistance a été jugée être la ligne aboutissant au résultat équitable²². La Cour a rejeté comme non-pertinentes les six circonstances invoquées par les Parties, à savoir la disproportion entre les côtes; le caractère fermé de la Mer Noire; la conduite des parties; les considérations liées à la sécurité; la présence de l'île des serpents dans la zone de délimitation; et enfin, l'effet d'amputation invoqué par l'Ukraine. Aucune de ces circonstances n'a été considérée par la Cour comme pertinente.

Je citerai enfin la sentence arbitrale du 11 avril 2006 rendue dans l'affaire de la *délimitation maritime entre la Barbade et la Trinité-et-Tobago*. Dans cette affaire où la délimitation concernait encore une fois des côtes concaves produisant un effet d'amputation, le Tribunal a refusé de considérer que l'absence d'accès de la Trinité-et-Tobago à la zone maritime située au-delà de sa limite des 200 milles nautiques constituait une circonstance pertinente supposant d'ajuster la ligne d'équidistance. Cette prétention de l'absence d'accès a été rejetée et le Tribunal a estimé au contraire que la ligne d'équidistance produisant cet effet d'enclavement aboutissait au résultat équitable recherché. Le Bangladesh a abondé dans ce sens dans sa réplique en qualifiant de la même manière la ligne décidée par le Tribunal²³.

Il est vrai que dans cette même affaire, le Tribunal a tout de même ajusté dans sa dernière partie la ligne d'équidistance au profit de la Trinité-et-Tobago²⁴. La ligne d'équidistance est en pointillés sur le schéma, la ligne du Tribunal est la ligne rouge. Le Professeur Crawford a qualifié cet ajustement de « l'un des modestes succès de [s]a carrière »

²⁰ CIJ, arrêt du 4 mai 2011 relatif à la requête du Honduras à fin d'intervention dans l'affaire du *Différend territorial et maritime* entre le Nicaragua et la Colombie, [www.icj-cij.org], par. 73.

²¹ *CIJ Recueil* 2002, p. 446, par. 299.

²² *CIJ Recueil* 2009, pp. 112-128, para. 155-204.

²³ Réplique du Bangladesh, par. 4.43.

²⁴ *RSA*, vol. XXVII, pp. 242 et s., para. 369 et s.

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(« *one of the modest successes of [his] life* »)²⁵, avant de préciser qu'il s'agissait tout de même d'un « réel succès » [« *a real one* »] au regard de la réclamation de la Barbade.

Monsieur le Président, Messieurs les Juges, vous voyez en ce moment ce succès à l'écran (c'est le petit triangle à l'extrémité Est de la ligne); et vous voyez immédiatement aussi, en le découvrant, combien, comparativement, la réclamation du Bangladesh dans notre affaire est tout à fait extravagante²⁶.

Le Professeur Crawford a pêché par ailleurs par omission en présentant ce qu'il qualifie lui-même de modeste succès. Il a négligé le fait important suivant : si le Tribunal a procédé à cet ajustement limité, ce n'est pas en raison de la concavité et de l'effet d'enclavement. C'est au motif uniquement de la disproportion de longueur des côtes des deux Etats que le Tribunal a estimé suffisamment importante (« *sufficiently great* ») pour devoir conduire à l'ajustement de la ligne au profit de la Trinité-et-Tobago. En l'espèce, le ratio était de 8 pour 1 en sa faveur : les côtes de la Trinité-et-Tobago étaient huit fois plus longues que celles de la Barbade²⁷.

Monsieur le Président, Messieurs les membres du Tribunal, si je résume donc :

- l'ajustement auquel le Tribunal a procédé est qualifié de « réel succès » par le Professeur Crawford;

- cet ajustement est « modeste », puisqu'il ne dépasse toujours pas la limite des 200 milles nautiques;

- et le Tribunal ne l'a accordé que parce que la longueur des côtes de la Trinité-et-Tobago était huit fois supérieure à la longueur des côtes de la Barbade.

Qu'en est-il dans notre affaire? La ligne d'équidistance donne un accès au Bangladesh à environ 182 milles nautiques; et la côte du Bangladesh n'est certainement pas huit fois plus longue que celle du Myanmar. Tout à l'opposé, c'est la côte pertinente du Myanmar qui est deux fois plus longue que celle du Bangladesh. En bref, la ligne d'équidistance est équitable.

Durant leur premier tour de plaidoiries, les conseils du Bangladesh ont visiblement paru gênés de ces précédents.

Le Professeur Boyle, tout d'abord, s'est appuyé mardi dernier sur l'affaire de la Barbade et de la Trinité-et-Tobago pour protester contre l'effet d'amputation subi par le Bangladesh²⁸. La démarche est pour le moins étrange : la sentence rendue dans cette affaire décide précisément en sens contraire de la thèse du Bangladesh : selon le Tribunal arbitral, une ligne dont l'effet est d'enfermer la Trinité-et-Tobago dans sa zone des 200 milles nautiques et la ligne équitable et cet enclavement n'a rien d'une circonstance pertinente.

Les commentaires du Professeur Crawford sont tout aussi surprenants, avec tout le respect que je lui dois. Selon lui, cette affaire ne serait pas pertinente dès lors, je le cite, qu'il « n'y avait pas de littoral concave, pas d'Etat coincé entre ses voisins »²⁹. La concavité est pourtant bien là ainsi que l'effet d'amputation qu'elle produit pour l'Etat coincé au milieu – la Trinité-et-Tobago est coincée entre la Barbade et le Venezuela.

Vient alors une deuxième raison selon le Professeur Crawford pour laquelle cette affaire ne serait toujours pas pertinente : en concluant l'accord de 1990 avec le Venezuela – c'est la ligne noire sur le croquis qui s'écarte de la ligne d'équidistance –, la Trinité-et-Tobago se serait « auto-amputée » (« *auto cut-off* ») et il n'appartenait pas au Tribunal statuant dans l'affaire *Trinité c. Barbarde* de « dédommager » la Trinité-et-Tobago vis-à-vis

²⁵ ITLOS/PV.11/2/Rev. 1 (E), p. 26, lignes 42-44 (Crawford).

²⁶ V. Dossier des Juges, 12 septembre 2011, Tab. 4.12 (J. Crawford).

²⁷ *RSA*, vol. XXVII, p. 239, par. 350 et par. 352.

²⁸ ITLOS/PV/11/6 (E), p. 27, lignes 7-19 (Boyle).

²⁹ ITLOS/PV/11/2/Rev.1 (E), p. 27, lignes 43-44 (Crawford).

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de la Barbade pour ce que la Trinité-et-Tobago avait concédé au Venezuela³⁰. L'argument, je dois le dire, ne manque pas d'une certaine saveur.

Nous avons cru comprendre en effet que la thèse du Bangladesh (comme de la Trinité-et-Tobago, comme du Cameroun) reposait entièrement sur l'affaire du *Plateau continental de la mer du Nord* : selon cette thèse, le droit international (je le souligne), le droit international exigerait que l'effet d'amputation produit par une concavité soit supprimé en désenclavant l'Etat désavantagé par la nature.

En lien avec cette thèse, M. Martin nous a rappelé lundi dernier la raison pour laquelle la Trinité-et-Tobago a accepté d'ajuster la ligne d'équidistance au profit du Venezuela dans l'accord de 1990 : cela aurait été fait, nous dit M. Martin, pour accorder au Venezuela une sortie vers l'Atlantique « en pensant tout à fait au résultat des affaires [du *Plateau continental*] de la mer du Nord »³¹ (« *with the result of the North Sea cases very much in mind* »).

Il se trouve en effet que le Venezuela est enfermé par la Guyane au sud et la Trinité-et-Tobago au nord et que cet Etat subit à ce titre un effet d'amputation. Si j'ai bien compris la démonstration de M. Martin, l'Accord de 1990 –la ligne noire– conclu par le Venezuela et la Trinité-et-Tobago aurait appliqué le précédent de la *Mer du Nord*, et ce faisant cet accord conforterait la thèse du Bangladesh. Mais alors, Messieurs les Juges, si tel est bien le cas, il ne peut y avoir qu'une seule alternative :

- première branche de l'alternative : le désenclavement s'impose au titre du droit international : dans ce cas, le Tribunal arbitral aurait dû, à son tour, désenclaver la Trinité-et-Tobago par rapport à la Barbade; M. Martin nous dit qu'il était nécessaire au regard du droit international que la Trinité-et-Tobago désenclave le Venezuela; si c'était vrai, si c'était vrai, la Trinité et Tobago pouvait difficilement alors, dans sa relation cette fois-ci avec la Barbade, être punie par le Tribunal pour s'être « auto-amputée » en application du droit international;

- seconde branche de l'alternative : le désenclavement ne s'impose pas au titre du droit international, ce qui n'interdit pas qu'il puisse être accordé à titre de concession politique (en offrant par exemple un corridor) : si tel est bien le cas, le Tribunal devait estimer alors que la concession *politique* faite par la Trinité et Tobago au Venezuela, la ligne noire, par le biais d'un accord bilatéral qui ne regardait que ces deux Etats était sans effet sur la délimitation judiciaire avec la Barbade.

Monsieur le Président, Messieurs les Juges, c'est précisément cette seconde solution qu'a retenue le Tribunal et il l'a retenue doublement :

- premièrement, il a analysé l'ajustement opéré par le Traité de 1990 entre la Trinité-et-Tobago et le Venezuela non pas comme le fruit de l'application du droit, mais comme une *concession politique* faite par la Trinité-et-Tobago au Venezuela : les termes de la sentence sont clairs : des « considérations politiques » (« *political considerations* ») ont conduit à ce que la Trinité-et-Tobago *abandonne* (« *giv[e] up* ») certaines de ses zones maritimes au Venezuela³². Le Professeur Crawford a lui-même parlé de la « concession » faite au Venezuela³³;

- deuxièmement, le Tribunal arbitral a refusé d'ajuster la ligne avec la Barbade au seul motif que cette ligne enclaverait la Trinité et Tobago (je le rappelle, si ajustement il y a eu, c'est uniquement en raison de la disproportion dans la longueur des côtes). Autrement dit, le Tribunal n'a pas accepté de poursuivre la démarche entreprise par l'Accord de 1990.

³⁰ ITLOS/ PV/11/2/Rev.1 (E), p. 27, lignes 9-19 (Crawford).

³¹ ITLOS/ PV/11/4 (E), p. 20, lignes 20-24 (Martin).

³² Sentence du 11 avril 2006, *RSA*, vol. XXVII, pp. 238-239, pars. 346-347.

³³ ITLOS/ PV/11/2/Rev.1 (E), p. 27, ligne 17 (Crawford).

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Pour ce qui le concerne, en tant que tribunal, c'est l'équidistance, et uniquement elle, qui gouverne la délimitation, quel que soit l'effet d'enclavement.

Nos contradicteurs ne sont pas plus à l'aise avec l'affaire *Cameroun c. Nigéria*. Elle est pourtant particulièrement déterminante – et il est utile de projeter de nouveau ici le croquis de tout à l'heure, qui se trouve toujours à l'onglet 3.2 du dossier des Juges. Cette affaire est particulièrement déterminante, je le disais, et elle l'est pour plusieurs raisons :

- la partie de l'arrêt qui nous intéresse ici a été rendu à l'unanimité des seize juges composant la Cour, les deux juges *ad hoc* compris;
- nous sommes en présence d'un Etat dont la projection côtière pertinente est ouverte vers le large, comme le Bangladesh estime que c'est son cas, par contraste avec l'Allemagne dans l'affaire de la *Mer du Nord*³⁴;
- ce même Etat est affecté par pas moins de trois concavités : sa côte générale est concave, sa côte pertinente vis-à-vis du Nigéria l'est également; l'île de Bioko exacerbe enfin ceci en ajoutant une troisième et très sévère concavité que le Professeur Crawford n'a curieusement pas vue;
- cette configuration côtière enferme le Cameroun dans une zone ne dépassant pas les 30 milles nautiques;
- dans son mémoire dans l'affaire de la *Mer du Nord*, M. Reichler l'a rappelé le premier jour³⁵, l'Allemagne avait soumis un certain nombre de croquis à l'appui de sa thèse, dont celui du Golfe du Bengale, pour illustrer l'effet de l'équidistance ; j'ajouterai à ce rappel que l'Allemagne avait également soumis un croquis du golfe de Guinée qui montrait également l'enclavement du Cameroun³⁶;
- le Cameroun s'est prévalu devant la Cour internationale de Justice du précédent de la *Mer du Nord*³⁷;
- plus précisément, il a indiqué à la Cour que

Si une ligne était tracée en appliquant strictement l'équidistance, la zone économique exclusive et le plateau continental auxquels il pourrait prétendre seraient quasiment inexistant³⁸;

- dûment informée de tous ces éléments, la Cour internationale de Justice a adopté dans son arrêt d'octobre 2002 la ligne d'équidistance sans estimer devoir l'ajuster, en rappelant qu'il ne lui appartenait pas de refaire la nature.

Qu'ont à répondre les avocats du Bangladesh ? Oserais-je dire, sans paraître trop impertinent, que je crois qu'ils ne le savent plus très bien.

D'un côté, ils s'appuient sur cette affaire pour défendre l'idée qu'il faudrait dans toute délimitation tenir compte de la configuration côtière globale. C'est ce qu'a dit le Professeur Crawford en se référant, explicitement sur ce point dans sa plaidoirie du lundi, à l'affaire *Cameroun c. Nigéria*³⁹. C'est également un argument qu'avait invoqué le Professeur Sands⁴⁰. C'est effectivement l'argument qu'avait plaidé le Cameroun, mais il se trouve, très précisément, qu'il n'a convaincu aucun des seize juges de la Cour.

Les Professeur Sands et Crawford n'ont pas plus convaincu... le Professeur Crawford. Dans sa première plaidoirie, celui-ci avait rappelé que la Cour n'avait effectivement pas pris

³⁴ ITLOS/PV.11/4 (E), p. 17, lignes 6-21 (Martin).

³⁵ ITLOS/PV.11/2/Rev.1 (E), p. 15, lignes 19-21 (Reichler).

³⁶ Mémoire soumis par la RFA, [www.icj-cij.org], 14 mai 1962, p. 43, Figure 7.

³⁷ V. duplicque du Myanmar, par. 6.36.

³⁸ Arrêt du 10 octobre 2002, *CIJ Recueil 2002*, p. 433, par. 271.

³⁹ ITLOS/PV.11/5 (E), p. 4, lignes 8-12 (Crawford) [la référence en note 19 est d'ailleurs fautive].

⁴⁰ ITLOS/PV.11/4 (E), p. 10, lignes 20-22 (Sands).

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en compte toute la côte du Cameroun mais s'était limitée à la seule côte du Cameroun jusqu'au Cap Debundsha. Procéder autrement —c'est-à-dire prendre en compte la configuration côtière globale du golfe— aurait, indique M. Crawford, conduit la Cour à procéder à une « reconfiguration de la géographie », ce qui était interdit à la Cour de faire — le Professeur Crawford parle à cet égard de « prohibition »⁴¹.

Nous souscrivons entièrement à cette remarque. Le tracé adopté par la Cour dans l'affaire *Cameroun c. Nigéria* parle de lui-même. Il y avait un grave effet d'amputation, il y avait un enclavement manifeste due à une concavité ; la Cour trace une ligne d'équidistance, un point, c'est tout.

En dépit de ces précédents, le Bangladesh continue d'affirmer que des circonstances justifieraient une mise à l'écart de la ligne d'équidistance. Cette prétention ne correspond aucunement à la méthode et au droit applicables dont je vais maintenant examiner les modalités de mise en œuvre en montrant que les circonstances invoquées par le Bangladesh ne sont pas de nature à imposer l'ajustement de la ligne d'équidistance en sa faveur. Cela vaut tant pour l'île de Saint Martin que pour l'effet d'amputation.

Commençons, Monsieur le Président, Messieurs les Juges, par l'île de Saint-Martin. Lundi dernier, M. Reichler a accusé de manière très véhémement le Myanmar de ne respecter aucune méthode à l'égard du sort à réserver à cette île dans la délimitation au-delà de la mer territoriale⁴². Je répondrai donc, pour le satisfaire, de manière méthodique au souci de M. Reichler, en décomposant mon raisonnement en trois temps.

Je commencerai par une série de trois brefs constats :

- Premier constat : il concerne la position singulière de l'île de Saint Martin, qui possède trois éléments caractéristiques : cette île se situe près de la frontière terrestre et donc du point de départ de la ligne d'équidistance ; elle présente la particularité très exceptionnelle par ailleurs de se situer du mauvais côté de cette ligne d'équidistance (je préciserai qu'elle est aussi placée du mauvais côté de la bissectrice invoquée par le Bangladesh) ; enfin, les côtes continentales à délimiter sont de nature adjacente et pas opposée : ces trois éléments conduisent ensemble à créer un effet de grave distorsion très excessif sur la délimitation, ce qu'a rappelé vendredi dernier M. Lathrop ;

- Deuxième constat : le Bangladesh n'a jamais inclus l'île de Saint Martin dans sa façade côtière ni dans la description de ses côtes pertinentes ; dans sa réplique, le Bangladesh écrit que sa côte pertinente s'étendrait, d'ouest en est, du point d'aboutissement de la frontière terrestre avec l'Inde au point d'aboutissement de l'autre frontière terrestre, à la rivière Naaf⁴³ : nulle mention ici de l'île de Saint Martin ; cela n'en rend que plus curieuse l'affirmation selon laquelle cette île constituerait, selon M. Reichler, une « partie intégrante de la côte du Bangladesh »⁴⁴ (« *an integral part of the Bangladesh coast* ») ;

- Troisième constat : tous les précédents cités par le Professeur Sands vendredi montrent qu'aucun effet au-delà de la mer territoriale n'a été donné aux îles lorsque la délimitation est de nature continentale⁴⁵ : lorsqu'une île se situe à proximité de la ligne d'équidistance de délimitation des zones économiques exclusives, la limite de la mer territoriale de l'île rejoint toujours la ligne d'équidistance qui est tracée sans que les îles soient prises en compte.

Permettez-moi d'en donner deux illustrations parmi d'autres, l'une que j'emprunte au Professeur Sands, l'autre à la Roumanie et à l'Ukraine :

⁴¹ ITLOS/PV.11/2/Rev.1 (E), p. 26, lignes 1-2 (Crawford).

⁴² ITLOS/PV.11/4 (E), p. 26, lignes 19-25 (Reichler).

⁴³ Par. 3.166.

⁴⁴ ITLOS/PV.11/4 (E), p. 31, lignes 18-19 (Reichler).

⁴⁵ ITLOS/PV.11/3 (E), p. 21, lignes 13-30 (Sands). V. aussi contre-mémoire du Myanmar, pars. 4.51-4.61.

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- C'est par exemple le sort réservé à l'île de Jazirat Dayyinah dans l'Accord de 1969 entre le Qatar et Abu Dhabi ;
- ou à l'île des Serpents dans l'affaire *Roumanie c. Ukraine*.

J'en viens maintenant à la méthodologie. M. Reichler reproche au Myanmar de confondre la première et la seconde étapes du processus de délimitation. Il faudrait d'abord tracer la ligne d'équidistance en incluant l'île, pour ensuite voir s'il s'agit d'une circonstance pertinente⁴⁶. Je crains fort que la critique ne soit pas dirigée contre nous, mais contre les juridictions internationales. Dans l'affaire *Roumanie c. Ukraine*, que cite pourtant M. Reichler, la Cour a clairement dit qu'à l'exception du cas où une série d'îles frangeantes bordent la côte, aucun point de base ne peut être retenu sur une île isolée aux fins de la délimitation au-delà de la mer territoriale. Voici ce que précise la Cour :

Considérer l'île des Serpents comme une partie pertinente du littoral reviendrait à greffer un élément étranger sur la côte ukrainienne; c'est-à-dire à refaçonner, par voie judiciaire, la géographie physique, ce que ni le droit ni la pratique en matière de délimitation maritime n'autorisent. La Cour est donc d'avis que l'île des Serpents ne saurait être assimilée à la configuration côtière de l'Ukraine (et la Cour précise : voir le cas de l'île de Filfla dans l'affaire du *Plateau Continental entre la Lybie et Malte*.⁴⁷).

Ce n'est qu'au deuxième stade du processus que l'île pourrait – et j'emploie volontairement le conditionnel – que l'île pourrait, en cas de besoin, être prise en compte, mais alors selon des modalités bien particulières. De nouveau, l'arrêt de la Cour internationale de Justice dans l'affaire *Roumanie c. Ukraine* est d'une clarté exemplaire. Je cite toujours, c'est le paragraphe 146 de l'arrêt :

La Cour rappelle qu'elle a établi que l'île des Serpents, qui ne fait pas partie de la configuration côtière générale (...), ne pouvait servir de point de base pour construire la ligne d'équidistance provisoire entre les côtes des Parties, ligne qu'elle a tracée lors de la première étape de la présente délimitation. Elle doit maintenant, dans le cadre de la deuxième étape, déterminer si la présence de l'île des Serpents dans la zone de délimitation constitue une circonstance pertinente justifiant un ajustement de la ligne d'équidistance provisoire⁴⁸.

De la méthodologie ainsi rappelée par la Cour et des précédents auxquels celle-ci se réfère par ailleurs, il ressort deux conclusions :

Première conclusion : en principe, une île qui n'appartient pas à une série d'îles frangeantes [« *fringe islands* »] ne peut pas être considérée comme une partie intégrante de la « configuration côtière générale » et donc n'entre pas en ligne de compte pour la construction de la ligne d'équidistance;

Deuxième conclusion : une île qui, par exception, aurait été prise en compte au premier stade du processus doit être exclue au second stade dès lors qu'elle produit un effet disproportionné⁴⁹.

⁴⁶ ITLOS/PV.11/4 (E), pp. 26-27, lignes 39-47 puis 1-3.

⁴⁷ *CIJ Recueil 2009*, p. 110, par. 149. V. également l'arrêt de la CIJ dans l'affaire *Tunisie/Libye*, 24 février 1982, *CIJ Recueil 1982*, pp. 88-89, pars. 128-129; la sentence arbitrale du 17 décembre 1999 dans l'affaire *Erythrée/Yémen (Délimitation maritime)*, RSA, vol. XXII, p. 367, par. 139, et p. 369, pars. 149-151.

⁴⁸ *CIJ Recueil 2009*, p. 122, par. 186.

⁴⁹ *Ibid.*, p. 122, par. 185.

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Si l'on regarde maintenant attentivement comment la jurisprudence a appliqué cette méthodologie, on constatera qu'aucune île dans la position de l'île de Saint Martin n'a jamais été considérée, au premier stade du processus, comme une île devant être prise en compte aux fins du tracé de la ligne d'équidistance au-delà de la mer territoriale, ni, au second stade du processus, comme une circonstance pertinente.

Dans la quasi-totalité des affaires jugées, les îles en cause ont été traitées de la manière suivante en effet :

- d'une part, elles n'ont pas été considérées comme des îles côtières ;
- d'autre part, elles ne se sont vues reconnaître aucun effet sur le tracé de la ligne d'équidistance au-delà de la mer territoriale.

C'est le sort, ou l'absence de sort, qui a été réservé successivement aux îles suivantes :

- les îles anglo-normandes dans l'affaire de la *Délimitation du plateau continental entre la France et le Royaume-Uni* de 1977⁵⁰;
- l'île de Djerba dans l'affaire *Tunisie/Libye* résolue en 1982⁵¹;
- l'île de Filfla dans l'affaire *Libye/Malte* tranchée en 1985⁵²;
- l'île d'Abu Musa dans la sentence entre *Dubai et Sharjah* de 1981⁵³;
- les îles yéménites dans l'arbitrage *Erythrée/Yémen* de 1999⁵⁴;
- l'île de Qit' at Jaradah dans l'affaire *Qatar/Bahreïn* de 2001⁵⁵;
- l'île de Sable dans l'arbitrage de 2002 entre la province de Terre-Neuve et du Labrador⁵⁶;
- l'île des Serpents dans l'affaire *Roumanie c. Ukraine* de 2009⁵⁷;
- enfin, les cayes dans l'affaire *Nicaragua c. Honduras* de 2007⁵⁸.

Ces précédents s'appliquent à l'île de Saint Martin, à un double titre.

L'île de Saint Martin ne constitue pas, tout d'abord, une partie intégrante de la côte du Bangladesh au sens de la jurisprudence que je viens d'évoquer. Elle ne fait pas partie d'un système d'îles frangeantes qui borderaient la côte du Bangladesh. Qui plus est, elle se trouve en face de la côte du Myanmar, pas du Bangladesh. Dans ces conditions, considérer l'île de Saint Martin comme une partie intégrante de la côte du Bangladesh, ce serait « refaçonner la géographie physique ».

Contrairement à ce qu'a affirmé M. Reichler, l'île de Saint Martin n'a rien de commun à ce titre avec les îles Sorlingues et l'île d'Ouessant en cause dans l'affaire de la *Délimitation du plateau continental entre la France et le Royaume-Uni*. Ces îles se trouvaient « en face » des côtes de l'Etat auquel elles appartenaient et, précise la Cour d'arbitrage en 1977, elles faisaient parties « aussi bien géographiquement que politiquement » du territoire de l'Etat en face duquel elles se trouvaient⁵⁹.

En l'espèce, l'île de Saint Martin fait sans contestation possible « politiquement partie » de l'Etat du Bangladesh. Mais du point de vue de sa localisation géographique en revanche, elle se trouve en face des côtes du Myanmar. M. Lathrop l'a rappelé vendredi⁶⁰, lorsque l'on épouse la perspective du droit de la mer, que l'on se place sur la côte

⁵⁰ Contre-mémoire du Myanmar, par. 4.55

⁵¹ *CIJ Recueil 1982*, p. 64, par. 79, et p. 85, par. 120.

⁵² *CIJ Recueil 1985*, p. 48, par. 64.

⁵³ *ILR*, vol. 91, pp. 676-677.

⁵⁴ *RSA*, vol. XXII, pars. 117, 119 et 147.

⁵⁵ *CIJ Recueil 2001*, pp. 104-109, par. 219.

⁵⁶ Duplique du Myanmar, par. 5.40.

⁵⁷ *CIJ Recueil 2009*, p. 188, par. 123.

⁵⁸ Duplique du Myanmar, par. 3.25.

⁵⁹ Sentence du 30 juin 1977, *RSA*, vol. XVIII, p. 254, par. 248.

⁶⁰ ITLOS/PV.11/8 (E), p. 19, lignes 31-35.

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continentale qui génère le titre et que l'on regarde vers le large, l'île est en face du Myanmar, elle n'est pas en face du Bangladesh.

Par ailleurs, si l'on devait, sans respecter ce qui précède, malgré tout prendre en compte l'île de Saint Martin dans l'opération de délimitation, cela produirait de toute manière un résultat tout à fait disproportionné, ce qu'interdisent précisément les affaires que je viens de citer et, notamment, les affaires *Dubai/Sharjah* de 1981⁶¹, *Libye/Malte* de 1985⁶², *Qatar/Bahreïn* de 1991⁶³ et *Roumanie c. Ukraine* de 2009⁶⁴.

Cette île de 5 km de long produirait à elle seule en effet 13 000 kilomètres carrés au moins d'espaces maritimes au profit du Bangladesh dans le cadre de la délimitation entre masses continentales⁶⁵. C'est manifestement disproportionné et cette appréciation n'a rien de subjective, quoi qu'en disent nos contradicteurs. La disproportion saute aux yeux.

M. Reichler a argumenté que la question n'est pas de savoir si une île se situe ou non du bon côté de la ligne d'équidistance ; ce qui compterait nous dit-il, ce serait l'éventuel effet disproportionnel qu'elle produirait⁶⁶. Mais c'est justement de cela dont il est question ici : la localisation de l'île en face des côtes du Myanmar, du mauvais côté de la ligne d'équidistance qui est tracée entre des côtes continentales adjacentes, crée précisément cette distorsion.

Envisageons maintenant, Monsieur le Président, Messieurs les Juges, les très rares cas où des îles ont reçu en jurisprudence un certain effet dans la délimitation continentale. On constate alors qu'elles possédaient toutes des caractéristiques que ne possède aucunement l'île de Saint Martin :

- dans l'affaire du *Golfe du Maine*, l'effet produit par l'île de Seal n'avait rien de disproportionné. La Cour indique que les « conséquences pratiques » sur la délimitation de la prise en compte de l'île sont « limitées »⁶⁷ – et ces conséquences pratiques étaient limitées parce que cette île, qui se trouve être du bon côté de la ligne d'équidistance et près de la masse continentale, influait sur une délimitation entre côtes opposées et pas entre côtes adjacentes. Aussi, la Cour précise-t-elle que la question du sort à réserver à l'île de Seal n'est qu'un « aspect mineur » dit la Cour, ce n'est qu'un aspect mineur, cette île n'entraîne – je cite – : qu'une « légère translation de [la] ligne sans modification de son inclinaison »⁶⁸ ;

- dans l'affaire de la *Délimitation du plateau continental entre la France et le Royaume-Uni*, les îles Sorlingues et l'île d'Ouessant se trouvaient du bon côté de la ligne d'équidistance, elles étaient très peuplées et elles se trouvaient en concurrence avec une ou des îles appartenant à l'autre Etat qui se trouvaient à leur tour du bon côté de la ligne d'équidistance⁶⁹ ;

- enfin, dans l'affaire *Tunisie/Libye*, les îles Kerkennah se trouvaient du bon côté de la ligne d'équidistance, elles étaient d'une très large étendue (180km²), elles étaient peuplées de plus de 15 000 habitants et elles constituaient des îles frangeantes⁷⁰ ; les îles prises en compte dans l'arbitrage *Erythrée/Yémen* de 1999 étaient elles-aussi des îles frangeantes⁷¹.

⁶¹ *ILR*, vol. 91, par. 677.

⁶² *CJ Recueil 1985*, p. 48, par. 64.

⁶³ *CJ Recueil 2001*, p. 104, par. 219.

⁶⁴ *CJ Recueil 2009*, p. 122, par. 185.

⁶⁵ Duplique du Myanmar, par. 5.35.

⁶⁶ ITLOS/PV/11/4 (E), p. 28, lignes 36 et s.

⁶⁷ *CJ Recueil 1984*, pp. 336-337, par. 222.

⁶⁸ *Ibid.*

⁶⁹ Duplique du Myanmar, par. 5.31.

⁷⁰ Contre-mémoire du Myanmar, par. 4.58.

⁷¹ Sentence arbitrale du 17 décembre 1999 dans l'affaire *Erythrée/Yémen (Délimitation maritime)*, RSA, vol. XXII, p. 367, par. 139, et p. 369, pars. 149-151.

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L'île de Saint Martin ne relève d'aucune de ces situations pour les raisons que j'ai indiquées tout à l'heure. Aussi, en conclusion sur l'île de Saint Martin, sa localisation et l'effet qu'elle produit en font une circonstance spéciale dans le cadre de la délimitation de la mer territoriale, ce qui explique le soin mis par le Myanmar à lui attribuer l'effet le plus approprié à sa localisation singulière. Ces mêmes considérations conduisent à ne pas lui donner davantage d'effet dans le cadre de la délimitation des zones économiques exclusives.

Dans la droite ligne de la jurisprudence, dont les affaires *Nicaragua c. Honduras* de 2007 et *Roumanie c. Ukraine* de 2009 sont la manifestation la plus récente, la ligne de délimitation doit par conséquent, au-delà de la mer territoriale, rejoindre la ligne d'équidistance. C'est, je le répète, exactement la conclusion à laquelle aboutissent la pratique et la jurisprudence illustrées par le Professeur Sands il y a dix jours⁷².

J'en viens enfin à l'effet d'amputation qui, selon le Bangladesh, constituerait une circonstance pertinente à part entière. Rassurez-vous, Monsieur le Président, Messieurs les Juges, nous approchons de la fin de cette trop longue plaidoirie.

La portée de cette circonstance a été circonscrite très étroitement par le Demandeur dans sa réplique. Le Demandeur en résume ainsi l'objet au paragraphe 3.39 sa deuxième pièce de procédure écrite :

Le Bangladesh ne prétend pas qu'une concavité rend *ipso facto* l'équidistance inéquitable. Le Bangladesh convient qu'il y a des côtes concaves, y compris sur le golfe du Bengale, qui ne causent pas de préjudice à l'Etat côtier. Ce n'est pas une concavité de la côte à elle seule qui est source d'iniquité. L'iniquité, sous la forme d'un grave effet d'amputation, provient d'une côte concave qui est encadrée par des frontières terrestres de part et d'autre et à l'intérieur de la concavité. Tel est le type de concavité qui caractérise la situation du Bangladesh mais d'aucun autre Etat de la région. En fait, il n'y a, nulle part dans le monde, d'effet d'amputation plus marqué causé par une concavité de la côte.

Cette longue citation, dans laquelle se trouve résumée toute la thèse du Bangladesh, appelle un certain nombre de commentaires et quelques correctifs.

Tout d'abord, il est faux d'affirmer que la frontière terrestre entre le Bangladesh et le Myanmar, de l'extrémité de laquelle doit partir la délimitation maritime, serait située « à l'intérieur de la concavité » (« *within the concavity* »). Comme je l'ai déjà indiqué ce matin, le point de départ de la frontière maritime se situe à plus de cent kilomètres de la concavité, à un endroit où la côte pertinente est droite et même très légèrement convexe.

Le Bangladesh reconnaît par ailleurs dans ce passage que ce n'est de toute manière pas la concavité en soi du golfe du Bengale qui serait une circonstance pertinente, mais l'effet d'enclavement qui en résulterait. Le Bangladesh admet au passage qu'une ligne d'équidistance peut produire un résultat équitable même en présence d'une concavité. De fait, c'est ce qui a été décidé dans les affaires *Cameroun c. Nigéria* et *La Barbade c. Trinité-et-Tobago* que j'ai présentées tout à l'heure.

Quant à l'effet d'amputation, il n'a rien d'une circonstance très spéciale. Selon les termes parfaitement justifiés de la sentence de 1977 de la Cour d'arbitrage dans l'affaire de la *Délimitation du plateau continental entre la France et le Royaume-Uni*,

[P]our ce qui est de la délimitation, (...) [la] conclusion [selon laquelle il ne doit pas y avoir d'amputation de l'espace maritime d'un autre Etat] énonce le problème sans pour autant le résoudre. Le problème de la délimitation se pose précisément dans de telles situations⁷³.

⁷² V. également contre-mémoire du Myanmar, pars. 5.94-5.98 et duplique du Myanmar, pars. 5.27-5.42.

⁷³ *RSA*, vol. XVIII, p. 179, par. 79.

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Pour déterminer si l'amputation produite par la ligne d'équidistance au détriment de l'une et l'autre parties aboutit à un résultat équitable, il convient de faire recours au test de l'absence de disproportion significative qui n'est pas un test de proportionnalité, précisément parce qu'il ne s'agit pas de refaire la nature mais de délimiter en fonction de la nature. Particulièrement pertinente ici est la remarque de la Cour internationale de Justice dans l'affaire *Libye/Malte* : le fait qu'une côte soit particulièrement irrégulière ou particulièrement concave ou convexe, nous dit la Cour, ne peut être pris en compte que si cela conduit à un résultat disproportionné⁷⁴. En l'espèce, Sir Michael Wood y reviendra dans un instant, le test de l'absence de disproportionnalité est rempli. Et s'il l'est, c'est avant tout parce que les côtes du Bangladesh ne sont pas d'une longueur disproportionnée par rapport à celle du Myanmar.

A l'objectivité des chiffres, prévus par la troisième étape de la méthode de délimitation, le Bangladesh a préféré substituer, de manière tout à fait artificielle, les envolées lyriques et la dramaturgie. Sur ce point, le Bangladesh a fait preuve d'une énergie verbale remarquable : voici un florilège non exhaustif : le Bangladesh serait privé « de la majorité écrasante » (« *overwhelming majority* ») des zones maritimes auxquelles il aurait droit⁷⁵ ; il serait confronté à une inéquité du plus grand ordre⁷⁶, à un effet d'amputation « dramatique »⁷⁷, à l'effet d'amputation le « plus drastique qui soit au monde » (« *the most dramatic cut-off in the world* »)⁷⁸ ; l'équidistance produirait en l'espèce des résultats « arbitraires »⁷⁹ et même « irrationnels »⁸⁰ ; elle ne « laisserait [au Bangladesh] qu'un tout petit bout de zone maritime triangulaire »⁸¹.

Monsieur le Président, Messieurs les Juges, le drame feint par le Bangladesh ne doit pas tromper le Tribunal. Les prétendues « circonstances pertinentes » qu'il invoque ne reposent en définitive sur rien d'autre que sur une exagération purement verbale des effets de la ligne d'équidistance, inspirée d'une conception en équité de la délimitation maritime, comme si celle-ci devait conduire à un partage égalitaire de la zone.

Selon le Bangladesh, par l'intermédiaire de M. Reichler, il n'existerait « aucune méthode généralement acceptée qui permette de mesurer et de compenser l'effet de distorsion d'une ligne côtière concave sur le tracé d'une ligne basée sur l'équidistance »⁸². Ce n'est pas vrai. Il existe, Messieurs les Juges, des moyens concrets de mesurer le caractère équitable de la ligne d'équidistance. Je ferai en ce sens les quatre remarques conclusives suivantes.

Premièrement, je rappellerai que l'effet d'amputation subi du fait de la concavité du golfe du Bengale n'affecte pas uniquement le Bangladesh. Nous ne sommes pas dans une situation comparable à celle de la *Mer du Nord* dans laquelle un seul Etat subirait l'effet de côtes concaves tandis que ses voisins bénéficieraient, eux, de côtes convexes⁸³. En l'espèce, le Myanmar subit lui aussi l'effet de cette concavité. La délimitation maritime adoptée en 1986 par l'Inde et le Myanmar pointe vers le nord-ouest du golfe⁸⁴. L'effet occasionné par la présence des îles indiennes dans le sud-est du golfe est d'autant plus marqué pour le Myanmar que le Myanmar est totalement enclavé par l'Inde et la Thaïlande dans le golfe de Mottama.

⁷⁴ *CJ Recueil 1985*, p. 48, par. 64.

⁷⁵ Mémoire du Bangladesh, par. 6.30. V. également par. 2.46 (i)

⁷⁶ *Ibid.*, par. 6.45.

⁷⁷ Réplique du Bangladesh, par. 3.39.

⁷⁸ *Ibid.*, par. 3.59.

⁷⁹ ITLOS/PV.11/4 (E), p. 9, l. 24 (Sands).

⁸⁰ Mémoire du Bangladesh, par. 6.56.

⁸¹ ITLOS/PV.11/2 (F), p. 6, ligne 43 (M^{me} Moni).

⁸² ITLOS/PV.11/2/Rev.1 (E), p. 16, lignes 24-25 (Reichler) [ITLOS/PV.11/2 (F), p. 17, lignes 18-19].

⁸³ Contre-mémoire du Myanmar, pars. 5.128-5.129.

⁸⁴ V contre-mémoire du Myanmar, p. 29, croquis 2.3.

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Deuxièmement, le Bangladesh admet que la ligne d'équidistance lui octroie une zone maritime s'étendant jusqu'à 182 milles nautiques de ses côtes. Une telle extension ne correspond aucunement à un « tout petit bout de zone maritime triangulaire »⁸⁵.

Troisièmement, à la lumière des délimitations concrètement adoptées dans la pratique judiciaire contemporaine, je songe tout particulièrement à l'enclavement de la Trinité-et-Tobago dans sa limite des 200 milles nautiques décidée par le Tribunal arbitral à l'unanimité de ses membres en 2006 et à l'enclavement du Cameroun dans moins de 30 milles nautiques décidé, de nouveau unanimement, par les juges de la Cour internationale de Justice en 2002, il est incontestable que, par comparaison, la ligne d'équidistance dans notre affaire aboutit pleinement à un résultat équitable. Je le rappelle : le Bangladesh dispose d'un accès à plus de 180 milles nautiques, et il n'existe aucune disproportion significative entre la longueur de ses côtes et celles du Myanmar.

Quatrièmement et enfin, le test de l'absence de disproportionnalité est satisfait, comme Sir Michael vous l'expliquera immédiatement. A elle seule, cette dernière donnée confirme que la ligne d'équidistance constitue la solution équitable dans la présente instance, dès lors en tout cas que l'on applique le droit contemporain de la délimitation maritime tel qu'il est, et non tel que le Bangladesh aurait rêvé qu'il fût.

Monsieur le Président, Messieurs du Tribunal, je vous remercie d'avoir eu la patience de m'écouter si longtemps. Monsieur le Président, je vous serais très reconnaissant si vous pouviez appeler maintenant à cette barre Sir Michael qui vous présentera le test de disproportionnalité. Je vous remercie.

The President:

Thank you.

I now give the floor to Sir Michael Wood.

⁸⁵ V. duplique du Myanmar, pars. 6.70-6.72.

STATEMENT OF MR WOOD – 19 September 2011, p.m.

STATEMENT OF MR WOOD
COUNSEL OF MYANMAR
[ITLOS/PV.11/10/Rev.1, E, p. 18–24]

Mr Wood:

Mr President, Members of the Tribunal, as Professor Forteau has just said, we now come to the third stage of the equidistance/relevant circumstances, the application of the disproportionality test. As the Annex VII Arbitral Tribunal in *Barbados v Trinidad and Tobago* said,

proportionality [is] 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.¹

Professor Pellet described this morning how the law of maritime delimitation, that is the international law referred to in articles 74 and 83 of the Law of the Sea Convention, has, “in recent decades, been specified with precision” (these are the words of the International Court²) into the three-stage method. There are three ‘defined’³ and ‘separate’⁴ stages (again, these are the words of the ICJ). They are the establishment of a provisional equidistance line; the taking into account as necessary of relevant circumstances, if any; and the application of the disproportionality test. This three-stage process was described with great clarity by the International Court of Justice in the ‘Methodology’ section of its judgment of 3 February 2009 in the *Black Sea* case⁵.

This morning, Mr Lathrop explained the provisional equidistance line. Professor Forteau has just taken you through the possible relevant circumstances. He has explained that there are, in the present case, no such relevant circumstances requiring any adjustment of our proposed line. Now, at this third stage, we have to apply the disproportionality test to the line resulting from the first two stages. The aim at this stage is to check that that line does not produce a “great disproportionality”⁶ between, on the one hand, the ratio of the areas appertaining to Myanmar and those appertaining to Bangladesh, and, on the other hand, the ratio of their respective coastal lengths – great disproportionality. Other terms also used in *Romania v Ukraine* are “marked disproportion”⁷ and “significant disproportionality”⁸. As we have just seen, the Tribunal in *Barbados/Trinidad and Tobago* spoke of “gross disproportionality”.

Mr President, we have dealt with the application of this test in both our Counter-Memorial⁹ and our Rejoinder¹⁰ and I do not need to repeat what we said there. Instead, I shall first recall the most relevant and recent case law. I shall then apply the test to the line proposed by Myanmar. It will be clear that Myanmar’s proposed line results in no great disproportionality, and thus requires no adjustment at this third stage.

¹ *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*, Award of 11 April 2006, UNRLAA, Vol. XXVII, p. 214, para. 238.

² *Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009*, p. 61, at p. 101, para. 116.

³ *Ibid.*, at p. 101, para. 115.

⁴ *Ibid.*, at p. 101, para. 116.

⁵ *Ibid.*, at pp. 101-103, paras. 115-122.

⁶ *Ibid.*, at p. 103, para. 122.

⁷ *Ibid.*, at p. 103, para. 122.

⁸ *Ibid.*, at p. 129, para. 210.

⁹ MCM, paras. 5.145-5.153.

¹⁰ MR, paras. 6.63-6.92.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Finally, in the last part of this speech, I shall describe briefly the line that Myanmar proposes and explain in particular the treatment of the end-point, where the line approaches the area where the rights of a third State may be affected.

First, a brief look at the case law on the disproportionality test. In its *Romania v Ukraine* judgment, the International Court of Justice described this third stage, concisely and precisely, at the end of a section entitled “Delimitation Methodology”. It did so in the following terms:

... at a third stage, the Court will verify that the line ... does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line . . . A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said “the sharing out of the area is therefore the consequence of the delimitation, not vice versa (Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v Norway*), Judgment, I.C.J. Reports 1993, p. 67, para. 64).¹¹

Mr President, the application of the disproportionality test is, in part, mathematical (not particularly advanced mathematics, fortunately), but it is, above all, a matter for the appreciation of the court or tribunal concerned in the light of all the circumstances. When the ICJ came to apply the test in the *Black Sea* case, it was clear as to what the test involved, and — just as important — what it did not involve. The Court said:

The continental shelf and exclusive economic zone allocations are not to be assigned in proportion to length of respective coastlines ...”

The Court cannot but observe that various tribunals, and the Court itself, have drawn different conclusions over the years as to what disparity in coastal lengths would constitute a significant disproportionality which suggested the delimitation line was inequitable and still required adjustment. This remains in each case a matter for the Court’s appreciation, which it will exercise by reference to the overall geography of the area.¹²

In that case, the *Black Sea* case, the Court went on to note that the ratio of the coastal lengths for Romania and Ukraine was approximately 1:2.8 and the ratio of the relevant area between Romania and Ukraine was approximately 1:2.1¹³. The International Court concluded that this did not suggest that the line required any alteration¹⁴.

In other cases too, international courts and tribunals have considered that quite large differences between the two ratios did not require the adjustment of the line. In *Eritrea/Yemen*, the Tribunal stated that a ratio of 1:1.31 for the coastal lengths and 1:1.09 for

¹¹ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment of 3 February 2009, I.C.J. Reports 2009, p. 103, para. 122. See also *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*, Award of 11 April 2006, UNRIAA, Vol. XXVII, p. 214, para. 238.

¹² *Ibid.*, p. 129, paras. 211, 213.

¹³ *Ibid.*, p. 130, para. 215-216.

¹⁴ *Ibid.*

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the areas allocated to each Party did not justify any adjustment of the equidistance line¹⁵. Similarly, in *Tunisia/Libya*, the ICJ found that the allocation to Tunisia of 60% of the area, while 69% of the relevant coasts belong to it, met the requirements of the proportionality test¹⁶. The ratio of the relevant coasts was 1:2.22, and the ratio of the areas allocated to each was 1:1.5.

Mr President, Members of the Tribunal, there are three cases in which international courts and tribunals have decided that ‘great disparity in the lengths of the relevant coasts’¹⁷ called for an adjustment to the line under the equidistance/relevant circumstances method. In *Libya/Malta*, the International Court found that a disparity between coastal lengths of 192 M (for Libya) and only 24 M (for Malta) was a relevant circumstance which required a transposition of the median line northward¹⁸. In *Jan Mayen*, as Professor Forteau mentioned today, the disparity between the relevant coasts was in the order of 9:1¹⁹. In *Barbados v Trinidad and Tobago*, also mentioned by Professor Forteau, it was approximately 8:1²⁰. In each of these three cases the corresponding adjustment was in fact relatively minor. A great disparity does not lead to a great adjustment. In any event, in our case, there is clearly no such great disparity between the relevant coasts; and, as Daniel Müller has shown, any disparity would favour Bangladesh, not Myanmar.

Mr President, Members of the Tribunal, it is hardly surprising that international courts and tribunals have rarely found that an adjustment was called for at this, the third stage of the equidistance/relevant circumstances method. It is not surprising, because any serious disproportion will most likely have been ironed out at the earlier stages, including at the second (relevant circumstances) stage. The International Court suggested as much in its conclusion on disproportionality in *Romania v Ukraine*. It said:

The Court is not of the view that this suggests that the line as constructed, and checked carefully for any relevant circumstances that might have warranted adjustment, requires any alteration.²¹

I emphasize the words “and checked carefully for any relevant circumstances that might have warranted adjustment ...”

Mr President, Members of the Tribunal, that is precisely what Myanmar has done in this case. We have checked carefully our line for any relevant circumstances that might have warranted adjustment. Professor Forteau has just shown that there were none, so it is not to be expected that the disproportionality test would require any adjustment of the line at this third stage.

Daniel Müller mentioned this morning the curious approach of Bangladesh in its written pleadings to the ascertainment of the relevant coasts and the relevant area. Bangladesh adopted, if anything, an even more curious approach to the disproportionality test²². In its Memorial, it ignored the actual coasts, and employed what it asserted were

¹⁵ *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, *UNRIAA*, Vol. XXII, p. 373, para. 168.

¹⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment*, *I.C.J. Reports 1982*, p. 18, at p. 91, para. 131.

¹⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports 1985*, p. 13, at p. 52, para. 73.

¹⁸ *Ibid.*, pp. 48-49, paras. 66-73.

¹⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, *Judgment*, *I.C.J. Reports 1993*, p. 38, at p. 65, para. 61.

²⁰ *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*, Award of 11 April 2006, *UNRIAA*, Vol. XXVII, p. 239, para. 352.

²¹ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, *Judgment of 3 February 2009*, *I.C.J. Reports 2009*, p. 61, at p. 230, para. 216.

²² *BM*, paras. 6.28, 6.75-6.78; *BR*, paras. 3.165-3.199.

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“coastal facades”²³. It offered us what it referred to as two ‘types of proportionality analysis’²³. First, it worked out the ratio between what it termed variously ‘coastal facades’ or ‘coastal front lines’²⁴. And, second, and even more curiously, it tried to apply proportionality by reference to the extent of access to a 200-M line²⁵. I think this is another example – an extreme example – of the Bangladesh’s propensity, or at any rate the propensity of its lawyers, to ignore well-established legal principle and seek to persuade the Members of the Tribunal to sail off into uncharted waters.

Fortunately, the Tribunal does not need to grapple with these eccentricities, because on Monday Professor Crawford completely changed tack. He then sought to apply the third-stage disproportionality test to Bangladesh’s bisector line, but he did so very cursorily (I think it came to four lines in the transcript, in fact)²⁶. So perhaps at this late stage there is now some agreement between us at least on the test. But, the disproportionality test is part of the three-stage method. Professor Crawford, however, applied it to Bangladesh’s angle-bisector line and found that ‘the bisector splits the relevant area almost exactly in half’, a ratio of 1.05:1 in favour of Bangladesh. This rather conveniently corresponds almost exactly to the ratio that Bangladesh had found between the relevant coasts, 1.1:1²⁷.

Mr President, that is almost too good to be true – and, of course, it is not true. As Daniel Müller has shown earlier today, Bangladesh’s calculation of the relevant coasts, and its establishment of the relevant area, reflect neither geographical reality nor applicable legal principle.

Mr President, this morning Mr Müller described the relevant coasts and the relevant area. You will get the sketch-map on the screen with the relevant coasts and it is also at tab 4.6 of the Judges’ folders. I will just recall his conclusions. Myanmar’s relevant coast stretches from the terminus of the land boundary between Myanmar and Bangladesh in the mouth of the Naaf River to Cape Negrais. The length of Myanmar’s relevant coast is approximately 740 km.

As Mr Müller demonstrated this morning, Bangladesh’s argument seeking to limit Myanmar’s relevant coast to a northern sector between the mouth of the Naaf River and Bhiif Cape is simply mistaken and wrong in law. It would remove a stroke half of Bangladesh’s relevant coast.

I now turn to the relevant parts or segments of Bangladesh’s coast. Mr Müller has described these. He explained that the relevant segments of Bangladesh’s coasts are, first, the segment that goes in a generally west-east direction from Bangladesh’s border with India to the western limit of the Meghna River estuary; and, second, the segment between the eastern limit of the estuary and the border with Myanmar in the mouth of the Naaf River, which goes in a roughly north-south direction. The relevant coasts do not include the inner coasts of the estuary of the Meghna River, which face each other and do not project in such a way as to overlap with projections from Myanmar’s coast. The total length of the relevant coasts of Bangladesh is approximately 364 km.

It follows that the ratio between Bangladesh and Myanmar’s relevant coasts is approximately 1:2.03.

I now turn to the second factual element for the application of the disproportionality test, the relevant area and its division by the delimitation line. The relevant area was described this morning by Mr Müller, and is depicted on your screens and in the sketch map found in tab 4.6. As Mr Müller showed, Bangladesh has sought, without justification, to

²³ BM, para.6.78.

²⁴ BM, para. 6.75-

²⁵ BM, para. 6.77.

²⁶ ITLOS/PV.11/5 (E), p. 12, lines 43-48 (Crawford).

²⁷ *Ibid.*

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exclude a certain quite significant area from its own part of the relevant area. If this area is restored, as we say they must be, the total relevant area amounts to 214,300 km², of which 80,400 km² lie on Bangladesh's side of the delimitation line proposed by Myanmar and 133,900 lying on Myanmar's side. The ratio between part of the relevant area appertaining to Bangladesh and the part appertaining to Myanmar is approximately 1:1.66.

Let us see, for the sake of argument, what would happen if we do what Bangladesh has done, and remove from the relevant area the area between what is said to be the Indian claim line and an equidistance line between Bangladesh and India. You see what they have done on the sketch map on the screen. They have removed the western part of the relevant area. (This would, I should point out, be an extraordinary thing to do: Bangladesh would be assuming a worst case scenario for itself in the arbitration with India. Of course, Myanmar cannot be required to compensate Bangladesh for such a hypothetical, self-interested 'concession'.) In any event, Mr President, as you can see, even if we were, hypothetically, to subtract this part of the area, the ratio between the part of the relevant area allocated to Bangladesh and the part allocated to Myanmar would be approximately 1:1.94. With a coastal ratio of 1:2.03, this would clearly not be in any way disproportionate.

Mr President, I will return from this fantasy land to the actual relevant area. To summarize, the ratio of the relevant coasts between Bangladesh and Myanmar is 1:2.03. The ratio of the relevant area is 1:1.66. It is clear, to pick up the language of the International Court in the *Black Sea* case, that this does not suggest that the relevant line proposed by Myanmar requires any adjustment as a result of the application of the disproportionality test. The difference is minor, and it is, moreover, in Bangladesh's favour.

Mr President, Members of the Tribunal, that concludes my analysis of the application of the disproportionality test. It also concludes our application of the three-stage process for effecting a delimitation. In this case it remains only to recall our line, and say a word about the end point.

Mr President, Members of the Tribunal, as explained by Counsel who have preceded me, and as is set out in our written pleadings²⁸, Myanmar requests the Tribunal to draw a single maritime boundary between Myanmar and Bangladesh that starts at the agreed end point of the land boundary, point A. On your screen this line is shown on sketch map, taken from our Rejoinder²⁹.

The line follows an equidistance or median line between point A and point C. Between point A and point B the line is an equidistance line between the adjacent coasts of Myanmar and Bangladesh. Between points B and C it is a simplified median line between the opposite coasts of the Myanmar mainland and the eastern side of Bangladesh's St Martin's Island. From point C, the line goes via point D to point E. point E is where the continuation of the provisional equidistance line meets the twelve-M arc drawn around St Martin's Island. From point E, the line continues a south-west direction along the equidistance line as far as point G.

Just beyond point G, as you will see on the screen, there is an arrow indicating that the line continues along the same azimuth until it reaches the area where the rights of a third State (in this case, India) may be affected. Since the third State is not before this Tribunal, it cannot be for this Tribunal to decide where that point is. By placing an arrow, the Tribunal fulfils its mandate to delimit the line between Myanmar and Bangladesh, while not prejudicing the rights of any third State.

²⁸ MCM, pp. 171-172, Submissions and sketch-map No. 5.11 at p. 169; MR, pp. 195-196, Submissions and sketch-map No. R1.1 at p. 5.

²⁹ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61,

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Mr President, this is standard practice in maritime delimitation cases. The most recent example is *Romania v Ukraine*. It did the same in *Nicaragua v Honduras*³⁰, and in other cases³¹.

The International Court explained its practice in this regard in the recent judgment concerning Costa Rica's application to intervene in the Case between Nicaragua and Colombia. The Court said:

In the present case, Costa Rica's interest of a legal nature may only be affected if the maritime boundary that the Court has been asked to draw between Nicaragua and Colombia were to be extended beyond a certain latitude southwards. The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved.³²

Mr President, Members of the Tribunal, that concludes my statement. And that concludes what Myanmar has to say in the present round concerning the construction of the delimitation line that we propose.

Professor Pellet, after the break, will address you on the inappropriateness of Bangladesh's proposed angle bisector line.

I thank you Mr President.

The President:

I think at this point we will break off for 30 minutes and come back at 5 p.m.

(Short adjournment)

The President:

The hearing continues.

I give the floor to Mr Alain Pellet.

³⁰ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659, at p. 759, para. 320; and sketch-map 8 at p. 762.

³¹ *Territorial and Maritime Dispute (Nicaragua v Colombia) (Application by Honduras for Permission to Intervene)*, available at <http://www.icj-cij.org>, para. 64.

³² *Territorial and Maritime Dispute (Nicaragua v Colombia), Application by Costa Rica for permission to intervene*, Judgment, 4 May 2011, para. 89.

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EXPOSÉ DE M. PELLET
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/10/Rev.1, Fr, p. 27–40]

M. Pellet :

Monsieur le Président, Messieurs les Juges, prétendant, contre toute raison, que le recours à l'équidistance est impossible (pour cause d'iniquité), nos amis du Bangladesh recourent à une méthode de délimitation inhabituelle qu'ils appellent « *the angle bisector method* » (« la méthode de la bissectrice »). Ce faisant, ils commettent deux erreurs que je m'emploierai à mettre successivement en évidence :

- en premier lieu, le principe même du recours à cette méthode est erroné puisque, dans la présente espèce, rien ne s'oppose à la mise en œuvre de celle, normale et prioritaire, dite de l'équidistance et des circonstances pertinentes ;

- en second lieu, quand bien même l'on admettrait que l'affaire en examen se prête à l'application de la méthode de la bissectrice, le Demandeur en fait une application totalement inacceptable.

Monsieur Lathrop montrera demain que la ligne qui résulterait d'une application correcte de la méthode de la bissectrice en l'espèce, que rien ne justifie en droit, serait nettement plus favorable au Myanmar que celle tracée conformément à la méthode usuelle en trois étapes, que mes collègues Coalter Lathrop, Mathias Forteau et Sir Michael Wood ont décrite dans leurs trois dernières interventions.

Monsieur le Président, comme nous avons eu l'occasion de le rappeler ce matin, le recours à l'équidistance à titre prioritaire est la norme – et c'est une norme juridique, une norme juridiquement obligatoire : l'article 15 de la Convention de 1982 sur le droit de la mer fait explicitement de l'équidistance le principe en matière de délimitation de la mer territoriale; et s'il est exact que les articles 74 et 83 ne la mentionnent pas explicitement, il n'en reste pas moins qu'il résulte d'une jurisprudence, maintenant abondante et très généralement approuvée -je cite l'affaire de 2009 - que « la première étape consiste à établir la ligne d'équidistance provisoire »¹. En d'autres termes, pour mettre en œuvre la règle posée dans les articles 74 et 83, il faut recourir à la méthode « équidistance / circonstances pertinentes » qui, d'une manière générale, permet d'aboutir à un résultat équitable; la ligne en résultant doit ensuite être testée à l'aune de la non-disproportionnalité manifeste lors de la troisième phase de la mise en œuvre de la méthode. L'équidistance est donc bien à l'origine au centre du processus.

Ceci dit, si l'équidistance est le principe, elle cesse de trouver application lorsque, je cite l'affaire Nicaragua c. Honduras, « des circonstances spéciales ne ... permettent pas d'appliquer le principe »² -ne permettent pas d'appliquer le principe- ou, selon l'original anglais, *when a court or tribunal faces « special circumstances in which it cannot apply – cannot apply- the equidistance principle »* –telle est la formule utilisée par la Cour internationale de Justice dans la plus récente des très rares affaires dans lesquelles l'équidistance a été écartée comme point de départ de l'opération de délimitation. La citation complète se lit ainsi :

Pour tous les motifs qui précèdent, la Cour se trouve dans le cas de l'exception prévue à l'Article 15 de la Convention des Nations Unies sur le Droit de la Mer, c'est-à-dire face à des circonstances spéciales qui ne lui permettent pas

¹ CIJ, arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, CIJ Recueil 2009, p. 101, par. 118.

² CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 745, par. 281.

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d'appliquer le principe de l'équidistance. *Ce dernier –le principe de l'équidistance- n'en demeure pas moins la règle générale - la règle générale*³.

Bien que la Cour mentionne l'article 15 de la Convention de 1982, cette « règle générale », de nature coutumière, vaut également pour la délimitation du plateau continental et de la zone économique exclusive, puisque, j'y ai déjà insisté, la méthode applicable pour délimiter ces espaces est semblable à celle qui est énoncée dans cette disposition.

Pour quels motifs la Cour a-t-elle écarté cette « règle générale » dans *Nicaragua c. Honduras* aussi bien (et j'y insiste : aussi bien) pour la délimitation de la mer territoriale que pour celle du plateau continental et des zones économiques des Parties ? Il y a quatre motifs à cela, que la Cour a appliqués *cumulativement* mais dont aucun ne se retrouve dans notre affaire.

En premier lieu, dans l'affaire qui a donné lieu à l'arrêt de la CIJ de 2007, « ni l'une ni l'autre des Parties ne [faisait] valoir à titre principal qu'une ligne d'équidistance provisoire constituerait la méthode de délimitation la plus indiquée »⁴ [« *neither Party has as its main argument a call for a provisional equidistance line as the most suitable method of delimitation* »]; alors que, dans l'affaire qui nous occupe, le Myanmar est convaincu que c'est indiscutablement le cas et croit l'avoir montré. C'est que les circonstances très particulières qui, dans *Nicaragua c. Honduras*, avaient conduit les Parties et la Cour à écarter la méthode de l'équidistance, ne se retrouvent en aucune manière dans notre affaire.

En deuxième lieu –et c'est probablement l'un des motifs déterminants qui a conduit la Cour à se rallier aux vues communes des Parties dans *Nicaragua c. Honduras*– le point terminal de la frontière terrestre entre le Nicaragua et le Honduras –je cite la Cour « est une projection territoriale très convexe touchant à un littoral concave de part et d'autre » [« *is a sharply convex territorial projection abutting a concave coastline on either side to the north and south-west* »]; « [c]ompte tenu de l'Article 15 de la CNUDM, et étant donné [cette] configuration géographique ..., les deux points de base à situer sur l'une et l'autre rives du fleuve Coco [le fleuve Coco est le fleuve qui constitue la frontière entre le Honduras et le Nicaragua], à l'extrémité du cap, auraient une importance critique dans le tracé d'une ligne d'équidistance, en particulier à mesure que celle-ci s'éloignerait vers le large. Ces points de base devant être très proches l'un de l'autre, la moindre variation ou erreur dans leur emplacement s'amplifierait de manière disproportionnée lors de ce tracé »⁵. Cette circonstance très spéciale est illustrée en ce moment à l'écran : les deux points v et w sont les seuls points de base qui pouvaient être retenus; ils sont éloignés l'un de l'autre d'à peine 1 250 mètres, ce qui en rend l'utilisation pour le moins hasardeuse pour les raisons données par la Cour : la ligne d'équidistance aurait dû être construite entièrement à partir de ces deux points (v et w) qui sont les points extrêmes de l'embouchure du fleuve et, à aucun moment, un autre secteur ou un autre point des côtes des Parties n'aurait été pertinent à cette fin, car aucun ne se trouve plus proche que v ou w de la ligne d'équidistance⁶.

Rien de tel dans notre affaire : comme l'a montré M. Lathrop ce matin, il est parfaitement possible de déterminer des points de base à partir desquels on peut, sans problème, tracer la ligne d'équidistance provisoire, susceptible d'ajustements le cas échéant. Certes, les points $\beta 1$ et $\mu 1$, situés de part et d'autre de l'embouchure du fleuve Naaf, sont proches l'un de l'autre (ils sont tout de même éloignés d'un peu plus de 6 kilomètres et demi - 6 kilomètres et demi ici contre 1,250 kilomètre dans *Nicaragua c. Honduras* -, beaucoup

³ *Ibid.* – italiques ajoutées.

⁴ *Ibid.*, par. 275.

⁵ *Ibid.*, par. 277.

⁶ V. le mémoire du Nicaragua dans cette affaire, disponible sur <http://www.icj-cij.org/doCKET/files/120/13719.pdf>, not. pp. 14-15, pars. 31-32; pp. 157-158, par. 23, et p. 159, par. 25.

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plus donc que ce n'était le cas dans *Nicaragua c. Honduras*). Mais, comme le Myanmar l'a montré dans sa duplique⁷, la distance n'est pas un problème essentiel; en revanche, $\beta 1$ et $\mu 1$ présentent trois caractères qui les différencient radicalement des points v et w à l'embouchure du fleuve Coco :

- d'une part –et c'est le point essentiel, ils ne sont pas si je peux dire « seuls de leur espèce »; alors que dans *Nicaragua c. Honduras*, v et w commandaient exclusivement le tracé de toute la ligne, $\beta 1$ et $\mu 1$ sont deux points parmi cinq : la ligne d'équidistance est construite à partir de $\beta 1$ et $\beta 2$ côté Bangladesh et $\mu 1$, $\mu 2$ et $\mu 3$ côté Myanmar, ce qui limite d'autant l'influence de $\beta 1$ et $\mu 1$;

- d'autre part (et ceci est lié), si pour une raison ou une autre $\beta 1$ ou $\mu 1$ ne faisaient pas l'affaire, d'autres points de base seraient disponibles dans le voisinage immédiat de ceux retenus par le Myanmar et pourraient être utilisés pour tracer la ligne provisoire d'équidistance; il n'en n'allait pas ainsi dans *Nicaragua c. Honduras*, où l'extrême convexité de l'embouchure du fleuve Coco excluait toute alternative; et

- enfin, ces deux points ($\beta 1$ et $\mu 1$) sont situés sur des berges qui, en contraste avec ce qui est le cas pour les rives du fleuve Coco, présentent une grande stabilité.

En troisième lieu en effet, comme la CIJ l'a également relevé, le Honduras et le Nicaragua convenaient

en outre que les sédiments charriés et déposés en mer par le fleuve Coco confèrent un morphodynamisme marqué à son delta, ainsi qu'au littoral au nord et au sud du cap. Aussi l'accrétion continue du cap risquerait-elle de rendre arbitraire et déraisonnable dans un avenir proche toute ligne d'équidistance qui serait tracée aujourd'hui de cette façon⁸

Je sais bien, Monsieur le Président, que le Bangladesh s'emploie à faire croire que le même phénomène prévaut ici. Ainsi, au paragraphe 3.104 de sa réplique, le Demandeur réaffirme que le littoral du Delta du Bengale est « l'un des plus instables qui soit dans le monde »⁹. Mais cette affirmation est trompeuse.

La question n'est pas de déterminer dans quelle mesure les côtes du golfe du Bengale en général sont ou non stables, elle est de savoir si leur instabilité supposée empêche de fixer des points de base appropriés.

Or, comme M. Lathrop l'a également montré, il est tout à fait possible de fixer des points de base qui échappent à cette instabilité en partie postulée¹⁰. Sans que j'aie besoin d'y revenir, tel est le cas des cinq points sur lesquels le Myanmar s'appuie pour tracer la ligne d'équidistance provisoire. Et c'est tout spécialement le cas des points $\beta 1$ et $\mu 1$ dont la similitude avec les points v et w, situés aux bords du fleuve Coco, est un leurre. Comme le montre la série de photographies satellite qui est projetée à l'écran et qui se trouve sous l'onglet 4.10 de votre dossier, les alluvionnements du Coco sont particulièrement impressionnants : ils avancent à plus de 3,5 kilomètres par siècle. 3,5 kilomètres par siècle !

Rien de tel en ce qui concerne l'estuaire du Naaf. Comme le Myanmar l'a montré dans sa duplique¹¹, cette partie de la côte de la Baie du Bengale est, au contraire, remarquablement stable. La comparaison des cartes nautiques de la région allant de 1974 à 2011, dont vous voyez les extraits pertinents sur vos écrans et qui figurent aussi à

⁷ DM, pp. 95-101, pars. 5.10-5.13.

⁸ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 742, par. 277.

⁹ V. aussi : MB, pars. 2.16 et 2.46.

¹⁰ V. la plaidoirie de M. Samson (ITLOS/PV.11/7 (F), p. 18, lignes 11-29).

¹¹ DM, pars. 5.18-5.19 and Sketch-map No. R.5.3.

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l'onglet 4.11 du dossier des Juges confirme cette stabilité. Les points β1 et μ1 sont situés à des emplacements qui sont restés immuables en tout cas depuis 1974.

Last but not least, et c'est la quatrième raison qui avait conduit la CIJ à écarter l'équidistance comme méthode de délimitation dans *Nicaragua c. Honduras*, la Cour avait relevé que, dans cette affaire, la « difficulté à identifier des points de base fiables [était] accentuée par les divergences » subsistant

entre les Parties quant à l'interprétation et à l'application de la sentence arbitrale rendue en 1906 par le roi d'Espagne au sujet de la souveraineté sur les îlots formés près de l'embouchure du fleuve Coco et de l'établissement du « point extrême limitrophe commun sur la côte atlantique »¹²,¹³.

Mutatis mutandis, il en allait de même dans l'affaire du *Golfe du Maine*. En revanche, à nouveau, rien de tel dans notre espèce dans laquelle les Parties acceptent toutes les deux que le point de départ de la délimitation à laquelle le Tribunal de céans est prié de bien vouloir procéder coïncide avec le point terminal de la frontière terrestre. Le Bangladesh et le Myanmar conviennent que celui-ci est fixé par l'article IV du Protocole supplémentaire du 17 décembre 1980 sur la démarcation de la frontière entre les deux pays sur le fleuve Naaf¹⁴.

Monsieur le Président, je me suis un peu attardé sur les différences – abyssales – qui séparent l'affaire qui nous réunit de celle que j'avais eu l'honneur de plaider à La Haye pour le Nicaragua il y a quelques années, parce qu'elle est la plus récente de la courte série de « précédents » - et je mets le mot entre guillemets - que le Bangladesh invoque à l'appui de la méthode de la bissectrice. Et la comparaison est édifiante : elle montre que l'on ne trouve trace ici d'*aucun*, vraiment aucun, des motifs qui avaient conduit la CIJ à retenir cette méthode subsidiaire, à titre exceptionnel, dans l'arrêt relatif au *Différend territorial et maritime entre le Nicaragua et le Honduras*. Au demeurant, après avoir constaté qu'en l'espèce « des circonstances spéciales ... ne lui [permettaient] pas d'appliquer le principe de l'équidistance », la Cour avait pris soin de rappeler que « [ce] dernier – le principe de l'équidistance - n'en demeure pas moins la règle générale »¹⁵. Il n'existe, ici, aucune raison d'y déroger en faveur de la « méthode de remplacement » de la bissectrice, ce qui ne serait possible que pour « des raisons impérieuses propres au cas d'espèce »¹⁶, comme la CIJ l'a souligné dans *Roumanie c. Ukraine*. Il n'existe pas de telles « raisons impérieuses » en l'espèce.

J'ajoute que, dans *Nicaragua c. Honduras*, la Cour a considéré qu'il était impossible de tracer une « ligne d'équidistance à partir du continent »¹⁷, c'est-à-dire pour l'ensemble des zones maritimes des Parties : la zone économique exclusive et le plateau continental *mais également, et avant tout en réalité, en ce qui concerne la mer territoriale*. Or, dans notre affaire, le Bangladesh n'a jamais contesté qu'il soit possible de tracer une ligne d'équidistance pour la délimitation de la mer territoriale depuis l'embouchure du fleuve Naaf.

¹² Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (*Honduras c. Nicaragua*), arrêt, *CIJ Recueil 1960*, p. 202.

¹³ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, *CIJ Recueil 2007*, p. 743, par. 279.

¹⁴ MB, vol. III, annexe 6; v. MB, pp. 35-36, pars. 3.21 et 3.23 et MCM, p. 26, par. 2.29.

¹⁵ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, *CIJ Recueil 2007*, p. 745, par. 281.

¹⁶ CIJ, arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, *CIJ Recueil 2009*, p. 101, par. 116.

¹⁷ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, *CIJ Recueil 2007*, p. 745, par. 283.

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On ne voit pas pourquoi ce qui est possible pour la mer territoriale ne le serait pas pour les zones maritimes subséquentes.

L'arrêt de 2007 présente un autre intérêt : la CIJ y analyse les quelques rares autres précédents qu'invoque en outre le Bangladesh à l'appui de sa méthode favorite : il s'agit des affaires *Tunisie c. Libye et Golfe du Maine*, également tranchées par la Cour, et la sentence arbitrale de 1985 dans *Guinée c. Guinée Bissau*. (Et je remarque à nouveau en passant que durant sa présentation du droit applicable jeudi dernier, le professeur Crawford a « classé » *Tunisie c. Libye et Guinée c. Guinée Bissau* parmi les décisions reposant non pas sur le principe de la bissectrice mais sur une méthode *sui generis*¹⁸). Les analyses de la Cour serviront de trame à mes quelques remarques concernant ces trois affaires que j'examinerai dans l'ordre inverse de leur chronologie –étant remarqué qu'elles remontent toutes trois aux années 1982-1985; près de trente ans ont passé depuis lors.

La sentence de 1985 est sans doute celle qui sert le moins mal les intérêts du Bangladesh. Mais je le dis tout net, malgré tout le réel et profond respect que j'ai pour les membres du tribunal qui l'a rendue, elle est passablement excentrique en ce qui concerne la méthode de délimitation retenue et est (heureusement je crois) demeurée totalement isolée ; en outre, elle a été récusée peu après par l'un des membres du Tribunal, le Président Bedjaoui¹⁹, comme Mathias Forteau l'a relevé ce matin. Du reste, si la CIJ l'a mentionnée à trois reprises dans l'arrêt de 2007²⁰, elle se garde bien de s'appuyer sur le raisonnement du tribunal pour rendre sa propre décision. On peut même penser que le *caveat* dont elle a assorti son recours prudent à la méthode de la bissectrice lui a justement été inspiré par ce « précédent » un peu désarçonnant. Je cite la Cour :

Aussi, met en garde la Cour en se référant à son arrêt de 1969 dans les affaires du *Plateau continental de la mer du Nord*²¹, « en cas de recours à la méthode de la bissectrice, faut-il veiller à ne pas 'refaire la nature entièrement' »²².

Cela est vrai, bien sûr, dans tous les cas, mais ce l'est particulièrement lorsque l'on recourt à la méthode de la bissectrice qui, si l'on n'y veille, se prête à tous les excès –ce que la revendication du Bangladesh illustre de manière tout aussi caricaturale que la sentence de 1985 qui lui est si chère.

Je rappelle que, de toute manière, cette sentence atypique –que, encore une fois, dans son tableau des affaires de délimitation maritime, le Professeur Crawford classait parmi les affaires *sui generis*– n'est pas fondée sur l'application de la méthode de la bissectrice à proprement parler, mais sur une autre qui s'apparente à la perpendiculaire à la direction générale de la côte (et, en l'espèce, de la côte de tout un continent...). Comme l'a également rappelé la CIJ, mais, cette fois, dans son arrêt de 1982 dans *Tunisie c. Libye*, cette méthode, on le sait, « devient généralement d'autant moins adaptée comme ligne de délimitation qu'elle s'éloigne du littoral »²³.

A propos de cette même affaire *Tunisie c. Libye*, la Cour de La Haye a relevé (et je me réfère à nouveau à *Nicaragua c. Honduras*) que « la méthode de l'équidistance ne pouvait

¹⁸ V. le document produit sous l'onglet 1.18 du dossier des Juges du jeudi 8 septembre (*Outcome of Decided Cases*).

¹⁹ Opinion dissidente de l'arbitre M. Bedjaoui dans l'affaire de la *Délimitation maritime entre la Guinée-Bissau et le Sénégal*, sentence du 31 juillet 1989, *RSANU*, vol. XX, p. 194, par. 104 et note 109.

²⁰ *Ibid.*, p. 745, par. 280; p. 747, par. 288; p. 756, par. 311 (mais à un tout autre sujet).

²¹ (CIJ, arrêt, 20 février 1969, *CIJ Recueil 1969*, p. 49, par. 91).

²² CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, *CIJ Recueil 2007*, p. 747, par. 289.

²³ CIJ, arrêt, 24 février 1982, *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, *CIJ Recueil 1982*, pp. 87-88, par. 125.

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pas être appliquée au deuxième segment de la délimitation (en cause dans *Tunisie c. Libye*) parce que le point de départ de ce segment ne se situait sur aucune des lignes d'équidistance possibles ». C'est pourquoi, « [d]ans cette affaire, la Cour utilisa une bissectrice pour refléter l'infléchissement vers le nord de la côte tunisienne à partir du golfe de Gabès »²⁴. Et comme le souligne l'arrêt de 2007, elle a recouru à cette méthode dans *Tunisie c. Libye* « pour des raisons très particulières » car elle était « partie d'une ligne de convergence entre les concessions accordées par chaque Partie et l'[avait] traduite en une ligne tracée à partir d'un point fixé en mer jusqu'au point terminal de la frontière terrestre »²⁵. Au surplus, ce recours à une bissectrice tracée dans un angle formé par les côtes d'une seule – pas des deux – des deux Parties en litige (en l'espèce la Tunisie) a des rapports fort lointains avec la « méthode de la bissectrice » telle que le Bangladesh prétend l'appliquer dans notre espèce.

En outre, dans *Tunisie/Libye*, la CIJ avait estimé devoir tenir compte de la « ferme position des Parties », qui estimaient *toutes deux* que le recours à l'équidistance n'aurait pas été satisfaisant en l'espèce²⁶.

En ce qui concerne l'affaire du *Golfe du Maine* enfin, la CIJ rappelle dans son arrêt de 2007 – dans lequel elle fait l'analyse de tous ces prétendus précédents – que la « raison principale » pour laquelle la Chambre qui a tranché l'affaire du *Golfe du Maine* a dû écarter la méthode de l'équidistance au profit de celle de la bissectrice était le désaccord des Parties sur l'appartenance territoriale des points de base qui auraient permis d'y recourir. Et je cite l'arrêt de 2007 :

La Cour relève que, dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/États-Unis d'Amérique)*, la « raison principale » pour laquelle la Chambre n'avait pas souhaité recourir à la méthode de l'équidistance pour le premier tronçon de la délimitation résidait en ceci que le choix opéré dans le compromis, d'un point A comme point de départ de la ligne privait la Cour d'un point d'équidistance « établi à partir de deux points de base dont l'un appartiendrait sans conteste aux États-Unis et l'autre sans conteste au Canada »²⁷ ²⁸.

Ici encore, rien de tel dans notre affaire : je l'ai dit, les Parties s'accordent pour considérer que le point d'arrivée de la frontière terrestre, qui coïncide avec le point de départ de la frontière maritime, est celui dont les coordonnées sont indiquées à l'Article IV du Protocole de 1980.

La deuxième raison qui a conduit la Chambre de l'affaire du *Golfe du Maine* à écarter l'équidistance au profit d'une bissectrice dans l'arrêt de 1984 ne se retrouve pas davantage en la présente espèce; dans les termes de l'arrêt de 2007 :

En l'affaire du *Golfe du Maine*, la Chambre de la Cour utilisa également la bissectrice de l'angle formé par les côtes continentales du golfe, parce qu'elle

²⁴ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 746, par. 288, renvoyant à CIJ, arrêt, 24 février 1982, *Tunisie/Libye*, CIJ Recueil 1982, p. 94, par. 133, point C 3).

²⁵ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 745, par. 280, faisant référence à CIJ, arrêt, 24 février 1982, *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, CIJ Recueil 1982, p. 85, par. 121.

²⁶ CIJ, arrêt, 24 février 1982, *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, CIJ Recueil 1982, p. 79, par. 110.

²⁷ Arrêt, CIJ Recueil 1984, p. 332, para. 211.

²⁸ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 743, par. 279.

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estimait que les petites îles situées dans le golfe ne pouvaient pas convenir comme points de base ...²⁹.

Et le professeur Crawford a ajouté que, dans cette affaire « [t]he Chamber decided that the extraordinary irregularity of the coast, particularly on the United States side, made the use of equidistance problematic »³⁰ [« La Chambre a décidé que l'irrégularité extraordinaire de la côte, en particulier du côté des Etats-Unis, rendait problématique l'emploi de l'équidistance »]. Mon éminent contradicteur ne pouvait reconnaître plus nettement (et plus honnêtement) que l'on était dans un cas, particulier, dans lequel le recours à l'équidistance était exclu (et c'était il y a dix-sept ans).

Pour récapituler, Monsieur le Président :

1°) les affaires dans lesquelles une juridiction internationale a recouru à la méthode de la bissectrice sont extrêmement rares; il n'en existe qu'une dans laquelle elle a été appliquée pleinement pour l'ensemble de la délimitation requise par les Parties : c'est l'affaire *Nicaragua c. Honduras*; l'étrange arbitrage de 1985 dans *Guinée/Guinée-Bissau* recourt à la perpendiculaire à la direction générale des côtes de cinq États (outre les Parties, la Sierra Leone, le Sénégal et la Gambie) – solution qui ne saurait à l'évidence, être transposée en la présente espèce; et, dans les affaires *Tunisie/Libye* et du *Golfe du Maine*, la CIJ n'a écarté l'équidistance que pour déterminer une portion de la frontière maritime entre les Parties, et en insistant sur les caractères très particuliers des circonstances de chacune de ces affaires; ces circonstances ne se retrouvent nullement dans la nôtre qui, au surplus, se distingue profondément de la seule affaire réellement probante dans laquelle une ligne bissectrice a été tracée, faute pour l'équidistance d'être praticable (et je me réfère encore une fois à *Nicaragua c. Honduras*); de plus, comme je l'ai dit, *Tunisie/Libye* ne constitue pas non plus une illustration probante de la « méthode de la bissectrice » à proprement parler;

2°) à la différence de ce qui était le cas dans l'arrêt de 2007, il n'est nullement impossible de déterminer dans notre affaire des points de base permettant de tracer la ligne provisoire d'équidistance, et je vous renvoie à ce qu'a dit ce matin M. Coalter Lathrop ;

3°) même si certaines parties du littoral de la baie du Bengale sont instables, ce n'est pas le cas des emplacements retenus pour fixer les points de base proposés par le Myanmar ;

4°) il n'existe aucun désaccord entre le Bangladesh et le Myanmar sur le point de départ de la délimitation maritime et sa coïncidence avec le point terminal de la frontière terrestre;

5°) et enfin, contrairement à ce qui était le cas dans *Nicaragua c. Honduras* (et aussi d'ailleurs dans *Tunisie/Libye*) les Parties à l'affaire qui vous est soumise, Messieurs les Juges, ne s'accordent nullement pour vous prier d'écarter la méthode de l'équidistance / circonstances pertinentes; le Myanmar est fondamentalement opposé à la mise à l'écart de cette méthode qui permet parfaitement, et sans complication, d'aboutir à une solution tout ce qu'il y a de plus équitable au sens que le droit donne à ce mot, en tenant pleinement compte de la géographie côtière des Parties. Monsieur le Président, le Tribunal de céans n'est pas appelé et n'a pas été appelé à statuer *ex aequo et bono*.

Puisque, pour reprendre l'expression de la CIJ dans l'affaire *Roumanie c. Ukraine*, il n'existe pas dans notre espèce de « raisons impérieuses » qui interdirait de tracer une ligne

²⁹ *Ibid.*, pp. 746-747, par 288 ; v. CIJ, arrêt, 12 octobre 1984, *Délimitation de la frontière maritime dans la région du golfe du Maine*, CIJ Recueil 1984, p. 332, par. 210 ; v. aussi, not., p. 330, par. 202 et CIJ, arrêt, 12 octobre 1984, *Délimitation de la frontière maritime dans la région du golfe du Maine*, CIJ Recueil 1984, p. 332, par. 211.

³⁰ ITLOS/PV.11/5 (E), p. 2, lignes 31-33 (M. Crawford).

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d'équidistance³¹ et puisque, contrairement à la Cour dans *Nicaragua c. Honduras*, le Tribunal ne se trouve pas « face à des circonstances spéciales qui ne lui permettent pas d'appliquer le principe de l'équidistance »³², il n'existe aucune raison pour l'écarter au profit de la douteuse méthode de la bissectrice.

Ce n'est donc que pour surplus de droit, Messieurs les Juges, que je vais m'employer maintenant à montrer, de manière plus concise, qu'en tout état de cause le Bangladesh applique la méthode de la bissectrice de manière grossièrement erronée.

Prétendant respecter les directives de la CIJ suivant laquelle, pour appliquer la méthode de la bissectrice, il faut, avant tout, « rechercher une solution en déterminant d'abord ce que sont les 'côtes pertinentes' des États »³³, le Bangladesh adopte une position robuste : selon lui, l'ensemble de ses côtes seraient pertinentes aux fins de l'établissement de la ligne bissectrice³⁴ tandis que la seule côte pertinente du Myanmar serait celle qui s'étend entre l'embouchure du fleuve Naaf et le cap Bhiff.

Je ne suis pas sûr qu'il y ait besoin de plus que d'un coup d'œil sur le schéma projeté à l'écran pour réaliser l'incongruité de ces propositions. La côte du Bangladesh connaît plusieurs changements brutaux de directions :

- un premier segment orienté nord-ouest part du fleuve Naaf (point a) pour aboutir au phare de l'île de Kutubdia, marqué « b » sur le schéma;
- à partir de b, la côte s'infléchit davantage vers le nord jusqu'au point c, qui marque le point le plus septentrional de la baie du Bengale ;
- elle change ici radicalement de direction pour descendre vers le sud-ouest jusqu'au point d,
- d'où elle prend une direction presque est-ouest pour aboutir au point e, entre le Bangladesh et l'Inde.

Malgré ce tracé en zigzags, le Bangladesh n'hésite pas à déclarer toute sa côte pertinente – au prix d'une simplification audacieuse qui consiste à tracer une ligne droite entre a et e – entre la point-frontière avec le Myanmar et le point-frontière avec l'Inde. Le problème que pose cette opération est que la ligne ainsi tracée n'a strictement plus aucun rapport – aucun rapport – avec « la situation géographique réelle »³⁵ et qu'il est difficile, pour dire le moins, d'y voir le résultat d'« une appréciation réfléchie de la géographie côtière réelle »³⁶ pour citer la CIJ dans *Nicaragua c. Honduras*. Sans vouloir peiner mes estimables contradicteurs, c'est tout simplement n'importe quoi !

L'erreur est moindre du côté du Myanmar en ce sens que la direction générale de la côte retenue par le Bangladesh est moins grossièrement arbitraire. Mais vous noterez, Messieurs les Juges, la dissymétrie flagrante qui existe entre le traitement que le Demandeur réserve au Myanmar et celui qu'il s'octroie à lui-même : toute sa côte, mais seulement une petite partie de celle du Myanmar, alors que l'on voit mal pourquoi en tout cas la portion cap Bhiff – Cap Negrakis serait exclue puisqu'elle se projette vers le Bangladesh auquel elle fait partiellement face. Si le Bangladesh tient à refaçonner la nature en sa faveur, il doit accepter qu'il en aille au moins de même en faveur du Myanmar, d'autant plus que ce serait infiniment moins arbitraire, et il n'existe pas de raison pour que la portion de côtes situées entre cap

³¹ CIJ, arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, CIJ Recueil 2009, p. 101, par. 116.

³² CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 745, par. 281.

³³ *Ibid.*, p. 747, par. 289.

³⁴ MB, p. 91, par. 6.70 et RB, p. 98, par. 3.141 et p. 100, pars. 3.149.

³⁵ (CIJ, arrêt, 3 juin 1985, *Plateau continental (Jamahiriya arabe libyenne/Malte)*, CIJ Recueil 1985, p. 45, par. 57).

³⁶ CIJ, arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CIJ Recueil 2007, p. 747, par. 289.

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Bhiff et Cap Negrais soit éliminée du tableau que peint le Bangladesh (il est vrai qu'il se réclame probablement plus du surréalisme, voire du dadaïsme que de l'école réaliste ...). Honnêtement, ce n'est pas très sérieux et, comme M. Lathrop le montrera demain matin, la construction d'une ligne bissectrice digne de ce nom en conformité avec les règles de l'art aboutit à des résultats bien différents. Pour l'instant, je me permets de vous inviter seulement, Messieurs du Tribunal, à jeter un coup d'œil sur le schéma qui inclut la bissectrice inventée par le Bangladesh ; la bissectrice qui serait tracée selon les règles de l'art si l'on recourait à cette méthode –avec, en arrière-plan, la ligne résultant de l'application de la méthode « normale » équidistance / circonstances spéciales ou pertinentes. Mais encore trois brèves remarques de caractère général sur la méthode –ou serait-ce l'absence de méthode ?– suivie par nos contradicteurs.

En premier lieu, je ne fais que mentionner en passant l'argument très singulier qu'ils tirent de la prétendue similarité entre la représentation de la direction générale des côtes qu'ils défendent et celle qui résulterait de la jonction des points de base proposés par le Myanmar les uns avec les autres. Nos contradicteurs étaient si enchantés de leur trouvaille qu'ils y ont consacré pas moins de deux pleines pages et sept paragraphes de leur réplique³⁷. La réfutation n'en mérite pas tant : il me suffira de dire que c'est tout mélanger et qu'il n'entre pas dans la fonction des points de base de décrire la direction générale des côtes; ils n'ont d'utilité que pour construire les lignes d'équidistance³⁸. Et si coïncidence il y avait, elle serait purement fortuite. Ceci étant, les avocats du Bangladesh n'y sont pas revenus durant leur premier tour de plaidoiries –dont acte.

En deuxième lieu, il est important de noter que la notion de « côtes pertinentes » –si importante en matière de délimitation maritime– ne recouvre pas la même réalité selon la méthode retenue et le stade de son application –stade de l'application qui est celui où nous sommes. Dans sa plaidoirie de ce matin, Daniel Müller a décrit les côtes pertinentes aux fins du tracé de la ligne d'équidistance; les mêmes côtes sont également pertinentes, ainsi que Sir Michael l'a montré, pour l'application du test de la non-disproportionnalité. Mais les choses sont bien différentes lorsqu'il s'agit de déterminer les côtes à prendre en considération pour tracer une ligne bissectrice³⁹. Ici, ce n'est pas leur longueur qui importe mais leur direction –et celle-ci doit être unique afin de pouvoir déterminer les deux côtés de l'angle dont la bissectrice constituera la frontière maritime entre les deux pays– alors que les côtes pertinentes aux fins du tracé de la ligne d'équidistance et de l'application du test de la non-disproportionnalité peuvent comporter plusieurs segments suivant des directions différentes, du moment que ces segments sont adjacents à la côte de l'autre État concerné ou lui font face. Or le Bangladesh ne fait pas la différence : il conteste dans un même mouvement le bien-fondé des côtes retenues par le Myanmar pour construire la ligne d'équidistance dont il ne veut pourtant pas d'une part, et en vue de déterminer l'angle de la bissectrice d'autre part⁴⁰; et il utilise les mêmes lignes (de représentation générale des côtes) aux fins du tracé de la ligne bissectrice comme du test de non-disproportionnalité⁴¹. Une fois encore, Monsieur le Président, c'est tout mélanger.

Nos contradicteurs, qui ont fini par s'apercevoir que leur notion de côtes pertinentes était grossièrement erronée, sont revenus à une conception un peu plus raisonnable des choses, comme Daniel Müller l'a montré ce matin et comme l'illustrent les schémas figurant à l'onglet 3.5 du dossier des Juges d'aujourd'hui. Mais cela laisse entière la question de la

³⁷ RB, pp. 93-97, pars. 5.129-5.136; voir aussi RB, p. 98, par. 3.143 et p. 99, par. 3.144.

³⁸ V. DM, pp. 117-118, pars. 5.44-5.45.

³⁹ V. DM, pp. 120-125, pars. 5.52-5.54.

⁴⁰ ITLOS/PV.11/5 (E), pp. 4-7 (M. Crawford); v. aussi : RB, p. 98, pars. 3.141-3.143 et pp. 100-101, pars. 3.149-3.156.

⁴¹ V. DB, p. 103, par. 3.166.

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détermination des côtes pertinentes non plus en vue du test de non-disproportionnalité ou de la ligne d'équidistance mais aux fins de la construction de la bissectrice : l'équidistance reflète la géographie côtière des Parties dans son ensemble – toutes les côtes définies comme pertinentes doivent être prises en considération ; la bissectrice coupe un angle dont les côtés doivent être définis en faisant preuve d'un tant soit peu de bon sens – de « jugeote », si je peux m'exprimer ainsi. Le professeur Crawford⁴² a eu beau invoquer l'appel à « une appréciation réfléchie » lancé par la CIJ dans *Nicaragua c. Honduras*, il n'a pu résister aux démons qui tenaillent si fort nos contradicteurs et amis et qui les incitent à refaire encore et toujours entièrement la nature. Si l'on voulait construire une bissectrice selon les règles de l'art, il faudrait prendre en compte les segments a-b d'une part, sur la côte bangladaise, et celui allant de l'embouchure du fleuve Naaf à la pointe sud de l'île Myingun du côté du Myanmar d'autre part.

En troisième lieu, je ne puis m'empêcher de souligner l'extraordinaire contradiction dans laquelle s'enferme le Bangladesh :

- d'un côté, il dénonce comme étant une « affirmation pure et simple » (*a bare assertion*) la thèse du Myanmar selon laquelle les côtes pertinentes pour déterminer l'angle à partir duquel la bissectrice sera tracée sont celles qui se trouvent à proximité immédiate du point de départ de la délimitation⁴³ (alors qu'il me semble que cela relève de l'évidence lorsque l'on s'essaie à une « appréciation réfléchie » des côtes pertinentes);

- mais, de l'autre, le Bangladesh affirme, avec une égale véhémence, que la côte du Myanmar au sud du cap Bhiff « *is just too far from the delimitation to be considered relevant* »⁴⁴ (« est tout simplement trop éloignée de la zone à délimiter pour être jugée pertinente »).

Cette dernière remarque prend une saveur toute spéciale de la part d'un Etat qui manifeste une inclinaison particulière pour la sentence arbitrale de 1985 entre la Guinée et la Guinée-Bissau dans laquelle le Tribunal n'a pas hésité à représenter la côte pertinente par une ligne tracée le long des côtes de pas moins de cinq Etats et s'étendant sur pas moins de 870 kilomètres.

Monsieur le Président, il me semble qu'il est à peine besoin de conclure :

- il n'y a pas lieu de faire appel à une ligne bissectrice quand rien ne s'oppose à recourir à l'équidistance;

- et la ligne bissectrice inventée par le Bangladesh relève de la pure fantaisie.

Avec votre permission, Monsieur le Président, M. Lathrop complètera demain matin cette présentation générale par des considérations plus techniques, et montrera ce que pourrait être une ligne bissectrice convenablement tracée – elle ne serait pas à l'avantage du Bangladesh. Ceci conclut notre présentation de cet après-midi, Messieurs les Juges, je vous remercie vivement pour votre très aimable attention.

The President:

We have come to the end of today's sitting. The hearing will be resumed tomorrow at 10 a.m. The sitting is now closed.

(The sitting closes at 5.48 p.m.)

⁴² ITLOS/PV.11/5 (E), p. 9, ligne 24 (M. Crawford).

⁴³ DB, p. 99, par. 3.145.

⁴⁴ RB, p. 100, par. 3.151.

20 September 2011, a.m.

PUBLIC SITTING HELD ON 20 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 20 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR LATHROP
COUNSEL OF MYANMAR
[ITLOS/PV.11/11/Rev.1, E, p. 1–7]*Mr Lathrop:*

Mr President, distinguished members of the Tribunal, yesterday Professor Pellet explained why it is not necessary, nor, indeed possible, to resort to the angle bisector method in the circumstances of this case. To paraphrase Professor Pellet, it is not appropriate to apply the bisector method because the preferred method – the equidistance method – can be applied to the coasts of the Parties without any of the obstacles faced by the International Court in *Nicaragua v Honduras*. There are no sovereignty disputes. The Parties agree to the location of the land boundary terminus and the starting point for this delimitation. The Parties agree on the charts. The coasts of the Parties are stable, and the shapes of the relevant adjacent coasts are relatively flat. Indeed, there are no obstacles to applying the equidistance method whatsoever.

Yesterday I had the privilege of addressing the Tribunal regarding the proper application of the equidistance method to the coasts of the Parties. As I emphasized in that presentation, the construction of the provisional equidistance line is eminently feasible in this coastal geography. Moreover, as Professor Forteau and Sir Michael Wood demonstrated in subsequent presentations, the equidistance method produces an equitable result in this case.

Accordingly, since the equidistance method is both feasible and equitable, Myanmar does not suggest in any way that the angle bisector need be or should be applied in this delimitation. Nonetheless, because the angle bisector method has been used – albeit incorrectly – by Bangladesh in its proposed delimitation, it is incumbent upon Myanmar to make the Tribunal aware of the flaws in Bangladesh’s application of the angle bisector method. In doing so, Myanmar will show the Tribunal the actual delimitation line that would result if that method were to be applied correctly.

My task this morning has three parts. First, I will cover some preliminary points about the angle bisector method. Second, I will present to you a critique of Bangladesh’s application of the angle bisector method. Third and finally, I will present a demonstration of the proper angle bisector line that is actually generated in this coastal configuration.

At the outset, two preliminary points should be made about the angle bisector method. The first is that the bisector method is a modified version of the equidistance method as applied to simplified coasts or, as the International Court said in *Nicaragua v Honduras*, “the bisector method may be seen as an approximation of the equidistance method”¹. On this first preliminary point, Bangladesh agrees².

The second preliminary point is that, when properly applied, the angle bisector lessens the effects of unusually prominent features. In that regard, it has been described by a Chamber of the International Court as “a corrective”³. Unfortunately, because the application of the method requires a subjective assessment of coastal configurations, this “corrective” tool is particularly susceptible to abuse. To limit that abuse, the International Court has laid down the following rule in its case law – the bisector must be constructed using general direction lines that are representative of the actual coast.

On this second preliminary point, Bangladesh clearly does not agree. But before critiquing Bangladesh’s misapplication of the method, it is important to review the Court’s

¹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Judgment, I.C.J. Reports 2007* (hereinafter “*Nicaragua v Honduras*”), p. 78, para. 287.

² See Reply of Bangladesh (hereinafter “BR”), para. 3.127; ITLOS/PV11/5(E), p. 2, lines 1–4 (Crawford).

³ See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v U.S.)*, Judgment, I.C.J. Reports 1984 (hereinafter “*Gulf of Maine*”), p. 320, para. 176.

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limited case law on the use of general direction lines for constructing angle bisectors. Since there have been so few bisector cases in international law, this will not be a lengthy task.

In the *Gulf of Maine* case, a Chamber of the International Court addressed “the abstract concept of the ‘general direction’ of the coast”⁴. This concept, wrote the Chamber, “may indeed be used as a corrective where the real direction of the coast at which the land boundary ends *deviates only insignificantly* from this ‘general direction’”⁵. The Chamber, in this passage, was writing about the problem of applying a perpendicular to coasts that formed an angle, but the Chamber’s statement is no less relevant in the present case. A general direction line must act as no more than a corrective. It may deviate only insignificantly from the real direction of the coast or, as the Chamber writes in the same paragraph, from “the real geographic configuration.”

In resorting to this concept of a general direction line, the Chamber sought to “correct” for the influence of “tiny islands, uninhabited rocks or low-tide elevations” which would otherwise, as the most salient features, have influenced the delimitation⁶. The result of the Chamber’s application of the general direction concept to the coasts of the Parties in that case is shown on the screen. The Tribunal will notice that the Chamber used a different version of the coasts for measuring the coastal length of the two States. Mr Müller presented the latter version of the coasts to you yesterday and we have added them to the screen for comparison. Professor Crawford told you that there was no authority for the proposition that different portions of the coast can be used for these two different purposes – for general direction on the one hand and coastal length⁷ on the other – but he was mistaken. The *Gulf of Maine* case followed exactly this approach.

In *Nicaragua v Honduras*, the full Court reaffirmed the view that general direction lines may deviate only insignificantly from the real geographic configuration. In that case, the Court described the angle bisector it constructed as “the line formed by bisecting the angle created by the linear approximations of the coastlines”⁸. The Court also described the general direction lines as “lines representing the relevant mainland coasts”⁹. Applying this concept to the actual coasts in that case, the Court examined two general direction lines proposed by Nicaragua, which were purported to represent the direction of the Honduran coast. But because the two lines would in fact cut across significant portions of Honduran territory¹⁰, the Court found that it did not represent the actual coast. Accordingly, the Court rejected them—not for the reasons Professor Crawford gives¹¹, but because they “would run entirely over the Honduran mainland and thus would deprive the significant Honduran land mass between the sea and the line of any effect on the delimitation”¹². Nicaragua’s unacceptable coastal front line is shown on the screen. For the purpose of a bisector-based delimitation, all of the territory north of that line would be effectively erased from existence and given no effect. This was not a “linear approximation” of the Honduran coast, and it was therefore rejected in favor of the coastal front line that has now been added to the map. According to the Court, this third version of the coastal front or general direction line would “avoid the problem of cutting off Honduran territory”¹³.

⁴ *Ibid.*

⁵ *Ibid.* (emphasis added).

⁶ *Gulf of Maine, I.C.J. Reports 1984*, p. 329, para. 201.

⁷ ITLOS/PV11/5(E), p. 8, lines 2-6 (Crawford).

⁸ *Nicaragua v Honduras, I.C.J. Reports 2007*, p. 78, para. 287.

⁹ *Ibid.*

¹⁰ *Ibid.*, pp. 80-81, paras. 295, 297.

¹¹ ITLOS/PV11/5(E), p. 9, lines 7-13 (Crawford).

¹² *Nicaragua v Honduras, I.C.J. Reports 2007*, p. 81, para. 297.

¹³ *Ibid.*, para. 298.

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To summarize, we can extrapolate from these two cases, *Gulf of Maine* and *Nicaragua v Honduras*, the guiding principle for the application of the angle bisector method—the general direction lines must represent approximations of the actual coast, while deviating only insignificantly. As the Court noted in *Nicaragua v Honduras*, applying this rule requires careful attention to “the actual coastal geography”¹⁴. That is, an international court or tribunal must adhere faithfully to the actual coasts in drawing the general direction lines. Then, once these lines have been identified on the coasts of both Parties, the construction of the bisector is a purely objective, relatively simple, mathematical calculation.

Bangladesh badly misapplies this simple rule when it identifies its own coastal façade. But before I address Bangladesh’s errors, allow me to note several points of agreement between the Parties with respect to the application of the angle bisector method. First, both Parties use their agreed land boundary terminus as the vertex of their angles¹⁵. Second, neither Party includes extraneous features in their general direction lines¹⁶. And third, both Parties take largely the same view of the general direction of the Myanmar coast. The lengths of the two versions are different, but their directions vary by only two degrees¹⁷.

Bangladesh’s errors are the result, first and foremost, of the misapplication of the coastal front rule to its own coast. Bangladesh’s version of its own coastal front does not “represent” its actual coast. It does not “deviate only insignificantly” from the real direction of its coast. It is not a “linear approximation” of that coast. The direction of Bangladesh’s coastal front line is simply wrong. The map on the screen is sufficient evidence of Bangladesh’s error, but it is not the only evidence.

In fact, Bangladesh does not even pretend to follow the rule governing general direction lines. Instead, Bangladesh claims that the construction of a general direction line is “a straightforward operation of connecting the two land boundary termini”¹⁸. Professor Crawford referred to this approach as the “simplest” way to represent Bangladesh’s coast¹⁹. While there is no denying that connecting two points with a line is a straightforward and simple operation, the resulting coastal front line clearly does not “represent”, “approximate”, or “deviate only insignificantly” from Bangladesh’s actual coast. It is not “faithful to the actual geographical situation”²⁰. Moreover, the Court rejected this same approach in *Nicaragua v Honduras*²¹.

Of course, Bangladesh drew its own coastal front line this way in order to drive its bisector to the south, away from Bangladesh’s coast and towards Myanmar’s. The result is a bisector line running from the land boundary terminus at 215° east of north. Like the versions of the coastal fronts that were tested and rejected by the Court in *Nicaragua v Honduras*, this version of Bangladesh’s coastal front does not reflect reality. In fact, it is the mirror image of Nicaragua’s strategy, presented in this case exactly backwards. Much as the lines proposed by Nicaragua deprived its neighbour’s territory of influence on the delimitation, the lines proposed by Bangladesh would create territory for itself - where none actually exists - and permit that invented territory to affect the delimitation.

Unfortunately, the bisector method is especially susceptible to abuse like this. The International Court acknowledged as much when it noted that “where the bisector method is

¹⁴ *Ibid.*, para. 289.

¹⁵ BM, at Figure 6.11; MCM, at Sketch-Map 5.6.

¹⁶ BM, at Figure 6.11; MCM, at Sketch-Map 5.6.

¹⁷ See MR, para. 5.61 (“[T]he coastal front of Myanmar ... follows an azimuth of 145°.”); BR, para. 3.142 (“[T]he general direction of [Myanmar’s] coast follows an azimuth of N143°E.”).

¹⁸ BR, para. 3.149 (emphasis added).

¹⁹ ITLOS/PV11/5(E), p. 8, line 20 (Crawford).

²⁰ *Nicaragua v Honduras*, I.C.J. Reports 2007, p. 79, para. 289 (citing *Continental Shelf (Libyan Arab Jamahirya/Malta)*, Judgment, I.C.J. Reports 1985, p. 45, para. 57).

²¹ *Nicaragua v Honduras*, I.C.J. Reports 2007, p. 80, para. 295.

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to be applied, care must be taken to avoid ‘completely refashioning nature’²². Mr President, I could search the world over but it would be difficult to find a better example of nature refashioned than the imaginary land reclamation project represented by Bangladesh’s bogus coastal front line. Stretching from one end of Bangladesh’s coast to the other, the line effectively adds over 23,000 square kilometres of non-existent territory to Bangladesh’s mainland, rotates a properly constructed bisector line 22 degrees in Bangladesh’s favour, and gives Bangladesh an additional 25,000 square kilometres of maritime area as compared to the properly constructed bisector.

Mr President, Bangladesh’s coastal façade is just that: it is a mask that disguises Bangladesh’s actual coast, a coast that it does not come close to representing or approximating. When that façade is, in turn, used to calculate an angle bisector, the resulting line is equally absurd.

But Bangladesh does not stop there. Instead, Bangladesh takes its absurd bisector and moves the line even further south, to begin its trajectory, not from the agreed land boundary terminus, but from Bangladesh’s Point 7/8A. Bangladesh calls this move a “shift” or a “slight transposition”²³. The Tribunal would be excused for not even noticing this “final step”²⁴, since it is barely mentioned in Bangladesh’s written pleadings²⁵, and we heard about it only briefly in the first round of these hearings²⁶. The reason Bangladesh says so little about this shift is that it is completely unjustifiable and yet in fact this “slight transposition,” is not slight. It adds more than 8,000 square kilometres of maritime area to the area already taken in by Bangladesh’s un-transposed bisector. Moreover, this shift functions to exaggerate and amplify the distorting effect that St Martin’s Island would have on this delimitation.

To the extent that Bangladesh attempts to justify this shift, it asserts that a Chamber of the Court in the *Gulf of Maine* case “shifted, or transposed [the bisector] to the agreed offshore starting point for the maritime boundary, Point A ...”²⁷. Bangladesh then illustrated the Chamber’s so-called transposition at Memorial figure 6.7. The Tribunal will have noticed that Bangladesh has since adjusted its figures somewhat since the written pleadings were concluded²⁸. Still, Bangladesh continues to misrepresent the methodology used in the *Gulf of Maine* case to construct its bisector and to determine its starting point, claiming yet again that the Chamber “moved the bisector line such that it started at point A”²⁹.

In fact the Chamber did not transpose, shift, or move the bisector to point A. It constructed the bisector from point A, the agreed starting point of the delimitation, and there it stayed. At risk of boring the Tribunal with a long quotation, allow me to demonstrate the Chamber’s methodology by reading the relevant paragraph from the *Gulf of Maine* judgment, while the method is illustrated on the screen.

The Chamber wrote:

[O]ne may justifiably draw from point A two lines respectively perpendicular to the two basic coastal lines here to be considered, namely the line from Cape Elizabeth to the international boundary terminus and the line from that latter point to Cape Sable. These perpendiculars form, at point A, on one side an acute angle of about 82° and on the other a reflex angle of about 278°. It is the bisector

²² *Ibid.*, para. 289 (quoting *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 49, para. 91).

²³ See Memorial of Bangladesh, para. 6.60, 6.73.

²⁴ *Ibid.*, para. 6.73; ITLOS/PV11/5(E), p. 9, line 34 (Crawford).

²⁵ See BR, para. 3.133; MR, para. 3.34.

²⁶ ITLOS/PV11/3(E), p. 29, lines 31-40 (Sands); ITLOS/PV11/5(E), p. 9, line 34-38 (Crawford).

²⁷ BM, para. 6.60.

²⁸ Compare ITLOS/PV11/3(E), p. 29, lines 35-40 and Figure A-22 (Sands), with BM, para. 6.73 and figure 6.7.

²⁹ ITLOS/PV11/3(E), p. 29, lines 37-40 (Sands).

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of this second angle which the Chamber considers that it should adopt for the course of the first segment of the delimitation line³⁰.

It is the bisector of the 278° angle that the Court considers that it should adopt in the course of the first segment of the delimitation line.

The map now on the screen and in your folders depicts the Chamber's actual methodology in the *Gulf of Maine* case. There was no transposition; there was no shift; there was no move – just the construction of the bisector starting at the last point agreed by the Parties.

In *Gulf of Maine*, the vertex of the bisected angle and the agreed starting point of the maritime boundary were the same: Point A. Here, if the bisector method were used, the proper vertex of the angle and the agreed starting point of the maritime boundary would be the same as well: the agreed land boundary terminus. This fact does not suit Bangladesh, as it would not allow for the so-called "slight transposition" that Bangladesh urges upon the Tribunal. But it may well explain why, in the face of all evidence and law to the contrary, Bangladesh insists that there is an agreed boundary in the territorial sea out to point 7/8A. As has already been made clear, there is no such agreement. Instead, the last agreed point on the boundary between the Parties is the land boundary terminus. That point is the proper starting point for this delimitation and Bangladesh's "slight transposition" has no basis in law and cannot stand.

Mr President, to further illuminate the flaws in Bangladesh's proposed bisector, I will now present to the Tribunal a proper application of the angle bisector method to the coasts of the Parties. As I noted earlier, the Parties agree on the vertex of the angle to be bisected and the general direction of Myanmar's coast. The main difference between the Parties is the treatment of Bangladesh's coast.

To repeat the words of the Court in *Nicaragua v Honduras*, the point of this exercise is to construct a "bisector of the angle created by lines representing the relevant mainland coasts"³¹. It should be clear that the Court was not referring to the "relevant coasts" used to measure overall coastal length for the purpose of applying the disproportionality test. Here, the Court was referring only to the coasts which control the direction of an angle bisector. The coasts that are relevant for that purpose are the ones that conform to the rule set out above regarding conformity with the actual coasts. Bangladesh's version of its own coastal front simply does not comply.

The proper coastal front line for the Bangladesh coast, as now shown on the screen, runs from the land boundary terminus to Bangladesh's Sonadia Island on an angle of 329° east of north. Between those two points, the Bangladesh coast runs in a relatively straight line and the proper coastal front line follows that actual coast with only small deviations to both landward and seaward along its length. At Sonadia Island, the direction of the Bangladesh coast changes to northward as it falls away from the delimitation area. The length of Bangladesh's coastal front line is approximately 100 km. Combined with Myanmar's 120 km coastal front line, the lines generating the properly constructed bisector total approximately 220 km in length.

There is one final point to make about the properly constructed bisector. We have added Myanmar's proposed delimitation line to the map. The Tribunal will notice that the properly constructed angle bisector is *more* favourable to Myanmar than the equidistance line that Myanmar advocates in the present case. This comparison can only support Myanmar's position that the equidistance line creates an equitable solution in this geography. But I would like to point out why, as a technical matter, the two lines differ. They differ because the

³⁰ *Gulf of Maine*, I.C.J. Reports 1984, p. 333, para. 213.

³¹ *Nicaragua v Honduras*, I.C.J. Reports 2007, p. 78, para. 287.

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bisector method, properly applied, can have a corrective effect. It reduces the weight that the equidistance method gives to the most prominent coastal features and it increases the weight of large sections of the coast that generate no relevant base points and would have no direct effect on the equidistance line.

Here, the most prominent feature influencing the course of the equidistance line is Bangladesh's Shahpuri Point – the northern headland of the Naaf River and the location of Bangladesh's base point $\beta 1$. As you will recall, this lone base point drives the equidistance line from the land boundary terminus all the way out to point Z of the provisional equidistance line. Bangladesh complained that it had only one base point on this part of its coast, but when yours is the most prominent base point, one is all you need. The proper application of the bisector method to the Bangladesh coast, which results in a coastal front line running just landward of Shahpuri Point, reduces or "corrects" the effect of Bangladesh's $\beta 1$ on the delimitation line.

To be clear, Myanmar does not ask the Tribunal to use the angle bisector method and does not seek this corrective effect. Even to its own disadvantage, Myanmar is willing to accept the real coasts as they actually are.

Mr President, members of the Tribunal, that concludes my presentation on the correct application of the angle bisector method. I thank you for your kind attention and ask you to call upon Professor Pellet.

The President:

Thank you.

I call on Professor Pellet.

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. PELLET
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/11/Rev.1, Fr, p. 8-17]

M. Pellet :

Monsieur le Président, Messieurs les Juges, les deux dernières plaidoiries qui vont être présentées au nom de la République de l'Union du Myanmar concernent une question qui, nous le croyons très fermement, ne se pose pas en droit (or nous sommes dans une enceinte vouée au droit) : nous allons en effet vous parler de la délimitation du plateau continental au-delà de 200 milles marins des lignes de base.

Or cette question ne se pose doublement pas : d'une part, comme nous l'avons montré (et je me réfère tout spécialement à la dernière plaidoirie de Sir Michael Wood hier après-midi), la frontière maritime entre le Bangladesh et le Myanmar ne peut, juridiquement, s'étendre au-delà de cette limite. En l'absence de l'Inde, il est impossible de déterminer avec précision son point d'aboutissement, c'est la raison pour laquelle nous avons figuré l'extrémité de la ligne frontière par une flèche; ceci correspond également aux conclusions de notre duplique, par laquelle le Myanmar prie le Tribunal de bien vouloir, et je la cite « *adjudge and declare that ... [f]rom Point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of 231° 37' 50.9" until it reaches the area where rights of a third State may be affected* »¹.

Je tiens à redire qu'en faisant droit à cette demande, le Tribunal se sera à la fois conformé à la jurisprudence habituelle dans des cas de ce genre, Sir Michael l'a rappelé hier après-midi, et qu'il aura *complètement* délimité la frontière maritime entre les deux Etats, sans empiéter sur les droits de l'Inde, ainsi que les deux Parties à la présente instance le souhaitent².

Mais aussi loin que cette ligne pourrait se prolonger, elle ne conférerait aucune portion de plateau continental au Bangladesh au-delà de 200 milles marins de ses côtes. Au surplus mais ceci a, en l'espèce, un intérêt assez académique, si je dis bien si le Demandeur avait pu établir la possibilité contraire, ce qu'il n'a pas fait, Monsieur le Président, le Tribunal ne pourrait, de toute manière, exercer la compétence lui appartenant en matière de délimitation dans cette zone dans l'attente des recommandations de la Commission des limites du plateau continental (la CLPC – CLCS selon le sigle anglais) et dans l'attente des suites données par les Etats intéressés à ces recommandations. Je développerai brièvement cet aspect des choses, avant que mon savant collègue et ami Daniel Müller explique que, de toute manière, c'est en vain que les conseils du Bangladesh, juristes ou non, nous inondent d'informations (tout à fait intéressantes en soi par ailleurs) sur la tectonique des plaques ou le système détritique du Bengale : l'article 76 de la Convention n'a pas le sens et la portée qu'ils lui attribuent ou dont ils l'affublent.

Pour ces mêmes raisons, la discussion du problème de la « zone grise » que le Professeur Crawford a jugé utile de commenter longuement dans sa plaidoirie de lundi dernier est tout aussi dénuée de portée concrète³. Son esprit curieux toujours en éveil l'a conduit à qualifier cette question de « *one of the more analytically interesting issues in the law of maritime delimitation* »⁴. Qu'on parle de « *grey zone* » ou d'« *orphan wedge* » (de « triangles orphelins », ce qui est une bien jolie expression !), ou du problème de l'« *alta*

¹ DM, p. 195, point 2.

² V. not. ITLOS/PV.11/2/Rev.1 E, p. 7, lignes 13-14 (Mme Moni); p. 23, lignes 23-26 (M. Crawford); ou ITLOS/PV.11/5 E, p. 17, lignes 36-37 et p. 25, lignes 31-34 (M. Akhavan); v. aussi MB, p. 8, par. 1.22; p. 51, par. 4.25; p. 54, par. 4.33 et p. 108, par. 7.37 et RB, p. 121, par. 4.19 et p. 122, par. 4.21.

³ ITLOS/PV.11/5 (E), pp. 13-16 (M. Crawford).

⁴ *Ibid.* p. 13, lignes 11-13.

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mar », il ne n'agit en effet que de cela : d'une question surement intéressante dans une perspective académique, mais qui est sans objet dans la présente instance judiciaire. La délimitation équitable à laquelle le Tribunal est prié de procéder ne s'étend pas au-delà de 200 milles marins; par conséquent, il n'y a pas lieu de se demander ce qu'il devrait advenir dans cette zone grise. J'ajoute que la solution proposée par le Bangladesh est de toute manière intenable : faire prévaloir une (très) hypothétique prétention sur le plateau continental au-delà de 200 milles sur les droits souverains appartenant *ipso facto* au Myanmar en vertu de l'article 77 de la Convention sur son plateau continental en-deçà de cette distance et sur le droit dont il dispose d'étendre sa zone économique exclusive jusqu'à cette limite, serait contraire à la Convention de Montego Bay. Ce l'est aussi à la pratique internationale que nous avons citée dans notre dupliclique – une pratique sur laquelle le Professeur Crawford a gardé un silence que je m'aventure à qualifier d'embarrassé⁵.

Ce problème académique mis à part, je tiens à préciser que, dans son principe, la compétence du Tribunal de céans ne pose pas de problème à nos yeux : à la suite de la notification d'arbitrage du Bangladesh, les deux Parties ont acceptée cette compétence dans les mêmes termes, conformément aux dispositions de l'article 287, paragraphe 1, de la Convention de Montego Bay, en vue du « règlement du différend ... concernant la délimitation maritime entre les deux pays dans le golfe du Bengale ».

Le seul problème qui se pose concerne la *possibilité* – la possibilité – actuelle pour le Tribunal d'exercer cette compétence et de se prononcer sur la délimitation du plateau continental au-delà de 200 milles marins à l'heure actuelle. J'ai bien dit la possibilité, Monsieur le Président – pas la compétence dans l'abstrait. Le Myanmar en effet ne conteste pas que, *si* le Bangladesh pouvait faire valoir des revendications sur cette partie du plateau continental du golfe du Bengale, le Tribunal *aurait* compétence pour procéder à la délimitation.

Nous n'avons aucune « volonté désespérée » d'empêcher le Tribunal de se prononcer sur les prétentions du Demandeur à cet égard⁶ si – beaucoup de si – elles avaient un semblant de vraisemblance, et après que la procédure prévue (notamment par l'article 76, paragraphe 8, de la Convention) aurait été convenablement suivie. (Comme Daniel Müller et moi allons nous référer assez abondamment à l'article 76, nous l'avons à nouveau inséré dans votre dossier d'aujourd'hui – il y figure sous l'onglet 1). Mais, pour l'heure, la procédure en question n'a pas été suivie et les revendications du Demandeur demeurent putatives et hypothétiques en l'absence de détermination de leur bien-fondé par la CLPC. Dès lors, le Tribunal ne peut pas exercer la compétence lui appartenant en principe et qui, dans l'état actuel des choses, est, elle aussi, hypothétique.

Par conséquent si malgré les autres raisons – décisives selon nous – qui font que, de toute façon, le problème ne se pose pas, vous estimiez néanmoins la requête recevable sur ce point – *quod non*, vous ne pourriez que surseoir à statuer en ce qui concerne cet aspect des choses. Ceci jusqu'à ce que les Parties se soient prononcées, conformément à l'article 76 de la Convention, sur les recommandations de la Commission concernant la réalité des titres des deux Parties sur le plateau continental au-delà de 200 milles marins et, si ces titres existent, sur leur extension vers le large – c'est-à-dire, sur les limites extérieures (pas latérales, *extérieures*) du plateau continental des deux pays.

Le Bangladesh invoque plusieurs arguments à l'encontre de cette conclusion auxquels je vais répondre brièvement tour à tour.

En premier lieu, le Myanmar confondrait « *delimitation* » et « *delineation* »⁷ – un mot qu'il est difficile de traduire en français (bien que les documents de la CLPC utilisent le

⁵ DM, pars. 6.58-6.60.

⁶ ITLOS/PV/5, p. 18, ligne 30 (M. Akhavan).

⁷ MB, p. 52, par. 4.26.

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néologisme « délimitation », et ce mot ne figure d'ailleurs qu'à l'article 5 de l'Annexe II de la Convention de 1982 – disons « limites latérales » et « limites extérieures »; cette dernière expression, « limites extérieures », est d'ailleurs celle qu'utilise l'article 76. Alors que la CLPC est compétente pour se prononcer, par voie de recommandations, sur les limites extérieures du plateau continental d'un Etat côtier, le paragraphe 10 de l'article 76 dispose :

Le présent article [relatif à la 'définition du plateau continental'] ne préjuge pas de la question de la délimitation du plateau continental entre les Etats dont les côtes sont adjacentes ou se font face;

Et l'article 9 de l'Annexe II va dans le même sens.

Mais ni l'une ni l'autre de ces dispositions (l'article 76 et l'article 9) n'établit explicitement une priorité entre la fixation des limites extérieures du plateau continental, la « délimitation », (pour laquelle la CLPC joue un rôle éminent) et sa délimitation latérale (qui relève de l'un des organes de règlement des différends envisagés dans la partie XV de la Convention, en l'espèce, du Tribunal de céans). A vrai dire, malgré ce silence, il n'y a pas de souci à se faire pour les messieurs trop polis que décrivait le professeur Akhavan lundi dernier⁸; l'ordre de priorité relève du simple bon sens : avant de procéder à la délimitation latérale du plateau continental au-delà de 200 milles marins entre deux Etats côtiers, il faut d'abord s'assurer que ces deux Etats ont un titre sur le plateau continental en question, et cela relève, conformément à la Convention, de la compétence de la Commission. Prétendre que la délimitation latérale peut être décidée par la voie judiciaire avant la vérification du titre au plateau continental au-delà de 200 milles marins revient non seulement à violer la procédure prévue par la Convention, mais aussi à court-circuiter entièrement la Commission dont le mandat est fixé à l'article 3 (1)(a) de l'Annexe II de la Convention, et qui se trouverait placée devant un fait accompli et n'aurait plus rien sur quoi se prononcer.

Toutefois, en deuxième lieu, le Bangladesh réduit le rôle de la Commission à celui d'expert consultant, le Professeur Akhavan parle de son « *expert advisory role* »⁹, au prétexte qu'elle n'a qu'un pouvoir de recommandation. Dès lors, selon le Demandeur, il serait absurde de considérer que la délimitation latérale est suspendue à son intervention en ce qui concerne la fixation des limites extérieures. Voici, Monsieur le Président, une lecture bien réductrice des pouvoirs de la Commission; une lecture qui est en contradiction flagrante avec la lettre et l'esprit de l'article 76 et de l'Annexe II de la Convention. Certes, aux termes de l'article 76, paragraphe 8, que je lis : « [l]a Commission adresse aux Etats côtiers des recommandations sur les questions concernant la fixation des limites extérieures de leur plateau continental »; mais ces recommandations ne sont pas de simples constatations poétiques dont les Etats sont libres de tenir compte ou non.

Elles sont investies d'une lourde charge normative; comme l'a fait remarquer une autorité éminente en la matière : si un Etat fixait ses limites autrement que sur la base de recommandations de la CLPC, le Secrétaire général des Nations Unies « *would be unable to accept them and to give them the publicity as provided for under Article 76, paragraph 9, of the Convention* »¹⁰. Les recommandations de la Commission sont des actes-conditions, indispensables à l'établissement définitif des limites extérieures du plateau continental de l'Etat côtier au-delà de 200 milles marins.

⁸ ITLOS/PV.11/5 E, p. 19, lignes 3-7 (M. Akhavan).

⁹ ITLOS/PV.11/5 E, p. 20, ligne 14 (M. Akhavan).

¹⁰ R. Wolfrum, « The Role of International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf », in R. Lagoni et D. Vignes (dirs.), *Maritime Delimitation*, Martinus Nijhoff Publishers, The Hague, 2006, p. 25; v. aussi la déclaration du Conseiller juridique des Nations Unies à l'ouverture de la première réunion de la CLPC (CLCS/1, 30 juin 1997, par. 12).

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Aux termes de la phrase suivante du paragraphe 8 de l'article 76 : « Les limites fixées par un Etat côtier *sur la base de ces recommandations –sur la base de ces recommandations–* sont définitives et de caractère obligatoire ». Si l'Etat concerné « est en désaccord avec la recommandation de la Commission », tout ce qu'il peut faire aux termes de l'article 8 de l'Annexe II à la Convention est de soumettre à la CLPC, « dans un délai raisonnable, une demande révisée ou une nouvelle demande »; il peut aussi bien sûr, refuser la recommandation, mais, s'il en reste là, les limites extérieures de son plateau continental ne seront pas opposables aux tiers ni publiées par le Secrétaire général des Nations Unies. Il est donc très abusif de réduire le rôle de la Commission à celui d'un simple donneur d'avis; certes, elle ne décide pas; mais ses recommandations conditionnent l'opposabilité des limites que proclame l'Etat côtier.

Ici encore, si le Tribunal décidait de passer outre, il empièterait sur les compétences de la CLPC – et je dirais sans « profit » pour sa propre compétence puisqu'il n'est pas contesté qu'une fois fixées les limites extérieures des prétentions des Etats côtiers, c'est à lui, le Tribunal, qu'il appartiendrait de se prononcer sur les prétentions « latérales » respectives des Parties. Du reste, conformément aux dispositions du paragraphe 10 de l'article 76 de la Convention, aux termes de l'Article 5.b) de l'Annexe I au Règlement de procédure de la CLPC, « [l]es demandes présentées à la Commission et les recommandations que celle-ci approuve sont sans préjudice de la position des Etats parties à un différend maritime ou terrestre ».

Troisième argument du Bangladesh : il fait valoir qu'aux termes de l'alinéa a) de cette même disposition, l'Article 5.a) de l'Annexe I au Règlement de procédure, « [d]ans le cas où il existe un différend terrestre ou maritime, la Commission n'examine pas la demande présentée par un Etat partie à ce différend et ne se prononce pas sur cette demande ». Selon la Partie demanderesse, il en résulterait que la position du Myanmar relève d'un raisonnement circulaire qui revient à exclure toute possibilité de règlement obligatoire de ce genre de litiges¹¹. Il n'en va évidemment pas ainsi : d'une part, une fois que le Tribunal aura réglé le différend que les Parties lui ont soumis, il n'y aura plus de différend entre elles; d'autre part, d'ores et déjà, le Règlement de procédure de la Commission ouvre une possibilité permettant à celle-ci de se prononcer puisque le même Article 5.a) dispose qu'« avec l'accord préalable de tous les Etats parties à ce différend, la Commission peut examiner une ou plusieurs demandes concernant des régions visées par le différend ». En tout état de cause, le Règlement de procédure de la Commission ne saurait être interprété d'une manière qui empêcherait cet organe de s'acquitter de ses compétences statutaires – c'est-à-dire d'exercer ses compétences exclusives en matière d'examen des informations présentées par les Etats côtiers qui se proposent de fixer la limite extérieure de leur plateau continental sur la base des recommandations de la Commission, en application de l'article 76.

Et voilà qui suscite de nouvelles lamentations du côté bangladais, et je cite mon excellent collègue M. Akhavan :

If Myanmar contention is accepted that the Commission must first delineate the outer margin, this Tribunal would have to wait 25 years to delimit the boundary in the outer shelf. Such an absurd situation can hardly be called a trap that Bangladesh has laid for itself, or a "catch-22" of Bangladesh's "own making", to quote Myanmar's Rejoinder¹².

¹¹ V. ITLOS/PV.11/5 E, p. 22, lignes 12-27 (M. Akhavan).

¹² ITLOS/PV.11/5 E, p. 22, lignes 15-19 (M. Akhavan).

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Mais Monsieur le Président, à qui la faute ? Le Myanmar a présenté sa demande le 16 décembre 2008¹³ et se trouve être aujourd'hui le premier dans la « file d'attente », la Commission n'ayant que suspendu l'examen de son dossier¹⁴. Le Bangladesh, lui, a attendu le 25 février 2011, de cette année, pour présenter sa propre demande (et je ne peux m'empêcher de penser que ce délai n'est pas dénué de tout lien avec l'affaire qui nous occupe ni d'arrière-pensée tactique). En tout cas, telle est la situation : le Myanmar est n° 16, le Bangladesh, n° 55. A qui la faute, Monsieur le Président ? Il y a des règles, elles valent pour tous.

J'ajoute qu'il ne dépend que du Bangladesh de retirer son opposition qui entraîne, en fait sinon en droit, le blocage dont il se plaint. Je note d'ailleurs incidemment qu'il n'est pas établi que le Bangladesh exerce un « droit » lorsqu'il s'oppose à l'examen de la demande du Myanmar comme le prétend le Professeur Akhavan¹⁵ : la Commission a, certes, différé l'examen de cette demande mais, contrairement à ce qui s'est passé dans les cas où le différend portait sur l'appartenance du territoire terrestre concerné – à propos des Falklands/Malvinas ou de l'Antarctique par exemple¹⁶ –, elle ne s'est pas déclarée incompétente s'agissant de la demande du Myanmar; elle s'est bornée à différer l'examen de celle-ci¹⁷. Il est donc assez évident que, lorsque vous aurez rendu votre arrêt, Messieurs les Juges, la CLPC s'acquittera aussitôt de son office s'agissant des droits du Myanmar et qu'elle le fera dans les meilleurs délais (compatibles avec l'ordre de dépôt des demandes) pour ce qui est des prétentions du Bangladesh si, par impossible, il était encore, après le rendu de votre jugement, en position de les maintenir. Et j'ajoute que les prévisions pessimistes de mon contradicteur quant aux délais qui seraient nécessaires pour cela¹⁸ semblent assez exagérées; en tout cas, l'Assemblée des Etats parties est consciente du problème et a d'ores et déjà pris des mesures pour tenter d'y remédier¹⁹.

Et puis, Monsieur le Président, réfléchissons un instant aux conséquences qu'aurait la thèse du Demandeur si elle devait être retenue : tous les Etats qui ne veulent pas attendre que la CLPC examine leur demande porteraient devant vous un différend –réel ou inventé– avec leurs voisins pour court-circuiter la Commission. Cela s'appelle du « resquillage » et le Tribunal ne prêterait évidemment pas la main à une telle manœuvre : vous n'avez nul besoin, par les temps qui courent, Messieurs les Juges, d'un tel gonflement artificiel de votre rôle !

En quatrième lieu et enfin, le Bangladesh invoque une jurisprudence –ou plutôt une sentence arbitrale– qui, selon lui, contredirait la position du Myanmar à cet égard²⁰. Il s'agit de la décision souvent mentionnée au cours de ces audiences, rendue le 11 avril 2006 dans l'affaire de *La Barbade c. La Trinité-et-Tobago*. Dans cette sentence, le Tribunal arbitral a estimé que sa compétence pour fixer la frontière maritime entre le plateau continental des deux pays s'étendait à la partie de celui-ci située au-delà de 200 milles marins²¹. Cela est exact et un examen superficiel de cette sentence pourrait donner à penser qu'elle contredit la position du Myanmar.

¹³ CLCS/64, 1^{er} octobre 2009, p. 9, par. 35. La demande est disponible à l'adresse http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf (CMM, Annexe 16).

¹⁴ CLCS/70, 11 mai 2011, p. 13, par. 52. La demande est disponible à l'adresse http://www.un.org/depts/los/clcs_new/submissions_files/bgd55_11/Executive%20summary%20final.pdf (RB, Annexe R3).

¹⁵ ITLOS/PV.11/5 E, p. 21, lignes 46-47 (M. Akhavan).

¹⁶ CLCS/66, 30 avril 2010, p. 12, par. 60, ou CLCS/64, 1^{er} octobre 2009, p. 17, par. 77.

¹⁷ CLCS/70, 11 mai 2011, p. 13, par. 52.

¹⁸ ITLOS/PV.11/6 E, p. 22, lignes 13-17 (M. Akhavan).

¹⁹ V. les décisions de la Réunion des Etats parties concernant le volume de travail de la CLPC, des 18 juin 2010 (SPLOS/216) et 17 juin 2011 (SPLOS/229).

²⁰ Cf. ITLOS/PV.11/5 E, p. 18, lignes 21-35 (M. Crawford); ou pp. 22-23, lignes 34-41 et 1-3 (M. Akhavan).

²¹ *R.S.A.N.U.*, vol. XXVII, p. 65, par. 217(ii).

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Mais il n'en va pas ainsi pour au moins deux raisons :

- *D'une part*, parce qu'une telle conclusion repose sur une interprétation erronée de la position du Myanmar : comme je l'ai indiqué, nous ne contestons pas la compétence *in abstracto* du Tribunal de céans (ou de toute autre instance saisie conformément aux dispositions de la partie XV) pour trancher un différend relatif à la délimitation latérale du plateau continental au-delà de 200 milles marins. En revanche, nous avons la conviction, Messieurs les Juges, que vous ne pouvez l'exercer en l'espèce car, en l'absence de recommandations de la CLPC, cette partie de la requête du Demandeur est irrecevable.

- *D'autre part*, le Tribunal arbitral, dans l'affaire *Barbade/Trinité-et-Tobago*, ne se prononce finalement pas à cet égard car il constate que « *there is no single maritime boundary beyond 200 nm* »²², « *il n'y a pas de frontière maritime unique au-delà de 200 milles marins* »; et, l'on y revient inévitablement, il en va de même dans notre espèce : il ne peut pas y avoir de frontière commune au-delà de 200 milles marins entre le Bangladesh et le Myanmar puisque cette frontière s'arrête nécessairement avant cette limite.

Au demeurant, la sentence de 2006 n'est pas le seul précédent que l'on puisse invoquer. Dans l'affaire de *Saint-Pierre-et-Miquelon* entre le Canada et la France, le Tribunal a très catégoriquement refusé de se prononcer sur les prétentions de la République française à un plateau continental au-delà de 200 milles marins²³ en relevant notamment qu'« [u]n tribunal ne peut pas parvenir à une décision en supposant, par pure hypothèse, que de tels droits existeront en fait »²⁴ [« *it is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist* »]. Moyennant quoi, le Tribunal a pris soin de préciser, à très juste titre :

De toute évidence, refuser de se prononcer sur la thèse française en se fondant sur l'absence de compétence du Tribunal ne saurait signifier ni ne saurait être interprété comme préjugeant, acceptant ou refusant les droits que la France, ou le Canada, peut revendiquer sur un plateau continental au-delà de 200 milles marins²⁵.

Le Bangladesh s'efforce de discréditer cette sentence de 1992 au prétexte principalement de son ancienneté (ce qui ne manque pas d'un certain piquant lorsque l'on sait combien le Demandeur affectionne la jurisprudence la plus poussiéreuse possible). En tout cas, il ne peut frapper du même anathème l'arrêt de la CIJ de 2007 dans lequel la Cour relève à titre d'*obiter dictum* peut-être, mais ceci n'en a que plus de poids que :

Toute prétention relative à des droits sur le plateau continental au-delà de 200 milles doit être conforme à l'Article 76 de la CNUDM et examinée par la Commission des limites du plateau continental constituée en vertu de ce traité²⁶.

Voici, Monsieur le Président, qui est à la fois récent, et clair, et net !

En réalité, Messieurs les Juges, la position du Demandeur va à l'encontre à la fois de la logique même du mécanisme de détermination des titres des Etats côtiers sur le plateau continental au-delà de 200 milles des lignes de base, comme le Myanmar l'a souligné dans

²² *Ibid.*, p. 109, par. 368.

²³ S.A., 10 juin 1992, affaire de la *Délimitation des espaces maritimes entre le Canada et la République française*, R.S.A.N.U. vol. XXI, pp. 292-293, pars. 78-82.

²⁴ *Ibid.*, p. 293, par. 81.

²⁵ *Ibid.*, par. 80.

²⁶ Arrêt, 8 octobre 2007, *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, Rec. 2007 (II), p. 759, par. 319.

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l'appendice joint à sa duplique²⁷, mais aussi de sa propre logique. Car si le Bangladesh a raison de souligner qu'il faut distinguer la délimitation extérieure (la « délinéation » si l'on veut...) de la délimitation latérale, il en découle nécessairement que la première doit venir avant la seconde; la position inverse n'est pas tenable.

Et d'abord parce qu'elle conduirait à spéculer sur des droits hypothétiques – ce qui n'entre pas dans les fonctions d'un organe judiciaire²⁸-. Le Professeur Crawford affirme qu'il n'en est rien car, contrairement à La Trinité-et-Tobago à l'époque où la sentence a été rendue, le Bangladesh a fini (en février 2011 – bien après votre saisine – Messieurs les Juges) par présenter une demande à la CLPC, et je cite M. Crawford :

The same is not true here. Bangladesh has made its submission to the Annex II Commission on a fully articulated basis. There is nothing either theoretical or speculative about our claim to the outer continental shelf²⁹.

C'est aller un peu vite en besogne ! Comme si le seul fait pour un Etat de déposer une demande établissait ses droits. J'ajoute que tout en exigeant que sa demande reste confidentielle, le Bangladesh s'est arrangé pour la diffuser³⁰, dans l'espoir sans doute, Messieurs du Tribunal, que vous vous laisseriez impressionner par l'accumulation des données (pour l'essentiel non pertinentes) qu'il a ainsi laissé filtrer. Vous ne serez bien sûr pas dupes : formuler une demande, je le répète, ce n'est pas établir son bien-fondé. Sur ce point, il faut attendre que la CLPC se soit prononcée.

Or, justement, la position du Bangladesh revient à court-circuiter la Commission des limites du plateau continental et à la priver de l'exercice de compétences que la Convention de 1982 lui réserve. Je ne dis pas que ce serait placer la charrue devant les bœufs, ce serait plutôt priver les bœufs de charrue ! (Je le dis sans songer à une comparaison désobligeante soit pour la Commission, soit pour le Tribunal – honni soit qui mal y pense !). Au contraire, si l'on procède en suivant l'ordre logique des choses, l'on préserve les compétences tant du Tribunal que de la CLPC : à celle-ci son rôle technique irremplaçable pour l'appréciation du bien-fondé des demandes; aux Etats et, en dernière ressort, au Tribunal (ou aux autres mécanismes de Règlement des différends de la Partie XV) le dernier mot sur les différends entre Etats relatifs à la délimitation latérale (mais un dernier mot éclairé par l'avis préalable de la Commission). Au surplus, suivre le raisonnement du Bangladesh reviendrait à placer les tiers – qu'il s'agisse de l'Inde ou de la communauté internationale – devant un fait accompli.

Ceci étant, Monsieur le Président, je me suis attardé quelque peu sur ce problème de recevabilité car le Bangladesh y consacre de longs développements; mais ce n'est que par souci de ne rien laisser dans l'ombre. En réalité, comme je l'ai dit en commençant, ce problème ne se pose tout simplement pas : il résulte de l'application des règles de délimitation figurant dans les articles 74 et 83 de la Convention, complétées par l'évolution que le droit a ultérieurement connue en ce domaine, que le Bangladesh ne peut prétendre à aucun droit sur le plateau continental situé au-delà de 200 milles marins de ses côtes. Il n'est donc pas nécessaire que vous vous prononciez sur les questions de principe que soulèvent les revendications du Demandeur – aussi intéressantes soient-elles.

Je vous remercie vivement, Messieurs les Juges, de votre attention renouvelée (je promets de ne plus apparaître devant vous... durant ce premier tour !) et je vous prie,

²⁷ DM, pp. 203-204, par. A.17.

²⁸ C.I.J., arrêt, 2 décembre 1963, *Affaire du Cameroun septentrional (Cameroun c. Royaume-Uni), Exceptions préliminaires*, C.I.J. Recueil 1963, pp. 33-34; *Affaire de la Délimitation du plateau continental entre Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et République française*, Décision du 30 juin 1977, R.S.A.N.U., vol. XVII, p. 155, par. 28.

²⁹ ITLOS/PV.11/2/Rev.1 (E.), p. 27, lignes 35-38 (M. Crawford).

³⁰ V. la lettre du Greffier à l'Agent du Myanmar du 16 mars 2011.

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Monsieur le Président, de bien vouloir donner la parole à M. Daniel Müller pour un exposé pertinent sur la non-pertinence des prétentions « géologiques » du Bangladesh.

The President:

I now give the floor to Mr Daniel Müller.

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EXPOSÉ DE M. MÜLLER
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/11/Rev.1, Fr, p. 17-37]

M. Müller :

Monsieur le Président, Messieurs les Juges, à l'évidence, cet exposé va dépasser la pause-café. Si je peux me permettre, Monsieur le Président, je vous indiquerai un moment approprié dans mon discours pour procéder à la pause. Merci.

Monsieur le Président, Messieurs les Juges, à vrai dire, M. Pellet vient de vous le rappeler, le premier tour de la présentation du Myanmar est d'ores et déjà terminé, car aucun problème quant à la délimitation et à la délimitation du plateau continental au-delà de 200 milles marins ne se pose dans l'affaire qui vous êtes soumise. Il n'est donc ni nécessaire ni juridiquement possible d'étaler devant votre Tribunal une analyse scientifique sophistiquée sur les caractéristiques du plateau continental dans la région du golfe du Bengale. Et cela me permettra de m'abstenir de remonter 130 millions d'années dans le temps; ni le Bangladesh, ni le Myanmar, ni l'Inde, ni le Sri Lanka, pas même le golfe du Bengale n'existaient à l'époque. Je ne compte pas non plus vous présenter la demande du Myanmar à la Commission des limites, qui a été déposée en décembre 2008¹. La Convention de Montego Bay a justement établi une procédure de demande qui fait partie intégrante du système mis en place par ladite Convention afin d'assurer un certain degré de contrôle sur les réclamations des Etats côtiers². Dans le cadre de ce système, c'est à la Commission des limites qu'il convient de soumettre et de présenter, le cas échéant, les informations sur les limites du plateau continental s'étendant au-delà de 200 milles marins et il appartient à cette dernière de faire des recommandations concernant cette limite, conformément à l'article 76(8). La semaine dernière, nos amis de l'autre côté de la barre se sont trompés de forum : ils ont fait à Hambourg ce qu'ils devaient faire – et ce qu'ils ont d'ailleurs fini par faire il y a seulement quelques semaines à New York. Le Bangladesh a soumis sa demande à la Commission des limites en février de cette année³, et il l'a présentée à la plénière de la Commission le 24 août⁴.

Pourtant, sans qu'il soit besoin de preuves concernant la géologie du golfe du Bengale qui contrediraient la présentation du Bangladesh, je me présente confiant devant vous pour affronter, un peu seul – même si je remercie mon ami le Professeur Pellet de m'avoir prêté un soutien certain vendredi dernier et ce matin –, la flotte commandée par le contre-amiral Alam avec son équipage, le Docteur Parson et le Professeur Boyle⁵, à laquelle il faudra certainement ajouter les deux experts « indépendants » – j'ai mis cela entre guillemets – dans l'équipe de plaidoirie du Bangladesh, les Professeurs Kudrass et Curray, qui se sont, discrètement, il est vrai, présentés au Tribunal de céans mardi dernier⁶. Je suis confiant, et un peu soulagé je dois dire, parce que la bataille ne se joue pas sur la science – pour laquelle j'ai

¹ Pour le résumé de la demande du Myanmar, v. CMM, annexe 16 (également disponible sur le site internet de la Commission des limites : http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf). V. également CMM, Appendice, par. A.44-A.47.

² V. aussi DM, Appendice, par. A.17.

³ Pour le résumé de la demande du Bangladesh, v. RB, vol. III, annexe R3 (également disponible sur le site internet de la Commission des limites : http://www.un.org/Depts/los/clcs_new/submissions_files/bgd55_11/Executive_summary_final.pdf). Le texte complet de la demande du Bangladesh a été versé au dossier de l'affaire, en vertu de l'Article 63 (2) du Règlement du Tribunal et sous la condition que « *the submission should be treated as a confidential document* » (Lettre du Greffier du Tribunal à l'agent du Myanmar, 16 mars 2011), V. aussi DM, Appendice, par. A.4-A.8.

⁴ ITLOS/PV.11/6, p. 10, ligne 4 (Alam).

⁵ ITLOS/PV.11/5 (E), p. 10, lignes 36-37 (Crawford).

⁶ V. aussi ITLOS/PV.11/6 (E), p. 5, lignes 17-18 et ligne 35 (Parson).

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certainement moins de compétence que ne l'a laissé entendre M. Pellet, et certainement pas sur la géologie, mais sur le droit et plus particulièrement sur l'article 76 de la Convention des Nations Unies sur le droit de la mer, disposition dont nous avons à nouveau inclus les textes français et anglais dans vos dossiers de plaidoiries, comme le Professeur Pellet vient de le rappeler. Seule l'application de cette disposition juridique détermine le titre d'un Etat côtier sur le plateau continental.

Vous n'avez aucunement besoin de déterminer si les Parties disposent effectivement d'un titre sur un plateau continental s'étendant au-delà de 200 milles marins pour vous acquitter de la tâche qui est la vôtre. Au demeurant, vous ne le pouviez pas en l'absence des recommandations de la Commission des limites. Je m'emploierai cependant à démontrer que l'interprétation et l'application de l'article 76 de la Convention de 1982, sur la base desquelles la Partie bangladaise nie tout titre du Myanmar sur une zone du sol-marin et de son sous-sol au-delà des 200 milles marins, tout en s'attribuant un droit exclusif sur ces mêmes espaces, donc l'application et l'interprétation de l'article 76 proposées par le Bangladesh sont dépourvues de tout fondement juridique. Mais avant de le faire, il est indispensable de revenir, rapidement, sur l'erreur capitale sous-jacente à l'ensemble de l'argumentation du Bangladesh concernant la question du plateau continental. Cette erreur consiste à faire un amalgame entre la science et le droit.

Monsieur le Président, Messieurs les juges, j'insiste cependant, encore une fois, sur le fait qu'il ne s'agit que d'une présentation pour surplus de droit. Malgré son intérêt abstrait pour les internationalistes que nous sommes, cette question ne se pose pas dans le cadre de la présente affaire parce que le Bangladesh ne bénéficie en aucun cas d'un plateau continental au-delà de la limite de 200 milles marins en raison, justement, de la ligne de délimitation résultant d'une application correcte des règles juridiques pertinentes.

Au bénéfice de cette mise en garde, je vais donc commencer avec mon premier point, qui consiste à démontrer que l'article 76 est une règle de droit et non pas une proposition scientifique

L'utilité du développement peut surprendre tant il paraît évident que l'article 76 est une règle juridique.

Pourtant, et les plaidoiries de mardi dernier l'ont encore une fois montré, le Bangladesh s'obstine à faire appel à des scientifiques, des géologues pour être précis, pour tenter de justifier son interprétation de la Convention. Le Docteur Parson ne s'est guère caché en affirmant, tout au début de sa présentation, qu'il était géologue et que, à ce titre, il devait se concentrer sur –je cite– « l'examen de la géologie et la géomorphologie des fonds marins dans le Golfe du Bengale »⁷. Un peu plus tard, il s'est néanmoins employé à tenter d'expliquer comment l'article 76 devait être appliqué, tout en affirmant, de nouveau, qu'il s'exprimait en tant que scientifique et non pas en tant que juriste⁸. Je tiens toutefois à souligner que le Docteur Parson fait partie des Conseils et Avocats du Bangladesh, et non pas des experts « indépendants ».

En soi, il n'y a certainement pas d'inconvénient à ce qu'un scientifique, et même un géologue, interprète et applique une règle de droit. *A priori*, ce n'est pas un problème et, après tout, la Commission des limites, elle-même, est chargée de « soumettre des recommandations conformément à l'Article 76 »⁹, alors qu'elle est composée de 21 membres « experts en matière de géologie, de géophysique ou d'hydrographie », pour reprendre les termes de l'article 2, paragraphe 1, de l'annexe II de la Convention de Montego Bay.

Le problème qui se pose ici est différent et a été illustré avec une évidence frappante par le Docteur Parson, lundi dernier, lorsqu'il a affirmé, je cite ses propos, qu'« [u]n

⁷ ITLOS/PV.11/6, p. 1, lignes 13-14 (Parson).

⁸ *Ibid.*, p. 8, lignes 16-17 (Parson).

⁹ Article 3 (1) (a) de l'annexe II à la Convention des Nations Unies sur le droit de la mer.

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géologue lisant l'article 76 de la Convention a immédiatement l'impression que les termes ... lui sont familiers » et qu'« [i]l n'y a rien dans le texte qui soit surprenant pour un scientifique ». Ce sont ses termes. Mais, en fait, ce n'est justement qu'une *impression*. Il est, pour le moins, peu avisé de vouloir comparer ce qui n'est pas comparable. L'identification des termes et concepts juridiques développés notamment dans le domaine du droit de la mer avec des concepts relevant des sciences naturelles n'est tout simplement pas possible. Ce n'est pas parce que les scientifiques utilisent les mêmes termes que ces termes visent effectivement la même chose dans un texte juridique. Les différences entre les disciplines sont même considérables. Il est dès lors important que le « scientifique-interprète » ne tente pas à toute force de plaquer sur le droit son savoir technique, mais qu'il s'emploie, comme le fait la Commission des limites, à comprendre la logique propre du texte juridique qu'il applique.

Le meilleur exemple est donné par le Professeur Curray, dans son rapport annexé à la réplique de l'Etat demandeur. Il affirme, avec une assurance époustouflante – je le cite en anglais – :

*The term continental shelf is not used in varied ways by earth scientists. As a student of continental shelves and continental margins for over fifty years, I am unaware of any disagreement or variation in use of this term in the earth science profession, including geologists, geophysicists and geochemists. Earth scientists agree that the continental shelf is the submerged margin of a continent or island extending from the shoreline to the prominent break in slope or increase in gradient at a world-wide depth average of about 120 meters.*¹⁰

Sur le schéma projeté actuellement représentant une version idéale de la marge continentale vous voyez ce que M. Curray définit comme « plateau continental ». C'est le sol et le sous-sol qui s'étendent de la côte jusqu'à la ligne verte environ.

Je ne cherche aucunement à contredire l'expert du Bangladesh sur ce point d'un point de vue scientifique. Mais, en tant que juristes, nous avons une notion tout à fait différente du plateau continental et de son étendue qui, en droit, résulte de la définition de l'article 76. Pour les juristes, le plateau continental s'étend de la fin de la mer territoriale (donc, en principe, à partir des 12 milles marins mesurés des lignes de base – la ligne bleue ou bleue claire sur le schéma – et non pas de la côte) au moins jusqu'à une distance de 200 milles marins des lignes de base. Si le rebord externe de la marge continentale se trouve à une distance plus importante que 200 milles marins, le plateau continental du juriste est déterminé par référence à ce rebord externe.

La notion du rebord externe de la marge continentale ne désigne pas non plus les mêmes choses pour un scientifique et dans le cadre de la Convention. Le Docteur Parson en a donné la preuve. Il a ainsi affirmé dans sa présentation de lundi dernier -je cite- que c'est « la largeur physique du système détritique du Bengale, y compris l'éventail du Bengale, [qui] définit le rebord extérieur de la marge continentale »¹¹. Autrement dit, le rebord, la limite de la marge continentale se trouve à la limite même de cette nouvelle « merveille du monde océanique »¹² qui n'est, selon le Docteur Parson, rien d'autre qu'un énorme glaciais¹³. Puis, quelques minutes plus tard, le contre-amiral Alam vous a montré un tout autre rebord externe de la marge continentale : celui qui figure dans la demande du Bangladesh transmise à la

¹⁰ RB, vol. III, annexe R4, p. 3.

¹¹ ITLOS/PV.11/6 (E), p. 9, lignes 9-10 (Parson).

¹² *Ibid.*, p. 5, ligne 28 (Parson).

¹³ *Ibid.*, p. 8, lignes 18-19 (Parson).

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Commission des limites en février de cette année et qui, selon les dires du contre-amiral, a été déterminé non pas scientifiquement, mais en application des dispositions de l'article 76(4).

Schématiquement, donc, le scientifique, le Docteur Parson, a défini le rebord externe de la marge continentale par rapport à la fin du glacis, c'est-à-dire par le lieu où ce glacis rencontre les grands fonds marins – vous voyez la zone qui correspond à cette description en violet à l'écran. Il s'agit nécessairement d'une zone, parce que, comme en convient M. Parson, le glacis -je cite ses termes- « est caractérisé par une forme subtile qui le rend souvent difficile à identifier ou à présenter sur une carte avec précision »¹⁴.

M. Alam, qui, lui, a appliqué la Convention de Montego Bay, a trouvé la définition juridique du rebord externe de la marge continentale – la limite maximale du plateau continental juridique – dans le paragraphe 4 de l'article 76. Appliqué à notre modèle, ce rebord externe de la marge continentale se trouve environ à la ligne rouge indiquée sur l'écran.

Ce schéma montre très clairement à quel point les notions juridiques de plateau continental et de marge continentale ou, plus exactement, de rebord externe de la marge continentale, sont différentes des notions correspondantes dans les sciences de la terre. Il est intéressant, à cet égard, que, contrairement aux conseils du Bangladesh, la Commission des limites ait été tout à fait consciente de ces difficultés. Dans ses directives scientifiques et techniques, la Commission a souligné que - je cite - :

L'Article 76 utilise dans un contexte juridique des termes scientifiques dont le sens s'écarte à certains égards sensiblement du sens scientifique généralement admis. ... Le paragraphe 1 qui définit la notion juridique du plateau continental par référence au rebord externe de la marge continentale donne la mesure de l'écart actuel entre les usages juridique et scientifique des termes.¹⁵

Ceci vaut, et peut-être surtout, pour la notion de « prolongement naturel » tant chérie par nos amis de l'autre côté de la barre. Le Professeur Pellet en a déjà dit quelques mots vendredi après-midi. La réplique de l'Etat demandeur a affirmé à cet égard, un peu hâtivement, que - je cite en anglais - :

*The ordinary meaning of the words 'natural prolongation' in their context is clear : both geomorphological and geological continuity must exist between the coastal State's landmass and the seabed beyond 200 M. The words 'natural' and 'prolongation' applied to a continental shelf cannot mean anything else.*¹⁶

Je n'ai pas besoin de contredire ceci; c'est le Professeur Curray qui l'a fait lorsqu'il a écrit dans son deuxième rapport annexé à la réplique -je cite encore en anglais- : « *The term 'natural prolongation' is not in common usage among earth scientists.* »¹⁷ Il est difficile d'admettre que le paragraphe 1^{er} de l'article 76 utilise les termes « prolongement naturel » dans un sens scientifique particulier si, selon les scientifiques eux-mêmes, il n'existe pas un tel sens généralement accepté. On se retrouve alors à la case départ.

M. Curray ajoute cependant - je cite encore en anglais - : « *When the term [natural prolongation] is used [by earth scientists], however, it carries strong connotations of geological continuity and similarity of nature, age, structure and tectonics of the crust* »¹⁸.

¹⁴ *Ibid.*, p. 8, lignes 9-10 (Parson).

¹⁵ Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la Commission le 13 mai 1999 à sa cinquième session, doc. CLCS/11, point 6.1.5.

¹⁶ RB, par. 4.58.

¹⁷ RB, vol. III, annexe R4, p. 1.

¹⁸ *Ibid.*

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Soit. Mais M. Curray a oublié un détail qui, pourtant, a été très fermement souligné par la Cour internationale de Justice dans l'affaire du *Plateau continental* entre la Libye et Malte, dont l'extrait a donné lieu aux observations et critiques de l'expert scientifique que je viens de citer. Je cite donc la Cour internationale : « [M]algré son origine physique, [le prolongement naturel] a acquis tout au long de son évolution le caractère d'une *notion juridique* de plus en plus complexe »¹⁹. Comme pour l'ensemble des termes et notions de l'article 76, l'expression « prolongement naturel » n'est pas du tout utilisée dans un contexte scientifique, mais a été élaborée par des juristes et diplomates pour les besoins spécifiques d'un instrument juridique. Dans ce contexte, les termes « prolongement naturel » n'ont pas du tout le même sens que lorsqu'ils sont utilisés par un géologue.

Monsieur le Président, l'article 76 n'est pas une approximation d'une vérité scientifique. En droit, il constitue *la* vérité juridique : il décrit ce qui, pour le juriste et dans le cadre de la Convention de Montego Bay, constitue le plateau continental indépendamment des progrès scientifiques en la matière. L'article 76 est ce qu'il est. Certes, on peut (et on doit) interpréter cette disposition conformément aux règles et méthodes d'interprétation des traités. Mais interpréter ce n'est pas réviser²⁰. Pourtant, c'est exactement ce que le Bangladesh vous demande de faire lorsqu'il propose d'intégrer un nouveau « test de prolongement naturel géologique » dans l'article 76.

Même si vous étiez amenés à vous prononcer sur l'existence et l'étendue d'un plateau continental s'étendant au-delà de 200 milles marins, vous, en tant que Tribunal statuant en droit, devriez appliquer le droit. Vous devriez déterminer ce qu'est le plateau continental en vertu de l'article 76 tel qu'il est écrit. C'est de droit que nous parlons ici, dans ce solennel hall de justice; nous ne sommes pas ici pour déterminer si le Myanmar ou le Bangladesh dispose d'un plateau continental au sens scientifique de l'expression. Pour cette raison, il n'est guère utile de se battre contre les arguments scientifiques dans le vide; c'est le droit qui est – et en tout cas qui doit être – au centre de la discussion. Ce n'est pas que je refuse de croiser le fer avec les scientifiques de l'équipe du Bangladesh si cela était nécessaire; mais leurs concepts et termes scientifiques ne peuvent rien devant votre Tribunal et contre le droit. Je suis donc au regret de devoir constater qu'au moins trois des membres de l'équipage du contre-amiral sont éliminés.

Monsieur le Président, Messieurs les Membres du Tribunal, ceci m'amène à la partie proprement juridique de ma présentation. Quant aux règles juridiques pertinentes pour la détermination du titre et de la limite extérieure du plateau continental juridique, les Parties sont d'accord : il s'agit de l'article 76 de la Convention des Nations Unies sur le droit de la mer. Et je pense que les Parties sont également d'accord pour considérer que cette disposition constitue « un tout soigneusement structuré »²¹. Le Myanmar n'a jamais prétendu que le paragraphe 1 de cette disposition « ne joue[] quasiment aucun rôle dans la détermination d'un droit à un plateau continental »²² au-delà de 200 milles marins, comme M. Boyle l'a suggéré, et est loin de court-circuiter²³ cette disposition. Ce n'est pas parce que nous appliquons un autre paragraphe de l'article 76 pour résoudre l'équation du paragraphe 1 que nous évitons ce paragraphe (le paragraphe 1); tout au contraire, nous l'appliquons comme il se doit en droit. Car l'article 76 constitue un tout, « *a carefully structured package* »²⁴, selon l'expression du

¹⁹ C.I.J. Recueil 1985, p. 33, par. 34 (italiques ajoutés).

²⁰ *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif*, C.I.J. Recueil 1950, p. 229; *Droits des ressortissants des États-Unis d'Amérique au Maroc (France c. États-Unis d'Amérique)*, arrêt, C.I.J. Recueil 1952, p. 196.

²¹ RB, par. 4.47.

²² ITLOS/PV.11/6 (E), p. 17, ligne 35 (Boyle).

²³ ITLOS/PV.11/6 (E), p. 18, ligne 13 (Boyle).

²⁴ RB, par. 4.47.

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Bangladesh, et ne contient pas un paragraphe 1, d'une part, et neuf autres paragraphes – séparés –, d'autre part, comme l'Etat demandeur l'insinue.

En insistant sur un prétendu « sens ordinaire » de la notion de « prolongement naturel » – qui n'existe pas et qui ne peut alors pas élucider le problème de l'interprétation –, les Conseils du Bangladesh ignorent les autres éléments à prendre en compte pour l'interprétation et l'application du paragraphe 1. Ce paragraphe fait partie de l'ensemble de l'article 76 et ne peut pas être interprété ou appliqué tout seul.

Il faut donc prendre en considération le contexte – et plus particulièrement le contexte immédiat du paragraphe 1^{er} de l'article 76, à savoir ses neuf autres paragraphes dont la combinaison et l'application raisonnable déterminent à la perfection, et d'une façon juridique, la notion du plateau continental pour les besoins de la Convention et les limites extérieures de ce plateau continental. Ce dernier élément – la limite extérieure du plateau continental juridique – est et a toujours été particulièrement important et ne peut, en aucun cas, être isolé de la question du titre juridique sur le plateau continental. Le titre s'étend nécessairement et inévitablement jusqu'à sa limite.

La détermination de la limite extérieure du plateau continental juridique constitue ainsi le principal objectif de l'Article 76. Pour les négociateurs de la Convention de 1982, il n'y avait guère de doute que tout Etat côtier avait un droit à un plateau continental, droit qui, à cette époque, était déjà très solidement établi dans les règles du droit international à travers l'article 1^{er} de la Convention de Genève sur le plateau continental de 1958²⁵. La question qui restait ouverte, et qui a donné lieu à d'âpres négociations tout au long de la troisième Conférence, était celle de savoir jusqu'où les droits souverains peuvent être exercés. Où le plateau continental se termine-t-il et, par conséquent, où les espaces internationaux, ce qui va devenir la Zone, commencent-ils? Toute interprétation de l'article 76 doit répondre à cette interrogation avec la précision nécessaire afin d'assurer non seulement une stabilité juridique, mais également afin de permettre une exploitation ordonnée des ressources naturelles des fonds marins.

Monsieur le Président, je pense que c'est un endroit approprié pour moi pour interrompre ma présentation et la continuer après la pause de trente minutes.

The President:

We will break for 30 minutes and resume at 12 noon.

(Short adjournment)

The President:

The hearing continues.

You may resume your statement, Mr Müller.

M. Müller :

Monsieur le Président, Messieurs les Juges, je pense que la pause-café nous a permis de nous libérer de toute idée scientifique préconçue. Appliquons donc maintenant l'article 76, en tant que règle juridique, à un modèle idéalisé des fonds marins qui apparaît sur l'écran. Vous voyez donc une coupe du globe. La masse terrestre se trouve à gauche, avec la côte, puis la mer. Ce n'est pas l'eau qui nous intéresse, donc je l'enlève pour mieux voir la surface du sol marin qui, pour utiliser les mots de Dr. Parson, « *conceals* », cache, la géologie²⁶. Encore une

²⁵ V. notamment *Plateau continental de la mer du Nord (République fédérale d'Allemagne/Pays-Bas; République fédérale d'Allemagne/Danemark)*, arrêt, C.I.J. Recueil 1969, p. 39, par. 63.

²⁶ ITLOS/PV.11/6 (E), p. 4, ligne 11 (Parson).

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fois, c'est une version idéalisée du sol marin qui, en réalité, est souvent bien plus complexe. Mais pour la démonstration, cette approximation suffit amplement.

Le paragraphe 1 de l'article 76 constitue notre point de départ, parce qu'il faut commencer au commencement et nous ne voulons assurément pas appliquer le droit « en sens inverse »²⁷. En vertu du paragraphe 1 donc, le plateau continental juridique d'un Etat – et je cite le paragraphe 1 que vous avez dans le dossier des Juges à l'onglet 6 – je vous le rappelle –

comprend les fonds marins et leur sous-sol au-delà de sa mer territoriale, sur toute l'étendue du prolongement naturel du territoire terrestre de cet Etat jusqu'au rebord externe de la marge continentale ou jusqu'à 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale, lorsque le rebord externe de la marge continentale se trouve à une distance inférieure

La question qu'il faut se poser n'est pas s'il y a « prolongement naturel » ou pas, mais celle de savoir où se trouve le rebord externe de la marge continentale : s'il se situe à une distance inférieure à 200 milles des lignes de base, on se trouve dans la deuxième hypothèse de ce paragraphe et l'Etat côtier ne peut prétendre qu'à un plateau continental de 200 milles. Si, par contre, le rebord se trouve au-delà de cette limite, l'Etat a un titre qui potentiellement peut s'étendre jusqu'au rebord externe. Laissons donc pour le moment la question du « prolongement naturel » de côté. Non pas parce que la notion nous dérange, mais tout simplement parce que ce n'est pas par rapport à la limite externe d'un tel « prolongement naturel » que la discrimination entre les deux hypothèses du paragraphe 1^{er} est établie, mais par rapport à l'endroit où se trouve le rebord externe de la marge continentale. Ce n'est pas pour autant que nous allons oublier la notion de « prolongement naturel »; elle n'a simplement, pour le moment, aucune fonction concrète pour l'application de l'article 76.

Cette disposition, l'article 76, renvoie à la question non de la détermination du plateau continental juridique, mais à celle de savoir où se termine la marge continentale de l'Etat côtier ou, plus exactement, à quelle distance des lignes de base se trouve le rebord externe de la marge continentale. Mais, plutôt que se référer à une notion scientifique de cette marge continentale – comme M. Parson l'a fait en sa qualité de géologue²⁸, l'article 76, dans son paragraphe 3, décrit, juridiquement, cette notion :

La marge continentale est le prolongement immergé de la masse terrestre de l'Etat côtier; elle est constituée par les fonds marins correspondant au plateau, au talus et au glacis ainsi que leur sous-sol. Elle ne comprend ni les grands fonds des océans, avec leurs dorsales océaniques, ni leur sous-sol.

Dit autrement, dans le cadre du droit du plateau continental, ou plutôt de la marge continentale, la Convention distingue trois régions : la *terra firma* (ou plutôt le territoire terrestre et les eaux intérieures), la marge continentale avec ses trois composantes, et les grands fonds océaniques. Cette disposition renferme une certaine idée de continuité entre la marge continentale, d'une part, et la masse terrestre, d'autre part, sans pour autant exiger une continuité géologique. Seule la morphologie de la surface est prise en considération, rien d'autre, et j'attire votre attention, Messieurs du Tribunal, sur les définitions données par le Dr. Parson du plateau, du talus et du glacis qui, toutes, étaient basées sur la forme de la pente²⁹. Le paragraphe 3, et tout le concept de la marge continentale dans l'article 76, se base

²⁷ RB, pars. 4.52 et 4.45.

²⁸ ITLOS/PV.11/6 (E), p. 7, ligne 49-p.8, ligne 10 (Parson).

²⁹ ITLOS/PV.11/6, p. 7, ligne 45, p. 8, lignes 2-3, p. 8, ligne 7 (Parson).

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donc sur un modèle morphologique, sur la surface du sol marin, et non pas sur sa géologie. M. Pellet dirait que la coquille de l'œuf suffit pour définir l'œuf.

On pourrait croire que le paragraphe 3 détermine, par implication, la limite de la marge continentale en tant que point de rencontre du glacis -le dernier composant de la marge- avec les grands fonds marins.

Mais c'est encore une fois ignorer les termes de l'article 76. Le paragraphe 3 décrit certes les éléments de la marge continentale; mais il faut attendre le paragraphe 4 pour trouver une description juridique du « rebord externe de la marge continentale ».

Il n'en pourrait guère aller autrement car, et je reprends ici, à nouveau l'explication du Dr. Parson, le glacis, en tant que dernier élément de la marge continentale, « est caractérisé par une forme subtile qui le rend souvent difficile à identifier ou à présenter sur une carte avec précision »³⁰. Une telle imprécision ne peut pas satisfaire les nécessités de la sécurité juridique et c'est pour cette raison que les pères de la Convention de Montego Bay ont opté pour une définition plus circonscrite de la limite ou du rebord externe de la marge continentale – notion-clé pour l'identification de l'étendue du plateau continental juridique.

Quelle est donc la limite juridique de la marge continentale dont, je le rappelle, nous avons besoin pour trancher la question posée dans le paragraphe 1 de l'article 76 ? Nous sommes toujours à ce premier paragraphe et ne l'avons, à vrai dire, pas encore quitté. Mais pour pouvoir appliquer le paragraphe 1, il faut savoir où le « rebord externe de la marge continentale » se trouve. Et c'est à cet effet qu'il convient de se référer au paragraphe 4.

L'identification du rebord externe de la marge continentale, dans le sens juridique de la notion, repose donc entièrement sur le paragraphe 4. Dans son alinéa a, celui-ci prévoit deux formules alternatives que le Professeur Pellet a, d'ores et déjà, mentionnées vendredi après-midi. Il s'agit de la formule Gardiner (aussi connu comme la formule irlandaise) et de la formule Hedberg. Les deux formules s'appliquent par rapport à un point de référence commun, le pied du talus continental qui se trouve, comme son nom l'indique, sur le talus et plus exactement, à sa base (la zone en orange sur l'écran). La Commission des limites a défini la base du talus comme « la région où la partie inférieure du talus se fond avec le sommet du glacis continental, ou avec le toit des grands fonds océaniques lorsqu'il n'y a pas de glacis »³¹. C'était une citation du point 5.4.5 des Directives scientifiques de la Commission. Tout cela n'est toujours pas très concret, pourriez-vous dire. Et vous avez raison. Mais l'article 76 (4) (b) ne détermine aucunement une zone plus ou moins vaste, mais définit très clairement l'endroit, un point, qui doit être considéré, pour les besoins de l'application de l'article 76, comme le pied du talus continental. Je cite l'article 76, paragraphe 4 (b) : « le pied du talus continental coïncide avec la rupture de pente la plus marquée à la base du talus ». Cette pente est mesurable, et la rupture la plus marquée de la pente est calculable; la présentation du contre-amiral Alam de la semaine dernière vous a donné une idée de ce processus. En principe, cette rupture la plus nette ou la plus marquée n'est pas une zone, mais constitue véritablement un endroit précis sur la courbe des fonds marins, qui est généralement représenté par un point, le point du pied du talus, ou le *foot of the continental slope point* en anglais.

A ce point de l'exercice, qui n'est toujours pas terminé –au contraire, nous nous trouvons tout à fait au début de l'identification du rebord externe de la marge continentale–, permettez-moi, Monsieur le Président, de faire quelques remarques supplémentaires quant à ce pied du talus continental, le *foot of the continental slope*. Le Professeur Pellet a expliqué que le paragraphe 4 (b) de l'article 76 permet d'administrer la « preuve du contraire », mais

³⁰ ITLOS/PV.11/6, p. 8, lignes 9-10 (Parson).

³¹ Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la Commission le 13 mai 1999 à sa cinquième session, doc. CLCS/11, point 5.4.5.

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uniquement d'une façon tout à fait subsidiaire. Il s'agit d'« une exception à la règle »³², comme la Commission des limites l'a reconnu. Néanmoins, cette même Commission des limites a considéré que :

c'est aux Etats qu'il incombe d'utiliser les meilleurs éléments de preuve géologiques et géophysiques dont ils disposent pour localiser le pied du talus continental à sa base lorsque les éléments de preuve géomorphologique apportés par la rupture de pente la plus marquée suivant la règle générale ne permettent pas de localiser le pied du talus continental avec la fiabilité voulue³³.

Il ne s'agit donc aucunement d'une carte blanche à l'utilisation de la géologie, même dans le contexte bien circonscrit et limité de la détermination du pied du talus à sa base. Tout au contraire, la Commission a souligné (point 6.2.4. des Directives) qu'il « est malaisé de localiser le pied du talus continental et le bord de la marge continentale d'un point de vue géologique »³⁴.

Une des situations particulières dans laquelle l'administration de la « preuve du contraire » est admise par la Commission concerne les zones de subduction comparables à celle qui, selon le Bangladesh, se trouve à quelques milles marins devant la côte de Rakhine et qui se caractérise par un prisme d'accrétion³⁵. Même dans un tel cas, c'est seulement si la rupture la plus marquée de la pente n'était pas identifiable par des moyens morphologiques et bathymétrique que le pied du talus pourrait être fixé par référence au « bord le plus au large du prisme d'accrétion »³⁶. Mais, premièrement, ce n'est pas le cas de la marge continentale du Myanmar, car la méthode normale -la règle générale- permet de déterminer le pied du talus par rapport à la rupture de la pente la plus marquée, et le Bangladesh a lui-même procédé ainsi – je vais y revenir à la fin de ma présentation. Ce n'est parce qu'il y a une zone de subduction qu'un Etat doit nécessairement recourir à la méthode de la « preuve du contraire ». Tout au contraire, dans ses recommandations concernant la demande faite par La Barbade, la Commission des limites a refusé que l'Etat côtier définisse certains points sur le pied du talus sur le prisme d'accrétion formé le long de la zone de subduction. Mais non pas parce qu'il s'agissait d'une discontinuité géologique, mais simplement parce que, selon la Commission, et je cite les recommandations, « *these FOS points could be determined on the basis of the general rule* »³⁷.

Deuxièmement, la détermination des points sur le pied du talus n'est pas du tout la fin de l'histoire. Le pied du talus ne constitue aucunement la limite du rebord externe de la marge continentale, comme le Professeur Boyle l'a laissé entendre³⁸. Le pied du talus n'est rien d'autre que le début, le point de référence, auquel il faut de toute manière, « preuve du contraire » ou pas, appliquer les lignes décrites par le sous-alinéa (a) du paragraphe 4. Autrement dit, le pied du talus constitue « la ligne de base »³⁹ pour l'application des formules Gardiner et Hedberg de l'alinéa (a), mais en aucune manière la limite du plateau continental ou le rebord externe de la marge continentale. Rien dans le texte de l'article 76 (4) (b) ne suggère d'ailleurs le contraire. Il s'agit d'un point de départ, je cite la Commission des

³² *Ibid.*, point 6.1.2.

³³ *Ibid.*, point 6.1.10.

³⁴ *Ibid.*, point 6.2.4.

³⁵ *Ibid.*, point 6.2.6 (a) (i) et point 6.3.6.

³⁶ *Ibid.*, point 6.3.6.

³⁷ Summary of Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by Barbados on 8 May 2008, 15 avril 2010, p. 3, par. 14.

³⁸ ITLOS/PV.11/6, p. 19, ligne 35-p. 20, ligne 3 (Boyle).

³⁹ Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la Commission le 13 mai 1999 à sa cinquième session, doc. CLCS/11, point 5.1.1.

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limites, « sur lequel reposent le droit à un plateau continental étendu et la délimitation des limites extérieures de ce plateau »⁴⁰.

Une fois ce point pivot de l'article 76 déterminé, il reste donc à appliquer les deux formules et à retenir le rebord externe de la marge continentale qui en résulte.

Commençons avec la formule Hedberg, donc la formule prévue par l'alinéa (a) (ii) du paragraphe 4. Son application est particulièrement aisée parce qu'il suffit de déterminer les points qui se trouvent à une distance de 60 milles marins à partir du pied du talus continental. Sur notre schéma, c'est donc le demi-cercle de couleur marron. Nul besoin d'examiner la géologie; seule la distance par rapport au pied du talus est déterminante.

La mise en œuvre de la formule Gardiner est plus difficile et nécessite de prendre en compte certaines données de la composition du sous-sol marin afin de déterminer l'épaisseur de la couche de sédiments sur le socle en direction du large. Selon l'article 76 (a) (i), le rebord externe de la marge continentale est déterminé, pour les besoins de la Convention, à l'endroit où l'épaisseur de sédiment -et je dis bien : l'épaisseur, pas la nature, ni même l'origine, des sédiments- (nommons cette variable *e*) est égale au centième de la distance entre le pied du talus et le point considéré (c'est notre variable *d* comme « distance »). Autrement dit, l'épaisseur de sédiments ne doit pas être inférieure à un pourcent de la distance de ce point au pied du talus. De l'application de cette méthode à notre cas fictif résulte la ligne en couleur verte.

L'équipe du Bangladesh a fait grand cas de l'importance des dépôts sédimentaires dans l'ensemble du golfe du Bengale⁴¹, et au-delà de ses limites. Tout au long de leur présentation, les conseils du Bangladesh ont souligné que ces sédiments ont été essentiellement déposés à travers le delta du Bengale, ce qui, selon eux, constitue une raison suffisante pour s'approprier cette merveille du monde océanique, comme si le Bangladesh avait créé l'éventail. Mais tout ceci est, encore une fois, sans pertinence. M. le contre-amiral Alam l'a très clairement démontré lorsqu'il a expliqué la détermination d'un point Gardiner par le Bangladesh dans sa demande soumise à la Commission des limites en février de cette année, en vous montrant l'exemple d'une ligne sismique, que vous avez à l'écran, qui permet, par déduction, d'identifier différentes structures dans le sous-sol. Il s'est borné à identifier la surface du sol, d'une part, le *sea bed*, et le socle, d'autre part, le *basement*, tout en concluant que tout qui se trouve entre ces deux lignes, bleue et rouge, sont des sédiments. Il n'a pas examiné si ces sédiments ont la même nature que le matériau se trouvant sur la masse terrestre du Bangladesh, comme il n'a pas non plus fait des recherches sur l'origine de ces sédiments – qui se trouve certainement dans l'Himalaya, et non pas au Bangladesh. Seule l'épaisseur est déterminante.

L'application des deux formules de l'article 76 (4) (a) est alternative. Ainsi, seule la ligne qui se trouve plus vers le large, ou l'enveloppe extérieure d'une combinaison des deux lignes est déterminante. Dans notre cas, la ligne Gardiner se trouve à une distance plus importante de la ligne de base que la ligne Hedberg. C'est donc cette première ligne seule qui est pertinente. C'est elle qui constitue, pour les besoins de la Convention, en général, et l'application de l'article 76, en particulier, le rebord externe juridique de la marge continentale de l'Etat côtier.

A ce stade, il ne faut pas se tromper d'exercice. La ligne en pointillés à l'écran ne constitue pas, pas encore devrais-je dire, la limite extérieure du plateau continental juridique. Nous ne nous trouvons pas encore à ce stade de l'application de l'article 76, mais seulement, et toujours, à celui de l'application de son paragraphe 1. Oui, de son paragraphe 1, parce que, pour le moment, on s'est certes servi de certaines définitions par ci par là, mais on n'a jamais

⁴⁰ *Ibid.*

⁴¹ ITLOS/PV.11/2/Rev.1 (E), p. 10, ligne 27-p. 11, ligne 10 (Reichler); ITLOS/PV.11/6 (E), p. 6, lignes 1-9 (Parson).

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quitté le paragraphe 1 et la question de la distance entre la ligne de base et le rebord externe de la marge continentale. La ligne noire en pointillés ne constitue que ce rebord externe de la marge continentale dont la distance des côtes –des lignes de base– permet de déterminer si on se trouve dans l'un ou l'autre des cas prévus dans le paragraphe 1. Si la distance est inférieure à 200 milles marins (la ligne rouge), on se trouve dans le deuxième cas, sinon, dans le premier.

Dans la configuration de la marge continentale sur le schéma, le rebord externe de la marge établie conformément aux dispositions de l'article 76, paragraphe 4, se trouve à une distance non pas inférieure à 200 milles marins, mais à une distance bien supérieure. L'Etat côtier est alors en droit de prétendre à un plateau continental au-delà de 200 milles marins « jusqu'au rebord externe de la marge continentale » et doit procéder à la délimitation de son titre. C'est seulement à ce stade que l'application du paragraphe 1 de l'article 76 est terminée ! et qu'il est permis de passer au paragraphe 2 en suivant l'ordre logique de cette disposition. Tandis que le paragraphe 1 définit l'étendue du plateau continental juridique en se référant au rebord externe de la marge continentale, le paragraphe 2 détermine la limite externe, non pas de la marge continentale, mais du plateau continental juridique en précisant que ce plateau juridique « ne s'étend pas au-delà des limites prévues aux paragraphes 4 à 6 ».

Il me suffit d'indiquer à cet égard que la limite extérieure du plateau continental ne coïncide pas, purement et simplement, avec le rebord externe de la marge continentale que nous avons d'ores et déjà dû déterminer pour pouvoir passer le test du paragraphe 1. Il convient notamment de prendre en considération les limites de contraintes de tout plateau continental juridique décrites dans le paragraphe 5 : le plateau continental juridique ne peut pas s'étendre au-delà d'une limite de 350 milles marins ou au-delà de la ligne qui se trouve à 100 milles marins de l'isobathe de 2 500 mètres.

Si, au contraire la configuration générale des fonds marins est différente et la marge continentale moins étendue vers le large, en raison des faits de la nature, l'application de l'Article 76, paragraphe 1, donne un tout autre résultat. Vous voyez indiqué sur le schéma le point de référence, le pied du talus, ainsi que la ligne Hedberg (en marron) et la ligne Gardiner (en vert). Cette fois-ci, c'est la ligne Hedberg qui est plus favorable à l'Etat côtier et qui détermine donc le rebord externe de la marge continentale pour les besoins de l'application du paragraphe 1 de l'article 76. La limite de 200 milles marins mesurée à partir de la ligne de base se trouve ici plus vers le large que le rebord externe de la marge. C'est pour cette raison, et pour cette raison seulement, que nous nous trouvons dans la deuxième hypothèse du paragraphe 1, c'est-à-dire dans le cas où le plateau continental juridique s'étend « jusqu'à 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale ». En effet –et je cite toujours le paragraphe 1-, « le rebord externe de la marge continentale se trouve à une distance inférieure ». La limite externe de cet espace maritime est, *ipso facto*, identique à la limite de 200 milles marins.

Ce n'est donc aucunement parce que le « plateau continental physique » ou « scientifique » – j'ai mis ces deux expressions entre guillemets – du Myanmar ne s'étend, selon le Bangladesh, « que jusqu'à environ 50 milles de la côte » que le plateau continental juridique du Myanmar est limité à 200 milles marins, comme le Professeur Boyle l'a suggéré⁴². Avec tout le respect que je lui dois, cela ne correspond aucunement aux termes de l'article 76 (1). Ce n'est pas l'étendue du plateau scientifique qui est pertinente ici, c'est l'étendue de la *marge continentale juridique* ! Et seulement de la *marge continentale* avec son rebord externe ! Le texte de l'article 76 (1) est, je crois, tout à fait clair à cet égard.

Le Professeur Boyle vous a montré, mardi dernier, les limites extérieures des plateaux continentaux de l'Australie et de la Nouvelle-Zélande telles qu'elles ont été recommandées

⁴² ITLOS/PV.11/6 (E), p. 23, lignes 24-26 (Boyle).

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par le Commission des limites. La carte concernant les limites externes de la Nouvelle Zélande est, à nouveau, sur vos écrans. J'ai du mal à comprendre pourquoi le Myanmar devrait se contenter d'un plateau continental de 200 milles marins seulement si la Nouvelle Zélande, elle, peut tout à fait bénéficier d'un plateau continental au-delà de cette limite. Le Professeur Boyle ne vous a montré que les limites de 200 milles marins. Il a cependant oublié de préciser qu'immédiatement à côté de ces limites de 200 milles marins se trouvent des zones où, en vertu des recommandations de la Commission des limites, la Nouvelle Zélande peut déterminer une limite extérieure allant au-delà de 200 milles marins. La nature du plateau continental scientifique de la Nouvelle Zélande n'a pourtant pas changé radicalement de ce point-ci à ce point-là. Ce qui a changé, c'est la distance du rebord externe de la marge continentale par rapport aux côtes les plus proches. Par ailleurs, je profite de ce que cette carte est sur l'écran pour vous faire remarquer un autre point, que le Myanmar a déjà développé dans ses écritures⁴³. Dans la partie nord-est du plateau continental de la Nouvelle Zélande, la Commission des limites a reconnu un titre s'étendant au-delà de 200 milles marins malgré l'existence d'une zone de subduction bien plus marquée -elle est tout à fait visible sur la carte- que la prétendue discontinuité géologique devant les côtes de Rakhine.

Monsieur le Président, Messieurs les Juges, quels sont les enseignements qu'il faut tirer d'une application à la lettre de l'article 76, ou du moins d'une partie de cette disposition, et non la moindre parce qu'il s'agit de la disposition qui détermine si un Etat côtier a droit à un plateau continental, a un titre à un plateau continental allant au-delà de 200 milles ou pas. Il faut tenir compte de trois considérations, Messieurs les Juges.

Premièrement, je crois avoir démontré que l'article 76 se suffit très largement à lui-même. En tant que disposition juridique, il définit lui-même les termes et les notions qui sont importants pour son application, comme c'est le cas de « marge continentale », « rebord externe de la marge continentale » ou « pied du talus », notions qui – et ceci est essentiel – ne doivent pas être confondues avec leurs pendants scientifiques.

Puis, en deuxième lieu, vous avez remarqué qu'à aucun moment je n'ai eu besoin de me référer à la structure géologique très complexe du socle, à la nature de la croûte qui se trouve en dessous de la surface du sol marin ou aux plaques tectoniques. A un seul moment nous avons dû ouvrir la boîte noire pour identifier l'épaisseur -l'épaisseur seulement- des sédiments pour la fermer aussitôt. Jamais, cependant, la question de l'existence éventuelle d'une faille tectonique ou d'une frontière entre deux plaques tectoniques différentes ne s'est posée, ni celle de l'existence d'une zone de subduction pas plus que celle de l'origine des sédiments qui se sont déposés au pied du talus.

Et de ce deuxième point découle le troisième : la question d'une continuité géologique, dont nos amis bangladais défendent farouchement la nécessité, ne se pose tout simplement pas lors de l'application d'article 76.

La question de savoir si un Etat côtier a droit à un plateau continental juridique jusqu'à 200 milles marins ou au-delà de cette limite – question qui divise les Parties à la présente instance, sans qu'elle soit pour autant pertinente pour la solution du différend de délimitation sur lequel vous allez vous prononcer - cette question, donc, trouve sa réponse dans la seule application des règles juridiques qui font référence à certains critères d'origine scientifique contenus dans l'article 76. Il n'est aucunement nécessaire de recourir à d'autres concepts scientifiques. Le rebord externe de la marge continentale décrit par l'article 76 n'est pas seulement une des limites juridiques - et artificielles - qui permettent de fixer la limite extérieure du plateau continental au-delà de 200 milles marins. Il est également le pivot de l'application du test du paragraphe 1, parce que test il y a. Mais il ne s'agit pas d'un « test de

⁴³ DM, appendice, par. A.56.

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prolongement naturel », comme le Bangladesh le souhaite, mais du « test de la distance du rebord externe de la marge continentale ».

Cette interprétation a été également retenue par la Commission des limites qui ne se borne aucunement à examiner s'il y a continuité géologique⁴⁴; contrairement au Professeur Boyle -qui pourtant est un juriste éminent-, les membres de la Commission appliquent l'article 76 à la lettre. Tout comme nous venons de le faire, la Commission utilise constamment dans ses travaux⁴⁵ les dispositions du paragraphe 4 afin de déterminer, d'une façon liminaire, si un Etat est en droit de délinéer son plateau continental juridique au-delà de la limite de 200 milles marins ou pas, c'est-à-dire, si l'Etat passe le « test de la distance du rebord externe de la marge continentale » du paragraphe 1 ou pas. La Commission a trouvé un nom plus joli – et bien plus concis – pour ce test du paragraphe 1, elle l'appelle « test d'appartenance ». Ce test d'appartenance est formulé de la façon suivante, et je cite encore une fois les Directives scientifiques et techniques de la Commission, point 2.2.8 :

Si la ligne fixée à une distance de 60 milles marins du pied du talus continental [- autrement dit, la ligne Hedberg -] ou la ligne fixée à une distance où l'épaisseur des roches sédimentaires représente au moins un centième de la distance la plus courte entre le point en question jusqu'au pied du talus [- c'est là la description de la ligne Gardiner -], ou chacune des deux, tombent au-delà de 200 milles marins des lignes de base à partir desquelles la largeur de la mer territoriale est mesurée, un Etat côtier est en droit de fixer les limites extérieures du plateau continental comme le prescrivent les dispositions des paragraphes 4 à 10 de l'Article 76.⁴⁶

Cette description du test d'appartenance de la Commission des limites paraît bien plus compliquée que n'est en réalité. Il ne s'agit que d'une combinaison des dispositions et critères pertinents de l'article 76, et notamment de ses paragraphes 1, 4 et puis 2.

N'en déplaise au Bangladesh et au Professeur Boyle, les recommandations de la Commission des limites concernant la demande du Royaume-Uni relative à l'île de l'Ascension ne disent pas du tout le contraire; en fait, elles disent tout à fait cela, même dans l'extrait, un peu court, que le Professeur Boyle a cité mardi dernier⁴⁷ -et je cite les recommandations de la Commission en anglais : « The 'natural prolongation of [the] land territory' is based on the physical extent of the continental margin to its 'outer edge' »⁴⁸. C'est le paragraphe 1 de l'article 76, et rien d'autre. Ce n'est pas le prolongement naturel qui détermine le plateau, c'est l'étendue physique de la marge continentale, c'est-à-dire son rebord externe, qui est pertinente. La suite de cette « *declaration of principle* »⁴⁹ que le Bangladesh ne vous a pas montrée confirme, de surcroît, que pour l'application du paragraphe 1, il faut tenir compte de la définition du rebord externe de la marge continentale dans le paragraphe 4, et je me permets encore une fois de citer la suite des recommandations de la Commission : « *The outer edge of the continental margin in the sense of Article 76, paragraph 3, is established by applying the provisions of Article 76, paragraph 4, through measurements from the FOS* »⁵⁰. Le paragraphe 4 ne se limite donc aucunement à déterminer

⁴⁴ ITLOS/PV.11/6 (E), p. 17, lignes 11-15 (Boyle).

⁴⁵ CMM, appendice, par. A.20-A.26; DM, appendice, par. A.52-A.53.

⁴⁶ Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la Commission le 13 mai 1999 à sa cinquième session, doc. CLCS/11, point 2.2.8.

⁴⁷ ITLOS/PV.11/6 (E), p. 21, lignes 38-42 (Boyle).

⁴⁸ Summary of Recommendations of the CLCS in regard to the Submission made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008, 15 avril 2010, par. 22 (i).

⁴⁹ ITLOS/PV.11/6 (E), p. 21, ligne 36 (Boyle).

⁵⁰ Summary of Recommendations of the CLCS in regard to the Submission made by the United Kingdom of Great Britain and Northern Ireland in respect of Ascension Island on 9 May 2008, 15 avril 2010, par. 22 (ii). V. aussi *ibid.*, par. 44 et DM, appendice, par. A.53.

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la limite externe du plateau continental juridique, il joue un rôle indispensable dans l'identification de l'étendue physique de la marge continentale.

Monsieur le Président, Messieurs du Tribunal, nos amis de l'autre côté de la barre veulent peut-être se persuader en ce moment que toute cette démonstration est finalement sans aucun intérêt car j'ai éliminé la pertinence des termes « prolongement naturel » qui se trouvent dans le paragraphe 1 de l'article 76 et qui, pour eux, constitue précisément l'expression d'un test indépendant – et prioritaire – de continuité géologique et géomorphologique. Ils veulent ignorer que le Royaume-Uni, qui a justement voulu convaincre la Commission des limites que seul un tel test de prolongement géologique est pertinent pour la détermination du plateau continental juridique, a été débouté de cette demande⁵¹. Et pour cause : l'article 76 ne contient pas un tel test supplémentaire ou prioritaire, mais se suffit à lui-même.

Qui plus est, si le Bangladesh avait raison, si les termes « prolongement naturel » impliquaient un test de prolongement géologique, ou disons, « scientifique de continuité », l'article 76 aurait été mieux formulé dans un seul paragraphe que je vous cite, vous l'avez sur l'écran :

Le plateau continental d'un Etat côtier comprend les fonds marins et leur sous-sol au-delà de sa mer territoriale (*jusque-là, il n'y a aucun changement*), sur toute l'étendue du prolongement naturel du territoire terrestre de cet Etat ou jusqu'à 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale, lorsque le prolongement naturel ne s'étend pas jusqu'à cette limite.

Mais l'article 76 ne dit pas cela. En effet, Monsieur le Président, au tout début de la Troisième Conférence des Nations Unies sur le droit de la mer, il y a eu des projets de texte concernant une nouvelle définition du plateau continental qui disaient, à peu de choses près, exactement cela, et le Professeur Boyle vous en donné quelques exemples dans la note de bas de page 44 de sa plaidoirie de mardi dernier. Pour ne donner qu'un exemple parmi d'autres, le projet conjoint du Canada, du Chili, de l'Islande, de l'Indonésie, de Maurice, du Mexique, de la Nouvelle Zélande et de la Norvège proposait, en 1974, de définir le plateau continental de la manière suivante. Je vous cite le projet en anglais :

*The continental shelf of a coastal State extends beyond its territorial sea to a distance of 200 miles from the applicable baselines and throughout the natural prolongation of its land territory where such natural prolongation extends beyond 200 miles.*⁵²

C'est un texte qui, selon le point de vue que le Bangladesh exprime devant ce Tribunal, aurait été tout à fait acceptable sans réserve et en l'état. Mais, les sponsors du projet de texte que je viens de vous lire étaient conscients qu'une expression aussi vague que « prolongement naturel » n'était aucunement apte à définir *juridiquement* l'étendue spatiale de ce plateau continental *juridique*, un point crucial pour la détermination d'une définition. Ils ajoutèrent alors, en note de bas de page : « *Further provisions will be required on the subject of Article 19 including provisions to cover the precise demarcation of the limits of the continental margin beyond 200 miles* »⁵³. La simple référence à un critère prétendument scientifique, « prolongement naturel », ne suffisait, à l'évidence, pas.

⁵¹ DM, appendice, par. A.53.

⁵² A/CONF.62/L.4, *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. III, *Documents of the Conference*, p. 83 (Article 19, paragraphe 2).

⁵³ *Ibid.*

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Ce n'est pas pour rien, Monsieur le Président, Messieurs les Juges, que durant les huit années de la Troisième Conférence, les Etats se sont efforcés de trouver une définition juridique acceptable du plateau continental et qu'ils ont retenu les critères aujourd'hui inclus dans l'article 76. Le texte de ce qui est devenu l'article 76 a considérablement évolué et a été enrichi, tout au long des négociations, de moyens juridiques pour déterminer ce qu'est *juridiquement* le plateau continental. Comme je viens de le montrer et comme la Commission des limites l'a constaté, « [l']application d'autres critères quels qu'ils soient serait incompatible avec les dispositions de la Convention concernant le tracé des limites extérieures du plateau continental »⁵⁴.

Seuls les critères de l'article 76 décrivent ce qui est, en droit, le plateau continental. Certes, la science -et même la géologie- joue un certain rôle dans le processus d'application des critères juridiques. Personne ne le nie. Mais on ne peut pas remplacer la définition juridique, établie après d'âpres et longues négociations, par une définition purement scientifique ou faire entrer, par la petite porte de l'interprétation de certains termes de l'article 76 -« prolongement naturel » en l'occurrence- des critères scientifiques qui n'y figurent pas.

Les experts scientifiques du Bangladesh ont d'ailleurs expliqué, tout au long de la procédure écrite et lors des plaidoiries de mardi dernier, pourquoi il n'est, en droit, guère possible de se baser sur la seule science. J'ai déjà souligné que le Dr. Parson a reconnu qu'il est difficile de déterminer avec exactitude la fin scientifique du glacis continental⁵⁵. Les Etats et la communauté internationale ont cependant besoin de certitude; certitude que la science est incapable de fournir aujourd'hui.

Le vocabulaire utilisé par le Dr. Parson dans sa présentation est tout à fait remarquable à cet égard. Il ne vous a pas présenté des faits, mais une « *reconstruction* » de la surface terrestre⁵⁶, des *estimations* concernant les volumes de sédiments déposés sur le sol marin⁵⁷; il a reconnu ensuite que ces sédiments proviennent « *primarily* » de l'Himalaya, mais n'a pas osé utiliser le terme « *exclusively* » qui collerait certainement mieux avec la thèse du Bangladesh⁵⁸.

La seule donnée scientifique, géologique cette fois-ci, sur laquelle nos contradictaires semblent avoir une idée très précise est l'emplacement de la zone de subduction. C'est avec un certain étonnement qu'on admire, sur ce croquis qui vous est maintenant bien familier, l'aplomb avec lequel l'Etat demandeur a indiqué l'endroit de subduction de la plaque indienne sous la plaque birmane. Monsieur Reichler⁵⁹ et le Professeur Boyle⁶⁰, et même le Dr. Parson⁶¹, ont affirmé que cette zone de subduction se trouve à environ 50 milles marins de la côte du Myanmar⁶², sans jamais donner la moindre preuve scientifique. Ce n'est certainement pas parce que M. Parson a parlé en sa qualité de géologue qu'il peut vous fournir une preuve scientifique à cet égard, surtout lorsqu'il s'exprime en tant que conseil du Bangladesh. D'autres conseils de l'Etat demandeur⁶³ ont été un peu plus précis et se sont référés aux deux rapports du Professeur Curray joints aux écritures de la partie adverse, ou

⁵⁴ Directives scientifiques et techniques de la Commission des limites du plateau continental, adoptées par la Commission le 13 mai 1999 à sa cinquième session, doc. CLCS/11, point 2.2.7

⁵⁵ V. par. 0 ci-dessus.

⁵⁶ ITLOS/PV.11/6 (E), p. 2, ligne 16 (Parson).

⁵⁷ *Ibid.*, p. 4, ligne 24 et p. 6, ligne 2 (Parson).

⁵⁸ *Ibid.*, p. 6, lignes 12-13 (Parson).

⁵⁹ ITLOS/PV.11/2/Rev.1 (E), p. 12, ligne 1; p. 13, ligne 18; p. 19, ligne 15 (Reichler).

⁶⁰ ITLOS/PV.11/6 (E) p. 18, ligne 12; p. 19, ligne 29 (Boyle).

⁶¹ *Ibid.*, p. 7, lignes 7-8 (Parson).

⁶² MB, par. 1.20, 2.3, 2.22, 2.41, 2.45, 3.38, 7.29, 7.32, 7.35, 7.39; RB, par. 1.20, 4.26, 4.35, 4.36, 4.46

⁶³ ITLOS/PV.11/2/Rev.1 (E), p. 12, ligne 1; p. 13, ligne 18 (Reichler); ITLOS/PV.11/6 (E) p. 18, ligne 12; p. 19, ligne 29 (Boyle).

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encore au rapport du Professeur Kudrass, joint à la réplique. Pourtant, ni M. Curray ni M. Kudrass ne mentionnent jamais le chiffre de 50 milles dans leurs rapports ! Le Professeur Curray ne dit, en fin de compte, pas plus que cela : « *The approximate present day boundaries of these two depositional systems [en parlant du système du Bengale et du système dans la mer d'Andaman] are illustrated in Figure 22, along with the Sunda Arc subduction zone plate edge that separates the two systems.* » L'image est bien différente de celle qu'on vient de voir. La ligne qui marque la subduction ne passe pas devant la côte de Rakhine, elle s'enfonce, bien au sud de l'estuaire du fleuve Naaf, sous la terre. La différence est flagrante lorsqu'on superpose la ligne de subduction du Professeur de géologie sur le croquis préparé par les cartographes du Bangladesh. Il ne s'agit pas simplement d'une erreur de dessin. M. Curray dit exactement ce qu'il représente sur son croquis : la limite de la plaque birmane, dit-il, « *passes onto the land* »⁶⁴.

L'article scientifique de M. Nielsen⁶⁵, que M. Reichler a mis dans une de ses notes de bas de page, ne confirme pas non plus les allégations de l'Etat demandeur. Cet article, qui a été reproduit par le Demandeur dans le volume IV de son mémoire, montre cependant autre chose : M. Nielsen explique, en effet, que la morphologie de la marge continentale du Myanmar ne présente pas de discontinuité et ce malgré l'existence d'une zone de subduction. Il n'y a pas de fosse qui, normalement, caractérise ce phénomène géologique. Certes, le simple fait qu'on ne la voie pas ne veut pas dire qu'il n'y en a pas⁶⁶. Mais, bien que pour un scientifique il ne soit peut-être pas pertinent que la fosse soit remplie de sédiments ou pas, ce ne l'est pas pour l'application de l'article 76 qui se base simplement sur la surface, sur la morphologie.

De surcroît, le Bangladesh n'a, lui-même, aucun scrupule à ignorer la plus importante discontinuité géologique qu'il y ait, qu'il oppose pourtant aux droits du Myanmar. Sur vos écrans, vous voyez un croquis que le contre-amiral Alam a montré mardi dernier et qui se trouve dans la demande que le Bangladesh a soumise à la Commission des limites. Il montre la région du pied du talus que l'Etat demandeur a identifié. J'attire particulièrement votre attention sur le point sur le pied du talus n° 9 qui se trouve à l'extrême droite du croquis et sur la ligne noire correspond au profil bathymétrique utilisé pour l'identification de ce point n° 9. Je ferai deux remarques à ce sujet. Premièrement, la ligne se trouve non seulement immédiatement en face de la côte, non pas du Bangladesh, mais de celle du Myanmar que vous apercevez dans le coin en haut à droite du croquis. Il s'agit donc, à vrai dire, du prolongement du territoire terrestre du Myanmar, et non pas du Bangladesh. Deuxièmement, le profil bathymétrique utilisé, qui se trouve également dans la demande du Bangladesh, ne fait aucunement état de la discontinuité géologique en face de la côte du Myanmar. Tout au contraire, la morphologie montre une continuité certaine jusqu'à la base du talus. Le Bangladesh a déterminé le point n° 9 du pied du talus par la seule morphologie; il a également utilisé ce point -qui pourtant devrait se trouver derrière la zone de subduction s'ils avaient raison- comme point de base pour la détermination de la ligne Gardiner.

Monsieur le Président, Messieurs du Tribunal, pourquoi donc le Bangladesh devrait pouvoir faire ce qu'il défend au Myanmar ? Il n'y a strictement aucune raison. Ceci constitue une preuve suffisante pour la proposition que la discontinuité géologique -si importante aux yeux du Bangladesh- ne joue aucun rôle pour l'identification du plateau continental juridique, conformément à l'article 76 de la Convention de 1982.

Monsieur le Président, Messieurs les Juges, j'ai donc montré dans cette présentation un peu longue, et je m'en excuse, que l'interprétation de l'article 76 de la Convention des Nations Unies sur le droit de la mer proposée par le Bangladesh n'est pas correcte. Le titre

⁶⁴ RB, vol. III, annexe R4, p. 3.

⁶⁵ MB, vol. IV, annexe 52.

⁶⁶ RB, vol. III, annexe R4, p. 3.

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d'un Etat côtier sur un plateau continental s'étendant au-delà de 200 milles marins n'est aucunement conditionné par un quelconque « test de prolongement naturel géologique ». L'article 76 détermine, en tant que disposition juridique, les critères et les conditions pour l'existence d'un tel titre en même temps qu'il en définit les limites. L'existence d'une discontinuité géologique devant la côte du Myanmar n'est, à cet égard, aucunement pertinente, comme le Bangladesh l'a montré. La science ne détermine pas le titre juridique. C'est le droit qui le fait. Le Myanmar satisfait les critères et conditions de l'article 76 et a, par conséquent, un droit à un plateau continental au-delà de 200 milles marins.

Mais, finalement, Monsieur le Président, tout cela est sans aucune pertinence pour l'affaire qui vous est soumise par les deux Parties. La ligne de délimitation entre le Bangladesh et le Myanmar, ligne que nous vous demandons de déterminer, s'arrête avant la limite de 200 milles marins. Pour cette raison, il n'est aucunement nécessaire de déterminer les titres respectifs des deux Parties au-delà de cette limite, et encore moins de les délimiter.

Avec cette présentation pour surplus de droit se termine — pour de bon cette fois-ci — le premier tour de plaidoiries de la République de l'Union du Myanmar. Je vous remercie, Monsieur le Président, Messieurs les Juges, pour votre bienveillante attention.

The President:

This brings us to the end of this morning's sitting and the end of the first round of the oral arguments by Myanmar.

The hearing will resume tomorrow, 21 September, when Bangladesh will commence its second round of oral arguments. This schedule may possibly be changed. If it is changed, it will be displayed on our website this afternoon, but in principle that will be the schedule for our hearing tomorrow. The sitting is now closed.

(La séance est suspendue à 12 heures 53.)

21 September 2011, p.m.

PUBLIC SITTING HELD ON 21 SEPTEMBER 2011, 3.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 21 SEPTEMBRE 2011, 15 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good afternoon. Today we start with the second round of oral arguments in the dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. Bangladesh will commence its second round.

I first call on Mr Lawrence Martin to make his presentation.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Reply of Bangladesh

STATEMENT OF MR MARTIN
COUNSEL OF BANGLADESH
[ITLOS/PV.11/12/Rev.1, E, p. 1–7]

Mr Martin:

Mr President, distinguished Members of the Tribunal, good afternoon. It is once again a privilege to appear before you on behalf of Bangladesh, and to open this second round of Bangladesh's oral pleadings.

This afternoon I will sketch the broad contours of the arguments that you will hear over the next two days. I will also outline the order of our presentations. Before I turn to the substance of my submissions, however, I begin with a point of order. As you know, Mr President, the schedule of hearings permitted the Parties as many as three full sessions in the second round. After listening to Myanmar's presentations in the first round, we decided that we did not need all that time. We are confident that we can respond to Myanmar's arguments within the equivalent of two sessions.

We plan to use our time as follows. Today, we expect to speak until right around the coffee break. Tomorrow morning, we will use the full two and a half hour session, and tomorrow afternoon we aim to finish by the 4.30 coffee break. I hope that our decision to forego some of the time allotted to us will come as some relief to the very able people in the Registry and the translators, all of whom have worked very hard on our behalf these last two weeks. We thank them very much for their efforts.

We also opted for shorter presentations in the second round mindful of the fact that the Tribunal has already read and heard quite a lot from both Parties. You have two written submissions from each. Each has also already had five sessions of oral argument. There is no need to burden the Tribunal by belabouring points that have already been fully aired. Instead, we will use our time to reply to what Myanmar has said, focusing on what, in our view, are the key issues that can still benefit from further discussion. Points to which we do not respond in this round should under no circumstances be considered as having been conceded. They are not. Bangladesh maintains in full its submissions and arguments as previously set forth.

Mr President, Members of the Tribunal, we have listened attentively to the arguments that Myanmar presented in its first round. There is little – I dare say nothing – that surprised us. Indeed, Mr Reichler's observations from his initial presentation 13 days ago remain as true now as they were then. There are three key geographical and geological elements in this case: the concavity of Bangladesh's coast, St Martin's Island and the Bengal Depositional System. In its oral pleadings, Myanmar once again urged the Tribunal to ignore all three.

Because it fell to me to deal with the issue of the concavity in the first round, I will deal with this subject somewhat more thoroughly here than the others. On the remaining subjects, I will do no more than outline the essential points that will be addressed in the subsequent presentations.

On the issue of the concavity of Bangladesh's coast, we were initially quite pleasantly surprised. Myanmar at first seemed ready to engage with it in a clear and a direct manner. In his opening presentation last Thursday, Professor Pellet stated, and I quote: “[T]he coastlines of Bangladesh are universally concave; that is a fact.”¹ He also expressly admitted that Bangladesh's geographic situation is comparable to the third in the series of four schematics that I presented the Tribunal last week, and which he helpfully displayed once again. He said:

¹ ITLOS/PV.11/7, p. 9, lines 20-21.

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“[T]he case of severe concavity[:] I admit that this characterizes the coast of Bangladesh.”² To remind the Tribunal, the schematic to which Professor Pellet referred is the one now appearing on the screen.

But then other counsel seemed to backtrack and retreat to the more familiar – if less accurate – view according to which there is no concavity, or at least not one with which the Tribunal needs to concern itself. After Professor Pellet, a veritable parade of other speakers referred to the Bangladesh coast as “straight”³ or even – and this was a new one – as “convex”⁴.

They did this by inviting the Tribunal to focus only on the area in the immediate vicinity of the Parties’ land boundary terminus. For example, on the screen now is the map included at tab 3.4 of Myanmar’s Judges’ folder. You can see what Myanmar has done. The geographical context has been eliminated; two essential pieces are missing.

First, they have eliminated Bangladesh’s Bengal Delta coast to the north. If you include that, as you must, the concavity within a concavity along the Bangladesh coast immediately rematerializes. Second, they have also lopped off the coast of India to the west of Bangladesh. If you include that, as again you must, the primary concavity that is at the heart of this case comes back into focus. Context, Mr President, is key; but it is exactly this context that Myanmar does not want you to see. The image before you is included at tab 6.1 of today’s Judges’ folder.

This forced cartographic myopia is not a new twist adopted for the purposes of these hearings. If you look carefully at Myanmar’s written pleadings, you will note that aside from the first three sketch maps in Myanmar’s Counter-Memorial, none of the others, including any in the Rejoinder, dares to show India’s coast on the west side of the Bay of Bengal.

Mr President, Members of the Tribunal, depicted on the screen now is a coast that shall remain momentarily nameless. Some of you may recognize it; others may not. I ask you: is it obviously concave? Let us next see the whole coast in context. Now let me ask: is there anyone here who would deny that this coast is concave? I suspect not even Myanmar would.

Aside from these sleights of hand, Myanmar also asks you to ignore the concavity by telling you the recent jurisprudence does not consider concavity a circumstance warranting a departure from equidistance. It cites *Cameroon v. Nigeria* and *Barbados v. Trinidad & Tobago*. We already addressed these cases in our opening round and Professor Crawford will have a bit more to say later. I will not burden the Tribunal by saying anything more now.

I do, however, wish to say a word on the instances of State practice that I discussed during my first round presentation. These are the instances where the States concerned agreed to give a State that finds itself pinched in the middle of a concavity relief from the equidistance cut-off by according it an access zone out to its natural limits. On Monday afternoon Professor Forteau dismissed these as just four examples.⁵ Mr President, I am the last person to correct someone else’s math, but in point of fact I actually cited five agreements, as the verbatim record will confirm.⁶

There is also a sixth and a seventh that I did not mention, only because Professor Crawford already had.⁷ Those are the agreements among Germany, Denmark and the

² ITLOS/PV.11/7, p. 9, lines 32-33.

³ See e.g. ITLOS/PV.11/8, p. 25, line 32 (Lathrop); ITLOS/PV.11/10, p. 4, line 35, p. 5, line 28, p. 18, line 12 (Forteau); “The Correct Application of the Bisector Method” (Lathrop – 20 September 2011) at para. 26.

⁴ See e.g. ITLOS/PV.11/7, p. 16, lines 6-7 (Samson); ITLOS/PV.11/8, p. 25, lines 32-33 (Lathrop); ITLOS/PV.11/9, p. 13, line 33, p. 16, line 34 (Forteau); ITLOS/PV.11/10, p. 4, line 36, p. 5, line 28, p. 18, line 13.

⁵ ITLOS/PV.11/10, p. 1, line 36 (Forteau).

⁶ ITLOS/PV.11/4, pp. 19-20 (Martin).

⁷ ITLOS/PV.11/2/Rev.1, p. 22, line 43-44.

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Netherlands in which Germany was accorded access to the mid-sea median line with the UK. The discussion of these agreements in *International Maritime Boundaries* makes clear that Germany “succeeded in its contention that its shelf extended to the centre of the North Sea in such a way as to meet that of the UK.”⁸ This map is included at tab 6.2 of your Judges’ folder.

I might also have mentioned the arbitral award in the *St Pierre et Miquelon* case in which the Court of Arbitration gave the two small French islands which are otherwise completely surrounded by Canadian land and sea a 200-M access zone into the open Atlantic that is equal in breadth to the maritime front of the islands. At a certain point, Mr President, I do think that there is value in brevity.

What was more notable is what Myanmar did *not* say. In my initial presentation, I specifically invited Myanmar’s counsel to show us a contrary example from the State practice⁹ as they promised they could in their Rejoinder.¹⁰ I challenged it to show us an example where a State otherwise facing onto the open sea agreed to be cut off short of 200 M; but Myanmar had, and it has, nothing.

We say that the weight of the jurisprudence and the consistent State practice shows a clear international consensus: when a State sits in the middle of a concavity surrounded by neighbours on either side, equidistance cannot lead to an equitable solution.

In his presentation on Monday, Professor Forteau helpfully quoted a passage in Bangladesh’s Reply in which we stated that the cut-off that Myanmar’s proposed equidistance line would work on Bangladesh would be the worst anywhere in the world.¹¹ There is no larger coastal State anywhere that faces onto the open seas yet faces the prospect of being cut off before 200 M.¹² After reading these words, Professor Forteau then accused us of engaging in “dramatic arts” and “flights of fancy”¹³. Mr President, I have been accused of many things in my life, but having a flair for the dramatic is distinctly not one of them! What we wrote about the cut-off effect is not hyperbole; it is not exaggeration. It is a fact – a fact, by the way, which Myanmar has never once even tried to deny. We say that the inequitableness of such a result speaks for itself.

Before leaving the subject of the concavity there is one final point that I would like to address quickly. You heard quite a bit from Myanmar’s counsel about base points. In particular, you heard that Bangladesh’s base point β1 was located on “the most prominent feature in the area”,¹⁴ – Shahpuri Point. As a result, it supposedly takes three Myanmar base points to counteract it. Myanmar seems to think β1 is like a fearsome neighbourhood bully. It is so strong that it can take on three little base points on Myanmar’s coast singlehandedly.

This is nonsense. There is one and only one reason that there is just a single base point on the whole coast of Bangladesh – the concavity. Because the Bangladesh coast north of the land boundary terminus recedes into the concavity, there is nothing on the Bangladesh side to balance Myanmar’s coast. That is exactly why, as I showed last week,¹⁵ Myanmar’s proposed equidistance line cuts directly across the seaward projection of Bangladesh’s coast, blocking its access to the Bay of Bengal beyond a small triangular wedge.

Aside from the concavity, the second geographical fact that Myanmar would like the Tribunal to ignore is St Martin’s Island. Late last week and earlier this week Myanmar’s

⁸ *International Maritime Boundaries*, Vol. II, p. 1805.

⁹ ITLOS/PV.11/4, p. 21, line 34-35 (Martin).

¹⁰ Rejoinder of Myanmar (hereinafter “RM”) at para. 6.32.

¹¹ Reply of Bangladesh (hereinafter “RB”) at para. 3.59.

¹² Reply of Bangladesh (hereinafter “RB”) at para. 3.59.

¹³ ITLOS/PV.11/10, p. 19, line 2 (Forteau) (“envolées lyriques et la dramaturgie”).

¹⁴ ITLOS/PV.11/9, p. 34, line 7 (Lathrop).

¹⁵ ITLOS/PV.11/4, p. 14, lines 33-44 (Martin).

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counsel persisted in arguing that it should be given reduced effect in the territorial sea, and no effect whatsoever in the EEZ and continental shelf within 200 M. It is appropriate to ignore St Martin's in this way, they said, because it produces "a grossly distorting effect on the course of the delimitation".¹⁶

We have thought quite a lot about that statement over the last several days. In evaluating it, I wonder if it may be useful to step back just for a moment. Viewed in the round, Myanmar's case reduces to the following, rather remarkable, assertion: St Martin's Island distorts an equidistance line, but the double concavity of Bangladesh's coast does not! Or, to put a more formal point on it, Myanmar would have the Tribunal rule that St Martin's is "the epitome of a special circumstance"¹⁷, but the concavity of Bangladesh's coast is not. The absurdity of the argument is self-evident.

As you will hear, there is no basis for diminishing the effect given St Martin's Island, either in the territorial sea or in the EEZ. In the territorial sea, there is quite literally no precedent for giving an island with the characteristics of St Martin's anything less than a full 12 M. Indeed, at least since 1974 Myanmar itself has recognized this. Only in 2010, when it submitted its Counter-Memorial did Myanmar articulate the different view that it now purports to adopt. We say that the right view is the one that Myanmar itself accepted, without qualification, for at least 36 years: St Martin's Island is entitled to a full 12 M territorial sea.

In the EEZ and continental shelf, there is likewise no basis for ignoring St Martin's Island. Even viewed in isolation, St Martin's Island is a significant coastal feature with a large population and a vibrant economic life; it cannot be ignored. Moreover, it cannot be viewed in isolation. Once again, context is key. Far from exerting a distorting effect on the equidistance line, what St Martin's actually does is offset – but only partially – the far more pronounced effects of the double concavity of Bangladesh's coast.

This fact renders Myanmar's efforts to analogize to other cases wholly inapposite. At most, St Martin's abates the effects of the concavity within a concavity in the Bangladesh coast, and even that it does not do fully. Still less does it do anything to offset the effects of the primary concavity in the Bay of Bengal's north coast.

Myanmar also asks the Tribunal to ignore the Bengal Depositional System and the potential entitlement in the outer continental shelf it generates for Bangladesh. Myanmar's counsel argued that "Bangladesh cannot claim any entitlement in the continental shelf beyond 200 M".¹⁸ This was so, we were told, because the delimitation within 200 M would "inevitably stop" short of Bangladesh's 200-M limit.¹⁹

Mr President, Members of the Tribunal, whatever else might be said about this argument, it is admirably self-justifying. You might even call it a tautology. If Myanmar is wrong in its assertion that the delimitation stops short of the 200-M limit, then the conclusion that Bangladesh can claim no entitlement in the outer continental shelf is equally wrong. That is exactly our view.

Even as it denies the existence of Bangladesh's ability to "claim any entitlement in the continental shelf beyond 200 M", Myanmar nowhere – nowhere – denies the facts proving that entitlement. Last Tuesday, during the last session of our first-round presentations, you heard Dr Parson and Admiral Alam describe the basis on which and the manner in which Bangladesh claims entitlement in the OCS. In none of Myanmar's Counter-Memorial, its Rejoinder or its first-round presentations did Myanmar so much as suggest that Bangladesh is not entitled to apply article 76 in the manner that we described. Myanmar's only argument is that you can ignore these facts on the basis of the entirely circular reasoning I described.

¹⁶ ITLOS/PV.11/8, p. 26, line 8 (Lathrop).

¹⁷ ITLOS/PV.11/8, p. 23, line 44-45 (Lathrop).

¹⁸ ITLOS/PV.11/7, p. 11, line 1 (Pellet).

¹⁹ ITLOS/PV.11/8, p. 36, line 8 (Pellet).

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Yet another thing Myanmar asks the Tribunal to ignore, both as a matter of fact and a matter of law, is the issue of natural prolongation. In our first round, you heard all the reasons that Bangladesh considers the seabed and the subsoil of the Bay of Bengal the natural prolongation, that is, the physical extension, of its land territory. Myanmar had no reply. It said only that it did not think it “worthwhile to devote lengthy discussion” to what it considered “irrelevant points”.²⁰

In our first round, you also heard our interpretation of the phrase “natural prolongation” in article 76(1) as a matter of law. In our view, it establishes an independent criterion that must be met for a coastal State to establish entitlement in the OCS. Both geological and geomorphological considerations are pertinent.

Myanmar’s response is to read the term out of article 76, to render it without any independent legal significance. In Myanmar’s view, natural prolongation under article 76(1) is a mere conclusion that flows magically backwards from the application of article 76(4). This is plainly inconsistent with the principle of effectiveness. Article 76 should not and cannot be read to deprive any piece of it of meaning.

In contrast to Myanmar, Bangladesh believes that an equitable solution cannot be achieved by ignoring any one of the three most relevant geographical or geological elements of this case, let alone all three of them.

Context is key. In the circumstances of this case, and giving proper weight to the overall context, an equitable solution requires taking due account of the concavity of Bangladesh’s coast, St Martin’s Island and the Bengal Depositional System.

Mr President, I will now briefly outline the presentations to follow today and tomorrow. Following me to the podium this afternoon is Professor Boyle who will respond to Myanmar’s arguments that there is no binding agreement concerning the delimitation of the territorial sea.

After Professor Boyle, you will hear from Professor Sands who will address Myanmar’s argument that in the absence of agreement, St Martin’s Island should be given reduced weight in a territorial sea delimitation effected under article 15. As you will hear, there is no authority to support Myanmar’s wholly novel proposition. In accordance with article 15, the delimitation in the territorial sea must be an equidistance line. There are no grounds for adjusting it within 12 M. The outer limit of the territorial sea boundary and the starting point for the delimitation of the EEZ and continental shelf is at point 8A.

When we return tomorrow morning, Mr Reichler will address the Tribunal on the reasons Myanmar’s equidistance proposal does not result in an equitable solution in the EEZ and continental shelf within 200 M. He will show that the jurisprudence, including the jurisprudence relating to the effect to be given to islands, overwhelmingly supports Bangladesh’s arguments: first, equidistance should be rejected in favour of a different methodology; and second, if *quod non*, an equidistance approach were adopted by the Tribunal, the provisional equidistance line would have to be drawn giving full effect to St Martin’s Island, and then further adjusted to more fully relieve Bangladesh of the distorting effects of its doubly concave coast.

After that, Professor Crawford will respond to Myanmar’s arguments concerning Bangladesh’s alleged misapplication of the bisector method. As he will demonstrate, and in contrast to Myanmar’s equidistance proposal, Bangladesh’s proposed 215° bisector does yield an equitable result.

Professor Akhavan will conclude our presentations during tomorrow’s first session. He will refute Myanmar’s arguments relating to the Tribunal’s jurisdiction in the OCS.

²⁰ ITLOS/PV.11/7, p. 12, lines 35-37.

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Professor Akhavan will demonstrate that Myanmar's arguments are legally incorrect and, if adopted, would frustrate the very purpose of Part XV of the 1982 Convention.

Professor Boyle will be the first to the podium tomorrow afternoon and will return to the question of the outer continental shelf. Myanmar's arguments concerning the interpretation of article 76 are singularly unpersuasive, and its refusal to address the issue of the delimitation in the area is notable.

Professor Crawford will be the last of Bangladesh's counsel to speak. He will provide a summation of Bangladesh's case and will show that the overall solution we propose is precisely the equitable result that the 1982 Convention requires.

When Professor Crawford is done, the Honourable Foreign Secretary of Bangladesh will provide some concluding remarks and present Bangladesh's submissions.

Mr President, distinguished Members of the Tribunal, I thank you once more for your kind and patient attention. I ask that you invite Professor Boyle to the podium.

The President:

Thank you, Mr Martin. Professor Boyle, you have the floor.

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STATEMENT OF MR BOYLE
 COUNSEL OF BANGLADESH
 [TTLOS/PV.11/12/Rev.1, E, p. 7–12]

Mr Boyle:

Mr President, Members of the Tribunal, my task this afternoon is to respond to Sir Michael Wood's arguments on the existence of a territorial sea agreement. I have a very short speech. Let me begin with the easiest point. Both sides appear to accept that if the Agreed Minutes of 1974/2008 are binding agreements then they are sufficient for the purposes of article 15. The argument that divides the Parties is therefore not about form or legal effect but about whether the Agreed Minutes are indeed binding agreements at all. Let me reiterate Bangladesh's position: the 1974 Agreed Minutes are not simply a record of a meeting as Sir Michael alleges. Viewed objectively, the Agreed Minutes of 1974 constitute an agreement on a territorial sea boundary that is binding on the Parties. That agreement was confirmed by the Foreign Minister of Myanmar in 1985 and it was confirmed by a further agreement in 2008, and it remains in full force and effect today. Bangladesh does not accept Myanmar's arguments to the contrary.

Nor does Bangladesh recognize or agree with Myanmar's characterization of the negotiations that took place in 1974. Far from Bangladesh repeatedly pressurizing successive Burmese delegations with proposals, the record shows that both sides exchanged views and that each had its own agenda.¹ In order to understand what was and was not agreed, it may be helpful to understand the context in which the 1974 negotiations took place. Bangladesh was interested in an agreement that would facilitate oil exploration and drilling in waters and seabed adjacent to the existing Burmese oil fields.² Another reason for negotiating was to deal with access to the Naaf River.³ Burma was concerned that Bangladesh's proposed territorial sea boundary line – the one that was eventually agreed – would traverse the navigable channel into the Naaf River.⁴ Bangladeshi law required foreign warships to obtain prior permission for passage in the territorial sea, and this would be burdensome for Myanmar.⁵ So Myanmar had every reason to conclude an *ad hoc* agreement on the territorial sea in 1974 – it was in its interest to do so when broader negotiations failed to make progress and when general rules of international law on innocent passage were at that point potentially open to renegotiation at UNCLOS III. This was not, however, a matter that Bangladesh needed to press, but it was obviously important for Myanmar.

The fact that Myanmar nevertheless refused to sign the draft treaty on the territorial sea put forward by Bangladesh is explicable because Myanmar believed that doing so might imply that it was impossible to reach further agreement on the Exclusive Economic Zone or continental shelf.⁶ Moreover, the draft territorial sea treaty proposed by Bangladesh also covered additional issues – dispute settlement and transboundary oil deposits – that could more usefully be dealt with in a comprehensive agreement covering also the EEZ and continental shelf. But refusal to sign Bangladesh's territorial sea draft treaty is not inconsistent with reaching an *ad hoc* agreement on the boundary line in the territorial sea.

¹ See Burma's record of the 1974 talks in Counter-Memorial of Myanmar (hereinafter "MCM"), Annexes 2 and 3.

² Burma-Bangladesh Maritime Boundary Delimitation Talks, Minutes of the Second Round, 20-25 November 1974, Minutes of Second Meeting at para. 5, MCM, Annex 3.

³ *Ibid.*, Minutes of First Meeting at paras. 4-7, MCM, Annex 3.

⁴ *Ibid.*, para. 4.

⁵ *Ibid.*, para. 4; Minutes of Third Meeting, paras. 2-4, MCM Annex 3; see also Bangladesh Territorial Waters and Maritime Zones Act, 1974 (Act No. XXVI of 1974) (14 February 1974), Article 3(7). Memorial of Bangladesh (hereinafter "MB"), Annex 10.

⁶ *Ibid.*, Minutes of First Meeting, para. 10, MCM, Annex 3.

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The *ad hoc* agreement dealt with a far more limited agenda than Bangladesh would have wished to address in a more comprehensive treaty, but it nonetheless represented a compromise position for both States.

Mr President, Sir Michael Wood said on Thursday⁷ that paragraph 4 of the Agreed Minutes recorded only the approval of the Bangladesh delegation to points 1-7 of the territorial sea boundary. But if you read paragraph 4, it does not mention points 1-7 at all. Instead it simply refers back to paragraph 2, and when you read paragraph 2 it describes the course of the boundary in considerable detail and notes that it is illustrated on Special Chart 114. Paragraph 2 goes on because it also records that “With respect to the delimitation of the first sector of the maritime boundary” – which is the territorial sea “the two delegations agreed as follows.” It then sets out the details of the boundary. So there you have it, Mr President. Both delegations agreed points 1-7 in 1974, not just the Bangladeshi delegation. Both delegations signed the minutes and the chart, not just the Bangladeshi delegation. And despite what Sir Michael also said about point 7, the final point in the agreed line, there is no uncertainty about it in the text of the 2008 Agreed Minutes. The Minutes do refer to several options for a variety of possible starting point of the EEZ delimitation, but the agreed point 7 is specifically listed in paragraph 3 with full co-ordinates, like all the others. Even the Counter Memorial notes:

it was no doubt intended in due course that points 1 to 7 would be included in an overall agreement on the delimitation of the entire line between the maritime pertaining to Myanmar and those appertaining to Bangladeshi.⁸

Now let me deal next with Sir Michael’s continuing insistence that the Agreed Minutes were only a conditional agreement. He refers to three alleged conditions. First, he says that negotiation of a future treaty on the whole maritime boundary was the objective of both sides. That is obviously true; it says so in all the records. But of course the fact that such a treaty was never agreed does not exclude the option of agreeing *ad hoc* on a territorial sea boundary. An *ad hoc* agreement is no less an ‘agreement’. And there is nothing in the Minutes – in the terms of the agreement – that supports Sir Michael’s argument that nothing was agreed until everything was agreed. To remind the Court, what does the 1974 text say about this? It says only that negotiations would continue.⁹ That is all. How can that imply, still less express, the conditionality that Sir Michael claims? It is not obvious to me. After signing the ‘agreed minutes’ in 1974, there were several further rounds of talks held between Bangladesh and Myanmar from 1974 to 1985,¹⁰ yet the issue of negotiating the territorial sea boundary was never raised again by Myanmar. Why not? Does this not show that Myanmar regarded the territorial sea boundary as settled or agreed in 1974? The fact that it was confirmed without controversy and with only minor changes in 2008 simply adds to the conclusion that the boundary had indeed been settled in 1974.

Secondly, Sir Michael argued that the Parties failed to conduct the joint survey provided for in para. 2. II of the Agreed Minutes. That is true: they didn’t; but it overlooks the fact that they did agree co-ordinates through a joint inspection in 2008.¹¹ Even if the final

⁷ ITLOS/PV.11/7 (E/6), p. 33 lines. 4-7 (Wood).

⁸ MCM, para 4.9.

⁹ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary (23 November 1974), para. 6, MB, Annex 4.

¹⁰ MB, para. 3.32; MCM, paras. 3.11-3.41.

¹¹ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Myanmar Delegation Regarding the Delimitation of the Maritime Boundary (1 April 2008), para. 3. MB, Annex 7.

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boundary co-ordinates were incomplete in 1974, they were definitively plotted and agreed on Admiralty Chart 817 in 2008.¹²

The final alleged condition is our old friend unimpeded passage in the territorial sea. Well this is something of a red herring. On the one hand, Sir Michael argues that 'free and unimpeded navigation' was a precondition of the 1974 accord,¹³ but on the other hand, he also said on Thursday that ships of Myanmar traditionally enjoyed the right of free and unimpeded navigation to and from the Naaf River since 1948.¹⁴ This is a rather contradictory position – apparently unimpeded passage had been exercised as a 'historical right', to quote Professor Pellet, since 1948,¹⁵ – but was then not exercised after 1974 because Myanmar did not want to put the issue to the test!¹⁶ Why did Myanmar not raise the question again in negotiations between 1974 and 2008 if Bangladesh's position was as equivocal as Myanmar alleges? Self-restraint may explain a lack of conflict, but it can't easily explain a lack of negotiation. There was ample opportunity to negotiate in 1980 when the Parties concluded a supplementary protocol to the 1966 Agreement on the Demarcation of a Fixed Boundary in the Naaf River¹⁷ – unless of course Burma thought the matter had indeed been settled.

In 2008 the Parties recognized that access to the Naaf River was indeed no longer a problem, if it ever had been, because they agreed in that year unambiguously in the 2008 Agreed Minutes that navigation through the territorial sea was indeed governed by rules on innocent passage in the 1982 Convention. That had of course been the case since the Convention came into force. It is not really credible to say that Myanmar is still waiting today for Bangladesh to agree on the rules for unimpeded passage. Nor has Bangladesh ever demanded that Myanmar naval vessels seek prior permission for passage into the Naaf River and Myanmar has not alleged any such practice. So there is no basis for continuing to demand assurances about passage when the Parties have long since laid the issue to rest. In any event, Bangladesh has made unequivocally clear its acceptance of the right of unimpeded innocent passage for Myanmar vessels in accordance with the 1982 Convention as it had already agreed in 2008. It cannot meaningfully be said that it has not responded favourably to Myanmar's desire for unimpeded passage into the Naaf River.

Sir Michael alleges that if we look carefully at the terms of the 1974 Minutes we will not find an agreement. So let us look at the terms. They say expressly that "the boundary will be formed by a line extending seaward from Boundary Point No 1... connecting ... the mid-points between the nearest points on the coast of St Martin's Island and the coast of the Burmese mainland."¹⁸ What could be clearer and more precise? How else might the Parties be expected to express an agreement on the matter? Use of the future tense is appropriate when final co-ordinates are still to be plotted, but that does not make the agreed boundary any less clear or definitive. The text is considerably clearer and more precise than the communiqué in *Qatar/Bahrain case*. I make a mild diversion. You can see the text of that communiqué, or at least one version of the communiqué – there are two versions and I have compared the two of them – and there is no material difference for the purpose of the point I

¹² *Ibid.*

¹³ ITLOS/PV.11/7 (E/6) p. 22, line 6-8; p. 31, lines 41-45 (Wood); MCM, para. 4.12.

¹⁴ *Ibid.* PV.11/7 (E/6), p. 24, lines 15-17.

¹⁵ PV. 11/7 (E/6), p. 6, lines 12-23 (Pellet); Delimitation Talks, Third Round (February 1975), Minutes of First Meeting, para. 4. MCM, Annex 4; MCM, paras. 3.23 and 4.38.

¹⁶ *Ibid.*, p. 24, lines. 32-35.

¹⁷ Governments of Bangladesh and Myanmar, Supplementary Protocol to the 1966 Agreement between Pakistan and Burma on the Demarcation of a Fixed Boundary between the Two Countries in the Naaf River (1980). MB, Annex 6.

¹⁸ Governments of Bangladesh and Myanmar, Agreed Minutes of the Meeting Between the Bangladesh Delegation and the Burmese Delegation Regarding the Delimitation of the Maritime Boundary (23 November 1974), para. 2. MB, Annex 4..

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am about to make. Here we have the Qatar version. It merely reaffirms what was previously agreed previously, provides for continuation of the good offices of the Saudi king, and says that at the end of the agreed period “the Parties may submit the matter to the ICJ.”¹⁹ (Tab 6.5) The Bahraini version says the two Parties may submit the matter to the ICJ but it makes no difference for this point. The ICJ nevertheless regarded this rather ambiguous diplomatic language as a binding agreement concluded by Foreign Ministers – despite the fact that the Parties could not even agree on how to interpret and translate their communiqué.²⁰ There really is no comparable uncertainty or lack of clarity about the 1974 Agreed Minutes. On any reading they look much more like an agreement than the Qatar/Bahrain communiqué; they certainly look like an agreement on a boundary.

It is true, or course, that the minutes agreed in 1974 and 2008 were not agreed at Foreign Ministers, but that does not prevent the Parties from treating them as binding agreements in practice, as article 8 of Vienna Convention implies when it refers to subsequent confirmation. It is notable that at the sixth round of maritime boundary talks between the Parties in 1985, Myanmar’s Minister for Foreign Affairs and leader of its delegation to the talks, Mr U YE Goung, made the opening statement²¹ and when he made it, far from repudiating a supposedly unauthorized deal negotiated in 1974, he referred to the Minutes signed in Dhaka with approval. They were unquestionably confirmed again in 2008, subject only to minor modifications. This would be rather strange behaviour if Commodore Hlaing had had no authority to sign the agreement or if the agreement he negotiated had been repudiated by his government immediately after the 1974 talks. Bangladesh reiterates its view that Myanmar is now estopped from denying the authority of Commodore Hlaing to conclude the 1974 Minutes. It notes that Myanmar does not deny the authority of those who concluded the 2008 Agreed Minutes.

What then does Myanmar say about implementing this agreed boundary in practice? It says very little. It says that affidavits are unreliable evidence, to be treated cautiously, and that naval logs are of little help in proving the existence of a boundary.²² But Bangladesh is not using this evidence to prove the existence of an agreed boundary; it is simply using it to show how the boundary agreed in 1974 operated in practice – without problems, or disputes, or friction. Bangladesh has discharged whatever burden of proof it has in this respect and Myanmar has produced no evidence at all to the contrary. If there are problems, the burden is on Myanmar to prove them.²³ Myanmar admits that the evidence does show that its fishermen have been arrested on Bangladesh’s side of the territorial sea.²⁴ If there was in fact no agreed boundary, or no boundary in practice, why then did Myanmar not protest at these arrests? Myanmar says they were on Bangladesh’s side of the boundary.²⁵ Precisely, Mr President.

The conclusion – I said this would be a short speech – seems obvious. The 1974 Agreed Minutes in Bangladesh’s view did constitute an unconditional binding agreement settling the territorial sea boundary between the Parties, in accordance with article 15 of the

¹⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, para. 19.

²⁰ *Ibid.*, paras. 19 and 30.

²¹ Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 2. MCM, Annex 8.

²² ITLOS/PV.11/8 (E/7) p. 6, line 19; p. 11 line. 28 (Stoeger); RM, paras. I.4 (p. 15) and 2.50-2.69.

²³ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, para. 204; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, I.C.J. Reports 1984, p. 392, para. 101.

²⁴ ITLOS/PV.11/8 (E/7) p. 11, lines 34-35 (Stoeger).

²⁵ *Ibid.*, lines 11-28.

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1982 Convention.²⁶ But even if we assume that the 1974 Agreed Minutes were not binding unless Myanmar's conditions with respect to the fixing of boundary co-ordinates and unimpeded passage were fulfilled, by 2008 the coordinates had been plotted and the regime applicable to passage into the Naaf River had been agreed.²⁷

Acceptance of this boundary by the Parties is reflected in their wholly unproblematic practice with respect to navigation and law enforcement. The agreed boundary had been working effectively for 34 years in 2008 – and it continues to function effectively. Why? Not simply because it was agreed but because both Parties know it is equitable and because a properly drawn article 15 equidistance boundary would be almost identical – if anything it would be slightly more favourable to Bangladesh, as Professor Sands will shortly show you. Myanmar wants to unpick this agreement only because it is inconsistent with its grandiose and legally unsupportable arguments in the Exclusive Economic Zone and the continental shelf beyond the territorial sea.

Mr President, Members of the Tribunal, that concludes this part of my submission. Unless I can be of any further assistance, I would ask you to give the floor to Professor Sands.

The President:

I call on Professor Sands.

²⁶ ITLOS/PV.11/3 (E/2) p. 1, lines 23-25; p. 6, lines 7-9; p. 9, lines 16-19 (Boyle); MB, para. 5.18; RB, para. 2.8.

²⁷ See Agreed Minutes of Bangladesh-Myanmar Meeting Regarding Maritime Boundary Delimitation (1 April 2008), para. 2-3. MB, Annex 7.

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STATEMENT OF MR SANDS
 COUNSEL OF BANGLADESH
 [ITLOS/PV.11/12/Rev.1, E, p. 12–22]

Mr Sands:

Mr President, Members of the Tribunal, it falls to me to respond to Myanmar's arguments as to the delimitation of the territorial sea in the absence of the agreement to which Professor Boyle referred and it is off the back of Myanmar's recent discovery that St Martin's Island is, after all, a 'special circumstance' within article 15 of the 1982 Convention. This is, of course, an alternative argument. As is customary for a second round speech, I am going to limit myself to responding to the arguments of Myanmar, principally as presented by Mr Lathrop. I will not repeat what has been said in our written pleadings or in the first round of our oral arguments, and I will not seek to address the many inaccuracies or infelicities in Myanmar's treatment of this subject.

The bottom line, Mr President, as anyone with even a passing knowledge of the law and practice of article 15 will know, is that Myanmar's argument is thin, and that is a generous characterization. Article 15 establishes an equidistance rule for the territorial sea, and it draws no distinction – no distinction – between the entitlements that appertain to the mainland or to islands. Myanmar has found no authorities on which it can rely in support of its claim that St Martin's Island is to be treated as a 'special circumstance' within the meaning of article 15. It is inviting you to make new law. In our submission, there is no basis for you to do so. Accordingly, I can be relatively brief.

Before getting to the only real issue – why St Martin's Island is not now and has never been a 'special circumstance' – please allow me to make a small number of preliminary points.

First, it is necessary to say something about what Mr Lathrop had to say in its totality, or, rather, what he didn't say. One learns early in life, and in court, Mr President, that on some occasions that which is not said is more significant than that which is said. Mr Lathrop's presentation was one such occasion, and a particularly striking one. Many of those present in the courtroom when Mr Lathrop addressed the delimitation of the territorial sea will have noted those matters on which his silence was conspicuous.

He had nothing to say, for example, about access to the mouth of the Naaf River. He had nothing to say about any difficulties of access through the territorial sea of Bangladesh around St Martin's Island.¹ He had nothing to say about Myanmar's abrupt change of position after 2008: whether it be a legally binding agreement or not, the fact is that starting in 1974, and for a period of at least 34 years afterwards, through the negotiation, adoption, ratification of the 1982 Convention, and for more than a decade after that ratification, Myanmar did not treat St Martin's Island as a special circumstance. In fact, Myanmar continuously recognized that St Martin's Island was entitled to a full 12-mile territorial sea. It said so very publicly, and it said so at the highest levels of government. In 1985, for example, the distinguished Foreign Minister of Myanmar (or Burma, as it then was) said that his country recognized the "entitlement of St Martin's Island to a full 12 M territorial sea".² I emphasize the word "full". "Full" is not "partial", Mr President; nor is it "half-full", nor is it

¹ ITLOS/PV.11/3, pp. 25-27 (Sands).

² Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Rangoon, 19-20 November 1985, MCM, Annex 8, p. 2. Also, in a 2008 *Note Verbale*, Myanmar explicitly acknowledges the 12 M entitlement of St Martin's Island: "It is in this neighbourly spirit that the Myanmar side has requested the kind cooperation of the Bangladesh side since the streamer/receiver of the said survey vessel is expected to enter the 12-mile territorial sea which Bangladesh's St Martin's Island enjoys in principle in accordance with UNCLOS, 1982" (BR, Vol. III, Annex R1).

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three-quarters full. "Full" means full. Nothing has changed in the law or in the facts since 1985 when the Foreign Minister spoke. This Tribunal is entitled to an explanation from Myanmar as to why it has so recently and so abruptly changed its position; it has had no explanation.

You have also been given no explanations as regards Myanmar's own practice in this field elsewhere, and the manifest inconsistency between that practice and what it now says you should do in this case. It has provided no response to our questions during these hearings as to why St Martin's Island should be treated differently, for example, than Myanmar's Aladdin Islands; you will recall that those islands were given a full 12 M territorial sea in Myanmar's 1980 Agreement with Thailand. I referred to that explicitly in the first round.³ What was Myanmar's response? None. There was no response. Nor have you been given any explanation in these hearings as to why Myanmar's Little Coco Island – to which I also referred – was given full weight in the territorial sea in its 1986 agreement with India.⁴ What was Myanmar's response? None – again, silence. On all these matters, and on many others, Mr Lathrop was silent. He was equally reticent on the case law that we cited in our pleadings and that is so deeply harmful to the arguments of his client. I will return to that in a moment.

So what did he talk about? Well, he had quite a lot to say about so-called "mainland-to-mainland" equidistance lines. He sought to respond to our expression of surprise as to the very recent adoption by Myanmar of the merits of such a line, no doubt as a way of avoiding giving St Martin's Island the full 12 M territorial sea to which its Foreign Minister had previously professed such strong attachment. But, Mr President, you will have noted that Mr Lathrop was not able to show you a single decided case in which such an alleged line had been used in the manner now proposed by Myanmar, a situation where a significant coastal island is located in close proximity to the adjacent coastal State's mainland and well within the mainland's 12 M territorial sea. Now, he did refer you to four cases – the *Anglo-French Continental Shelf* case, the *Black Sea* case, the case of *Nicaragua v Honduras*, and the *Eritrea v Yemen* cases⁵ – but none of these cases is analogous, as we are sure you will all be fully aware. In the first three cases, the islands were not coastal islands; they were not located within 12 M of the mainland of the coastal State, and each was given a full 12 M territorial sea – except where the full-weight median lines truncate the territorial sea, as occurred for example in relation to some of the Honduran cays.

The fourth case he referred to was *Eritrea v Yemen*. I say, Mr President, we very much regret to have to say that the treatment of that case was entirely misleading: the tribunal in that case gave full weight and effect to four coastal islands, some of which were located at a far greater distance from the mainland than is St Martin's Island, some even beyond 12 M. As you can see on your screens, these islands included (highlighted in yellow at the top) the Dahlaks on the Eritrean side, and Tiqfash, Kutama, Uqban and Kamaran on the Yemen side. These were coastal islands, on which base points were located, and they were treated as an integral part of the mainland in drawing an equidistance line. The implication that they were ignored in drawing an equidistance line is wholly wrong. There is no analogy to be drawn, and the award entirely supports the approach of Bangladesh that a coastal island generates a full 12 M territorial sea, and full weight in the drawing of an equidistance line.⁶

In that delimitation, which concerned the continental shelf and not the territorial sea, the islands that were ignored were located at great distances from the mainland. Mr Reichler will return to say more about those islands tomorrow.

³ ITLOS/PV.11/3, p. 24, line 12 *et seq.*

⁴ *Ibid.*, p. 24, line 24 *et seq.*

⁵ ITLOS/PV.11/8, p. 15, line 14 to p. 16, line 9 (Lathrop).

⁶ RB, para. 2.79-2.80.

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The fact that these examples are not on point is presumably one of the reasons why Mr Lathrop did not show them to you on any charts. It is blindingly obvious, Mr President, with respect to these examples, that if there are no islands to be found within 12 M of the coast then article 15 could require you to draw a provisional equidistance line from base points that are to be found on the two States' mainlands. In these circumstances there are good and obvious reasons why you might want to start with a so-called "mainland-to-mainland" equidistance line – there are not any islands present. But if an island is located within the 12 M coast, like St Martin's Island, then there will be no justification for drawing such a line because the 1982 Convention requires you – *requires you* – to draw the equidistance line on the basis of base points located on the island. That is clear and established law.

Mr Lathrop derives no greater support from the writings of Professor Bowett. Writings, I have to say that he filleted them in a manner that brought to mind the use of a hammer to remove the bones from a sardine. Derek Bowett was a great international advocate and international jurist, who chose his words very carefully, and it is a matter of great regret that he never had an opportunity to address this Tribunal. He was also my teacher and colleague, and I fear he would have raised a characteristic eyebrow if he had witnessed Mr Lathrop's use of his writings to justify the unjustifiable.⁷ We have checked each and every one of the examples to which Mr Lathrop refers in the cited article. I can deal with them quickly. Mr Lathrop's first example was as follows, and you can see the quote on your screen: "The island of Halul was ignored ... in constructing the mainland-to-mainland equidistant[ce] line".⁸ That is what he said. You will note the dots and you will note the capital "T". Here is what Professor Bowett actually wrote, including the words that Mr Lathrop left out: "Thus, in the Iran-Qatar agreement the island of Halul was ignored, apparently because of its disputed status, in constructing the mainland-to-mainland equidistant line."⁹

If you then go to the footnote of that text, you will see that it refers to page 402 of Jayewardene's book *The Regime of Islands in International Law*. If you then go and dig that up, you will see that it says the following: "The Qatari island of Halul which is an off-lying island and located over 60 M off the coast has been ignored as is indicated in the preceding analysis. The reason for disregarding Halul appears to have been its disputed status."

So when you fill in the dots and put the word "the" in lower case, you see clearly what Professor Bowett was addressing, and it is entirely distinguishable from this case.

The second example that Mr Lathrop gave you, drawing from Professor Bowett's article, was the following quote: "Various small islands were ignored in drawing a mainland-to-mainland equidistant line."¹⁰ What Mr Lathrop did not draw to your attention was that Professor Bowett was again referring to the same Iran-Qatar agreement. It was an agreement, Mr President, negotiated and adopted between two States. It can provide no support for the drawing of an equidistance line desired by Myanmar in this case.

The third quotation given by Mr Lathrop, we regret to say, was also partial and omitted significant elements. The quote he gave you was – and this is taken from the PV: "Several islands . . . were ignored and a mainland-to-mainland equidistant boundary adopted."¹¹ Now let us look at the full quote:

⁷ ITLOS/PV.11/8, p. 15, line 4 *et seq.*

⁸ ITLOS/PV.11/8, p. 15, line 7 (Lathrop).

⁹ D. Bowett, *International Maritime Boundaries*, Vol. I, at p. 136.

¹⁰ ITLOS/PV.11/8, p. 15, line 8 (Lathrop).

¹¹ *Ibid.*

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So, too, in the Canada-Denmark agreement, where in the Kennedy Channel several islands on the Greenland side, and some small islands of indeterminate sovereignty in the middle of the channel, were ignored and a mainland-to-mainland equidistant boundary adopted.¹²

I could make a lot of points, but I will just make a small number. It was an agreement, not a judicial or arbitral award,¹³ and the situation is entirely distinguishable from that of St Martin's Island: first, the islands lie in a narrow channel, less than 20 M wide; secondly it is a situation of two opposite mainland coasts; and third, none of them sustains a permanent population. Canada and Denmark agreed not to take into account the islands because of the narrowness of the body of water.

So these three examples in no way assist Myanmar. The commentary of Professor Bowett may happen to use the same phrase that Myanmar likes, but they were very obviously referring to entirely different, extra-judicial cases, negotiated situations each of which turns on its own particular facts.

We deeply regret having to point out these textual infidelities, but let me give one more example. After invoking Professor Bowett, Mr Lathrop referred you to a discussion at the International Law Commission in 1953, in support of his argument that there could be a departure from equidistance where "a small island opposite one State's coast belonged to another".¹⁴ If you take the trouble to check out what the 1953 discussion was about, as I am sure you will, you will see that the meeting at which that occurred at the International Law Commission was addressing a proposed text for what was to become article 6 of the 1958 Continental Shelf Convention.¹⁵ The reference invoked by Mr Lathrop had nothing to do with the delimitation of the territorial sea. The way they have been treated by counsel for Myanmar reminds one of golden rule no. 3 of advocacy: if you are going to cite an authority that has footnotes, read the documents referred to in the footnotes.

It is against this background that we say it is entirely correct for us to argue that the invocation of a so-called "mainland-to-mainland" equidistance line in circumstances that wholly ignore an island located within 12 M is curious, to say the least, and appears to be novel and unprecedented in the case law. Let me be blunt: it is just plain wrong. We trust that this Tribunal will not be the first international court or tribunal to draw a so-called "mainland-to-mainland" equidistance line through an island or that ignores an island – and a most significant island at that – one that is located within 12 M of the coast.

We also trust that this Tribunal will not be seduced by Mr Lathrop's occasional reference to what he called Myanmar's "dominant mainland coast".¹⁶ Let us not forget that Mr Lathrop was addressing the delimitation of the territorial sea. Let us recall also that article 121(2) of the 1982 Convention makes it clear that islands such as St Martin's Island have got exactly the same entitlements as "other land territory". There is no basis – no basis – for the suggestion that any sort of adjustment is to be made to the limit of the territorial sea of St Martin's Island on account of it being an island. St Martin's Island is entitled to exactly the

¹² D. Bowett, *International Maritime Boundaries*, Vol. 1, at p. 136.

¹³ H. Jayewardene, "The Regime of Islands in International Law", (1990) at p. 431: "The boundary of the continental shelf between Canada and Greenland (Denmark) provides an example of how small islands lying in the middle of a narrow body of water may be treated."

¹⁴ ITLOS/PV.11/8, p. 26, lines 31-35 (Lathrop).

¹⁵ Y.L.L.C., vol. 1, *Summary records of the fifth session*, 204th Meeting, p. 128, para. 37: "There were cases, however, where a departure from the general rule was necessary in fixing boundaries across the continental shelf; for example, where a small island opposite one State's coast belonged to another; the continental shelf surrounding that island must also belong to the second State. A general rule was necessary, but it was also necessary to provide for exceptions to it." (Mr François) (emphasis added).

¹⁶ ITLOS/PV.11/8, p. 20, line 12; p. 23, line 27; p. 28, line 3 (Lathrop).

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same treatment as Myanmar's mainland coast - period. The concept of "dominance" simply does not arise. This is all the more so where St Martin's Island is a coastal island and an integral part of Bangladesh's coastline.

Related to this, Mr Lathrop invoked the concept of what he called a "simplified equidistance line". That was to respond, as you will recall, to our objection to Myanmar's use of incorrect base points for the calculation of the median line, in particular the location of Myanmar's point B, which had ignored the nearest points on Bangladesh's low water line, located on the final spit of the northern shore of the Naaf River on British Admiralty Chart 817.¹⁷

The response given by Myanmar to this was to say that it had engaged in what it called a "simplification process" with respect to the equidistance line.¹⁸ With great respect, Mr Lathrop has mis-stated the concept of a "simplified equidistance line". It is certainly correct that where a strict equidistance line has many turning points, all of which extend the line in the same direction, those plotting the line will often delete many of the turning points without altering the course of the line, or at least they will give each side an equal allocation of area by way of compensation. The process of simplification is done fairly such that neither party is disadvantaged, and the net effect is neutral. That is not what happened here: Myanmar's segment makes a distinct change of direction, and Myanmar's so-called "simplified equidistance line" would, if applied by the Tribunal, give Myanmar an added area at the expense of Bangladesh without any compensatory allocation to Bangladesh. It should not be applied by the Tribunal: it is incorrectly calculated and it wrongly allocates an area to Myanmar. The simple point is that Myanmar made a mistake in calculating the equidistance line, and it has now recognized that Bangladesh's line is the correct one. Mr Lathrop in effect admitted this. He conceded during his oral arguments that, "From a technical perspective, there is nothing objectionable about Bangladesh's proposed territorial sea line."¹⁹ We invite you to read that very carefully because it is a major concession, and we hope that the Tribunal will take note of it. In the unlikely event that the Tribunal does not find that an agreed boundary in the territorial sea has been in place since 1974, Bangladesh submits that the Tribunal should delimit the maritime boundary in the territorial sea as plotted by Bangladesh, from points 1A to 8A. You can see that line on the screen now: The only point of difference that remains between the Parties, is what to do beyond Myanmar's point C, or our point 6A, and it is to that which I now turn.

Having accepted that there is "nothing objectionable about Bangladesh's proposed territorial sea line", the burden is on Myanmar to prove there is no justification in law for delimiting the boundary along to point 7 (of the 1974 agreement), or to the end point (point 8A) of the territorial sea boundary drawn on the red equidistance line in accordance with article 15. Mr Lathrop set out his stall in the following way:

The problem with Bangladesh's proposed delimitation of the territorial sea", he said, "is not a technical one but a legal one. Bangladesh fails to take into consideration the second half of the equidistance/special circumstances rule as it applies to St Martin's Island."²⁰

Putting aside the matter that it took Myanmar more than 34 years to notice that St Martin's Island was somehow a special circumstance, and that even its own Foreign

¹⁷ RB, paras. 2.98 and 2.100; ITLOS/PV.11/3, lines 38-44, p. 27 (Sands).

¹⁸ ITLOS/PV.11/8, p. 22, line 27 (Lathrop).

¹⁹ ITLOS/PV.11/8, p. 21, line 4 (Lathrop).

²⁰ ITLOS/PV.11/8, p. 21, lines 21-24 (Lathrop).

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Minister had missed this point in 1985, the challenge for Myanmar before this Tribunal is to persuade you that St Martin's Island is indeed a special circumstance.

Mr Lathrop told you that the problem with Bangladesh's line is a "legal one". With great respect, he faces an insurmountable difficulty, as his limited use of authorities makes clear: he has no legal support whatsoever for his claim.

Just before we get to that issue, it is worth noting that as regards the characteristics of St Martin's Island there appears to be a large measure of agreement between the Parties. On the basis of what Mr Lathrop did and did not say, it seems there is general agreement between the Parties as to the facts pertaining to St Martin's Island. It is agreed that it is an island. It is agreed that it is located at an equal distance from the mainland coasts of Bangladesh and Myanmar, namely 4.5 M. There seems to be no dispute that so located it is a coastal island, that it has a significant population, extensive economic activity, and an important role as a base for Bangladesh's navy and coast guard. It is also common ground between the parties that during the period of 34 or more years over which Myanmar unequivocally recognized St. Martin's Island's entitlement to have a full 12 M territorial sea, no problems ever arose, particularly regarding navigational passage issues. There is one point of minor difference perhaps, in relation to the significance of St Martin's Island as a geographical feature, which Mr Lathrop on one occasion sought to play down – but I have to say he was somewhat contradictory. Early in his presentation he noted that if you were to stand on the Myanmar coast at any point between Cypress Point and the town of Kyaukpandu – a considerable distance by any standard – you would look toward the east-facing coast of St Martin's Island. That seems to suggest it is rather significant.²¹ But then, just a few minutes later, he backpedalled rather furiously, denying that St Martin's Island is a "major geographic feature".²² So you can see it along large parts of Myanmar's coast, but it is not significant.

This also allows me to correct a minor error into which Professor Pellet fell, when he said that you could only see the mainland coast of Bangladesh from the northernmost tip of St Martin's Island.²³ I am afraid that is not correct: a part of the mainland of Bangladesh can be seen from any point on the east coast of St Martin's Island.

So let's turn to the "legal problems" that Mr Lathrop identified with our line. The first point to make is that in making that assertion Mr Lathrop ignored the any of the cases to which I directed you.²⁴ I am not now, this afternoon, going to repeat all of them, but let us just take one. You will recall that I drew your attention to the Hawar Islands, which are located very close to Bahrain but were not treated by the ICJ as a special circumstance in delimiting the territorial sea. We said that we looked forward to hearing from Myanmar what it had to say about the Hawar Islands, and why the ICJ had got its law wrong.²⁵ What did Mr Lathrop have to say? Yet again, nothing; he made no mention of this island. This is a characteristic feature of Myanmar's approach not just to my part of the case that I am addressing now, but to its treatment generally; it ignores unhelpful authorities and hopes that somehow they will just go away.

Mr President, the function of counsel is to assist the Tribunal and to confront the difficulties in its own arguments.

Having failed to engage with the difficulties posed by its own treaty practice, and by this and other unhelpful authorities, what he did instead was to reach out to a different class of cases. Now I have to say, this had us really puzzled. He homed in on two cases in particular, in support of his proposition that St Martin's was indeed a special circumstance

²¹ ITLOS/PV.11/8, p. 19, line 31 (Lathrop).

²² ITLOS/PV.11/8, p. 25, line 41 (Lathrop).

²³ ITLOS/PV.11/7, p. 7, lines 34-35 (Pellet).

²⁴ ITLOS/PV.11/3, pp. 17-23 (Sands).

²⁵ ITLOS/PV.11/3, p. 19, line 21 (Sands).

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within the meaning of article 15, one that should cause a normal equidistance line in the territorial sea to be adjusted or rejected.

Last Friday, in his submissions, Mr Lathrop directed you to the award of *Guinea v Guinea-Bissau*. He described it – you can see it on the screen -- as “the most directly relevant case when it comes to the treatment of islands in the delimitation of the territorial sea.”²⁶ That being the case, one might ask oneself what did Myanmar have to say about the most directly relevant case in its Counter-Memorial. Well let us have a look at what Myanmar had to say. It is not a technical hitch Mr President: of the “most directly relevant case”, they said ... nothing. What did they say about it in the Rejoinder? We have already mentioned to you that they thought – you can see it on your screen now - the award was “so eccentric that it is difficult to refer to it”,²⁷ but that is not all they had to say in their Rejoinder. Eccentric perhaps, but nevertheless somehow they overcame the monumental difficulty of referring to it, and this is what they said: “The award cannot be applied to the geography in the present case.”²⁸ So what is it, Mr Lathrop? Have you actually read the pleadings? What is Myanmar’s case? Is *Guinea v Guinea-Bissau* inapplicable to the geography of this case, or is it the most directly relevant authority? I have to say that as I listened to this the episode reminded me of a particularly splendid answer given by a witness during a cross-examination in another case a few years ago. When asked whether she had ever seen previously seen a document, the witness initially declined to answer. She was pushed by the distinguished presiding arbitrator, and eventually she gave the following memorable response to the question: “Have you ever seen this document before?” “Yes”, she said, first [pause]; “No”, she said a moment later [pause] – “Maybe”, she said a moment after that. Is this the way in which Myanmar invokes *Guinea v Guinea-Bissau*? We look very much forward to hearing on Saturday whether it is “yes” or “no”, or “maybe”, or perhaps some combination of the three.

Let’s try to help you on this case. As you can see on your screens, there were some islands off the coast of Guinea and Guinea-Bissau, and some were within 12 M of the coast. The arbitral tribunal did not effect the delimitation by means of an equidistance line: it effected it in three stages. The line A to B reflects the agreement set forth in the 1886 Convention between Portugal and France; the segment B to C reflects the limit of Guinea’s claim in that area, and it will be noted that Guinea did not claim a 12 M territorial sea for these islands; and the segment beyond C is effected by using a bisector, as you can see in red on your screen; and it was drawn to ensure that Alcatraz Island remained squarely within the area claimed by Guinea. That is why the islands were not given a full 12 M. The issue of equidistance simply never came into play. Mr President, the award provides no support for the proposition that St Martin’s Island is not entitled to a full 12 M territorial sea.

Digging deep, very deep in fact, Mr Lathrop found another novel argument to justify an adjustment of the equidistance line in the territorial sea. He raised the spectre of the alleged disparity in the distance between the base points used on the coasts of St Martin’s Island and of Myanmar to draw the equidistance line. Mr Lathrop said that these had “a highly disproportionate ratio of approximately 1:20”.²⁹ In support of that argument he invoked a single case, the ICJ judgment in the *Jan Mayen* case, citing its conclusion that a coastal disparity of 1:9 as between the relevant coast of Greenland (Denmark) and the island of Jan Mayen was “a special circumstance that called for an adjustment of the equidistance line”.³⁰ This was even more curious than his new-found love for *Guinea v Guinea Bissau*: in that case (Jan Mayen) the line that was being delimited was not of the territorial sea, but of

²⁶ ITLOS/PV.11/8, p. 27, lines 25-26 (Lathrop).

²⁷ RM, para. 4.27.

²⁸ RM, para. 3.20.

²⁹ ITLOS/PV.11/8, p. 20, line 45 (Lathrop).

³⁰ ITLOS/PV.11/8, p. 21, lines 1-2 (Lathrop).

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fishing zones and continental shelf. As you can see now on your screens, the island of Jan Mayen is located some 245 M from the coast of Greenland, and it has a full 12 M territorial sea. It is simply irrelevant to the delimitation of the territorial sea.

There was a theme running through Mr Lathrop's presentation: he sort of forgot that he was dealing with the delimitation of the territorial sea. Time and again, he took you to cases that relate to the area beyond 12 M, and then he invited you to apply their findings to the delimitation within the 12 M limit. That is not something this Tribunal can or should do, and certainly cannot do safely, Mr President, without doing considerable damage to the well-established case law, all of which recognizes that islands located within 12 M are entitled to a full 12 M territorial sea. Let us not forget that Mr Lathrop's presentation was entitled: "The Delimitation within 12 Nautical Miles". It seems that in reality he was setting up the case for the delimitation beyond 12 M. This strategy was as plain to us as his pleading was confused, and he was just as wrong about truncating St Martin's beyond 12 M, a point to which Mr Reichler will return tomorrow.

Mr President, Myanmar has given every impression that it recognizes that it cannot win this part of the case. It knows that its own practice, the text of the 1982 Convention and the jurisprudence point decisively to a judgment from this Tribunal that gives St Martin's Island a full 12 M territorial sea.

What this necessarily means, as the 1974 Agreement and subsequent practice have confirmed, is that the end point of the territorial sea delimitation is where Bangladesh says it is: either at point 7 of the 1974 agreement, or at point 8A on Bangladesh's modern equidistance line plotted strictly in accordance with the requirements of article 15. Which brings me by way of wrap-up to another final curiosity of Myanmar's presentation of its case in oral argument: despite the clarity of what we thought we had said in the first week of hearings, it seems that we were not clear enough. Let me give you one example. Last Thursday we heard Professor Pellet say that it was "worth noting that our opponents do not contest the principle itself that there be a necessary semi-enclaving of St Martin's Island".³¹ Those were his words. In fact, it repeated a point made at paragraph 3.4 of their Rejoinder.

I have to say that I was pretty surprised when I heard him say that, as we thought we had taken the trouble to say very clearly that his claim, in paragraph 3.4 of their Rejoinder, was "totally wrong" – those were my words – and that we did and do contest that principle. The words "totally wrong" seemed to us to admit of no ambiguity, but in order to avoid any possible doubt, I also said the following, as the transcript will show. I said: "We have never accepted that there is any sort of enclave to be established around St Martin's, and until 2010 Myanmar made no such claim either".³² How, then, could Professor Pellet say what he did? Perhaps he had not heard me. I continued to wonder why, in the face of our clear denial, he still believed that we were supportive of an enclave around St Martin's Island. Then, thankfully, on Monday he gave us a clue. He made a reference to modern art. He referred to the work of the Dadaists and the surrealists.³³ Professor Pellet had entered the world of the surrealists, the world of surprises, the world of unexpected juxtapositions and *non sequiturs*. Perhaps therein lies the explanation for his odd statement, and suddenly, magically, I understood. One of the most well-known surrealists is the Belgian artist Rene Magritte, and one of his most famous paintings, dating to 1928, is titled 'La trahison des images'. You can see that on your screens; it's his painting. Some of you, I am sure will be familiar with it. It shows an image of what appears indisputably to be a pipe, and then underneath it the words 'Ceci n'est pas une pipe'. Magritte's point was that what we are looking at is not a pipe; it is an image of a pipe.

³¹ ITLOS/PV.11/7, p. 8, lines 21-22 (Pellet).

³² ITLOS/PV.11/3, p. 28, lines 27-29 (Sands).

³³ ITLOS/PV.11/10, (19 September 2011, p.m. session) (Pellet).

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With that in surrealist clue in mind, we think that we can perhaps understand Myanmar's approach to the delimitation of the territorial sea, which you will be able to see on the screens. It plainly shows the island of St Martin's Island within a partial enclave. So I can add the surrealist words, 'Ceci n'est pas une enclave'. Taking this surrealist approach, I suppose that that description of this image could be right. It is not an enclave, it is only an image of an enclave, and that would surely have been Rene Magritte's point if we had retained his services instead of those of our marvellous cartographers. Adopting that surrealist approach, let us try to be a little more precise, in the hope that we can once and for all impress upon Myanmar's counsel what our position is. Let us take a clear image that shows our line of delimitation of the territorial sea. You can see it in red and you see St Martin's Island. We can now graphically represent our belief that our line of delimitation does not depict an image of an enclave, and we can add the words, to be clear, 'Ceci n'est pas l'image d'une enclave'. Mr President, for the avoidance of all doubt, we remain totally opposed to any encaving of St Martin's. There is no justification for it in art or in law.

The point is actually a serious one. Counsel for Myanmar keep coming back to the enclave point, presumably as a means of helping to push the line of the territorial sea delimitation back to their point E. As you can see on the screen, point E is where Myanmar would like the territorial sea boundary to reconnect to their putative, imaginative, erroneous, novel and legally indefensible mainland-to-mainland equidistance line. They are as keen on point E as they are on an enclave, Mr President – so keen, in fact, that you too will no doubt have noted the concession that Professor Pellet made last Thursday afternoon, picking up on a hint made at paragraph 3.7 of their Rejoinder. "In any case", he told you, "we have to join the equidistance line plotted thus",³⁴ implying that they could live with a full 12 M territorial sea for St Martin's Island, so long as a line connecting the end point of a full 12 M territorial sea is then drawn to Myanmar's proposed point E. On your screens, in red, you can see what it would look like. That is what Myanmar is playing for. As you can see for yourselves, it is a manifestly unsupportable suggestion, deprived of any legal authority, and we invite you to robustly reject the suggestion. Point E is not, and has never been, a reasonable starting point for the delimitation of the continental shelf. It assumes the conclusion that St Martin's Island is not to be given any weight beyond the territorial sea. That is the point of their argument. Tomorrow, Mr Reichler will explain why there is no justification for refusing to give St Martin's Island anything less than full effect from the territorial sea boundary throughout the EEZ and continental shelf up to the 200 M limit. The correct starting point, the one you can see on your screens, is point 7 of the 1974 agreement, alternatively point 8A of the modern equidistance line.

Mr President, that concludes my presentation and, as we indicated yesterday afternoon, the presentations of Bangladesh are now concluded for today. The boundary in the territorial sea must be an equidistance line as required by article 15. St Martin's Island is not a special circumstance; it is entitled to a full 12 M territorial sea. We look forward to resuming tomorrow afternoon, assisted by a plentiful supply of graphics and charts that are intended to assist the Tribunal with its work, when Mr Reichler will pick up from my submissions and address the arguments of Myanmar on the delimitation of the EEZ and continental shelf. *Ceci est une promesse, M. le President*. I thank you for your kind attention.

The President:

I thank you, Mr Sands. That concludes our sitting today. The hearing will resume tomorrow morning at 10 a.m. The sitting is now closed.

³⁴ ITLOS/PV.11/7, p. 8, lines 13-14 (Pellet).

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

(The sitting closes at 4.34 p.m.)

22 September 2011, a.m.

PUBLIC SITTING HELD ON 22 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 22 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good morning. Today, Bangladesh will continue its second round of oral arguments in the dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I call upon Mr Paul Reichler to make his presentation.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR REICHLER
 COUNSEL OF BANGLADESH
 [ITLOS/PV.11/13/Rev.1, E, p. 1–16]

Mr Reichler:

Mr President, Members of the Tribunal, good morning. It is an honour for me to appear before you again.

Myanmar's counsel have struggled mightily during these proceedings - they have pulled out all stops - to persuade you to disregard St Martin's Island in the delimitation of the boundary beyond the territorial sea. At least four different lawyers dedicated themselves to this objective.¹ I admire their fortitude, and their imagination; but, with respect, they have produced an extremely complicated set of abstract arguments on this issue that are both misguided and impractical. They ignore the law and the established geographical facts. Their approach to the problem is ultimately unhelpful.

Their extraordinary and unorthodox efforts remind me of the four electricians who went to replace a burnt-out light bulb in the ceiling. The master electrician stood on a chair, holding the bulb high over his head, while his three apprentices slowly turned the chair.

I have a vision of my old and dear friend, *mon cher ami, mon frère*, Professor Pellet standing on a chair, holding the bulb high over his head, while his three apprentices, his three acolytes slowly turn the chair. "Angular displacement", shouts Mr Lathrop, straining under the weight; "Wrong side of the line", grunts Professor Forteau; "Dominant mainland coast", says Mr Müller; and then, in unison, the final *cri de coeur*: "Mainland to mainland provisional equidistance line".

Like the electricians, Myanmar's counsel supply an overabundance of effort, and provide a much-too-complicated solution, to a not-so-difficult problem. But the worst of it is: when they finish the job, the room is still dark.

Mr President, the problem of how to treat St Martin's Island is an important one, but it is not an especially difficult one to solve, and it takes not more than a single lawyer to do it, even one with talents as limited as mine.

There are really two ways to solve the problem. The first way – which is the one used by Bangladesh – is to delimit the boundary by means of an angle bisector. The bisector is drawn from the angle created by the intersection of the mainland coastal facades of the two States at their land boundary terminus. Then, to take account of St Martin's, the bisector is transposed to the south so that it begins at the outward limit of the territorial sea boundary.

The transposition of the bisector is not as innovative as Myanmar would have you believe. In fact, it is not innovative at all. It is something that has already been done three times in the case law: by the ICJ, by a Chamber of the Court, and by a distinguished arbitral tribunal. Professor Crawford will discuss these cases with you.

In regard to the use of an angle bisector or other non-equidistance methodologies, I am grateful to my friend, Mr Lathrop, for calling the attention of the Tribunal to the excellent article by Sir Derek Bowett in Volume I of the *International Maritime Boundaries Series*, concerning State practice in regard to delimitations involving islands.² The article entirely supports Bangladesh's approach, as Professor Sands pointed out yesterday. However, Professor Sands also called attention to the strikingly incomplete manner in which Mr Lathrop quoted from that article. Here is another example - Mr Lathrop cited Sir Derek for this proposition: "that offshore islands have a greater potential for distortion of any

¹ A. Pellet, M. Forteau, C. Lathrop, B. Samson. See e.g. ITLOS/PV.11/9, p. 15, lines 19-28 (Forteau).

² D. Bowett, "Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations", in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries* (2005), Vol. 1, p. 131.

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equidistant line in situations of adjacency than in situations of oppositeness”.³ Those *were* Sir Derek’s words, but they were only *some* of his words. The entire sentence from which Mr Lathrop extracted them, reads as follows:

*The rejection of equidistance is therefore presumably connected with the fact that offshore islands have a greater potential for distortion of any equidistance line in situations of adjacency than in situations of oppositeness.*⁴

“The rejection of equidistance”: rather important words to leave out, would you not say?

Also left out by Mr Lathrop, is the paragraph immediately preceding these words, from which Sir Derek drew his conclusion, in regard to the “rejection of equidistance”.⁵ He cites seven examples in State practice, where equidistance was rejected on these grounds in delimitations involving islands. Three of them employed angle bisectors to delimit the boundary, two used parallels of latitude, one used a straight line running along a constant azimuth, and the last used a series of loxodromes. I will not take up the Tribunal’s time elaborating on them, but the paragraph from Sir Derek’s article that sets this out is at tab 7.1 of your Judges’ folder.

I said there are two ways to address St Martin’s Island. Bangladesh’s preferred way is a transposed angle bisector. But if, contrary to Bangladesh’s view, equidistance is *not* rejected, the legally correct application of equidistance methodology, reflected in the case law, leads to an entirely different conclusion than the one advocated by Myanmar. It leads to the conclusion that St Martin’s must be given full weight in any solution based on an equidistance line, and that even *this*, is not enough to achieve the equitable solution that is required by the 1982 Convention.

Mr President, my presentation this morning will consist of three parts. First, I will discuss the opposing conclusions the Parties draw from their review of the case law regarding the effects given to islands in the delimitation of maritime boundaries. On the one hand, both Bangladesh and Myanmar rely on essentially the same cases. On the other, they draw opposite conclusions from these cases. Myanmar claims that they support exclusion of St Martin’s Island from the delimitation of the maritime boundary in the EEZ and continental shelf. Bangladesh disagrees. We say the case law demonstrates conclusively that St Martin’s must be given full effect in delimiting the area between 12 and 200 M. With your indulgence, Mr President, I will take you through these cases, and show you that Bangladesh is right, and Myanmar is wrong, in regard to the proper conclusions to be drawn from the rather considerable body of jurisprudence developed by the ICJ and arbitral tribunals.

In the second part of my submission, I will apply the legal principles derived from the case law to the delimitation between Bangladesh and Myanmar, and in particular to the treatment of St Martin’s Island. It will be *very* plain from this exercise that the law does not allow St Martin’s Island to be ignored; to the contrary, it requires that St Martin’s be given full effect in the construction of a provisional equidistance line; and then it requires an adjustment of that line in Bangladesh’s favour, to abate the distorting effects of the only truly relevant circumstance in this case: the double concavity of Bangladesh’s coast. Only in this manner can the Tribunal fashion an equitable solution, as required by the 1982 Convention.

³ ILOS/PV.11/8 p. 24, line 44 to p. 25, line 1 (Lathrop).

⁴ D. Bowett, “Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations”, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries* (2005), Vol. 1, p. 135.

⁵ *Ibid.*

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In the third and final part of my presentation, I will discuss, based on the case law, Bangladesh's view of how an equitable delimitation of the EEZ and continental shelf might be achieved in this case.

With your permission, Mr President, I will turn to the Parties' opposing interpretations of the case law, starting with that of Myanmar. There is more than a bit of contradiction in Myanmar's position. Mr Lathrop calls St Martin's "the epitome" of a special or relevant circumstance,⁶ while Professor Forteau insists that St Martin's is anything but a relevant circumstance.⁷ However, they do agree with one another that it should be given no effect in the delimitation, because it purportedly satisfies three conditions: (1) St Martin's is an island that is in a relationship of adjacency with the mainland of another State; (2) it lies in close proximity to the coast and land boundary terminus; and (3) there are no so-called "balancing islands" to offset its effects.⁸ Under Myanmar's view, it is a rule of law, derived from the jurisprudence, that any island that satisfies these three conditions must, *a fortiori*, be disregarded in any delimitation beyond the 12 M territorial sea.

There are several fundamental problems with Myanmar's view of the law. First, all of their three conditions are, to use Mr Lathrop's own very apt description of them, entirely "abstract" concepts.⁹ Myanmar would apply them universally regardless of the geographical context in which the islands exist. We say it is only by examining an island in the overall geographical context of a particular case, taking all of the relevant coastal geography into account, that it is possible to determine whether the island's effect is so distorting that it should be disregarded or given less than full weight. Second problem, and relatedly, is that no Court or arbitral tribunal has ever held that mere adjacency to another State's mainland coast, by itself, requires an island to be disregarded. It all depends on the context. The distorting effect of the island on the provisional equidistance line must be demonstrated. Third, there is no case – none – in which islands have been disregarded either because of their proximity to the land boundary terminus, or because there are no so-called "balancing" islands to offset their effects. Myanmar's three principles are, simply put, completely made up to fit this case. They are not supported by the case law.

If we examine the islands at issue in the principal cases relied on by both Parties, including, especially, the cases invoked by Professor Forteau Monday afternoon, we can see this very clearly.¹⁰ Even more, we can see from these cases that the ICJ and arbitral tribunals have, indeed, developed a clear and common approach to the determination of whether an island exerts such a distorting effect on the provisional equidistance line that it must be disregarded or given less than full weight in the delimitation; but what has emerged from all of these cases is nothing like the interpretation served up by Myanmar's counsel.

The common approach, the *de facto* rule, which emerges from the case law is this: an island *may* be deemed to have a distorting effect if it pushes the provisional equidistance line across the coast of another State, cutting off the seaward projection of that State's coastal front. Two elements are required for the island to be disregarded or given less than full weight: (1) the deflection of the equidistance line directly across another State's coastal front; and (2) the cut-off of that State's seaward access.

As we examine the cases, you will find that *this* is the unifying principle that explains and justifies *all* of the decisions cited and relied on by both Parties, including the cases mentioned by Professor Forteau on Monday. Mr President, this is Bangladesh's interpretation

⁶ ITLOS/PV.11/8, p. 23, line 44 (Lathrop).

⁷ ITLOS/PV.11/10, p.12, line 44 to p. 13, line 3 (Forteau).

⁸ ITLOS/PV.11/8, p. 24, line 42 to p. 25, line 6 (Lathrop).

⁹ ITLOS/PV.11/8, p. 25, line 15 (Lathrop).

¹⁰ ITLOS/PV.11/10, p.13, lines 13-35 (Forteau).

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of the law, and I am confident that by the time we finish you will agree that it is the correct one.

As you will recall, Professor Forteau told you that in all of the cases involving islands like St Martin's, the ICJ and arbitral tribunals have disregarded them.¹¹ The key words are "islands like St Martin's". Of course, it is much easier to *say* that the islands in these cases were like St Martin's than to *prove* it, and Professor Forteau did no more than *say* it, and provide you with a list of cases and names of islands. But it could not have escaped your notice that he did not present maps showing these islands, or showing the delimitation lines that were adopted, or any of the reasons the islands were disregarded. It thus falls to me to do so.

As we go through the cases carefully and individually – and there is no other way to do it – you will see a common approach, a common principle, emerge from them. And you will see that the case law does not support Myanmar's argument: it does not support the exclusion of St Martin's from the delimitation of the EEZ and continental shelf in this case. Quite the contrary: it supports not only including St Martin's, but also giving it full effect in delimiting the boundary beyond 12 M.

Mr President, we begin with the *Anglo-French Continental Shelf* case, to which Professor Forteau, Professor Pellet and Mr Lathrop have referred many times¹² (this is at tab 7.2). What you see on the screen is an equidistance line, as proposed by the United Kingdom, giving full weight to the Channel Islands - which lie directly in front of France's coast and more than 60 and 75 M, respectively, from Britain - and giving full weight as well to the Scilly Isles.¹³ You will clearly observe these effects: the Channel Islands push the equidistance line closer to, and across, the French coast, blocking its seaward projection into the English Channel; and the Scilly Isles (which are in a relationship of adjacency to the French coast) push the equidistance line across France's north-western coastal front, as shown by the thicker red arrow.

To relieve these blocking effects as best it could, the Court of Arbitration enclaved the Channel Islands, and gave half effect to the Scilly Isles, as is now shown.¹⁴ If you look at the delimitation line in the vicinity of the Scilly Isles, you will see that its direction was adjusted so it would more closely approximate that of, rather than cut across, the seaward projection of the French coastal front. As Professor Forteau very appropriately reminded us: "Delimitation depends" - and this is the first aspect of the principle "on the coastal configuration", and "the land dominates the sea through the projection of the coasts or the coastal fronts".¹⁵ We agree. You will soon see how this applies to the delimitation in this case, and fully supports Bangladesh's position.

The next case cited by Professor Forteau on Monday was *Eritrea v. Yemen*. The approach followed by the arbitral tribunal in that case was similar to the one employed in the *Anglo-French* arbitration (this is at tab 7.3). *Here* is the delimitation line adopted by the arbitral tribunal, which did not give weight to the Yemeni islands of al-Zubayr and Jabal al-Tayr.¹⁶ And this is why: if these islands, which are located at a great distance from the mainland, had been given full effect, the equidistance line would have been pushed directly

¹¹ ITLOS/PV.11/10, p. 13, lines 13-35 (Forteau).

¹² ITLOS/PV.11/7, p. 7, lines 37-40 (Pellet); ITLOS/PV.11/8, p. 15, lines 15-19; p. 16, line 37 *et seq.*; p. 18, lines 17-18 (Lathrop); p. 31, line 45 *et seq.* (Pellet); ITLOS/PV.11/9, p. 31, line 15 (Lathrop); ITLOS/PV.11/10, p. 13, line 15 (Forteau).

¹³ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter "*Anglo-French Continental Shelf Case*"), at paras. 199, 201-202, 244.

¹⁴ *Anglo-French Continental Shelf Case*, at paras. 199, 201-202, 248-249.

¹⁵ ITLOS/PV. 11/9, p.10, lines 33-39 (Lathrop).

¹⁶ *Arbitration between Eritrea and Yemen*, Award, Second Phase (Maritime Delimitation), 17 December 1999, reprinted in 22 RIAA 335 (hereinafter "*Eritrea/Yemen II*"), at paras.147-148.

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toward, and closer to, Eritrea's coastal front. Of course, when States lie directly opposite one another - like Eritrea and Yemen across the Red Sea, or the UK and France across the English Channel - one State's mid-sea islands will inevitably push the provisional equidistance line closer to the other State's coastal front, generally cutting off or at least reducing its seaward projection in those areas.

This is not *always* the case when an island lies *adjacent* to the mainland coast of another State; but it does happen, and when it does, the same approach is followed. Take, for example, what the ICJ did in *Qatar v. Bahrain*, also cited by Professor Forteau (this is at tab 7.4). These two States lie opposite one another for part of the boundary, and then adjacent for another. In the area where they are adjacent, the boundary line drawn by the Court gives no weight to Bahrain's Qit'at Jaradah Island.¹⁷ Here is why: giving full weight to this feature, which is actually an underwater reef with a tiny and barely visible projection above sea level, would have pushed the equidistance line into Qatar's territorial sea, so that in the affected area Qatar would have enjoyed no more than a 4.5-M territorial sea.

Professor Forteau helpfully brought up the *Newfoundland/Nova Scotia* arbitration, where the same principle was employed (this is at tab 7.5).¹⁸ Sable Island lies 88 M off the coast of Nova Scotia.¹⁹ Here is the delimitation line adopted by the arbitral tribunal. If Sable Island had been given weight in the construction of the equidistance line, it would have deflected the line right across the seaward projection of Newfoundland's coast, producing a distinct cut-off effect as now shown.²⁰ This was, in fact, one of the principal bases for the arbitral tribunal's award. Especially because of what it called the "remote location" of this "small, unpopulated island", the arbitral tribunal expressed its "concern relat[ing] to the cut-off effect that the provisional line has on the south-west coast of Newfoundland".²¹

It is noteworthy, as well, that if Sable Island had been allowed to influence the equidistance line it would have pushed the line right across France's continental shelf emanating from St Pierre and Miquelon.²² The boundary line adopted by the arbitral tribunal carefully avoided that. Now, I can see why my French friends like the result, but it does not support their argument on behalf of Myanmar: none of their three so-called "conditions" for disregarding an island were even mentioned in the award, let alone taken into account. And the same can be said of all the other cases.

Professor Forteau gamely sought support from the ICJ's Judgment in *Tunisia v. Libya*, although here again it fails to support Myanmar's argument (this is at tab 7.6). Professor Forteau told you that the Court gave no effect to Tunisia's Djerba Island.²³ What he neglected to say was that the Court did not employ equidistance methodology in the delimitation. In its first segment, the delimitation line was based on a *de facto* agreement reflected in the Parties' oil concessions, and their consistent treatment of the clear line separating their respective concessions as the international boundary for many years.²⁴

¹⁷ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 40 (hereinafter "*Qatar v. Bahrain*"), at para. 219.

¹⁸ ITLOS/PV.11/10, p.13, lines 30-31 (Forteau).

¹⁹ *Limits of the Offshore Areas between Newfoundland and Labrador and Nova Scotia*, Award, Second Phase, 26 March 2002, available at [http://lawlibrary.unb.ca/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English\[1\]_opt.pdf](http://lawlibrary.unb.ca/boundaryarbitration/pdfs/Awards%20&%20Maps/PhaseII_Award_English[1]_opt.pdf) (hereinafter "*Newfoundland/Nova Scotia Phase II*"), at para. 4.32.

²⁰ *Newfoundland/Nova Scotia Phase II*, at paras. 5.13-5.15.

²¹ *Newfoundland/Nova Scotia Phase II*, at paras. 5.14-5.15.

²² *Case concerning the delimitation of Maritime areas between Canada and the French Republic*, 31 I.L.M. 1145 (1992), at p.1148.

²³ ITLOS/PV.11/10, p.13, line 18 (Forteau).

²⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 (hereinafter "*Tunisia/Libya*"), at para. 133(C)(2).

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The second segment of the boundary, to the north-east, was a transposed angle bisector.²⁵ Here is what the delimitation line would have looked like if equidistance methodology had been employed: a line cutting across Libya's coastal front and blocking its seaward prolongation into the Mediterranean. Equidistance plainly would have been inequitable to Libya.

Last week I showed you that the same approach was also followed in the *Dubai/Sharjah* arbitration, where the island of Abu Musa was given no weight in the delimitation of the EEZ boundary (this is at tab 7.7).²⁶ This is another case invoked by Professor Forteau on Monday.²⁷ Here again, the effect of Abu Musa was to push the equidistance line directly in front of, and across, Dubai's coastline, and to cut off its seaward projection into the Persian Gulf.²⁸ Let me briefly show you once more that giving Abu Musa weight in the EEZ delimitation would have created a functional concavity for Dubai – which explains why the cut-off effect was so severe in that case. Neither Professor Forteau nor any of his colleagues offered a response to this point in five sessions of oral pleadings.

Now let's take a look at the final case on which Myanmar places heavy reliance, *Romania v. Ukraine*.²⁹ This appears to be the favourite case of Myanmar's counsel. We were told repeatedly that this case was decided unanimously, and that it represents the current state of maritime boundary delimitation law.³⁰ We welcome Myanmar's reliance on this case, because it follows exactly the same pattern as all the others. It employs precisely the same approach in seeking to avoid cut-off – as all of the other cases we have been discussing in regard to the effects of islands, and the geographic circumstances in which they may be disregarded when equidistance methodology is used (this is at tab 7.8).

As we all know, Ukraine's Serpents' Island – 22 M off the coast and 1/50th the size of St Martin's – was given no weight in the delimitation of the EEZ.³¹ Here is why: just as in all of the other cases we have been analyzing, the effect of this island would have been to push the provisional equidistance line directly across, and in front of, Romania's coast, significantly cutting off its access to the Black Sea.³²

Why was the cut-off of Romania so pronounced in these circumstances? Because the inclusion of Serpents' Island in the delimitation of the EEZ would have created a functional concavity for Romania. The ICJ did not make reference to any concavity on Romania's coast, but it did fashion a solution that abated the cut-off effect produced by Serpents' Island's deflection of the equidistance line across Romania's coastal front.³³

Myanmar has spent a lot of time talking about adjacency and oppositeness, about proximity to the land boundary terminus, about being on the "wrong side" of an artificially constructed "mainland to mainland provisional equidistance line", and about so-called "balancing islands", but the fundamental rule that emerges from the case law, when properly reviewed, is none of the above. The central and unifying principle common to all these cases is this: if equidistance methodology is used – and we continue to say it should *not* be used in this case – an island must be given full weight unless it has the effect of pushing the

²⁵ *Tunisia/Libya*, at para. 129.

²⁶ *Dubai/Sharjah Border Arbitration*, Award, 19 October 1981, reprinted in 91 ILR 543 (hereinafter "*Dubai/Sharjah*"), at p. 677, para. 265.

²⁷ ITLOS/PV.11/10, p. 13, line 22 (Forteau).

²⁸ *Dubai/Sharjah*, at p.676, para. 263 and p.677, para. 265.

²⁹ ITLOS/PV.11/9, p.26, lines 41-43 (Lathrop); ITLOS/PV. 11/10, p.15, lines 27-29 (Forteau); ITLOS/PV.11/7, p.6, line 46 to p.7, line 3 (Pellet).

³⁰ ITLOS/PV.11/9, p. 26, lines 41-43 (Lathrop); ITLOS/PV.11/7, p. 2, 7, lines 1-3 (Pellet).

³¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86 (hereinafter "*Romania v. Ukraine*"), at paras. 149, 150, 186-188.

³² *Romania v. Ukraine*, Sketch-map No.1 at p.9.

³³ *Romania v. Ukraine*, at para. 201.

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provisional equidistance line across, and in front of, another State's coastal front, resulting in a cut-off of that State's seaward projection. If the provisional equidistance line *is* distorted in this manner, the island may be discounted, or given less than full weight in the delimitation. Otherwise, it must be fully counted. This is what all the cases we have just reviewed, including the cases expressly relied on by Professor Forteau and his colleagues, all show.

Mr President, I come now to the second part of my submission: the treatment of St Martin's Island under the applicable case law. We will look at the actual effects of St Martin's Island on the provisional equidistance line, and see how they compare to the effects produced by the islands in the cases we have just reviewed. On the screen is Myanmar's map depicting the seaward projection of its coastal front adjacent to and south-east of St Martin's Island. This map was presented by Mr Lathrop last Friday.³⁴ You can see from the thick arrow that the Myanmar coast projects seaward directly toward the southwest. This is true, and it can be appreciated even more clearly if we zoom out so that we can see the entire Rakhine coast of Myanmar. What we have just added to the picture is a properly drawn provisional equidistance line, which takes St Martin's Island fully into account. This is at tab 7.9.

Myanmar says that the equidistance method requires the following steps: first, to draw a provisional equidistance line taking all features, including islands, into account; second, to consider whether any of these features has a distorting effect on the provisional line, and if it does, disregard it and adjust the line accordingly. This process is described by Mr Lathrop in an article he wrote in the *American Journal of International Law* in 2008, to which he very helpfully referred us in footnote 8 to his speech last Friday. Here's what he wrote:

In applying the two-step equidistance process, the Court and other boundary tribunals have given full effect to the base points on all features, regardless of size, in the first step of the analysis: the construction of the provisional equidistance line. In the second step of the analysis, the effect of these features on the equidistance line has then been discounted, either partially or fully, if necessary, to achieve an equitable result.³⁵

As I pointed out last week, this is what Myanmar's counsel say, but then they do something altogether different: Mr Lathrop himself draws what he calls a provisional equidistance line that ignores St Martin's completely. He and his colleagues attempt to justify this by their *a priori* declaration that St Martin's has a distorting effect on the line. But how can they know this before they draw a provisional equidistance line that includes St Martin's, and assess its effects on the line? Professor Pellet said on Monday that an equidistance line must be chosen not on the basis of the subjective criteria of one of the parties, but on the basis of law.³⁶ We agree. But Professor Pellet and his colleagues fail to practice what they preach. What else but the subjective criteria of one of the parties – Myanmar – justifies excluding St Martin's from the drawing of the *provisional* equidistance line, even before its actual effects are measured?

Perhaps this is an illustration of what my friend and colleague, Professor Sands, might call the fourth golden rule of advocacy. It is this: If you write an article about the law, and then say exactly the opposite in court, do not be surprised when opposing counsel calls attention to the fact that you have contradicted yourself. We hope that, in Myanmar's second

³⁴ ITLOS/PV.11/8, tab 2.5 (Lathrop).

³⁵ Coalter G. Lathrop, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, 102 A.J.I.L. 113 (2008), at p. 118.

³⁶ ITLOS/PV.11/9, p. 6, lines 2-5 (Pellet).

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round, Mr Lathrop will tell us whether he got the law right in his article, or here in Hamburg. Yes, no, maybe, or none of the above.

In accordance with the standard practice of the ICJ and arbitral tribunals and, as set forth in Mr Lathrop's article, if not in his pleadings before this Tribunal, we have drawn a provisional equidistance line that includes St Martin's Island. What we see from this – and this is the critical point – is that it does *not* cut across, or in front of, Myanmar's south-west-facing coastal front in the area beyond 12 M. It does not cut off Myanmar. It does not block Myanmar's seaward projection. Except for the very beginning of the line within the territorial sea, where Myanmar accepts full weight for St Martin's in the plotting of the equidistance line, it runs entirely in the same direction as the seaward projection of Myanmar's coast; it runs *with* the grain, so to speak, not against it. Myanmar's own arrow clearly shows this. The provisional equidistance line, the legally correct one including St Martin's Island, creates no problem for Myanmar.

For Bangladesh, however, it is a different story. This is at tab 7.10. The provisional equidistance line, which includes St Martin's, *does* cut across somebody's coastal front, and *does* cause a significant cut-off effect – but the effect is not on Myanmar; it is on Bangladesh. It is Bangladesh, not Myanmar, which needs an adjustment of the provisional equidistance line, to achieve the equitable solution required by the 1982 Convention.

Professor Forteau points to this line, and he tells us: "The disproportion cannot be missed".³⁷ Really? If this is true for Professor Forteau, what he has told us is that disproportion, like beauty, is in the eye of the beholder. What this reveals about Myanmar's case is that disproportion is entirely a subjective concept. Professor Forteau's remark is a telling admission that there is no objectivity, no substance, no justification, no legal basis, for Myanmar's rejection of St Martin's Island.

Does St Martin's have an *effect* on the provisional equidistance line? Of course it does. That is true for geographical features, insular and mainland, used in plotting the provisional line: they contribute to its direction. If all features that merely contributed to the direction of the line were disregarded, there would be no line. The pertinent question is not whether a particular feature affects the provisional equidistance line but whether it *distorts* the line. Does St Martin's distort the provisional equidistance line? The answer, the objective answer, based on the case law, is "No"! St Martin's does not distort the line, because it does not cause the line to cross, or cut across, or cut off Myanmar's coastal front or its seaward projection. The only State cut off by a properly drawn provisional equidistance line is Bangladesh; and it is that cut-off that requires an adjustment, in favour of Bangladesh, to avoid an inequitable solution.

However, instead of adjusting the line to reduce the cut-off of Bangladesh, Myanmar asks the Tribunal to adjust it in the opposite direction, against Bangladesh, thereby further exacerbating the cut-off. Myanmar's line cannot be an equitable solution, but neither is the technically correct provisional equidistance line, even if it includes St Martin's.

The reason these lines, or any other form of an equidistance line, are inequitable to Bangladesh is not difficult to discern: it is the double concavity in which Bangladesh sits. The concavity is the proverbial elephant in the room that Myanmar steadfastly tries to ignore, or to wish away as what Professor Forteau called an "irrelevant" circumstance. But as we have seen in our review of the *Dubai/Sharjah* and *Romania/Ukraine* cases, the effect of a coastal concavity on an equidistance line is to distort it by pulling the line closer and closer to the coast, until its seaward projection is cut off. That was also true, of course, in the *North Sea* cases and in the *Guinea/Guinea Bissau* arbitration, where equidistance methodology was rejected altogether, for this very reason.

³⁷ ITLOS/PV.11/10, p. 14, lines 25-26 (Forteau).

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In this case, the pull – the distorting effect – of Bangladesh's double concavity is so strong that even St Martin's Island can do no more than slightly reduce, but not even remotely eliminate, the distorting effects of Bangladesh's double concavity. For these reasons, Bangladesh maintains that equidistance is the wrong methodology to apply in this case.

Myanmar appears to believe that two wrongs make a right. In the face of the distorting effects of Bangladesh's double concavity, Myanmar would remove St Martin's from the delimitation, thus depriving Bangladesh of the one feature that partially, but only partially, reduces the distorting effects of the concavity. This is piling injury on top of injury.

Myanmar must recognize that its treatment of St Martin's – giving it no effect – is unsustainable as a matter of law. But their alternative argument is even worse, and even less sustainable. They suggest that if St Martin's is given full effect, then full effect must also be given to their May Yu Island, also known as Oyster Island. This is, with respect, ridiculous. In their written pleadings, Myanmar all but disowned May Yu. They never sought any effect for it, and never drew a single line taking it into account. In their Rejoinder, May Yu is practically ignored, meriting a footnote,³⁸ and an afterthought to paragraph 5.32, which states:

St Martin's Island stands alone in the vicinity of the delimitation line – except May Yu Island (Oyster Island) to which Myanmar agrees that no effect is to be given in the delimitation of the maritime areas as long as St Martin's Island has no such effect either.

Myanmar's attempt to equate May Yu Island to St Martin's is difficult to take seriously. This satellite photo at the same scale is located at tab 7.11. May Yu is 1/400th the size of St Martin's. That is 0.25 %, a quarter of one per cent. Next to May Yu, Serpents' Island is a monster. This diagram compares the sizes of these islands. We start with May Yu in the lower right corner; using the same scale, we add Serpents', which is eight times larger than May Yu; then we add St Martin's which is 50 times bigger than Serpents'. This is at tab 7.12. Mr President, when it comes to islands: size matters. You already know about the location, population and economic life of St Martin's. The facts are undisputed by Myanmar. The facts about May Yu are also undisputed: it has no permanent population, no economic life of any kind, nor is it capable of sustaining either.³⁹ Myanmar's attempt to introduce alleged facts about May Yu for the first time at these oral hearings, which were not part of its written pleadings, and which are unsupported by any evidence before the Tribunal, is inadmissible as a matter of fundamental fairness.⁴⁰ In any event, Mr Samson's assertion that a permanent regiment of the Myanmar army is now stationed there is not credible. A regiment consists of between 3,000 and 5,000 soldiers. The only way that many soldiers could fit on this minuscule feature is by stacking them one on top of the other like folding chairs.

Mr Lathrop asserts that May Yu is an island under article 121.⁴¹ But, unlike St Martin's Island, which falls under article 121(2), and has the same entitlements in an EEZ and continental shelf as a mainland, May Yu is governed by article 121(3), which makes it a rock. In that regard May Yu is like Filfla, depicted here. Filfla is the Maltese rock that the ICJ gave no weight in the *Libya/Malta* delimitation.⁴²

³⁸ RM, footnote 169 to para. 3.18.

³⁹ RB, para. 3.124.

⁴⁰ ITLOS/PV.11/7, p. 12, lines 18-19 and p. 14, lines 30-38 (Samson).

⁴¹ ITLOS/PV.11/8, p. 16, lines 24-26 (Lathrop).

⁴² *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13 (hereinafter "*Libya v. Malta*"), at para. 64.

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On Monday, Mr Lathrop rather surprisingly tried to equate Filfla with St Martin's Island. St Martin's is more than 130 times larger than Filfla.⁴³ Filfla is actually three times larger than May Yu at high tide; Filfla was probably even larger at one time, but the British navy used it for target practice during World War II. From the photo, it looks like they had good aim. I thank Mr Lathrop for calling Filfla to mind, and especially the ICJ's decision to disregard it because "the equitableness of an equidistance line depends upon whether the precaution is taken of eliminating the disproportionate effects of certain 'islets, rocks and minor coastal projections'".⁴⁴

But to fully appreciate the mis-directedness of Myanmar's argument in regard to May Yu, we need only look back at the map. This is at tab 7.13. Here is a provisional equidistance line—in the red broken line-- giving full weight to both St Martin's Island and May Yu. Here is one giving full weight to St Martin's Island and half weight to May Yu—also a red broken line, even though May Yu is only 0.25% as large. As you can clearly see, little May Yu, tiny and insignificant as it is, has a big effect on the provisional equidistance line because of its seaward location: it pushes the line, even at half weight, more directly in front of and across Bangladesh's coastal front, and exacerbates even further the cut-off of Bangladesh. It has no role—no role-- to play in an equitable delimitation.

Mr President, please allow me to turn now from lines that are clearly inequitable to Bangladesh to one that is not. Let us try to find the equitable solution to this case. The next series of graphics will be found at tab 7.14. We start where we left off last week in Bangladesh's first round. On your screens is a display of how, and to what extent, a properly drawn provisional equidistance line – one that includes St Martin's Island – helps to reduce the distorting effects of Bangladesh's concave coast. For illustration purposes, as we explained last week, and not to "reclaim land", we have eliminated the secondary concavity from the picture, so that we can determine its effects on an equidistance line. The red line is what an equidistance line would look like if there were no secondary concavity, and if St Martin's were disregarded. The purple line is the provisional equidistance line including St Martin's. St Martin's, you will see and may recall, offsets much, but not all, of the effect of the *secondary* concavity, the concavity within a concavity. The orange area is the maritime space lost to Bangladesh by reason of the secondary concavity that is not recovered even by giving St Martin's the full weight to which it is entitled.

We have now added, in green, the angle bisector, before its transposition to the south of St Martin's. As you can see, the green bisector is less favourable to Bangladesh than a properly drawn provisional equidistance line, out to a distance of approximately 140 M. The difference between the two lines out to this point is shaded in red. However, as the green bisector extends seaward, beyond the point where it intersects with, and crosses, the provisional equidistance line, it actually recovers the orange area for Bangladesh. The highlighted line that you now see, formed by the purple equidistance line that includes St Martin's, in combination with the green untransposed bisector, can thus be said to properly offset the distorting effects of the *secondary* concavity in Bangladesh's coast.

This highlighted line, at first glance, might appear to resemble an equitable solution, but it is not. To be sure, it has the benefit of offsetting the distorting effects of the secondary concavity. It also appears to give both sides something of what they have argued for; for Myanmar, it is for 140 M an equidistance line, albeit a properly drawn one that includes St Martin's Island, as the law requires; and for Bangladesh it is for a 60 M a bisector, albeit one that is not transposed. But what makes this line still inequitable to Bangladesh is that it

⁴³ ITLOS/PV.11/9, p. 29, lines 3-10 (Lathrop).

⁴⁴ *Libya v. Malta*, at para. 64.

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does nothing to offset the distorting effect of the primary concavity; it addresses only the problem caused by the secondary one.

Here is the only way, we believe, it is possible to address, and abate, the distorting effects of both concavities. This is at tab 7.15. In fact, the distorting effects are still evident, because even this line, the transposed bisector, leaves Bangladesh with a tapering wedge of maritime space, the tell-tale sign of a major coastal concavity, as my colleague Mr Martin has explained. Nevertheless, the transposed angle bisector is the closest approximation to the equitable solution that this case requires. It properly accounts for all of the features of coastal geography on which delimitation within 200 M is based, including Bangladesh's double concavity and St Martin's Island. It divides the relevant maritime area proportionately and equitably, and Professor Crawford will show this to you following my speech.

Contrary to Myanmar's assertions, the ICJ did not speak of a "mainland-to-mainland equidistance line" in *Romania v. Ukraine*. It did not utter the phrase. However, it did break with custom and decide that Serpents' Island was entitled to no weight in the delimitation of the EEZ without going through the first step of constructing a provisional equidistance line taking it into account.⁴⁵ Mr Lathrop called this "unusual", and it is.⁴⁶ As he acknowledged, the general practice of the Court and arbitral tribunals, up to that point, had been to follow the two-step process he described in his article.⁴⁷ To that extent, *Romania v. Ukraine* represents a departure from the common approach.⁴⁸

However, the deflection of the equidistance line across, and in front of, Romania's coast, and the consequent cut-off effect caused by Serpents' Island, were so blindingly obvious, as our earlier graphic demonstrated, that the Court found no need for the first step. St Martin's Island has no similar effect, and certainly not against Myanmar.

How, then, are we to explain Mr Lathrop's assertions that: "there are minor differences in geography between the two cases"; and that St Martin's "must be eliminated from the construction of the provisional equidistance line, as a legal matter, for the same reasons Serpents' Island, an otherwise legitimate source of relevant base points, was eliminated by the Court in the *Black Sea* case"⁴⁹ There is no explanation for Myanmar's awkward attempt to conflate two very dissimilar geographic situations. Like the four electricians changing the light bulb at the beginning of my speech, Myanmar's counsel are guilty of trying too hard. Their approach also leaves us in the dark. On Friday, Mr Lathrop said that there were seven sources where the phrase "mainland-to-mainland equidistance line" can be found.⁵⁰ None of them is a judicial or arbitral decision or award. The first source cited is Mr Lathrop himself.⁵¹ It is, I would suggest, a relevant circumstance, when counsel has to resort to citing himself to support his argument.

Professor Forteau provides no illumination either when he invokes *Romania/Ukraine* for the rather strange proposition that a small island that is one of a "fringe of islands" may be regarded as part of a State's coastal configuration; but even islands as large, populated and

⁴⁵ Coalter G. Lathrop, "International Decision: Maritime Delimitation in the Black Sea", 103 A.J.I.L. 543 (2009), at p. 548.

⁴⁶ Coalter G. Lathrop, "International Decision: Maritime Delimitation in the Black Sea", 103 A.J.I.L. 543 (2009), at p. 548.

⁴⁷ Coalter G. Lathrop, "International Decisions: Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*)", 102 A.J.I.L. 113 (2008), at p. 118.

⁴⁸ Coalter G. Lathrop, "International Decision: Maritime Delimitation in the Black Sea", 103 A.J.I.L. 543 (2009), at p. 548.

⁴⁹ ITLOS/PV.11/9, p. 3, lines 2-3.

⁵⁰ ITLOS/PV.11/8, p. 15 lines 11-12 and footnote 57 to that text (Lathrop).

⁵¹ ITLOS/PV.11/8, p. 15 lines 11-12 and footnote 57 to that text (Lathrop).

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significant as St Martin's do not count as part of the coast – no matter how close they are to the State's mainland – if they are not part of a so-called “fringe” group.⁵²

It is true that the ICJ said that Serpents' Island could not be considered part of Ukraine's coast because, among other reasons, it was not one of a “fringe of islands”, but that does not help Myanmar. What the Court was saying was that the only way an island like Serpents', located beyond the territorial sea at 22 M from the coast, may be counted as part of the mainland coast, is if it belongs to a group of islands fringing the coast and straddling the 12 M limit.⁵³ St Martin's needs no such help from sister islands. It is within 5 M of the Bangladesh mainland, well within its territorial sea, and an integral part of its coastal geography.

It is worth noting that Sir Derek Bowett's article, which addresses State practice, draws this conclusion, at tab 7.16: “There are numerous examples of islands being given separate entitlement and full weight as against mainland coasts”.⁵⁴ This is reflected in the case law as well. For example, in the *Anglo-French* case, France's Ushant Island, 10 M off the French coast, was given full weight and controlled the median line for a length of 190 M.⁵⁵

Full weight was also given to very small islands, much less significant than St Martin's, in the *Eritrea/Yemen* case.⁵⁶ Professor Sands told you yesterday that all of these islands were given 12-M territorial seas. What I want to emphasize is that they were all given full weight in the delimitation of the *continental shelf*, too. These include some of Eritrea's Dahlak Islands, and Yemen's islands of Tiqfash, Kutama and Uqbar, all of which were treated as “coastal islands” even though they are farther from their respective coasts than St Martin's is from Bangladesh.⁵⁷ Contrary to what you were told by Mr Lathrop, nowhere in this award – nowhere – did the arbitral tribunal indicate that its decision to give full weight to these islands in the continental shelf was based in any way on the presence of so-called “balancing” islands.⁵⁸

None of Myanmar's counsel made any effort to explain how it could be equitable to give Myanmar's Little Coco Island full effect in the delimitation of the equidistance boundary with India out to the 200-M EEZ limit, but not equitable to provide the same treatment to St Martin's Island, which is the same size as Little Coco and much closer to the mainland coast. As you know, equidistance methodology was rejected in the *Guinea/Guinea Bissau* case. But it is interesting to note that the arbitral tribunal considered tiny Alcatraz Island to be significant enough to transpose the boundary line more than 12 M to the west in order to keep Alcatraz within Guinea's waters. Alcatraz Island is much smaller than St Martin's, much further from the mainland coast, and has no population, except for the rather extended family of seabirds you see on your screens.

At tab 7.17 there is another of Sir Derek Bowett's conclusions. I am reading in the interest of time from the middle of the highlighted portion but the rest of the paragraph is presented:

the notion of ‘distortion’ is always linked to a perception of what the line would otherwise be, if the island did not exist. A variation caused by the island which

⁵² ITLOS/PV.11/10, p. 12, lines 3-7, 35-38; p. 13, 14-18; p. 14, lines 19-22; p. 15, lines 19-22; p. 17, lines 1-6.

⁵³ *Romania v. Ukraine*, at para. 149.

⁵⁴ D. Bowett, “Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations,” in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries* (2005), Vol. 1, p. 132.

⁵⁵ *Anglo-French Continental Shelf*, at para. 251.

⁵⁶ *Eritrea/Yemen II*, at paras. 146, 151.

⁵⁷ *Eritrea/Yemen II*, at paras. 146,

⁵⁸ ITLOS/PV.11/8, p. 25, lines 4-6; p. 25, lines 10-11 (Lathrop).

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appears inequitable, given the location and size of the island, will be regarded as a “distortion”.⁵⁹

That is Bangladesh’s argument. One cannot judge an island’s effects to be distorting based on a set of abstract rules, let alone “rules” or “conditions” that have never been adopted or applied by any Court or arbitral tribunal. Nor is it wise, except in the most extreme cases, to exclude an island on the basis that it is distorting, without first plotting a provisional equidistance line that demonstrates such an effect. Distortion can only be determined by looking at the effects of an island on a particular provisional equidistance line, within a specific geographical context.

And this is precisely what the ICJ and arbitral tribunals have done. The common thread of all the decided cases – the unifying theme – is that islands are deemed to distort the equidistance line and produce an inequitable result when they push or deflect the line across and in front of another State’s coast and cut off its seaward projection. St Martin’s Island produces no such effect on Myanmar. It is not “extraneous” to this delimitation. It cannot be ignored; it cannot be disappeared. It is entitled to, and should be given, full weight in the event an equidistance approach is favoured by the Tribunal.

But even then, the resulting line will not be equitable to Bangladesh. To produce an equitable result in this case, a further adjustment must be made to mitigate the effects of Bangladesh’s concave coast, since St Martin’s by itself provides insufficient mitigation, or a more appropriate delimitation methodology should be employed. And this is where I will pass the baton to Professor Crawford.

But before doing so, however, I feel that a response should be made to the conclusion that Mr Lathrop gave to his argument on Monday, which – not to single him out – may have reflected his colleagues’ attitude as well. Here is a graphic that he presented on Monday, and these are his words: “The fact that Myanmar, Bangladesh and India share a tripoint in the vicinity of point Z is a *geographic fact*. Bangladesh *must learn to live with that fact*”.⁶⁰ The tone was as unfortunate as the statement was wrong. With respect, it is not for counsel – not even Bangladesh’s own counsel – to lecture a sovereign State on what it “must learn to live with”. This conveys a message that is inconsistent with the spirit of friendship and mutual respect that was underscored in the very commendable opening speeches of the Agents of both Parties.

Mr Lathrop’s statement about Myanmar’s point Z is not only unkind but untrue. Point Z is not a “geographic fact”. The concavity of Bangladesh’s coast is a geographic fact. It is apparent on every map and chart of the region, except those that Myanmar put in front of you, which have a cut-off effect of their own: they cut off almost all of Bangladesh; in fact, they cut it entirely out of the picture, except for the small slice of coast next to the land boundary terminus. One gets the impression that they not only want you to ignore the concavity and ignore St Martin’s Island, they want you to ignore *Bangladesh!*

Like the concavity, St Martin’s Island is also a geographic fact. You can go there, and you can stand anywhere on its eastern shores and see the mainland coasts of both Bangladesh and Myanmar.

In contrast, point Z exists only on paper. It cannot be found anywhere in the Bay of Bengal. It is an imaginary point derived solely by the cartographic manipulation of ignoring the real, physical geographic facts: the concave Bangladesh coast, and St Martin’s Island.

⁵⁹ D. Bowett, “Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations”, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries* (2005), Vol. 1, pp. 143-144.

⁶⁰ ITLOS/PV.11/9, p. 34, lines 30-32 (Lathrop).

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You cannot get there otherwise. In the words of the American, and French, poet Gertrude Stein, who was not, but might have been, referring to point Z: “There is no there, there”.⁶¹

If point Z were ever to come into existence, it would not be by natural means. It would be a man-made disaster and one which Bangladesh trusts that the Members of this Tribunal, in your wisdom, mastery of the law, and commitment to achieve an equitable solution, will not allow to occur.

Mr President, Members of the Tribunal, since this is the last time I will be addressing you in these proceedings, please allow me once again to say what an honour and a privilege it has been for me to plead before you in this history-making case. I am very grateful and proud to be a part of it. I thank you again for your patience and your kind and courteous attention. And I ask that you now give the floor to Professor Crawford.

The President:

Thank you, Mr Reichler, for your statement.

I now give the floor to Mr James Crawford.

⁶¹ G. Stern, *Everybody's Autobiography* (1937), at p. 289.

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STATEMENT OF MR CRAWFORD
COUNSEL OF BANGLADESH
[ITLOS/PV.11/13/Rev.1, E, p. 16–24]*Mr Crawford:*

Mr President, Members of the Tribunal, in this presentation, I will do two things. First, I will deal with Myanmar's critique of the relevant coasts and areas as presented in our first round; and, secondly, with its critique of the angle bisector as a solution to the problem that Bangladesh finds itself in - shelf and zone-locked in the vast open area of the Bay of Bengal.

I turn then to the first of these topics, the relevant coasts and relevant areas. There are three aspects of the problem for which our argument was criticized: first, the western segment of the line with India; second, the question whether a line should be drawn across or within the Meghna Estuary and whether its coasts count as relevant; and, third, the southern portion of Myanmar's coast between Bhiif Cape and Cape Negrais. Before I deal with these, I should note that Myanmar made no answer to my criticism of the way in which their line measured their coastal configuration in loving detail, while ours was given a broad-brush treatment. I mentioned in that context the point about fractal geometry; there are many different ways of measuring coasts and one must at least be consistent as between different coasts.¹

Turning first to the putative line separating Bangladesh from India, we told the story so far in our Reply.² Counsel for Myanmar, with great independence of mind, complained that in no way could Myanmar be required to bear any burden or risk relating to the unknown claims of India.³ I am afraid that there is legitimate concern on Bangladesh's part that it is the odd person out in a game of "pass the parcel" – or perhaps the game is "pass the counsel". However, for the sake of argument, and only for the purposes of this exercise, let us accept Myanmar's version of the western limit of the relevant area, shown on the screen.

Then at the other end of the coast we have the controversy pitting Cape Bhiif against Cape Negrais. You can see these two features on the screen now, with the distances from the land boundary terminus: this is tab 7.19 in your folders. Myanmar argues that all the coast down to Cape Negrais is relevant despite its great distance from the delimitation area, this cannot be right.

In *Jan Mayen*, the Court identified the relevant coasts as follows: You can see the graphic transposed from the Court's decision.

It is appropriate to treat as relevant the coasts between points E and F and between points G and H on sketch-map No. 1 in view of their role in generating the complete course of the median line provisionally drawn which is under examination.⁴

You see these four points on the screen. The segments situated north of point H and south of point G were not considered as relevant for two reasons. First, the Greenland coast north of point H was not relevant because "Point H, in conjunction with point E determined the equidistance line at the point of its intersection with the Danish 200-mile limit."⁵

Second, the Greenland coast south of point G was not relevant because "point G determined in conjunction with the southern tip of Jan Mayen (point F) the equidistance line

¹ ITLOS/PV.11/5, p. 6, lines 24-26.

² MR, para 3.36; Annex R2.

³ Lathrop, ITLOS/PV.11/9 p.m., p. 25 lines 4-28; Wood

⁴ Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 38 (hereinafter "Jan Mayen") at para. 67.

⁵ *Jan Mayen* at para. 20.

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at its point of intersection (point D) with the 200-mile line claimed by Iceland⁶ – a third state – yet both points G and H were well within 200 M of the area of the delimitation, and coasts beyond both points G and H generated entitlements there.

To conclude, because Bhiff Cape is located 200 M from the land boundary terminus, any segment of the coastline further south to Cape Negrais becomes irrelevant, just like any segment northwest of point H on Greenland.

Finally, in the concavity of the Bay there is the closing line across the Meghna Estuary. You have heard the arguments about the Karkinit's'ka Gulf in *Romania v. Ukraine*. The comparison is on the screen now, and they are obviously different.

Myanmar's characterization of the Meghna Estuary's coastline as not relevant is unfounded, and the analogy between the Estuary and the Karkinit's'ka Gulf is misconceived. As you can see, these waters of the Meghna Estuary are part of the area affected by the line, to the same extent as waters an equivalent distance to the south of the putative boundary. The coasts within the estuary look out towards the area of the delimitation.

In the interests of time, I will not read the long quotation from the *Gulf of Maine* case in relation to the Bay of Fundy.

I simply make the point that two segments of the Canadian coastline in the Bay of Fundy face each other and measure approximately 120 M. These were taken into account in the calculation of the length of the relevant coastlines because they too looked on to the area which was under delimitation.

Because the Meghna Estuary opens out onto the Bay of Bengal and constitutes an integral part of it, the relevant coasts in that area as measured by Bangladesh should be taken into account in the delimitation. For the same reason, the Meghna Estuary cannot be analogized to Karkinit's'ka Gulf in *Romania v. Ukraine*.

Mr President, Members of the Tribunal, I struggled in *Romania v. Ukraine* with the south-facing coasts of Ukraine and lost that argument. I persist in thinking, that having happened, that the predominantly south-facing Bangladeshi coasts within the estuary are relevant coasts. If the stretch of coast which you can see here at 39 M just north of Cape Negrais is relevant – it is more than 500 km south of the land boundary terminus and does not generate any overlapping potential entitlement – then I fail to understand how the equivalent coasts within the estuary of 39 M, which is only 150 km north of the land boundary terminus and look straight on to the area to be delimited, could possibly be irrelevant. How can the area in the south be relevant and the area in the north be irrelevant?

Indeed, the relevance of the area in the north can be seen from Myanmar's own graphic, which draws a line across the opening of the estuary and shows as relevant area everything up to that line; you can see it on the screen now. How can the area in the vicinity of that line be relevant, while the predominantly south-facing coasts a few miles further north are not relevant coasts? How can that be? It will be one of the mysteries of the world. People down further on the eastern Bioko could go and see it. It does not make sense. These coasts generate overlapping potential entitlements.

For the reasons I have given, Bangladesh maintains its position as to the relevant coasts and areas in all respects.

The President:

I am sorry to interrupt. Perhaps a little slower.

Mr Crawford:

I am sorry, Sir.

⁶ *Jan Mayen* at para. 20.

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But let us suppose, hypothetically, that Myanmar is correct on Cape Negrais, correct on the limit with India and only incorrect, as it must be incorrect, in relation to the estuary. Let us also suppose, as is consistent with principle, that all relevant coasts generate corresponding relevant areas. In the Meghna Estuary there are relevant coasts, shown as simplified straight lines in the graphic on the screen; the area bounded by them must be part of the relevant area, so we have coloured that in. In the south, Myanmar cannot claim Cape Negrais without counting the areas offshore to the west out to 200 M, shown on the screen now. Making those three adjustments gives a relevant area of 252,500 km².

Now as to relevant coasts – you can see the relevant area in the delightful pink – again for the sake of argument, the entire Myanmar coast down to Cape Negrais and the entire Bangladesh coast across to the land boundary terminus with India, representing the complex coast of the estuary with a straight line and including all the waters of the sea bounded by them. We measure the two coasts the same way, with the same level of detail, and you can see on the screen now. The total of the “relevant coasts” on this basis – a basis favourable to Myanmar – is as follows:

Bangladesh:	510 km
Myanmar:	600 km
Ratio (B:M):	1:1.17

Now as a preliminary, let us divide this area by the ratio of relevant coasts. I do this not because the ratio of relevant coasts is necessarily a criterion for delimitation, but simply so as to give you an idea of possible parameters. The result is a line much more favourable to Bangladesh than any line for which either party has argued. It would give Bangladesh a very significant frontage at 200M, with strong implications for delimitation of the outer continental shelf. This is another way of saying – or at least of illustrating – that Bangladesh is significantly disadvantaged by its position at the back of the Bay of Bengal.

Now I propose to divide the relevant area now using lines for which the parties have argued. Let us start with Myanmar’s mainland equidistance line, as Professor Pellet’s peremptory norm of maritime delimitation would have us do. I will have more to say about Pellet’s Law this afternoon. The result is shown on the screen:

Bangladesh:	84,100 km ²
Myanmar:	168,300 km ²
Area ratio (B:M):	1:2.00
As opposed to a	
Coastal ratio (B:M):	1:1.17

Disproportionate? Pretty obviously. This is an indication of significant inequity. Myanmar gets much more than its coastal length would suggest or imply, *twice* as much.

Moreover you will see that this line falls short of the 200-M line from Bangladesh. The necessary implication is that Myanmar gets the entire bilateral area of shelf beyond 200 M and it has only India to deal with in the trilateral area. Already within 200 M Myanmar is significantly favoured; beyond 200 M its cup runneth over. Bangladesh gets nothing.

Now let us use Bangladesh’s line, the angle bisector. This produces the following result:

Bangladesh:	107,100 km ²
Myanmar:	145,300 km ²
Area ratio (B:M):	1:1.36

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This line also gives Bangladesh access to the outer continental shelf. It is a much more equitable line. Whether it is open to the Tribunal to adopt it is a question to which I will return.

Now, in the interests of equality, let us use Myanmar's version of the angle bisector, which Mr Lathrop showed you on Tuesday. This produces the following result:

Bangladesh:	69,800 km ²
Myanmar:	182,800 km ²
Area ratio (B:M):	1:2.62

This line of course also denies Bangladesh access to the outer continental shelf. To be fair to him, Mr Lathrop did not actually advocate this line.⁷ One can see why.

Finally, in the interests of full transparency, let us look at two other versions of THE equidistance line. The first, the Tribunal if it decides that some version of the equidistance line is called for, will require some study. Thought we might call it the full effect line. It is the line which entirely appropriately gives full effect to St Martin's Island and zero effect to Oyster Island. Mr Reichler has already referred to it. He stressed that it is only a starting point and that it requires adjustment to further abate the effects of Bangladesh's concave coast. But as it is, it produces the following result:

Bangladesh:	97,400 km ²
Myanmar:	155,100 km ²
Area ratio (B:M):	1:1.59

And it gives Bangladesh a modest frontage at 200 M.

The second version of an equidistance line is one to which Myanmar made no reference whatever. This is the line which gives full effect both to St Martin's Island and to Oyster Island. It produces the following result:

Bangladesh:	77,000 km ²
Myanmar:	175,500 km ²
Area ratio (B:M):	1:2.28

And it gives Bangladesh no frontage at all at 200 M – a powerful effect for an article 121(3) rock, which is all that Oyster Island is! You will find these results tabulated at tab 7.24 of your bundles. I will return to them briefly this afternoon.

Mr President, Members of the Tribunal, before leaving the question of relevant coasts and relevant areas, let me deal with two minor points.

First, no doubt it will be said that the figures I have just given you are new or revised figures, no objection. The Tribunal will no doubt be in a position to check them carefully for itself, as we have done. I would note in this context the figure cited by Mr Lathrop for the area that our coastal façade from the two terminal points of the land boundary "adds" to the land territory of Bangladesh is "over 23,000 sq km".⁸ The figure in the Counter-Memorial was 19,519.⁹ Apparently Bangladesh has grown rather significantly in the course of the last year, perhaps due to plate tectonics. But the better point, is that the Tribunal should have now the best figures available from the serried ranks of technicians assembled on either side.

⁷ ITLOS/PV.11/11, p. 7, lines 16-18 (Lathrop).

⁸ ITLOS/PV.11/11, p. 4, line 29 (Lathrop).

⁹ Counter-Memorial of Myanmar (hereinafter "MCM") at p 119, sketch-map 5.4.

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Secondly, counsel opposite criticised Bangladesh for supposedly having agreed a different coastal length of Myanmar during the 2008 negotiations.¹⁰ What the record reflects is that Bangladesh and Myanmar exchanged various ideas about coastal lengths as part of their effort, ultimately unsuccessful, to justify their different views on the boundary beyond 12 M. whatever may have been said on that occasion, it cannot possibly be relevant now. There is no basis for an estoppel. Where is the reliance? Moreover, if the doctrine of estoppel is to make its way into maritime boundary negotiations – negotiations in which, according to Myanmar, nothing was agreed until everything is agreed¹¹ – then we will never hear an end of it. There is nothing in the point.

Mr President, that concludes my presentation of relevant coasts and relevant areas as I move now about to turn to the angle bisector, but I think we should be fortified by caffeine for that experience.

The President:

Thank you very much.

The Tribunal will now withdraw for a break of 30 minutes and we shall return at 12 noon.

(Short adjournment)

Mr Crawford:

I turn to the question of the angle bisector, vigorously assaulted by Professor Pellet and Mr Lathrop (at one point I felt like I had been mugged in the park!)

A preliminary point to be made, however, concerns the *point* of the bisector. It is not there to smooth out the odd promontory or to justify ignoring coastal islands. Mr Lathrop presented it as a matter of technique,¹² but that ignores the reason for using it in the first place. It is a remedy for an inequitable result, which we know follows from strict equidistance when there is a coastal State with a comparable coastline caught in a concavity. If there are geographical circumstances to hand – for example, coastal islands – which allow adjustment of the equidistance line to achieve an equitable result, then well and good, they can be used. Let me repeat that: if there are geographic circumstances to hand – for example, coastal islands – which enable adjustment of the equidistance line to achieve an equitable result, then well and good; they can be used in that way, even if they are unrelated to the cause of the inequity. But what if there are no such features? An angle bisector which simply stuck to the existing south-west facing adjacent coasts of the two parties – such as Mr Lathrop showed you – will not solve the identified problem. You have seen that Myanmar's bisector gives the worst result of all for Bangladesh – an area ratio of 1:2.62. Maritime delimitation, Mr President, Members of the Tribunal, is not a matter of rolling dice, but nor is it a matter of fiddling at the edges; it is a purposive activity with a clearly articulated rationale in articles 74(1) and 83(1) – achieving an equitable result.

Professor Pellet and Mr Lathrop both complained that our angle bisector cut the corner and was therefore inadmissible as a matter of law: they are fond of law doing all the work, avoiding the need for the best judgment of your Tribunal. If they protest so much *in limine* it is perhaps because they are concerned at what will transpire over the threshold.

As to substance, Myanmar criticises both the closing line across our coastal front and the transposition of the bisector to the end of the territorial sea boundary. Let me deal with the transposition point first.

¹⁰ ITLOS/PV.11/9, p. 20, lines 8-10 (Müller).

¹¹ ITLOS/PV.11/3, p. 7, lines 25-26 (Wood).

¹² ITLOS/PV.11/11, p. 1, lines 41-45, p. 2, lines 1-8 (Lathrop).

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As to transposition, as Mr Reichler has said, this is by no means unprecedented. In *Tunisia v. Libya*, the Court transposed the angle bisector reflecting the average direction of Tunisia's coastal façade, so that it would begin at the end of the first landward, segment of the delimitation line. You can see the transposition on the screen.

In the *Gulf of Maine* case, the Chamber commenced the bisector at a point seaward of the Parties' territorial seas, which were not delimited in the area adjacent to the land boundary terminus. This was agreed point A. It is true that the bisector was not formally transposed to point A; Mr Lathrop complained that I said it was.¹³ What actually happened is that the same operation was performed at point A as would have been performed at the land boundary terminus, producing exactly the same angle of direction. It was as if Mr Lathrop told me that he took a pizza to a party on a boat when what he actually did was to take the ingredients and cook the pizza when he got to the boat. If it was the same pizza I would congratulate him on his versatility, his capacity to replicate cooking his pizza while at sea – not accuse him of not telling the truth.

The arbitral tribunal in *Guinea/Guinea Bissau* used a bisector of the West African coastline to delimit the boundary, and commenced it at a seaward point 12 M to the west of Alcatraz Island, so that that small feature would remain on Guinea's side of the boundary.

What these cases show is that, where equidistance is not considered an appropriate delimitation methodology, and a bisector is used instead, it is not uncommon to transpose the bisector, or to commence it at an appropriate point seaward of the land boundary terminus. That is what Bangladesh has done here.

I turn to the larger question of the choice of the line to represent Bangladesh's coastal frontage. As the Tribunal will know, we chose a line joining the two land boundary termini. As I said in our first round, this reflects the average direction of a bidirectional coast: it is not a mere arbitrary line. It was directed at resolving, to some degree, the problem of the concavity. And you saw from the figures I presented before the coffee break that it did so to some degree.

The angle bisector must be applied so as to alleviate the problem that warrants recourse to it in the first place. Thus, in the *Guinea/Guinea-Bissau* case, the arbitral tribunal employed it in such a way as to remedy the cut-off that equidistance would otherwise have imposed on Guinea. Any other approach would convert what is intended to be a solution into a perpetuation of the problem.

As the Tribunal is aware, the International Court was not called upon to effect a final delimitation in the *North Sea* cases. It was asked only to identify the applicable principles. Nonetheless, it is instructive to consider what would have been the result had the Court applied the bisector method in the manner we suggest here. Professor Forteau in effect implied that this was impossible. He said: "The International Court of Justice has never delimited Germany's maritime boundaries in the North Sea and it is highly speculative to imagine what it would have done in real terms."¹⁴

But the Court *knew* that the parties were committed to apply its judgment, and it must have believed that it was *possible* for them to do so. What is clear is that they could not have done so by applying any version of equidistance, howsoever modified. So let us apply the angle bisector methodology to the West German concavity problem, and see what it looks like. As you will see, it would have actually produced a worse result for Germany than the one ultimately negotiated, though nonetheless a comparable result.

You can see of course the pertinent coasts and the eventual maritime agreement made in 1971. We then draw straight line coastal façades for all three States. The coastal façade for

¹³ ITLOS/PV.11/11, p. 5, lines 3, 21-25 (Lathrop).

¹⁴ ITLOS/PV.11/10, p. 4, paras. 28-30 (Forteau).

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Germany resembles the one we have drawn for Bangladesh. Visually, it appears to cut across open water from one end of the coast to the other. In fact, it merely represents the average direction of a bi-directional coast. In any event, if we were to bisect the angles of the coastal fronts so depicted, the result would be as shown on the screen now.

The fact that the result is not as favourable for Germany as the agreed boundaries of 1971 shows the modest nature of what Bangladesh seeks in this case. Far from seeking something radical, all we seek is a modest abatement of the concavity of the coast. No doubt our colleagues opposite would regard this as a form of "land reclamation"; but that is sour grapes: I hope the local vigneron of Hamburg (if such there be) will forgive the phrase "sour grapes". The fact is that the Court envisaged a solution in accordance with international law, and in accordance with international law, the Parties found one. The angle bisector provides a possible analysis of a regular solution.

Mr President, Members of the Tribunal, to summarize, the bisector has been used as an alternative to equidistance in a number of different contexts for a number of different reasons, including to abate the prejudicial effects of a concave coast, exactly the reason Bangladesh says it should be used here.

For these reasons I reject the criticism of our opponents as to the choice of coastal lines or their transposition to the end of the territorial sea boundary. It would be wholly unreasonable to apply the bisector method in a way that made matters worse – even *more* inequitable. Its purpose is to produce an equitable result when equidistance cannot do so. It is to be employed with that objective firmly in mind.

Mr President, Members of the Tribunal, thank you for your attention. I would ask you, Mr. President, to call upon Professor Boyle.

The President:

Thank you, Mr Crawford.

I now give the floor to Mr Alan Boyle.

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STATEMENT OF MR BOYLE
COUNSEL OF BANGLADESH
[ITLOS/PV.11/13/Rev.1, E, p. 24–32]

Mr Boyle:

Mr President, members of the Tribunal. On Tuesday you heard a very long and complicated speech by Daniel Müller expanding on Myanmar's arguments regarding the continental shelf beyond 200 M and the interpretation of article 76.¹ And Mr Müller is obviously very interested in the technicalities of delineating the outer limit of the continental shelf. It is an enthusiasm he no doubt hopes that we all share, although I wonder if, like me, you sometimes felt rather confused by his arguments. I have read and re-read his speech, and still find it hard to see how it can help this Tribunal decide issues that are relevant to this case. He talked a great deal about the views of "Earth scientists" on what constitutes a continental shelf and so on, but with the utmost respect to scientists, including Professor Curray, who is in the courtroom today, we are not here to conduct an academic seminar on the uses of scientific language. Whatever the terms used in article 76 may mean is a question for lawyers; it is not a question for scientists – and that much is obvious to a lawyer. Fortunately, most of what Mr Müller said was previewed last week by Professor Pellet, who was clearer, but no more convincing, and scarcely more relevant.

So with your permission, I propose to deal briefly with the comments of Professor Pellet and Mr Müller on natural prolongation, before responding to what they had to say about article 76. And I will do my best to end by one o'clock, but I cannot promise that I will succeed.

Before doing so, however, let us recall what the Tribunal has to decide with respect to the continental shelf beyond 200 M, because on this subject Myanmar has sought to confuse the issues and to mislead the Tribunal into thinking that the case is far more complex than it really is. First, there is the question whether Myanmar has any entitlement under article 76 to exercise sovereign rights in the continental shelf beyond 200 M. Bangladesh, of course, argues that it does not.² This requires the Tribunal to decide whether article 76(1) requires geological and geomorphological continuity between the land territory of Myanmar and the continental margin beyond 200 M. It also requires the Tribunal to decide whether geological and geomorphological continuity actually exists between Myanmar's land territory and the areas of continental shelf beyond 200 M, the ones that are also claimed by Bangladesh. If geological and geomorphological continuity is necessary, pursuant to article 76(1), and if the evidence does not show that it exists, then Myanmar can have no entitlement to an outer continental shelf beyond the 200-M limit.

And Mr President, I might observe that the text from which I am reading is not quite the text that you have. I have been making a number of additions to it.

Secondly, and only if the Tribunal decides that Myanmar does have an entitlement beyond 200 M, then you have to achieve an equitable delimitation in the outer continental shelf, as between Myanmar and Bangladesh.³ That would require the Tribunal to decide what circumstances are most relevant to an equitable delimitation in that area. In particular, the Tribunal will have to decide whether, as Bangladesh argues, the encroachment by Myanmar on the natural prolongation of Bangladesh which results from the unusual concave coastal geography whether that is relevant beyond 200 M. You will also have to decide whether the geology, geomorphology of the seabed and subsoil are circumstances to be taken into account

¹ ITLOS/PV.11/11 (E/10) p. 15, line 31 *et seq.* (Müller).

² ITLOS/PV.11/8 (E/5) p. 14, lines 27-29 (Boyle); Memorial of Bangladesh (hereinafter "MB") paras. 7.27-7.36.

³ *Ibid* PV lines. 30-32; MB para. 7.42; Reply of Bangladesh (hereinafter "RB"), paras. 4.75-4.89.

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and relevant to the delimitation beyond the 200-M limit. Bangladesh has already made known its views on all of these questions.⁴ Myanmar has said nothing about equitable delimitation beyond 200 M in the first round – in its view the second question that the Tribunal posed to the parties simply does not arise. We regret this refusal to address the Tribunal’s second question, even hypothetically, because it deprives us of the opportunity to respond and it leaves the Tribunal in a position of some difficulty. Accordingly, in this round I have nothing more to add on equitable delimitation beyond 200 M, since there is nothing to respond to, and I will simply reiterate that the position outlined by Bangladesh in its submissions last week on equitable delimitation beyond 200 M has not changed.

Now Mr President, Members of the Tribunal, those are the only relevant questions for the Tribunal in respect of delimitation beyond the 200 M. That is probably a large enough menu for any court to decide in one case. Everything else in Professor Pellet’s speech and Mr Müller’s is a diversion. Despite what Mr Müller seemed to suggest, there is no need to understand or apply the Hedberg or the Gardiner formulae on the outer edge of the continental margin. That very technical question can safely be left to the States’ Parties and to the CLCS in accordance with article 76(8). It is their task, not yours, to delineate the outer limit of the continental shelf of either Party.

Nor, as the case now stands, do you need to decide whether Bangladesh has any entitlement to a continental shelf beyond 200 M – not for the reasons given by Myanmar, but simply because Myanmar has not challenged Bangladesh’s evidence, whether in the written pleadings or in these proceedings. And as Mr Martin reiterated yesterday, the point is not an issue between the Parties, and it is now too late for Myanmar to make an issue of it.

I turn then to natural prolongation, which is that the heart of this case, at least in so far as it concerns boundary delimitation beyond 200 M. The point of departure in all maritime delimitations is the entitlement of a State to a given maritime area.⁵ Beyond 200 M, natural prolongation – not distance from the coast – is the basis of entitlement to an extended continental shelf. The ICJ tells us in *Tunisia v. Libya* “[i]t is only the legal basis of the title to continental shelf rights [...] which can be taken into account as possibly having consequences for the claims of the Parties.”⁶ Natural prolongation is therefore fundamental to any claim beyond 200 M. Without it, Myanmar has no continental shelf beyond that limit.

Professor Pellet does not deny that the continental shelf beyond 200 M can only be constituted by natural prolongation. What he objects to is the proposition that natural prolongation is to any extent a geological phenomenon, although even here we note that he only says “not necessarily so”.⁷ He agrees that in the *North Sea Case* the ICJ wisely accepted that geology “appears to have to be taken into account”,⁸ but he immediately goes on to dismiss the statement as outdated, like the Court’s references to concavity and equidistance.⁹ My colleagues have explained why the *North Sea* case is still very relevant, and I do not think there is any need for me to repeat what they have said. The North Sea is somewhat distant from Paris and obviously not well understood there, but I am sure that will not be a problem in Hamburg – or The Hague.

Professor Pellet seems much more comfortable in the Mediterranean. He agrees that in the *Libya v. Malta Case* the ICJ “recognized the relevance of geophysical characteristics of

⁴ Ibid.

⁵ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147 para. 224. Reproduced in MB, Vol. V.

⁶ *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18 at para. 48 (hereinafter “*Tunisia/Libya*”).

⁷ ITLOS/PV.11/8 (E/7) p. 30, lines 4 (Pellet).

⁸ Ibid p. 30, lines. 12-14.

⁹ Ibid lines. 18-19.

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the area of delimitation if they assist in identifying a line of separation between the continental shelves of the parties.”¹⁰

So he accepts the principle – that geology is relevant to identifying a boundary between two separate continental shelves – and that is precisely the point that Bangladesh has repeatedly made. Geology can be relevant in this way if it marks the limit of the natural prolongation of one state, where “a marked disruption or discontinuance of the sea-bed” serves as “an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations”. I am of course quoting there from the language of the ICJ in *Tunisia v. Libya* once more.¹¹ It is the undisputed, unchallenged evidence before the Tribunal showing the complete absence of geological prolongation from Myanmar beyond 200 M which makes the 200-M line the limit of Myanmar’s continental shelf in the present case.

Now, to this argument Professor Pellet has a simple answer. He says: “This hardly corresponds ... to the circumstances of the facts of our case...”¹² But, unlike Libya, or Tunisia, or Malta, Bangladesh can point to a major geological discontinuity – the most significant discontinuity of all – a tectonic plate boundary running all the way along the Myanmar coast, barely 50 M offshore. In the Mediterranean the evidence of the Parties before the International Court was, in the Court’s view, inconclusive and contested.¹³ But in the Bay of Bengal the uncontested evidence shows that there is indeed a major geological discontinuity. So Professor Pellet cannot say that “this hardly corresponds ... to the circumstances of the facts of our case...”¹⁴ He is firmly impaled on the horns of Myanmar’s failure to plead any evidence or to call any experts to contradict what Bangladesh has argued. Having chosen that route, Myanmar is not now in a position to challenge our clear, compelling evidence.

The best that Myanmar can do is to argue that the tectonic plate boundary is not where Bangladesh says it is, but much further inland. And this was Daniel Müller’s closing argument on Tuesday.¹⁵ Unfortunately, Mr Müller is mistaken. He failed to understand the evidence. Professor Curray’s figure, the one you can see on the right, the one that was shown by Myanmar on Tuesday afternoon, indicates correctly (as a red line) the northward continuation of the axis of the subduction zone between the India and Burma Plate, buried as it is under the accretionary prism. But, if we can go back to the previous slide, if you look on the left you can see that we have shown you there the same red line, and if you look to the left of that you can see the outer edge, western edge, of the accretionary prism, and you can also see that it is well out to sea because that is what Mr Müller failed to understand.

In his report, Professor Curray traces the eastern margin of the Bengal Depositional System, which is what he shows in his chart, and the locus of the tectonic plate boundary, along that rather prominent dashed black line that you can see in the same figure. Now it is that black line that you can see in both figures that corresponds to the western edge of the accretionary prism and the outermost limit of Myanmar’s geological prolongation.¹⁶ The key point when you look at both charts is that it is the same line, on the left, and it is offshore by some 50 km. Again, we can show you that on the next figure, which is simply a schematic representation of the seabed, and you can see there the large serrated black line going

¹⁰ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, para. 40 (hereinafter “*Libya/Malta*”).

¹¹ *Tunisia/Libya* at para. 66.

¹² ITLOS/PV.11/8 (E/7) p. 32, lines 41-43 (Pellet).

¹³ *Ibid.*, *Libya v. Malta* at para. 41.

¹⁴ *Ibid.* (Pellet).

¹⁵ ITLOS/PV.11/11 (E/10) p. 28, line 8.

¹⁶ Joseph R. Curray, “The Bengal Depositional System: The Bengal Basin and the Bay of Bengal” (23 June 2010) at pp. 4, 6.MB, Vol. IV, Annex 37.

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underground; that is the black line that you could see on the previous chart, and it is quite obviously offshore.

Professor Curray's red line is not just a line on the map, I might say; it is the same subduction zone that caused the devastating tsunami off Sumatra in December 2004. That subduction zone is still active today. And I think that emphasizes the importance of this really rather major geological discontinuity between Myanmar and the seabed and subsoil of the rest of the Bay of Bengal.

Now late in his speech on Tuesday Mr Müller also referred to a scientific article by Mr C. Nielsen and others.¹⁷ He told the court that, according to Nielsen: "The morphology of the continental margin of Myanmar does not present any discontinuity in spite of the existence of a subduction zone."¹⁸

Well, Mr President, we spent some time last night scouring this article, looking for a statement to this effect, but we could not find any in the text. The article does say, however: "The structures observed along a 700-km long portion of the West Burma Scarp typically depict a dextral shear zone with wrenched accretionary wedge."¹⁹ If I can translate that into plain English, I think what they are saying is that it fully confirms the illustrations I have just shown you. It provides no support for what Mr Müller said on Tuesday.

Mr Müller's last illustration was taken from the Bangladesh submission to the Commission on the Limits of the Continental Shelf, and he showed us the positions of the foot-of-the-slope points used by Bangladesh to apply the Hedberg and Gardiner formulae in paragraph 4 of article 76.²⁰ He seemed to think there was something significant here, notably the location of the last point, No. 9; but all of these points, including point 9, lie within the natural prolongation of the land territory of Bangladesh. And again, the helpful citation from Nielsen in 2004 shows that even the most easterly of the points, including No. 9, lies west of the West Burma Scarp, in other words west of the accretionary wedge, described in the Nielsen reference. I think what that shows is that it is beyond the natural prolongation of Myanmar.

Turning back to Professor Pellet, his final act of surrealism is to transport Algeria to Brazil in response to an argument that Bangladesh has never made about the origin of sediments. The Bengal Fan is largely the natural prolongation of Bangladesh. We have argued that, and that is what the scientists say, but it is the natural prolongation of Bangladesh not because it has been transported there via Bangladesh - that fact is immaterial. Most of the Bay of Bengal is the natural prolongation of Bangladesh because of the continuous, unbroken, subsea structure of the Bengal Delta and the Bengal Fan, extending from well inside the land territory of Bangladesh to the outer edge of the continental margin far to the south. Our point is that Myanmar simply has no comparable natural prolongation because its geological shelf ends approximately 50 M offshore at the western boundary of two tectonic plates, marking again - to use ICJ phraseology - "the juncture of two separate natural prolongations".²¹ And that, Mr President, Members of the Tribunal, that is the fundamental difference at the heart of this case.

That is the reason why Bangladesh is inviting this Tribunal to rule, in accordance with the evidence, that Myanmar has no continental shelf extending beyond 200 M, as provided for in article 76(1) of the 1982 Convention.

¹⁷ C. Nielsen et al., "From Partial to Full Strain Partitioning Along the Indo-Burmese Hyper-oblique Subduction", *Marine Geology*, Vol. 209 (2004) at pp. 303-327, (hereinafter Nielsen) Annex BM-52.

¹⁸ ITLOS/PV.11/11 (E/10) p. 32, lines 26-28 (Müller).

¹⁹ Nielsen et al (2004) at p. 317.

²⁰ ITLOS/PV.11/11 (E/10) p. 32, lines 34 *et seq.* (Müller).

²¹ ITLOS/PV.11/6 (E/5) p. 7, lines 7-10 (Parson); BM paras. 2.22 and 2.41; BR para. 4.26.

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Mr President, Members of the Tribunal, Myanmar then attempts to reinterpret article 76 in order to avoid this inevitable conclusion. So we can now turn to that part of our argument. Myanmar's arguments on article 76 are indeed very complicated, and Bangladesh does not accept them. Daniel Müller boldly told the court on Tuesday that "Article 76 is not an approximation of a scientific truth. In law, it is the legal truth."²² I suppose like a medieval pope or perhaps Donald Rumsfeld, he was not interested in evidence or facts, whether scientific or otherwise. Salvation, it seems, comes through law, and only law. But of course even Mr Müller cannot eliminate all science from article 76. And he cannot do so because of the text of article 76. Even if we ignore article 76(1), there are still many elements of the article that require scientific evidence. The thickness of sedimentary rocks must be measured to apply article 76(4)(a)(i). Only scientists can tell us where the foot of the continental slope is located for the purposes of article 76(4)(a)(ii). Lawyers should probably not try to draw the 2,500-metre isobath in article 76(5). We need a geologist to identify the submarine ridges, plateaux, rises, caps, banks and spurs mentioned in article 76(6). and a cartographer would be very useful to draw the lines referred to in article 76(7). All of this different expertise is indeed carefully reflected in Annex II, article 2, paragraph 1 of the 1982 Convention, which identifies potential members of the Commission on the Limits of the Continental Shelf and calls for "experts in the field of geology, geophysics or hydrography".

So, Mr President, Members of the Tribunal, there is really no doubt the application of article 76 requires a great deal of scientific and technical expertise before lawyers can make effective use of it. That is why the submissions to the CLCS require significant amounts of scientific research and data collection and take years to assemble. It is why this Tribunal has to proceed on the basis of evidence before it, not on the basis of mere assertion or speculation of the kind proffered by Mr Müller. It is also why the CLCS Commissioners are not lawyers, and it explains why we have geologists, hydrographers, and cartographers on our legal team. Their expertise is indispensable, even to lawyers. So the idea that article 76 is simply law and only law is untenable and unworkable. Indeed, it is absurd.

And what is true for the rest of article 76 is equally true for article 76(1). That provision, as you know, redefined what constitutes a continental shelf. I think I do not really need to read out that provision, right? It also sets out the legal basis of entitlement to a continental shelf, partly in terms of distance, up to 200 M, but also in terms of natural prolongation of the land territory beyond 200 M. "Natural prolongation" and "continental margin" are legal terms because they are in a treaty, and they have to be defined and applied as treaty terms. We have to look, in accordance with the Vienna Convention, article 31, for the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty.²³ The rules on treaty interpretation are no different here.

But Mr Müller in effect says that "natural prolongation" as a concept has no ordinary meaning. He subsumes the concept entirely within the context of the rest of the article, and especially of article 76(4), as I explained last week. He ignores the object and purpose of the 1982 Convention, or at least he accords it no relevance, although one obvious object and purpose of article 76 is to give the definition and extent of the continental shelf greater certainty, a goal which his definition noticeably fails to reach. Finally, both he and Professor Pellet largely eliminate geology from their reading of natural prolongation. And of course that is what they want to achieve. Professor Pellet says that article 76:

merely relies on morphology to recognize the existence of natural prolongation, and only turns to geology... secondarily as additional or optional evidence.²⁴

²² ITLOS/PV.11/11 (F/10) p. 19, lines 44-45 (Müller).

²³ See Article 31 of the Vienna Convention on the Law of Treaties (1969), UNTS, Vol. 1155, I-18232, p. 331.

²⁴ ITLOS/PV.11/8 (E/7) p. 34, lines 38-40 (Pellet).

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According to him “geology may by way of exception be relevant [but] ... it is not at all necessary...”²⁵

Professor Pellet has given you a characteristically elegant and artful argument, but it is a diversion from the evidential basis of natural prolongation that underpins article 76. Moreover, his views are contradicted by the only scientific source that Myanmar cites in its Counter-Memorial for the proposition that “article 76 retains an essentially geomorphic definition of the margin, including the shelf, the slope and the rise.”²⁶ The article that he relies upon is by Dr Philip Symonds and his co-authors and that article recognizes that the words “shelf, slope and rise” are “geomorphological” but they go on, two pages later, to observe the following:

Although continental rise is a geomorphic term, it is really used to describe a depositional feature caused by the accumulation of sediment largely derived from the continent and transported both down and along the slope. Therefore, the definition of a rise should not be based simply on the smooth surface and low gradient towards the abyssal plain, *but also on its geological characteristic of being a sediment apron at the base of their slope.*²⁷

I think summarizing that, it is about geomorphology and geology. That is the key point.

Throughout their pleadings, Myanmar repeatedly tries to convince the Tribunal to decouple article 76 from geology, to decouple natural prolongation from geology, and – in their own expression – to “keep it in a black box”,²⁸ until it is briefly opened and when we turn to article 76(4)(a)(1), and then they close the lid again.

There are two answers to this view of article 76. First, it is simply wrong. The continental shelf is not just the seabed – according to article 76(1) it is the seabed and the subsoil, and the subsoil is nothing if it is not geology. The thickness of sedimentary rocks in 76(4)(a) is also a geological question. Bangladesh entirely accepts that geomorphology is relevant to the application of 76, but in conjunction with geology, not in splendid isolation from it.

The Tribunal needs to look at all of the relevant evidence – geomorphological and geological. You do not have to rely on Bangladesh for that view. Many of you will be familiar with the Scientific and Technical Guidelines published by the CLCS. If I may, we can look briefly at what they say about geology and article 76. In particular, they say: Article 76 “contains a complex combination of four rules, two formulae and two constraints, based on concepts of geodesy, geology, geophysics and hydrography.” In the implementation of article 76, they say, they “will be guided by bathymetric, geomorphologic, geologic and geophysical sources of evidence”. And they go on to say much the same with regard to evidence to the contrary under article 76(4)(b). That is interpreted by the CLCS in a whole chapter of their Guidelines to mean geological and geophysical evidence.²⁹ The Guidelines

²⁵ *Ibid* lines 40-41.

²⁶ CMM at para. A. 11, citing Ph. A. Symonds *et al.*, “Characteristics of Continental Margins”, in P.J. Cook and Ch.M. Carleton (eds.), *Continental Shelf Limits, The Scientific and Legal Interface*, Oxford University Press, 2000, pp. 27-29.

²⁷ *Ibid.* p. 31.

²⁸ ITLOS/PV.11/11 (E/10) p. 28, lines 10-11 (Müller).

²⁹ See Chapter 6 of Commission on the Limits of the Continental Shelf, *Scientific and Technical Guidelines*, U.N. Doc. No. CLCS/11 (13 May 1999) (hereinafter “*CLCS Guidelines*”).

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also refer to the outer limit of the shelf having both geological and geomorphological characteristics.³⁰

There are many other references to geology in the CLCS Guidelines. Indeed, the Commission almost goes so far as to suggest the geological considerations are more important than geomorphology in determining the outer edge of the continental margin. And you will see on the screen I think two paragraphs that are particularly helpful here. Mr. President, I will not read them out in the interests of time. You will see there that at the end of paragraph 6.1.9 they refer to consideration of tectonics, sedimentology and other aspects of geology.

You can see in 6.3.12 they talk about geological (plate tectonic) considerations and they say these are very important for coastal States in the determination of the various additional aspects they refer to there.

Mr President, a moment ago I quoted Dr Philip Symonds and his co-authors. Dr Symonds is one of the original members of the CLCS. He is a well-known geologist. He notes that it is possible to give a geomorphological interpretation to article 76 but he then adds, and I think this is an important point:

[a]n alternative view would be that the natural prolongation being referred to is defined by the geological continental margin (Figure 4.1b), and embraces both the geomorphic and sub-surface characteristics of the margin.

And he goes on then to refer to that view, building on the *North Sea* case, the subsequent interpretations of its significance by O'Connell, and he says that it gives support within article 76 from uses of the terms "seabed and subsoil". And he concludes by saying it suggests that the continental margin comprises the submerged prolongation in article 76(3), implying prolongation in the geological sense.³¹

Mr President, members of the Tribunal, I could go on, but I will spare you the ordeal. Like me, you are lawyers, not geologists and I probably sorely tested your patience and I would not wish to push it too far simply for the purposes of demolishing my opponent's rather desperate arguments. I hope I have said enough to demonstrate why article 76 of the 1982 Convention cannot be interpreted and applied in clinical isolation from the natural world. Geology is an indivisible element of article 76 and of the concept of natural prolongation. That is the simple, sensible point I have been trying to make, possibly at excessive length.

There is a second way to answer Myanmar's arguments but, Mr President, my sense is that, since I am not going to finish by 1 o'clock, my sense is this might be the moment to take a lunch break and to resume this afternoon.

The President:

Thank you.

This brings us to the end of this morning's sitting. The hearing will be resumed at 3 p.m. In this context, may I remind the parties that article 75, paragraph 2, of the Rules of the Tribunal provides the following:

At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party's final submissions.

³⁰ CLCS Guidelines at para 6.1.7. "Although article 76 refers to the continental shelf as a juridical term, it defines its outer limit with a reference to the outer edge of the continental margin with its natural components such as the shelf, the slope and the rise as *geological and geomorphological* features."

³¹ *Ibid.*

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A copy of the written text of these, signed by the agent, shall be communicated to the Tribunal and transmitted to the other party.

The sitting is now closed.

(The sitting closes at 12.45 p.m.)

22 September 2011, p.m.

PUBLIC SITTING HELD ON 22 SEPTEMBER 2011, 3.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 22 SEPTEMBRE 2011, 15 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good afternoon. We continue the second round of hearings.

I call on Professor Boyle to conclude his statement.

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STATEMENT OF MR BOYLE (CONTINUED)
COUNSEL OF BANGLADESH
[ITLOS/PV.11/14/Rev.I, E, p. 1–3]

Mr Boyle:

When I concluded this morning, I observed that geology is an indivisible element of article 76 and of the concept of lateral prolongation. Myanmar, of course, relies on geomorphology to make its case for lateral prolongation from the outer continental shelf. Bangladesh relies on the absence of geological connection between Myanmar's land territory and the outer continental shelf.

There is, however, a second way to answer Myanmar's arguments on article 76. That involves taking you on another trip to New Zealand. If we examine this one example of the practice of the Commission on the Limits of the Continental Shelf, we can see how far removed from reality Myanmar's position has become. Why New Zealand, you may be asking? New Zealand is one of the small number of States that have received recommendations from the CLCS after examination of their submission. If you look at the screen, you will see near the top right hand corner a small teardrop-shaped area labelled the "South Fiji Basin". The neck of the teardrop, and you can see the arrow pointing quite close to it on the screen, is less than 60 miles across. The area enclosed within the teardrop is deep seabed, but New Zealand, nevertheless, drew a 60-mile line across the neck of the teardrop and included the whole area within its continental shelf submission, relying on article 76(7), which indicates the method of construction "...*straight lines not exceeding 60 nautical miles in length, connecting fixed points, defined by co-ordinates of latitude and longitude*".

Without addressing the necessary element of natural prolongation from land territory, a literal implementation of the provisions in article 76(4) to 76(7), of the kind made by New Zealand, could easily enclose areas specifically excluded by the article, and that is exactly what happened in that example. The important point is that the CLCS did not accept New Zealand's attempt to enclose more than 60,000 square kilometres by lines that had been drawn ostensibly in strict accordance with article 76.¹ The only possible explanation for the decision of the CLCS is that the South Fiji basin represented deep ocean floor, beyond the continental margin, and therefore ineligible for definition as the continental shelf of New Zealand. It seems to us that this decision makes it clear that it is impossible slavishly to apply the wording of article 76(4), without taking into account the natural prolongation, both geological and geomorphological, of the features which extend beyond 200 M.

New Zealand's submission failed in the one area where there was no natural prolongation. Thus the ability to draw a line along the outer edge of the continental margin as defined in article 76(4) cannot be the only test of natural prolongation in article 76. Yet New Zealand had followed exactly the methodology recommended by Myanmar when it made its submission to the CLCS. It applied article 76(4), but it had enclosed a black hole and it was disallowed. In Bangladesh's view that is what should happen to Myanmar's reading of article 76(1) and to its attempt to subordinate natural prolongation within the formulae used in article 76(4). Professor Pellet and Mr Müller have offered you another surrealist vision of article 76. Like Don Giovanni at the Staatsoper, it will end by disappearing down a black hole. Relying on article 76(4) is not the right way to interpret natural prolongation.

Of course, you might say that the CLCS is not composed of lawyers. Its members are technical specialists in geology, geomorphology and hydrography² but they too have to interpret and apply article 76 as best they can. It is, however, for this court – not for the

¹ See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the submission made by New Zealand on the 19 April 2006, especially paragraph 148 and Figure 2.

² UNCLOS Annex II, article 2(1).

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Commission – to give authoritative and definitive guidance on the interpretation of article 76, but it is nevertheless significant that the practice of the CLCS with respect to New Zealand's submission supports Bangladesh's reading of article 76 and the role of natural prolongation, and the importance of geology in establishing that prolongation.

Mr President, Members of the Tribunal, there is a larger point underlying this debate on the place of scientific evidence and terminology in the 1982 Convention. It is your responsibility to interpret and apply the Convention coherently, consistently and authoritatively. In doing so, your interpretations will give guidance to States, international organizations and the institutions established by the Convention, and that includes the Commission on the Limits of the Continental Shelf. It is true, as I am sure we would all recognize, that interpreting article 76 is not entirely straightforward, and its application may also require you to consider the relevant evidence in order to decide questions posed by the parties to this or subsequent disputes. It does not require me to tell you that there is nothing unusual about this. Despite what counsel on the other side might urge upon you, the application of science to law is what courts do all the time. Environmental cases, if I may pray in aid my other specialty, provide many good examples³, including the *Pulp Mills* case and, for this Tribunal, the *Blue Fin Tuna* case. There are many counsel on both sides of this courtroom who understand very well the application of science in legal disputes. On the present topic, to come back to where I started and to reiterate one of my earliest points, the only evidential matter on which the parties disagree in this case is whether the tectonic plate lies under the Myanmar mainland or 50 M offshore. We showed you this morning our evidence, in summary, on the illustrations to demonstrate our view that it lies 50 M offshore, or thereabouts. Myanmar has tendered no evidence to address that issue. Its effort to challenge the evidence put in by Bangladesh have been unconvincing, in our view.

Mr President, Members of the Tribunal. This is an important case for a variety of reasons. The Tribunal now has the opportunity to contribute significantly to the articulation and crystallization of the law relating to the continental shelf beyond 200 M. However article 76(1) may be interpreted, it is self-evident that to give it an authoritative meaning will greatly assist the Parties to this case, the parties to the Convention, and the geologists and hydrographers who constitute the membership of the Commission on the Limits of the Continental Shelf. The same is true with regard to article 83(1). No international court has yet given judgment on the relevance of geology and geomorphology in fashioning an equitable solution in boundary delimitations beyond 200 M. Indeed, no international court has yet fashioned an equitable delimitation beyond 200 M. Until now, these have been, in the best sense, merely academic. It now falls to you to decide. Doing so will not merely help settle the present dispute but it will greatly facilitate future maritime boundary delimitations. Bangladesh has every confidence that you will rise to the occasion.

In conclusion, therefore, on the basis of the requirements of the 1982 Convention and the evidence we have put before the Tribunal, Bangladesh invites the Tribunal to rule as follows:

Firstly, we would maintain that in order to be able to exercise sovereign rights in any area beyond 200 M from its coast, article 76(1) of the 1982 Convention requires Myanmar to prove that there exists a natural prolongation from its land territory into the continental margin beyond 200 M.

Secondly, we would invite you to hold that the establishment of natural prolongation is dependent upon the presentation of geological evidence; establishing such a prolongation.

³ See inter alia *Pulp Mills on the River Uruguay (Argentina/Uruguay)* (Judgment); *Southern Bluefin Tuna Cases (Australia/Japan; New Zealand/Japan)* (Award on Jurisdiction and Admissibility) 39 ILM (2000) 1359.

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Thirdly, we would maintain that in the absence of any geological evidence establishing any natural prolongation from its land territory, Myanmar has no entitlement to extend its continental shelf beyond 200 M in any part of the bilateral or trilateral areas also claimed by Bangladesh.

Fourthly, and in contrast, Bangladesh has shown on the basis of the geological evidence that there exists a natural prolongation from its land territory that entitles it to extend its continental shelf beyond 200 M.

Accordingly, we would therefore maintain that Bangladesh is entitled to extend its continental shelf throughout the bilateral area also claimed by Myanmar and, without prejudice to the rights, if any, of India, also throughout the trilateral area also claimed by Myanmar and India.

Sixthly, to the extent that article 76 so requires, such determinations by the Tribunal are without prejudice to the delineation of the outer edge of the continental margin by the Commission on the Limits of the Continental Shelf.

Finally, further or alternatively, if the Tribunal were to rule that Myanmar has some entitlement to extend its continental shelf beyond 200 M, we would invite the Tribunal to achieve an equitable solution by delimiting the overlapping area in accordance with the line shown in Bangladesh's concluding submissions presented last Tuesday, 14 September.

Mr President, Members of the Tribunal, it has been an honour and a privilege for me to have the opportunity of addressing you on these questions. I would ask you now to invite my colleague, Dr Akhavan, to the podium.

The President:

Thank you, Professor Boyle, for your presentation.

I now call on Payam Akhavan to make his presentation.

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STATEMENT OF MR AKHAVAN
 COUNSEL OF BANGLADESH
 [ITLOS/PV.11/14/Rev.1, E, p. 4–12]

Mr Akhavan:

Mr President, distinguished Members of the Tribunal, my task in this presentation is to respond to the arguments of Myanmar concerning the exercise by the Tribunal of its jurisdiction to delimit the outer continental shelf between Bangladesh and Myanmar. As Myanmar has only touched very lightly on these matters, I shall be brief.

Myanmar's principal contention throughout these proceedings has been that delineation of the outer limits of the continental shelf is a matter exclusively for the CLCS, in accordance with article 76(8) of the 1982 Convention. They say that such delineation is a precondition for this Tribunal to be able to delimit any area beyond 200 M of the land territory of either Party. Last Tuesday, Professor Pellet made the point as follows:

[B]efore proceeding with lateral delimitation of the continental shelf beyond 200 nautical M between two coastal States, first of all we must ensure that these two States have a title to the continental shelf in question and this, according to the Convention, is within the competence of the Commission.¹

This submission is the product of a fertile legal imagination, one that is designed to clip the wings of this Tribunal. Professor Pellet was unable to identify any provision of the 1982 Convention that imposed this particular sequence of events. He was unable to explain how his argument could be reconciled with the requirements of article 76(10) of the Convention, which provides that the provisions of article 76 are “without prejudice to the question of the delimitation of the continental shelf” between Bangladesh and Myanmar, a matter over which this Tribunal plainly has jurisdiction. Unable to rely on any legal provision, Professor Pellet argued instead that this “order of priority is based on common sense.”² However, “common sense” as Voltaire said, “is not so common”, not least as a means of salvaging legal arguments that are wholly without merit.

As set forth in our first-round arguments, Myanmar's contentions are plainly inconsistent with the Convention, and none of Professor Pellet's pleadings or appeals to “common sense” can justify so unreasonable and erroneous an interpretation of the Convention. He was unable to grapple with the distinction between, on the one hand, the delineation of the outer limit, which may be a matter for the Commission, and the delimitation of the continental shelf. Such a distinction is confirmed by article 76(10) and article 9 of Annex II of the Convention. It is plain to Bangladesh that the delineation of the outer limit is a different exercise from the delimitation of continental shelf boundary of Bangladesh and Myanmar. Each involves different parties, principles, and procedures.

Myanmar is seeking to conflate two different and distinct concepts. The function of the Commission, as clearly defined by article 76(8) and article 3(1) of Annex II, is to assist coastal States to establish their “outer limits”. Nowhere does the Convention provide that Part XV procedures cannot apply to articles 76(1) and 83 to settle disputes between States in the outer shelf. Nowhere does the Convention state or imply that this Tribunal, or an Annex VII arbitral tribunal or the International Court of Justice, is required to desist from exercising its judicial or arbitral function when it comes to delimiting the outer continental shelf. No doubt the exercise of such judicial or arbitral function cannot prejudice the question of the delineation of the outer limit and the exercise by the Commission of its role. As we

¹ ITLOS/PV11/11 (E/10) p. 10, lines 1-5 (Pellet).

² *Ibid.* p. 9, line 47-p. 10, line 10 (Pellet).

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have shown, however, the role of the Commission cannot trump that of this Tribunal, which must be the ultimate guardian of the rights and obligations of the Parties under the 1982 Convention. The rule of law is plainly a matter for this Tribunal, not the Commission.

The potential conflict between entitlement to an outer shelf and its outer limits may be addressed in a straightforward manner. It does not admit of any particular difficulty. In these proceedings, this Tribunal has jurisdiction only with respect to the rights and obligations of Bangladesh and Myanmar. Its judgment cannot bind any third parties. It is without prejudice to their rights. This applies as much to India as it does to any third entities established under the Convention to address the area beyond national jurisdiction. For third States and third entities, any delimitation effected by this Tribunal pursuant to its exercise of jurisdiction is *res inter alios acta*.³ This point was put clearly by the Arbitral Tribunal in the *Newfoundland-Nova Scotia* Arbitral Tribunal as follows:

There does not seem to be any difference in principle between the non-effect of a bilateral delimitation *vis-à-vis* a third state ... and its non-effect *vis-à-vis* the "international community" or third states generally.⁴

As we have previously set forth, the definition of "natural prolongation" under article 76(1), as addressed earlier today by Professor Boyle, is plainly a matter that concerns "the interpretation or application" of the Convention within the meaning of article 288(1) of the Convention. Lest there be any doubt on that point, Mr Müller began his presentation with the following statement: "Article 76 is a rule in law and not a scientific proposition. This might be surprising to go into this, because it appears evident that article 76 is a legal rule."⁵ To the extent that article 76 is, as he emphasizes, a legal rule and not a scientific proposition, any disagreement on its interpretation and application gives rise to a legal dispute. As such, it is properly a matter for determination by this Tribunal; it is not a matter for scientific or technical assessment by the CLCS. The Commission has no mandate to resolve disputes as to the interpretation or application of the Convention. It can make "recommendations", but they are not binding, and they certainly cannot trump any determinations by this Tribunal. When it comes to legal determinations, the hierarchical relationship between the Tribunal and the Commission is clear.

The contradictions of the position adopted by Myanmar were rather plain to see. We noted that Mr Müller spoke in less than charitable terms about Professors Kudrass and Curray, despite the fact that both are renowned experts in the world of geology and geomorphology. He sought to dismiss the views expressed in their expert evidence, despite the fact that Myanmar has taken no steps to challenge that evidence. It could have introduced its own evidence; it has not done so. It could have sought to cross-examine these two experts, it has not done so. All Mr Müller has done is assert that their expertise is irrelevant to the definition of "natural prolongation". Then, contradicting himself, he argues that it is for other experts – experts at the CLCS – to resolve what he recognized to be a legal dispute between the parties in this case as to entitlement to an outer shelf. He told us: "I am confident and a little relieved that the battle is not playing in the field of science ... but in the field of law, and

³ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3, para. 28. Reproduced in MB, Vol. V.

⁴ 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) (Second Phase) (2002), 128 ILR (2006) 504 at 538, fn. 90. Reproduced in MB, Vol. V.

⁵ ITLOS/PV11/11 (E/10) p. 17, lines 6-7 (Müller).

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more particularly in article 76 of the Convention”.⁶ He concluded that: “It is only an application of these legal provisions which will determine entitlement of a coastal state to the continental shelf.”⁷

How can the Commission resolve this legal dispute? The Commission can make scientific recommendations, no more and no less. It is for this Tribunal to interpret and apply article 76 as a matter of law. In performing that function, the Tribunal can, of course, rely on expert evidence. That is the role in this case of Professors Curray and Kudrass.

Mr President, distinguished Members of the Tribunal, there is no evidence before the Tribunal to support Myanmar’s claim that it has any entitlement to an outer continental shelf, but even if the Tribunal were to find that Myanmar does have such an entitlement or were to conclude that the possibility of such an entitlement continues to exist, there is still no reason why the Tribunal could not exercise jurisdiction and act to delimit the outer continental shelf between the parties, in the proper exercise of its judicial function. All relevant parties – Bangladesh, Myanmar, and even India – agree that the outer limit of the continental shelf is nowhere near the area in dispute. But let us assume that Myanmar is correct. Let us consider hypothetically that there are serious doubts as to whether bilateral delimitation beyond 200 M could potentially encroach on areas beyond national jurisdiction. Let us assume, further, that the *res inter alios acta* principle is not sufficient to avoid prejudice to third parties. What would be the situation in such a scenario, as counsel for Myanmar seems so keen to argue?

The solution is straightforward and we need to look no further than Myanmar’s own submissions to find it. In order to prevent any prejudice to the rights of India in the continental shelf within 200 M, Myanmar’s Counter-Memorial invited the Tribunal to indicate the “general direction for the final part of the maritime boundary between Myanmar and Bangladesh”, in accordance with the well-established practice of international courts and tribunals.⁸ This directional line was depicted in Sir Michael Wood’s presentation on Monday.⁹ Now it is clear that we disagree strongly with the arbitrary and inequitable line drawn by Myanmar, but we agree that their line and method indicates that at the very least the Tribunal is free to indicate a directional line, one that could end before the potential location of the outer limits, one that could respect India’s actual claims, and that a similar line could be indicated by the Annex VII Tribunal with respect to India.

Upon delineation of the outer limits by the CLCS sometime around 2035,¹⁰ the extension of these two lines would intersect and fix the tripoint between the parties. The evidence on record indicates both India’s actual claims and the potential location of the outer limits of the continental shelf. Neither the actual nor the potential claims of third parties are a bar to the Tribunal’s jurisdiction. There is simply no reason why as a minimum the Tribunal cannot proceed on the basis of a directional line in the outer continental shelf. In that way, the rights of any third parties are fully protected.

In the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene judgment, the International Court of Justice ruled that, in exercising jurisdiction, the Court “is not called upon to examine the exact geographical parameters of the maritime area in which Costa Rica considers it has an interest of a legal nature”.¹¹

⁶ Ibid. p. 16, lines 18-22 (Müller).

⁷ Ibid. lines 22-24 (Müller).

⁸ Counter-Memorial of Myanmar (hereinafter “CMM”), para. 5.161.

⁹ Tab 4.7. of Myanmar’s Judges’ Folder.

¹⁰ See ITLOS/PV11/5 (E/4) p. 22, lines 13-15 (Akhavan).

¹¹ Para. 65.

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It also held that “a third State’s interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play.”¹²

The situation or principle is no different in this case in relation to the outer continental shelf, although we would submit that there is complete certainty as to the maximum claims of India and reasonable certainty as to the outer limits of the continental shelf.

In this regard, it is difficult to see any rhyme or reason in Myanmar’s proposition that a directional line is permissible within 200 M but not beyond. It seems that for Myanmar the use of a directional line to avoid prejudice to third parties has a certain Dr Jekyll and Mr Hyde duality: it is a sane solution within 200 M and a monstrous method beyond. There is no authority supporting the proposition that a directional line cannot be used in the outer shelf in the same manner as the inner shelf.

In brief, exercising jurisdiction is hardly an “artificial inflation of your role” as claimed by Professor Pellet.¹³ The only thing that is artificial is the attempt to transform unrelated procedures and third-party rights into an impenetrable obstacle against this Tribunal’s exercise of jurisdiction.

It is in this light that I now turn to some of Professor Pellet’s more entertaining arguments. These, of course, are more in the nature of variations on a theme, the theme being how to pay lip service to accept the Tribunal’s jurisdiction *in abstracto* while preventing its actual exercise.

Just as Professor Pellet admonishes you to avoid an artificial inflation of your role he has no problems with artificially inflating the role of the CLCS to the exclusion of your jurisdiction. He does this by attempting to confer quasi-judicial powers to the Commission. He claimed, for instance, that: “The recommendations of the Commission are legal rulings applicable to all and essential for the definitive establishment of the outer limits of the continental shelf of the coastal state beyond 200 M”¹⁴. However, later he back-pedalled and admitted that States parties “can also refuse the recommendation, but if it stays at that point, the outer limits of its continental shelf will not be binding on third parties.”¹⁵

This clarifies that the purpose of coastal State delineation based on CLCS recommendations is opposability against third States. As noted by an eminent authority during the negotiations of the Convention, where there is disagreement, “the strength of the proposed [CLCS] procedure [is] that the limit eventually established by the coastal State in this case *will not be opposable to third States*.”¹⁶

Nevertheless, Professor Pellet fails to explain how this function can either supplant the judicial role of this Tribunal or translate into a necessary pre-condition for this Tribunal’s right to exercise its jurisdiction in this case. The opposability of the outer limits is not an issue in this case.

The argument that determining “title to the continental shelf ... is within the competence of the Commission” is similarly flawed.¹⁷ A proper reading of article 76(8) makes clear that it is not within the competence of the Commission to confer title to the continental shelf; that is a matter for the coastal State. To read once again the last sentence of

¹² Para. 86.

¹³ ITLOS/PV11/11 (F/10) p. 14, line 20-21 (Pellet).

¹⁴ *Ibid.* p. 10, lines 32-34 (Pellet).

¹⁵ *Ibid.* lines 43-45 (Pellet).

¹⁶ Tullio Treves “La Nona Sessione della Conferenza sul Diritto del Mare” (1980) 63 *Rivista di Diritto Internazionale* 432-463 at 438; cited in Committee on “Legal Issues of the Outer Limits of the Continental Shelf” in International Law Association Report of the Seventy First Conference, (Berlin 2004) (International Law Association, London, 2004) (internet version) at p. 32, fn. 169 (emphasis added) [hereinafter 2004 ILA Report].

¹⁷ ITLOS/PV11/11 (E/10) p. 10, lines 2-5 (Pellet).

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article 76(8): “The limits of the shelf *established by a coastal State* on the basis of these recommendations shall be final and binding.” It is the coastal State that establishes its sovereignty by making a claim justified under the Convention. The relevance of CLCS recommendations is opposability to third States. This principle was recognized long ago in the *Anglo-Norwegian Fisheries* case, in which the ICJ held that:

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.¹⁸

The situation is no different under article 76(8). The CLCS does not confer title, any more than it resolves disputes as to delimitation.

Another theme that Professor Pellet conjured up was the notion of procedural anarchy. Delimitation prior to delineation, he claimed,

would not only be a breach of the procedure provided for by the Convention, but it would also entirely bypass the Commission ... which would be confronted with a *fait accompli* and would have nothing else to take a position on.¹⁹

I can reassure Professor Pellet that by proceeding as we suggest, in a manner that is without prejudice to the role of the CLCS, that body would not be left feeling futile and neglected. It would still have a role to play in delineating the outer limits, based on the Parties’ submissions.

What is perhaps more significant is that Professor Pellet’s procedural anarchy argument flies in the face of State practice. There are currently 14 bilateral maritime boundary agreements in which the continental shelf is delimited beyond 200 M. No fewer than eleven of these agreements were concluded before one or both Parties received a recommendation by the CLCS.²⁰ On Professor Pellet’s approach, the States concerned have acted without lawful authority, and these agreements would have to be deprived of any legal effect. The procedural culprits include Mexico–USA in 2000, Australia–New Zealand in 2004, Iceland and Norway in 2006, Kenya–Tanzania in 2009, and Barbados–France in 2009. Surely Professor Pellet would agree that these States have not left the CLCS with “nothing

¹⁸ ICJ Reports 1951, p. 116, at p. 132.

¹⁹ ITLOS/PV 11/11 (E) p. 10, lines 6-10 (Pellet).

²⁰ All but one of these agreements can be found in ASIL’s International Maritime Boundary series. The 1979 Agreement between the Gambia and the Republic of Senegal, Report No. 4-2, p. 849, read in conjunction with the Preliminary Information sent by both the parties to the CLCS; The 1978 Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, Report no. 5-3, p. 929; The 1982 Agreement on Maritime Delimitation between Australia and France (New Caledonia), Report no. 5-1, p. 905; The 1988 Agreement Concerning the Delimitation of Areas of the Continental Shelf between the two Countries between Ireland and the United Kingdom no. 9-5, p. 1767; The 1988 Agreement between the Government of Solomon Islands and the Government of Australia Establishing Certain Sea and Sea-bed Boundaries, Report no. 5-4, p. 977; The 1990 Treaty on the Delimitation of Marine and Submarine Areas between Trinidad and Tobago and Venezuela, Report no. 2-13(3), p. 675; The 1990 Maritime Boundary Agreement between the United States of America and the Union of Soviet Socialist Republics, Report no. 1-6, p. 447; The 2000 Treaty on the Delimitation of the Continental Shelf in the Western Gulf of Mexico beyond 200 Nautical M, Report no. 1-5(2), p. 2621; The 2004 Treaty between the Government of Australia and the Government of New Zealand establishing certain Exclusive Economic Zone and Continental Shelf Boundaries, Report no. 5-26, p. 3759; The 2009 Agreement between the United Republic of Tanzania and the Republic of Kenya on the Delimitation of the Maritime Boundary of the Exclusive Economic Zone and the Continental Shelf see LOSB 70; The 2009 Agreement between the Government of the French Republic and the Government of Barbados on the delimitation of the maritime space between France and Barbados, Report no. 2-30, p. 4223.

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else to take a position on.”²¹ This is extensive practice by significant States, on any view. It is practice that constitutes “objective evidence of the understanding of the parties as to the meaning of”²² the procedure under article 76(8). If States can reach bilateral agreement on delimiting their outer continental shelves lawfully and without prejudice to the role of the CLCS, why cannot this Tribunal? Professor Pellet has provided no answer to that point. Such practice informs the interpretation of article 76 of the 1982 Convention, pursuant to article 31(3)(b) of the Vienna Convention on the Law of Treaties, which, as this Tribunal has recognized, “apply to the interpretation of provisions of the Convention.”²³

Mr President, from common sense, to inflated roles, to procedural anarchy, the next theme in Professor Pellet’s presentation transported us from the outer limits of the continental shelf to the outer limits of legal reasoning. I refer in particular to his response to the insurmountable problems occasioned by the CLCS’s projected date of 2035 for considering Bangladesh’s submission. Professor Pellet complained at some length that whereas Myanmar is number 16 in the queue, Bangladesh is number 55. He asked, “Whose fault is that?” Now it is no secret that CLCS submissions are not like the Tour de France. There is no prize for being the first bicycle past the finish line. However, Professor Pellet goes to extraordinary lengths to attribute sinister motives to Bangladesh for being so far behind Myanmar in the queue. In responding to the fact that the CLCS recommendations may be 25 years away, he said:

Mr President, whose fault is that? Myanmar presented its request on 16 December 2008 and today it is the first in the queue. ... Bangladesh, for its part, waited until 25 February 2011 to present its own request and I cannot help but think that this is not entirely lacking in any link to the case we are dealing with now, nor of tactical strategy ... Myanmar is number 16, Bangladesh is number 55. Whose fault is that, Mr President?²⁴

If this were a horse race, with or without a cart, and we were galloping along the track, we would be devastated to know that Myanmar is number 16 and Bangladesh is number 55. But surely Professor Pellet is well aware that, according to article 4 of Annex II, States are only required to make their submissions “within 10 years of the entry into force of this Convention for that State.” The Convention entered into force for Bangladesh in July 2001, which explains why it made its submission on 25 February 2011, actually six months prior to the deadline. The Convention came into force for Myanmar in May 1996, but primarily because the Commission was not yet functioning, the 10-year period was extended to run from 1999.²⁵ Mr President, there is no evil conspiracy here, no sinister motive, no delaying tactic as Myanmar imagines. Bangladesh has merely made its CLCS submission in accordance with the time limits stipulated in the Convention.

Professor Pellet does not stop there with this line of argument. Having accused Bangladesh of delaying tactics, he then proceeds to accuse it of “jumping the gun.”²⁶ He

²¹ ITLOS/PV11/11 (E) p. 10, line 10 (Pellet).

²² ILC Yearbook 1966 (vol. II) 221.

²³ Advisory Opinion in the case of “Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area” 1 February 2011, para. 58. Available at <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>.

²⁴ ITLOS/PV11/11 (E/10) p. 12, lines 4-10 (Pellet).

²⁵ See *Decision regarding the date of commencement of the ten-year period for making submissions to the Commission of the Limits of the Continental Shelf set out in article 4 of Annex II to the United Nations Convention on the Law of the Sea*, Eleventh Meeting, SPLOS/72, 29 May 2001; *Report of the eleventh Meeting of State Parties*, Doc. SPLOS/73 of 14 June 2001, at 13 para. 81.

²⁶ ITLOS/PV11/11 (E/10) p. 14, line 32 (Pellet).

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warns the Tribunal of dire consequences if it exercises jurisdiction with respect to the outer shelf:

All States not wanting to wait for the CLCS to examine their submission would bring to you their disputes, whether real or invented with their neighbours in order to bypass the Commission. This is called ‘sneaking by’.²⁷

With all this concern about orderly queues and “sneaking by”, Professor Pellet would forgive me if I suggested that he sounds like an indignant Englishman. Perhaps he has in mind some barristers jumping the queue at the sandwich shop down the street, eager to have a quick lunch, as Englishmen do, so that they can hurry back to work on their pleadings. It is not fair to jump the queue, he says. However, it is difficult to understand how the exercise of jurisdiction by this Tribunal jumps the CLCS queue. Their functions are simply not the same. Bangladesh has not come to this Tribunal to delineate its outer limits. All that it asks for is a bilateral delimitation in the continental shelf within the outer limits. There is no “short-circuiting” of the Commission, of which Professor Pellet accuses us, no light bulbs that need to be changed, and the Convention’s fuse-box is not in danger of exploding.

Mr President, distinguished Members of the Tribunal, perhaps because Professor Pellet is an admirer of Pierre Corneille’s *Le Cid*, he is attracted to dilemmas and wants to force this Tribunal to make “*un choix cornélien*”. Just as Rodrigue had to choose between the honour of his father and his love for Chimène, we are told that this Tribunal has only two unpleasant choices: it must either wait 25 years to delimit the outer shelf or it will usurp the functions of the CLCS. Like Myanmar’s arguments on jurisdiction, *Le Cid* is both a tragedy and a comedy. Fortunately, the Tribunal can avoid such an outcome by adopting an approach based on the Convention, common sense, and established judicial practice.

As set forth in our pleadings, the Annex VII Tribunal in *Barbados v. Trinidad* – the only Part XV procedure to consider the issue – found that it had jurisdiction to delimit beyond 200 M.²⁸ Having studiously ignored this precedent, Professor Pellet finally admitted on Tuesday that:

In this award the arbitral tribunal considered that its competence to establish the maritime boundary between the continental shelf entitlements of the two countries extended to the part of the shelf situated beyond 200 M.²⁹

That is what Professor Pellet said, but he suggested that this precedent is consistent with Myanmar’s position because Myanmar does not contest the Tribunal’s jurisdiction *in abstracto*.³⁰ The Tribunal in that case, however, held that it had jurisdiction despite the argument advanced by Barbados – identical to Myanmar’s argument in this case – that delimitation would “interfere with the core function” of the CLCS and “affect the rights of the international community”, relying primarily on the *St Pierre et Miquelon* case.³¹ That Award, rendered in 2006, a decade after the entry into force of the Convention and the establishment of the CLCS, is certainly the more persuasive authority, and it only reinforces our conclusion that the Tribunal may exercise jurisdiction in the present case.

Mr President, distinguished Members of the Tribunal, as this Tribunal lives up to its role in contributing to the delimitation of maritime boundaries in the outer continental shelf,

²⁷ *Ibid.* p. 12, lines 33-36 (Pellet).

²⁸ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147, para. 217 (hereinafter “*Barbados/Trinidad & Tobago*”). Reproduced in MB, Vol. V.

²⁹ ITLOS/PV11/11 (E/10) p. 13, lines 4-7 (Pellet).

³⁰ *Ibid.* lines 13-15 (Pellet).

³¹ *Barbados/Trinidad & Tobago*, para. 82.

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as it asserts its rightful place as the guardian of the law of the sea, it must bear in mind that this will surely not be the last such dispute to come before it. The continental shelf beyond 200 M may be a last frontier of maritime delimitation beyond which lies the common heritage of mankind. With technological advances and the increasing demand for scarce resources, its importance will only grow in the coming years. It must be considered, as set forth in the ILA Report of 2004, that:

There are but few of such areas which form the natural prolongation of only one coastal State. For instance, an inventory by Prescott from 1998 identifies 29 areas of outer continental shelf. Of these areas, 22 involve more than one State and only 7 just one State.³²

There can be no doubt that many more States will need to resolve similar disputes in the future. Now is the time for the Tribunal to demonstrate that it can expeditiously and effectively delimit the outer shelf. Myanmar invites you to rule yourselves out of having any role in that process. That cannot be right. It must be a proper interpretation of the Convention that this Tribunal has the judicial role we say it has, contributing to the resolution of disputes in the outer continental shelf while respecting the role of the CLCS and giving full protection to the rights of third States. It is in this spirit that we invite the Tribunal to effect a full delimitation between the parties without prejudice to third parties so that, following its judgment and the award of the Annex VII Tribunal, Bangladesh's maritime borders in the Bay of Bengal with both Myanmar and India may be finally and completely settled. Future generations, we hope, will look back at this seminal judgment and see it as a groundbreaking contribution to international jurisprudence and an exemplary vindication of the Convention's dispute settlement procedures.

That brings to a conclusion my remarks. I thank you, Mr President and distinguished Members of the Tribunal, for your patience and kind consideration over the past several days. It has been a great privilege and honour to appear before you.

I now ask you, Mr President, to call Professor Crawford to the floor.

The President:

I thank you, Mr Akhavan.

I now give the floor to Professor James Crawford.

³² 2004 ILA Report, p. 26.

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STATEMENT OF MR CRAWFORD
COUNSEL OF BANGLADESH
[ITLOS/PV.11/14/Rev.1, E, p. 13–22]*Mr Crawford:*

Mr President, Members of the Tribunal, imagine Professor Pellet speaking not about non-derogable human rights or about the fundamental obligations of States on issues such as aggression. Imagine him speaking about the new-found diamantine law of maritime delimitation, the peremptory requirement of equidistance/special circumstances which we had previously thought of as a method. What Professor Pellet says sounds something like this - with apologies to W.H. Auden:

Law, says [Professor Pellet] as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is the Law.¹

It is true, there are exceptions: the law is sometimes not the law. There is even an exception in this case, St Martin's Island, whose maritime area is to be truncated and semi-enclaved in the interests of Myanmar; but with that self-interested, unprecedented and solitary exception, the law of maritime delimitation now proceeds in lock-step – first, equidistance; then special circumstances – but take care that they are really special – a ratio of relevant coasts of 8 or 9 to 1; then manifest disproportionality – a matter of appreciation, no doubt, but formulated in terms that the criterion for disproportionality will in normal circumstances never be met. “Law is the Law.” The effect is – equidistance – and Bangladesh simply has to bear the consequences. Thus Professor Pellet: “Unless we completely re-fashion nature, which is not possible, one cannot see this concavity as a circumstance involving a shift of the equidistance line.”²

Mr President, Members of the Tribunal, in this final substantive presentation of our Reply, I will first address the core issue of principle that separates the Parties, which is whether this Tribunal, exercising jurisdiction under Part XV, has some flexibility in order to achieve an equitable solution or whether your hands are so tied by precedent that you have no choice. To put it in other terms, is there such a conventional and precedential emphasis on equidistance as *the* solution to delimitation between adjacent States that there is nothing to be done? Secondly, and on the basis that you do have a significant degree of flexibility, I will make some brief final remarks epitomizing Bangladesh's case. Third, I will comment on your role vis-à-vis third parties, specifically India. Finally, I will say something about Myanmar's approach to the two questions you have asked us.

Mr President, Members of the Tribunal, you have heard Myanmar's chorus of counsel solemnly intoning the Canticle of Equidistance as a fundamental norm, subject to narrowly-defined special circumstances of which concavity is not – as such – one, but of which a coastal island is – provided it is associated with Bangladesh. By now you know both the words and the music of the Canticle of equidistance, and I will neither attempt to paraphrase nor to sing it. For the latter item of self-restraint the Tribunal should be grateful.

¹ W.H. Auden, “Law, say the gardeners, is the sun” (1940) in *Another Time* (New edn., Faber & Faber, 2007), p. 5.

² ITLOS/PV.11/7, p. 9, line 41-42 (Pellet) (footnotes omitted).

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Instead I will ask what courts and tribunals say about their task, and how in fact they perform it. Because the *North Sea* decision is said to be an outlier, I will start with the others and only come back to it at the end.

In *Tunisia/Libya* the Court said:

The task of the Court in the present case is quite different: it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result. While it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice.³

In *Gulf of Maine* the Chamber said of the delimitation criteria including equidistance:

... their equitableness or otherwise can only be assessed in relation to the circumstances of each case ... The essential fact to bear in mind is ... that the criteria in question are not themselves rules of law and therefore mandatory in the different situations, but “equitable”, or even “reasonable”, criteria ...⁴

In *Guinea/Guinea-Bissau* the Tribunal said:

The essential objective consists of finding an equitable solution with reference to the provisions of Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention ... In each particular case, its application requires recourse to factors and the application of methods which the Tribunal is empowered to select.⁵

In *Libya/Malta*, a case to which Myanmar rightly attributes importance, the Court said:

The application of equitable principles thus still leaves the Court with the task of appreciation of the weight to be accorded to the relevant circumstances in any particular case of delimitation...⁶

In *Jan Mayen* the Court said:

A court called upon to give a judgment declaratory of the delimitation of a maritime boundary ... will therefore have to determine “the relative weight to be accorded to different considerations” in each case; to this end, it will consult not only “the circumstances of the case” but also previous decided cases and the practice of States.⁷

In *Romania v. Ukraine*, as Professor Pellet is fond of emphasizing, the Court did give priority to three separate stages as “broadly explained” in *Libya/Malta*, but it did so without disapproving the earlier jurisprudence including *Libya/Malta*, which allows for flexibility,

³ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18.

⁴ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, at para. 158.

⁵ *Delimitation of Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, reprinted in 25 ILM 252, para. 88. Reproduced in MB, Vol. V.

⁶ *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Judgment, I.C.J. Reports 1985, p. 13, at para. 48.

⁷ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 59, para. 58.

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and it referred to the need for methods “that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place”.⁸

Finally, without descending to the form of legal realism which says that it all depends on what the judge had for breakfast,⁹ it is material to observe what tribunals actually do in delimitation cases, sometimes without saying so.

First, they compromise. Even *Romania v. Ukraine*, the most overwhelming win in recent delimitation history, involved an element of compromise: the area of overlapping claims was shared (in a ratio of about 4:1) and it would have been much closer to 50:50 had not Ukraine ridiculously over-claimed.

Second, they take access to resources into account. It is well-known that this happened in *Gulf of Maine*. There was a story, no doubt apocryphal, that the President of the Chamber said to the Canadian agent: “I have got you your lobsters.” The explicit reference to access to resources as a relevant factor in *Jan Mayen* – though it has attracted criticism – is a refreshing piece of intellectual honesty.

They emphasize the particular over the general. The Latin word “*unicum*” is used, for example, in the French texts of the *Gulf of Maine* judgment:

(Poursuit en français) La pratique, d'ailleurs ... est là pour démontrer que chaque cas concret est finalement différent des autres, qu'il est un *unicum* ...¹⁰

(Continues in English) The English translation of the authentic text is “monotypic”, which is a bit of a pity: “*unicum*” could have been left in the Latin. It was used in the English text of *Guinea/Guinea Bissau*.

Tribunals sometimes make *a priori* decisions, not according to the formula they themselves lay down – for example, the *a priori* decision to ignore Serpents’ Island in *Romania v. Ukraine*.

In all these respects they are following the general approach in the *North Sea* cases, and not following Pellet’s Peremptory Postulate - which brings me back, briefly, to that decision.

In the *North Sea* cases, the Court decided, definitively, that equidistance was a method of delimitation and not a rigid rule. It said:

It has however been maintained that no one method of delimitation can prevent such results and that all can lead to relative injustices. This argument ... can only strengthen the view that it is necessary to seek not one method of delimitation but one goal.¹¹ ... The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.¹²

The fact is that the decision in the *North Sea Continental Shelf* cases is ineradicably, indelibly part of the jurisprudence. The jurisprudence has evolved but it has not departed from the basic proposition that there is a level of flexibility in the process. The case is the single most cited authority in the jurisprudence of maritime delimitation.

⁸ *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, General List No. 132, para. 116.

⁹ Attributed to Jerome Frank: see a Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 Loy. L. A. L. Rev. 993, 993 (1992-1993).

¹⁰ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 246, at p. 290 (para. 81).

¹¹ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, para. 92.

¹² *Ibid.*, para. 93.

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Think how often counsel for Myanmar intoned that “the land dominates the sea”. Where did that come from? Well, *North Sea Continental Shelf*.

Think how often they warned you against “completely refashioning nature”. Where did that come from? *North Sea Continental Shelf*. It is worth noting, as I said this morning, that the Court was perfectly conscious that the negotiation of the continental shelf boundary in accordance with its judgment would involve substantial departure from equidistance, not merely trivial or minor. Hence the real significance of the word “completely” in that famous *dictum* – “completely refashioning nature”. You saw how much refashioning was involved. Counsel for Myanmar tended to ignore that, thereby refashioning the *dictum* more or less completely.

To conclude, the jurisprudence, like the treaties, supports the view that there is no rigid rule or presumption of equidistance in international law. Articles 74(1) and 83(1) are different from article 15 of UNCLOS, and they are different from article 6 of the 1958 Continental Shelf Convention: the difference of language was deliberate and resulted from the 1969 judgment and the deliberate policy decision that judgment embodied. Maritime delimitation is a bilateral process between neighbours aiming at an equitable solution.

A similar position is taken, by and large, in the literature. Myanmar cited on several occasions a 1993 article by Professor Sir Derek Bowett. There is no-one more experienced than Sir Derek in this field or more capable of calling a spade a spade. His conclusion was, as usual, succinct and clear: “The situations are so diverse that generalizations are hazardous, and to attempt to postulate ‘rules’ would be to fall into the error which the courts have persistently, and rightly, avoided.”¹³

Many others have said the same, although not always with the same concision. Thus Dupuy and Vignes following the *North Sea* cases:

“The goal became an ‘equitable solution’, taking account of all the ‘relevant circumstances’ which characterize a particular area, circumstances which might be geographical or geomorphological. Moreover, that solution could be obtained by drawing an adjusted median line, with due regard to the circumstances in question, even though this was by no means a rule ...”¹⁴

I won’t read the whole passage. Rothwell & Stephens:

The ICJ in *Tunisia v. Libya* ... gave initial guidance as to how this may be achieved, emphasizing the importance of taking into account the relevant circumstances of the case. This approach has been duplicated in subsequent decisions and is illustrated by the consideration given to a wide range of relevant geographic factors in order to ensure they are taken into account in the final delimitation lines.¹⁵

Malcolm Evans:

I’m sufficiently dogmatic and unrepentant and still believe what I first wrote about the subject nearly 20 years ago. This is that the idea of defimitation in accordance with equitable principles is best understood as a process, rather than

¹³ D. Bowett, in Charney & Alexander, *International Maritime Boundaries*, vol. I (1993) 131, 150.

¹⁴ Dupuy and Vignes, *A Handbook on the New Law of the Sea*, Academie de droit international, 13.

¹⁵ Rothwell & Stephens, *The International Law of the Sea* (2010), 401.

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as a call for the identification of any particular means, methods, concepts or factors which, when framed as principles, are to be considered equitable.¹⁶

Prescott & Schofield:

Thus there is ample scope for differing interpretations as to which factors are applicable to a particular case and therefore ... there is much potential conflict in the stances of States as to the emphases to be afforded to the principles or rules that might be applicable to a particular delimitation.¹⁷

Churchill & Lowe:

As regards the question of how particular relevant or special circumstances are to be weighted, it seems, especially from the *Libya/Malta* and *Greenland/Jan Mayen* cases, that a court has a broad discretion to determine the relative weight of any particular circumstances, subject only to the need for some consistency with previous cases.¹⁸

These passages could be replicated *ad nauseam*, but they confirm Bowett's understanding. It follows that: (1) equidistance/special circumstances is one – but only one – a very important, but only one method of delimitation – it is normal but not invariable; (2) there is no presumption of equidistance – if it does not produce a satisfactory, i.e. equitable, outcome, it should be modified or abandoned; (3) there are other methods, including angle bisectors that may be appropriate, and they have been recently used.

Mr President, Members of the Tribunal, I move to look at the various issues of delimitation that you face and the circumstances of the present case. Following Professor Sands, there is nothing I need to say more about the territorial sea around St Martin's Island, except to stress the obvious contradiction between Myanmar's case on the territorial sea boundary and its case on the single maritime boundary within 200 M.

As to delimitation beyond 12 and within 200 M, I would make four points by way of wrapping up our case.

The first point concerns St Martin's Island as an EEZ base point. Of course if it is not even entitled to a full 12-M territorial sea, then *a fortiori* it is unlikely to be an EEZ base point. This perhaps explains why Mr Lathrop's opening presentation on the territorial sea was so inextricably confused with issues of EEZ delimitation. I would respectfully suggest that the Tribunal should not think that by giving St Martin's Island a 12-M territorial sea, it is doing Bangladesh some sort of favour. The real question for the Tribunal concerns delimitation beyond 12 M.

I have nothing more to say about coastal base points for an EEZ and continental shelf boundary over and above what has been said so eloquently by Mr Reichler today. No doubt there is much that could be said about article 121(3) but Myanmar has not said any of it. All I would say is that article 121 is part of the Convention and must be given its proper effect – which is not to be evaded by the choice of an article 121(3) feature as a base point.

I turn again - this is my second point - to the *Cameroon v. Nigeria* case which Professor Forteau described as *particulièrement déterminante*.¹⁹ It is for your purposes for the present case not determinant at all, for reasons I gave in the first round. The crucial point is of

¹⁶ Evans, in Freestone, Barnes & Ong (eds) *The Law of the Sea: Progress and Prospects* (2006) 137, 145. See also Evans, in Evans (ed) *International Law* (3rd edn 2010) 651, 679.

¹⁷ Prescott & Schofield, *The Maritime Political Boundaries of the World*, (2nd edn, 2005), 223.

¹⁸ Churchill & Lowe, *The Law of the Sea*, (3rd edn, 1999), 188 (footnotes omitted).

¹⁹ ITLOS/PV.11/10 F/9, p. 10, line 22 (Forteau).

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course Bioko, located in precisely such a place as to block any south-eastern extension of a limited Cameroon-relevant coast. Incidentally, it was not I who came up with the bright idea of an Eastern Bioko, as counsel suggested.²⁰ It was their suggestion, but we are grateful for it, since locating eastern Bioko in the Bay of Bengal only emphasized the enormous open space of that Bay, over which Bangladesh's coastal frontage looks unimpeded, towards Antarctica. But I do confess that it was my idea that Eastern Bioko should be a holiday destination!

Professor Forteau, who also sees concavity everywhere except where it is actually to be found in the corner of the Bay of Bengal, noted that the Court said that the Cameroon coast west of Cape Debunsha established "no particular concavity" and that is true.²¹ Here there was nothing more than an irregular coastline with an estuary and a major opposite island with little or no sea space. None of these factors apply to our situation in the Bay of Bengal.

Thirdly, a final word about *Barbados v. Trinidad & Tobago*, on which our friends opposite had so much to say: the case was essentially about two different issues. First there were two small islands opposite each other, not to be distinguished – Tobago and Barbados. Barbados claimed about 80% of the relevant area between those two islands, essentially on grounds of historic fishing title, and it failed utterly. There was no case for anything more as between those two opposite coasts for anything more than equidistance. That is what Trinidad and Tobago asked for and it is what it got. Secondly, however, there was a question whether the east-facing coast of the island of Trinidad was entitled to get out to 200 M – that it was entitled to a corridor, or only to equidistance. The Tribunal's answer was – in effect – "yes, a modest tapering corridor" – but, the Tribunal said, "you have already given that away to Venezuela" – so they got a point instead, a point rather than a goal, you might say.. As I said in the first round, a tribunal which believed in Professor Pellet's peremptory norm would not have given even that.

Fourthly, I refer to the grey area issue that I discussed in the first round. Professor Pellet said almost nothing about it – he simply asserted that it created a legal impossibility – he is very fond of impossibilities. He added that my failure to deal with State practice was embarrassing.²² But I referred to the practice of his own client – that is to say Myanmar – which claims priority of EEZ over territorial sea in the area of cut-off of St Martin's Island. He completely failed to deal with that. In fact there is not much practice and what there is, is equivocal. I would simply note two points. First, much of the focus has been on the special case where rights in different zones overlap and are exercised by different States concurrently – as with the Australia-Papua New Guinea Agreement. But the Parties here agree that the boundary is a single maritime boundary, which effects a delimitation *inter se* of all rights by a single line. It excludes as well as allocating rights, whatever they may be. So there was no legal impossibility. There would be territorial sea rights to the south of the line between Nicaragua and Honduras because the lines around the cays are drawn from a single point, and the cays have outlying reefs and so on, which in other circumstances could have provided a basis for territorial sea jurisdiction. That jurisdiction is excluded vis-à-vis EEZ rights by the line that the Court drew. That is simply one example of potentially many. Of course it is possible for there to be an express agreement closing off the EEZ and continental shelf jurisdiction of a State at 200 M, in effect enclaving a corridor. There are only two judicial decisions – which reach opposite conclusions – but the logic of the position is as I have stated it, and it has only been challenged by Professor Pellet in a single conclusory sentence.

²⁰ ITLOS/PV.11/8, p. 17, lines 20-23 (Larthrop).

²¹ ITLOS/PV.11/9, p. 12, lines 15-16 (Forteau).

²² ITLOS/PV.11/11 F/10, p. 9, lines 37-39 (Pellet).

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Mr President, Members of the Tribunal, on the subject of delimitation of the continental shelf beyond 200 M, there is also nothing to add to what has just been said by Professors Boyle and Akhavan. I would only add one point. Presentations by Bangladesh have confirmed the importance placed on natural prolongation in the delimitation of the continental shelf. The importance is demonstrated by the *North Sea* cases, which noted that different levels or degrees of prolongation should be taken into account. The Tribunal has learnt the extent to which Bangladesh sustains a robust and continuous natural prolongation into the Bay of Bengal. It has been informed of the limited nature of the prolongation of Myanmar into the Bay – which is one of mere adjacency, and not of continuity. That fact must be relevant to your task.

An equitable solution: Mr President, Members of the Tribunal, Myanmar presents maritime delimitation as a form of manifest destiny, with Bangladesh excluded. Notably it is excluded from the 200-M line by Myanmar's claim line, which divides the area I showed you this morning – including the area down to Cape Negrais, in a ratio of 1:2 in favour of Myanmar; and this despite a coastal ratio – on the assumptions I set out this morning of 1:1.17. In truth, since Cape Negrais is too far from the area of the delimitation to exert any influence over it in terms of overlapping potential entitlement, the ratio of relevant coasts is much closer to 1:1. That makes a 2:1 division of the area of overlapping claims within 200 M obviously inequitable. This is the more so in that Myanmar's claim line excludes Bangladesh entirely from the outer continental shelf, despite the fact that it has more than 30% of the coastline in the northern part of the Bay of Bengal. The overall result taken together is grossly inequitable. To allow one State to have some access to the outer continental shelf and the other to have none – none at all – is grossly inequitable. It is far from being required by international law, as Myanmar claims.

I should say something about the position of India and the Annex VII Tribunal *vis-à-vis* your Tribunal. I would first note that Myanmar has said nothing in response to my comments in the first round about the systematic character of Part XV of the Convention, and the need for tribunals under Part XV to act in aid of each other.

Sir Michael makes much of the possibility that any attempt to remedy the cut-off effect by adjusting the boundary in this case will make Myanmar “compensate” Bangladesh for India's claims. One can safely predict that he will make the converse argument before the Annex VII Tribunal on behalf of India. The two parties have, it might seem, joined forces to try to prevent either Tribunal from addressing the cut-off effect in favour of Bangladesh.

Here there are four points to be made. First, you can only decide this case as between the two Parties. That is common ground. Secondly – and at least out to 200 M this also seems to be common ground – you can decide this case on the basis of equitable principles as between Myanmar and Bangladesh. Thirdly, Bangladesh's entire coastal frontage stands in opposition to Myanmar's and must be fully taken into account. Bangladesh's coast is not divided *a priori* between competing neighbours. India has the normal protections of a third party in bilateral delimitation proceedings: it could have intervened to clarify its position but it chose not to do so. That means it is unequivocally a third party. But, and this is my fourth point, the Tribunal is entitled to know and to take into account the factual situation. It is currently as shown on the screen. You are entitled to know and to take into account the fact that the two claim lines of Bangladesh's neighbours result in a cut-off which is more serious by reason of their combination. This enhances – it certainly does not diminish – Bangladesh's claim to an equitable result in the delimitation with Myanmar.

Further, the Tribunal cannot assume that the Annex VII Tribunal alone can remedy the cut-off. I suggest that you cannot avoid the issue by allowing each side to play the other side against Bangladesh – the game of pass the parcel to which I referred earlier. I suggest, with all respect, that your Tribunal cannot avoid adjusting the line as between these two

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Parties in view of the obvious inequity to Bangladesh. If each Tribunal acts in accordance with article 74(1) and 83(1), the overall result will be equitable as between all three States.

Mr President, Members of the Tribunal, finally certain remarks are called for concerning Myanmar's answers to the two questions put by the Tribunal, through you, Mr President, at the preliminary meeting on 7 September, and subsequently communicated in writing.

The practice whereby the Tribunal asks for certain matters to be dealt with by the parties in oral argument is now well established. It is a feature of Hamburg rather than The Hague – it would be good if it was a feature of The Hague. I remember the significant questions asked by the Tribunal in the *Southern Bluefin Tuna* and *Land Reclamation* cases, and Professor Sands has reminded me of those put in the *Saiga* case. Both parties in those cases took the questions seriously. Indeed, in this case we welcomed the questions and we did our best to address them. How did Myanmar answer these questions? Well, it did not, as you will have noticed.

The first question concerned Myanmar's right of access by ship to the Naaf River through the waters around St Martin's Island. There is no evidence that this has caused any difficulty in practice these last 30 years – certainly Myanmar produces none. Yet on Friday you heard a long presentation, ostensibly on the territorial sea, by Mr Lathrop in which the question of maritime access was not mentioned once. Not merely did Mr Lathrop not answer the question, he did not even say he was not answering the question. This was silence upon silence.

To be fair, Sir Michael Wood mentioned maritime access, in the course of his long refutation of a proposition for which we have not argued – that is, that there is a signed treaty delimiting the territorial sea. In the course of his speech he briefly mentioned the issue of naval access, on which he said there was likewise no agreement. He said Bangladesh's position was not clear.²³

Well, you have heard what the Foreign Minister and Agent had to say on Day 1.²⁴ I thought she was clear. What the Foreign Minister and Agent says in response to a direct question from an international tribunal commits the State. That is the lesson of the *Nuclear Tests* cases,²⁵ so there is your answer.

Unlike Mr Lathrop, Professor Pellet was explicit in failing to answer the second question, about methods of delimitation beyond 200 M. It did not arise, he said. Evidently your Tribunal thought it might arise, which is why you asked it, but from Professor Pellet, answer came there none. He said only that the criteria for delimitation do not change at 200 M.²⁶ Beyond that – in his best hard-boiled manner – he said, in effect, it is no business of yours. This was the self-judging advocate: what I tell you is off-limits, must be irrelevant. I do not suggest it was contempt of the Tribunal but it sounded like deliberate neglect. By contrast, Professor Boyle and I have tried to address the issue in a way we hope might assist in a useful, practical manner.

This leads me to my second final concluding point. This case has now been pleaded extensively, in writing and orally. On key issues Myanmar has adopted a strategy of silence. It has expressly declined to discuss delimitation beyond 200 M from the nearest coast. It takes refuge in an implausible admissibility argument to preclude you from dealing with an issue as to which the Annex II Commission self-evidently lacks jurisdiction to determine. We will listen with care to what they have to say on Saturday, but in respect to the silences I have mentioned, and the many others, I suggest, with respect, it should not be allowed to fill the

²³ ITLOS/PV.11/7, p. 24, lines 2-47 (Wood).

²⁴ ITLOS/PV.11/2/Rev.1, p. 5, lines 23-29 (H.E. Dr Dipu Moni).

²⁵ *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, at pp. 472-475.

²⁶ ITLOS/PV.11/8, p. 35, lines 39-47 (Pellet).

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cavities in its case by introducing new material or argument to which we have no chance to respond.

Mr President, Members of the Tribunal, I thank you again on behalf of counsel for your patient attention. I would ask you now to call the Deputy Agent to deal with the question of our submissions.

The President:

Thank you for your statement.

I now call on the Deputy Agent, Mr Mohammed Khurshed Alam, to read his Party's final submissions.

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STATEMENT OF MR ALAM
DEPUTY AGENT OF BANGLADESH
[ITLOS/PV.11/14/Rev.1, E, p. 22]

Mr Alam:

Mr President, Members of the Tribunal, may I request that H.E. Mohamed Mijarul Quayes, the Foreign Secretary of the Government of Bangladesh, comes to the podium for the submission.

The President:

Thank you.

I invite His Excellency Mr Mohamed Mijarul Quayes, the Foreign Secretary of Bangladesh, to take the floor to present the submissions of Bangladesh on behalf of the Agent of Bangladesh.

STATEMENT OF MR QUAYES – 22 September 2011, p.m.

STATEMENT OF MR QUAYES
COUNSEL OF BANGLADESH
[ITLOS/PV.11/14/Rev.1, E, p. 22–24]

Mr Quayes:

Mr President, distinguished Members of the Tribunal, it is a distinct privilege and honour for me, as the principal diplomatic officer of my Government, to appear before you to conclude the oral presentation so meticulously prepared and presented by our distinguished legal team. The Honourable Foreign Minister, in her capacity as the Agent for Bangladesh, asked me to speak on behalf of Bangladesh at the closing of this presentation and to read our formal submissions into the record.

Allow me at the outset to convey, on behalf of the Honourable Foreign Minister, myself, the Deputy Agent, the entire Bangladesh legal team and, most importantly, the people of Bangladesh, our sincerest thanks and appreciation to you, Mr President and to all your fellow Judges, including of course Judges Caminos and Nelson who are not able to be here today. We thank also the Registrar and everyone working at the Registry, the interpreters and translators, the stenographers, and the entire team that has made our work here over the past three weeks run as smoothly as it has. You have our deepest gratitude.

We are grateful also for everything that you have done to facilitate these proceedings, beginning as early as December 2009 when the Parties agreed to bring these proceedings before this Tribunal. The efficiency and fairness with which this case has been conducted have been exemplary. Everything that we have experienced over the last 21 months has only enhanced our confidence in the wisdom of our mutual decision to bring this case to the International Tribunal for the Law of the Sea.

I commend the Agent of Myanmar, the Honourable Attorney General Mr Tun Shin, for the foresight and courage that his Government has shown. I shall be remiss if I do not also thank the counsel for Myanmar and all the members of the team, for the courtesies and civility with which they have conducted themselves during the hearings, and the demonstration of their friendship.

In her opening remarks on 8 September, the Honourable Foreign Minister traced the many steps over the last very many years that brought us to your door. At this late stage, there is of course, no point in looking backwards. For 34 years, the Parties were unable to agree on the course of their maritime boundaries, except only in the territorial sea. Earnest efforts in good faith were made on both sides but ultimately to no avail. Thanks to the wisdom and foresight of the drafters of the 1982 Convention, the dispute resolution provisions of Part XV offered us another way to resolve this dispute once and for all.

For Bangladesh, this Tribunal's Judgment will be the first of two very important steps. As you know well, Bangladesh has parallel proceedings *vis-à-vis* its other neighbour, India, pending before a distinguished arbitral tribunal convened pursuant to the provisions of Annex VII of the 1982 Convention. Although India has not acceded to our request to bring our proceedings to this Tribunal, it is evident that the two cases are very much related. Our three States – Bangladesh, India and Myanmar – are geographically united by the concavity in the Bay of Bengal's north coast. The comprehensive resolution that Bangladesh seeks, and the full equitable solution that the 1982 Convention promises, will come once the Annex VII Tribunal also has issued its award.

Mr President, Members of the Tribunal, Bangladesh confidently places itself in your hands. I stand before you at this Areopagus of the Law of the Sea, not to argue a point of law, but to reiterate, *a fortiori*, the arguments and conclusions presented by our legal team. I stand here for the 160 million people of Bangladesh who have full faith in their capacity to define their destiny and to embellish their lives and livelihood with resourcefulness and enterprise,

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and the resources that they rightfully own on land and in their seas. I stand before you to convey their conviction that here justice will be done, with fairness, so as to achieve an equitable solution. We have never wavered, and will never waiver, in our trust in, and respect for, your judgment. You have heard the arguments presented by our counsel; they fully set forth the views of Bangladesh. There is nothing more for me to add.

Mr President, Myanmar is one of the only two States contiguous to Bangladesh. Naturally, there are issues characteristic of relations between the two countries that are born of contiguity. These, we would like to speak of as issues of intimacy rather than irritants or long-standing problems. Delimitation of the maritime boundary is one such issue of intimacy. Looking forward, Bangladesh very much believes that these proceedings will deepen, not detract from, the friendship between the peoples of Bangladesh and Myanmar. With the benefit of the Tribunal's Judgment, our two countries will be able to move forward, where the maritime boundary shall constitute a celebration of our friendship – not a wall that separates, but a frontier for cooperation, our way smoothed by the legal certainty that we seek.

Pursuant to article 75 of the Rules of the Tribunal, I shall now read the final submissions of the Government of the People's Republic of Bangladesh. They are unchanged from those set out in our Reply. Instead of reading out the many coordinates that are included there, we have provided a copy in the Judges' folders at Tab 8.10. The coordinates can also be seen on the screens.

Mr President, distinguished Members of the Tribunal, on the basis of the facts and arguments set out in our Reply and during these oral proceedings, Bangladesh requests the Tribunal to adjudge and declare that:

(1) The maritime boundary between Bangladesh and Myanmar in the territorial sea shall be that line first agreed between them in 1974 and reaffirmed in 2008. The coordinates for each of the seven points comprising the delimitation are those set forth in our written Submissions in the Memorial and Reply;

(2) From Point 7, the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215° to the point located at the coordinates set forth in paragraph 2 of the Submissions as set out in the Reply; and

(3) From that point, the maritime boundary between Bangladesh and Myanmar follows the contours of the 200-M limit drawn from Myanmar's normal baselines to the point located at the coordinates set forth in paragraph 3 of the Submissions as set out in the Reply.

Mr President, Members of the Tribunal, I thank you very much for your kind indulgence and patient attention. This brings us to the close of the Bangladesh's oral pleadings.

I thank you, Mr President.

The President:

I thank you, your Excellency, for your presentation.

This completes the second round of the oral arguments of Bangladesh. The hearing will be resumed on Saturday, 24 September, at 10 a.m. The sitting is now closed.

(The sitting closes at 4.35 p.m.)

24 September 2011, a.m.

PUBLIC SITTING HELD ON 24 SEPTEMBER 2011, 10.00 A.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judge ad hoc* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 24 SEPTEMBRE 2011, 10 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. OXMAN, *juge ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

Good morning. I would like to note that Judge *ad hoc* Thomas Mensah, for reasons made known to me, is unable to take his seat on the Bench today.

We will now hear the second round of oral arguments of Myanmar in a dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal.

I call on Mr Daniel Müller to make his presentation.

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Rejoinder of Myanmar

STATEMENT OF MR MÜLLER
 COUNSEL OF MYANMAR
 [ITLOS/PV.11/15/Rev.1, E, p. 1–8]

Mr Müller:

Mr President, Members of the Tribunal, Before I start my presentation, I should first indicate the order in which Myanmar's Counsel will address you in the second round: I am going to speak about some issues concerning the continental shelf beyond 200 M. I shall be followed by Professor Pellet, who will deal with the question of admissibility and also the bisector. Sir Michael Wood will then respond to Professor Boyle's arguments on the 1974 Agreed Minutes. Professor Forteau will continue after the short break. He will address the issue of special and relevant circumstances. This afternoon, Mr Coalter Lathrop will deal with the construction of the line. He will be followed by Sir Michael Wood, who will conclude the presentation by Myanmar's Counsel. The Agent of the Republic of the Union of Myanmar will then read out Myanmar's final submissions. We expect to finish about 4:30 in the afternoon.

My own task is limited to responding to some arguments and allegations concerning the issue (I should say: non-issue) of the continental shelf beyond 200 M and the interpretation of article 76, and in particular, to respond to Professor Boyle's presentation of Thursday. As we have constantly said during the first round of our argument, no issue concerning the delimitation of any entitlements nor the question of the existence of such entitlements, does or can, legally speaking, arise in the present dispute. This has not changed since last Tuesday, and my colleagues and friends will explain, later this morning and this afternoon, the reasons why the Tribunal has no need to dwell on these issues.

Mr President, I understand that Professor Boyle might not share my enthusiasm – which is more limited than he says – for the interpretation and application of article 76 of the Montego Bay Convention. But, with respect, this is exactly the problem with Bangladesh's argument: it ignores the technical aspects of article 76 and tries hard to circumvent its lack of interest in the actual wording of this basic provision by an open-ended concept of "natural prolongation" informed by geological elements. I must admit that article 76 is not the most straightforward provision of the 1982 Convention and that its application is not at all an easy exercise, especially not on a Saturday morning. But it is as it is, and a lawyer cannot ignore parts of it, only because they are "technicalities", including the Gardiner and Hedberg formulae. There is no strictly legal part of article 76 which is to be applied by lawyers, on the one hand, and a mere, let us say, scientific legal part which can "safely be left to States[] Parties and the CLCS"¹, on the other hand. Article 76 is "a carefully structured package"², and these are the words of Bangladesh, words they are perhaps now happy to forget.

Professor Boyle wants you to believe that some science, especially the science necessary to apply paragraph 4 of article 76, is too difficult and could be set aside. He does so only in order to reintroduce his own science – well, the science of Bangladesh's "independent" experts, through the concept of "natural prolongation". No science; yes, science; or maybe science?

Myanmar never argued that article 76 can be applied by lawyers alone. Indeed, it is based, necessarily, on data and measurements which a lawyer is hardly able to gather alone. Nevertheless, it is for the lawyer alone to reach his or her legal conclusions having considered

¹ ITLOS/PV.11/13 (E), p. 25, lines 39-40 (Boyle).

² RB, para. 4.47.

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the scientific data. It is for the lawyer to make up his mind whether there is a *legal* continental shelf extending out to 200 M, or if the entitlement to a continental shelf extends beyond that limit. This is the central question, and Professor Boyle stressed that this would be the core issue the Tribunal would have to decide³ – but you do not need to do so, as I recalled some minutes ago. It is not for a scientist to tell the lawyer that there is a scientific continental shelf, or even a scientific, geological, natural prolongation. We do not apply “science to law”⁴, as Mr Boyle said, we apply the law to scientific data. Even in the field of the protection of the environment, which is, of course, a field where the interrelation of science and law is particularly strong, we do not apply science to law. It is not because a biologist considers that a species is disappearing, that this species falls under those protected by the Convention on International Trade in Endangered Species; the issue can only be decided by application of the law. If the law does not correspond to scientific reality, well, then it is open to States Parties to change the law, in order to add the disappearing species to one of the annexes of CITES.

Most of us might need an expert, a biologist or an ornithologist, in order to know if a bird is part of the species listed in the annexes of CITES, for instance. Likewise, we need scientists to tell us where the maximum change in the gradient is, where the 1 % sediment thickness line is, and we may need an expert even to tell us where the 200 or 350 M lines are on a map. But, like Professor Boyle would not ask the ornithologist why the bird is endangered – well, of course he might and certainly will be interested in this point, but it is not necessary for the application of CITES – in the context of article 76 we do not need to ask the geologist if there is a geological discontinuity or if the *legal* continental shelf is a *scientific* continental shelf. It is irrelevant for the application of article 76.

Mr President, Members of the Tribunal, the aim of my speech on Tuesday, certainly too long, I must confess, was indeed to show exactly this: the application of article 76, paragraph 1 – the very provision which defines the legal entitlement of a coastal State to a continental shelf – is self-sufficient. There is no need to refer to anything else than the “outer edge of the continental margin” and its distance from the baselines. I did not try to go into the issue of delineation, and I apologize if Professor Boyle did not understand that point. Throughout my presentation of last Tuesday, we did nothing more than to solve the issue of paragraph 1: Is the outer edge of the continental margin of a coastal State situated beyond 200 M, or not? This question cannot be resolved without reference to paragraph 4, containing the very definition of the “outer edge of the continental margin”.

Bangladesh, however, adds a test of “geological natural prolongation” as some independent prerequisite to article 76, in order to import scientific concepts which, otherwise, are not relevant to the application of article 76. There is no reference to tectonic plates, the nature of the crust under the margin, or to a subduction zone. There is no reference at all to any “natural” or scientific boundary or limit of the margin anywhere in article 76. This is explained by the object and purpose of this provision which we need to take into account in its interpretation and application: and I entirely agree with Professor Boyle when he underlined that “one obvious object and purpose of article 76 is to give the definition and extent of the continental shelf greater certainty”⁵. Scientific “natural prolongation”, whether a geologic or a morphologic concept, cannot achieve this purpose, because, as Bangladesh’s own experts have admitted, it does not provide such certainty⁶.

Mr President, I will not argue with Professor Boyle or with Professor Curray, whether the subduction zone is at a distance of 50 M or at any other distance from the coasts, or even

³ ITLOS/PV.11/13 (E), p. 24, lines 45-47 (Boyle).

⁴ ITLOS/PV.11/14 (E), p. 2, line 26 (Boyle).

⁵ ITLOS/PV.11/13 (E), p. 30, lines 9-10 (Boyle).

⁶ ITLOS/PV.11/11 (F), p. 35, line 20 *et seq.* (Müller).

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(as seems to appear on Bangladesh's own drawings) somewhere under Myanmar's land territory. Of course we did spot the black lines in Professor Curray's sketch, but, as he explained in his report⁷, these lines were only aimed at showing the limits of the Bengal Depositional System, not a plate boundary. The form of the line is indeed quite revealing (because plate boundaries are usually depicted not by a dashed line but by a dented line – like Professor Curray's red one). I will not bother the Members of the Tribunal by taking them to Bangladesh's own scientific material attached to the Memorial. It is however interesting to note that Professor Curray's red-line has in fact appeared in the very same form, not only in two other figures attached to his first report⁸, but also in at least eight maps in five scientific articles⁹, including those co-signed by Professor Curray. If there is any conclusion which can be drawn from this material, it is merely the continuing scientific uncertainty about the concrete location of the subduction.

Be that as it may, the subduction zone, at 50 M, or at 20, or even on land, does not have any role in the application of article 76 to Myanmar's continental margin. I shall try again to demonstrate why.

Let us take, again, a scheme of the profile of the sea-floor, but this time, we decided not to take just an idealised model, but a bathymetric profile of Myanmar's submerged prolongation, shown on figure A.4 of our Counter-Memorial. It is indeed one of the profiles which have been used by Myanmar in applying article 76.

The land territory of Myanmar is on the left and to the right the profile extends out into the Bay of Bengal.

Just at this point, Mr President, Members of the Tribunal, it is quite obvious that there is indeed a morphologic continuity. There is no trench, or any other kind of discontinuity on this profile. This is exactly what Nielsen, to whom I referred on Tuesday¹⁰, pointed out. He wrote, and I quote his article: "A set of bathymetric sections across the West Burma Scarp (Fig. 2) clearly shows that the morphology is not typical of a trench."¹¹ I do not need to translate this into plain English; it is clear: there is no trench and there is no sign whatsoever of a subduction, if one looks at the morphology only. Bangladesh's Counsel overlook this passage of Nielsen's article and the figure at the page immediately before, no doubt because they read it only the night before Professor Boyle's pleading.

Let us assume that Bangladesh was right and that there is indeed a plate boundary at 50 M.

In addition, let us assume that article 76 of the 1982 Convention does include a test of geological natural prolongation, what would be the outcome? According to Bangladesh, this "geological natural prolongation" would stop at a distance of 50 M. This is obviously well before the 200 M limit.

But then, what would be Myanmar's entitlement? 200 M, Bangladesh would tell you, because every State has a right to a legal continental shelf up to 200 M independent of any natural prolongation. This is what they would tell you, and this is what they actually said. Professor Boyle repeated this last Thursday¹².

⁷ BM, Vol. IV, Annex 37, p. 6.

⁸ BM, Vol. IV, Annex 37, figures 18 and 19.

⁹ BM, Vol. IV, Annex 38, p. 374; Annex 39, pp. 87-88, 125 and 126; Annex 40, p. 164; Annex 43, p. 748; Annex 48, pp. 1192 and 1200.

¹⁰ ITLOS/PV.11/12 (F), p. 36, lines 21-30 (Müller).

¹¹ C. Nielsen, *et al.*, "From Partial to Full Partitioning Along the Indo-Burmese Hyper-oblique Subduction", *Marine Geology*, Vol. 209 (2004), at p. 307 (BM, Annex 52).

¹² See, e.g., ITLOS/PV.11/13 (E), p. 27, lines 3-4 (Boyle).

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But is this right? If I may, again, point you to the actual text of article 76, paragraph 1 – so perfectly ignored by Bangladesh, and especially to the second part of the sentence. It reads:

The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea ... to a distance of 200 M from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

Here is exactly the problem of Bangladesh's interpretation of article 76, paragraph 1. It is not because there is no "geological natural prolongation" beyond 200 M that a coastal State is entitled to "only" 200 M of legal continental shelf. The criterion is not the limit of natural prolongation, but the location of the "outer edge of the continental margin". Article 76 does not say that a State is entitled to at least 200 M of continental shelf unless there is a greater natural prolongation. What article 76 is saying is different: in principle a State is entitled to a continental shelf up to the outer edge of the continental margin, or to 200 M if this outer edge is situated closer to the baseline.

So, whether Bangladesh likes it or not, it is established that one cannot escape the identification of the outer edge of the continental margin when applying paragraph 1, and one has to go through paragraph 4, even if one does not want to do so because it is "complicated and technical". But, and this is important to stress, when referring to paragraph 4 in order to determine the outer edge of the continental shelf and its distance from the coast – a necessary step in the implementation of paragraph 1 – one is not delineating the legal continental shelf. The only aim of this exercise is to determine if there is, or is not, any entitlement to such a legal shelf beyond 200 M. This is quite different, even if it is closely linked.

Myanmar did indeed identify the outer edge of its continental margin by reference to the Gardiner formula, which is, as you now know very well, embodied in article 76 (4)(a)(i) and which is based on the thickness of the sediments of the rise. Myanmar is entitled to do so, irrespective of the existence of a geological discontinuity, because, according to paragraph 3, the continental margin is composed of the shelf, the slope and the rise. It does not say that the margin ends at a major – or even a minor – geological discontinuity.

The foot of the continental slope points were identified by Myanmar by reference to the general rule. There was, and there is indeed no need for the "evidence to the contrary" provision. Just as Bangladesh identified its foot of the slope points this way in the same region¹³, Myanmar's experts identified foot of the slope points with reference to morphology only, at the maximum change of the gradient.

As you see on the scheme, the Gardiner line is well beyond 200 M, and, consequently, Myanmar's outer edge of the continental margin is so too. If Bangladesh were right, Myanmar would have neither the right to a continental shelf beyond 200 M – given the missing geological prolongation – nor to a continental shelf extending up to 200 M, because the outer edge of the continental margin as defined by article 76, paragraph 4, is at a greater distance. Bangladesh's interpretation does not bring certainty, but great uncertainty: it leaves Myanmar in a legal limbo.

It is Bangladesh's interpretation which cannot be right. The issue is not only whether geology or geomorphology plays some role in the identification of the legal continental shelf entitlement under article 76 of the Montego Bay Convention. But it is clear that geology does not play the role Bangladesh wants it to play. There cannot be any additional criterion of "scientific/geological natural prolongation", or any additional test. Article 76 can be applied, and must, indeed, be applied as it stands, taking into account solely the scientific elements

¹³ ITLOS/PV.11/11 (F), p. 36, line 32 *et seq.* (Müller).

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mentioned. It is “a carefully structured package”¹⁴, but it is exactly that, a package, just like a box nicely wrapped in paper: if you open it in order to take something out, or to put something in, you will get into trouble. You should not look inside Professor Boyle’s egg...

Professor Boyle quite happily pointed you to New Zealand’s teardrop in order to show, as he claimed, that “it is impossible slavishly to apply the wording of article 76”¹⁵. However, as he rightly explained, the “only possible explanation is that the South Fiji basin represent[s] deep ocean floor, beyond the continental margin”¹⁶. The CLCS indeed accepted that in that region the outer edge of the continental margin of New Zealand could be established by reference to the Hedberg formula on the red arc of the circles. Everything which is beyond that limit is not part of New Zealand’s legal margin. But this has indeed been taken care of by article 76, which, as you will recall, explains in paragraph 3, that deep ocean floor is not included in the continental margin. It is therefore not necessary to have recourse to “natural prolongation”, but only, and foremost, to the provisions of article 76. Of course, these provisions cannot be applied “slavishly” – no legal provision should be applied this way – but in an orderly and reasonable manner.

Myanmar did exactly this, as you can see on these maps which are taken from the Executive Summary of Myanmar’s Submission to the CLCS. It identified its foot of the slope points at the maximum change in the gradient. It then constructed the Gardiner line, the 1 % sediment thickness points, and the line which results. The outer edge of the continental margin is represented by this Gardiner line. Myanmar concluded that it is entitled to a continental shelf extending beyond the 200 M limit and proceeded to the delineation of this entitlement with reference to the Gardiner line, and the two constraint lines provided for by article 76 (5). The relevant data have been submitted to the CLCS for its consideration¹⁷. You will find the corresponding maps from the Executive Summary of Myanmar’s submission to the CLCS at tab 6.2 of your Judges’ folders.

“Geological natural prolongation” or the existence of a subduction zone is entirely irrelevant in this regard, as the recent practice of the CLCS shows.

On the screen you can see the outer limit of the continental shelf recommended by the Commission with regard to Barbados’ submission¹⁸. The outer limit of Barbados’ entitlement (the purple line) extends well beyond 200 M, notwithstanding the existence of a well-marked subduction zone – the Atlantic Plate is subducting under the Caribbean Plate (which you also see on the screen depicted by the usual dented line).

Similarly, Indonesia, in its submission to the CLCS of June 2008¹⁹, submitted relevant data concerning the outer limit of its continental shelf extending beyond 200 M and, and this is the relevant point, extending beyond the Sunda subduction trench – the very same plate boundary Bangladesh is opposing against Myanmar’s entitlement.

There is only one point left, Mr President, Members of the Tribunal, which I wish to address this morning. It is not a technical but a legal one – and very short. In his introductory statement of last Wednesday, Mr Martin accused us of disregarding the terms of article 76,

¹⁴ BR, para. 4.47.

¹⁵ ITLOS/PV.11/14 (E), p. 1, line 27 *et seq.* (Boyle).

¹⁶ ITLOS/PV.11/14 (E), p. 1, line 33-34 *et seq.* (Boyle).

¹⁷ Continental Shelf Submission of Union of Myanmar, Executive Summary, 16 December 2008 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf) (CMC, Annex 16).

¹⁸ Summary of Recommendations of the CLCS in regard to the Submission made by Barbados on 8 May 2008, 15 April 2010 (available at http://www.un.org/Depts/los/clcs_new/submissions_files/brb08/brb08_summary_recommendations.pdf).

¹⁹ Continental Shelf Submission of Indonesia, Partial Submission in respect of the area of North West of Sumatra, Executive Summary, 16 June 2008 (available at http://www.un.org/depts/los/clcs_new/submissions_files/idn08/Executive20Summary.pdf).

STATEMENT OF MR MÜLLER – 24 September 2011, a.m.

depriving “natural prolongation” of any meaning²⁰. This is quite incorrect. In its written pleadings, Myanmar set out its interpretation of “natural prolongation” in the particular context of article 76, and I respectfully refer the Tribunal to the relevant paragraphs of the Counter-Memorial and Rejoinder²¹.

“Natural prolongation” does not, and cannot, refer to a pseudo-scientific concept of geological continuity. Professor Curray said that the term “is not in common usage among earth scientists”²². I have just shown, I hope, that the meaning Bangladesh wants to attach to “natural prolongation”, does more harm to the function of article 76, than it serves the object or purpose of this provision.

Myanmar, on the other hand, accepts that “natural prolongation” has a clear function within article 76. In order to understand that function, one cannot go back to 1969 and the ICJ *North Sea Continental Shelf* cases. Of course, the Court did use extensively the term “natural prolongation”, but it did not invent it in 1969.

“Natural prolongation” is indeed as old as States’ claim areas of sea floor beyond their territorial sea. Interestingly, the proclamation of President Truman²³, one of the most fundamental steps in the history of the law of the continental shelf, did not claim the entire “natural prolongation” of the United States land territory under the sea as subject to certain sovereign rights. This first continental shelf did extend, in the opinion of the Truman Administration, only to an artificial depth line of 100 fathoms (which corresponds to 183 metres)²⁴. But, despite this purely artificial definition of the continental shelf, the idea and concept of “natural prolongation” was present, not in order to define the extent of the shelf, but in order to justify the appropriation of this area. I quote from the proclamation:

[I]t is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, ... since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it...²⁵.

The 1958 Geneva Convention on the Continental Shelf²⁶ did not define the extent of the continental shelf with reference to a scientific “natural prolongation” either. The criteria retained by article 1 of the 1958 Convention are, of course, very familiar to you. “Natural prolongation” did not play any role in the definition of the legal continental shelf. Despite this fact, the ICJ did not, in 1969 –in the *North Sea Continental Shelf* cases which are so essential to Bangladesh’s case – call into question the definition of the continental shelf contained in article 1 of the 1958 Convention. The Court even underlined that the relevant rules concerning the extent of the continental shelf were part of, or were becoming to be part of, customary international law²⁷. For the Court, “natural prolongation” was not designed to define the continental shelf in space and extent. It was in 1945, in 1958 and in 1969 something quite different; and this has not changed in 1982.

²⁰ ITLOS/PV.11/12, p. 6, lines 9-13 (Martin).

²¹ MCM, Appendix, paras. A.3-A.27; MR, Appendix, paras. A.27-A.49.

²² BR, Vol. III, Annexe R4, p. 1.

²³ Proclamation n° 2667 concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, reproduced in *A.J.I.L. Suppl.*, vol. 40, 1946, pp. 45-46.

²⁴ M.H. Nordquist *et al.* (dir.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol. II, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1993, p. 828.

²⁵ *Op. cit.* (fn 23), p. 45.

²⁶ United Nations, *Treaties Series*, Vol. 499, p. 311.

²⁷ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), Judgment, I.C.J. Reports 1969*, p. 39, par. 63.

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Indeed, since it appeared, “natural prolongation” is nothing other than the legal basis, the legal reason, why this part of the sea is not part, any more, of Grotius’ *mare liberum*, but is indeed submitted to sovereign and exclusive rights. “Natural prolongation” cannot answer the question what is part of the legal continental shelf; but it gives the appropriate answer to a different question: why can a State exercise certain rights in this area of the sea-bed?

Mr President, Members of the Tribunal, this brings this preliminary presentation to an end. I hope that I have made clear that, even if science plays a certain role in the implementation of article 76, geology does not have the all-encompassing importance Bangladesh is claiming and cannot bar Myanmar from enjoying its legal entitlement to a continental shelf beyond 200 M. An orderly application and implementation of article 76, as it stands, and as it is indeed applied by the CLCS, confirms that Myanmar is entitled to such a continental shelf.

However, Mr President, there is no need for you to go into these issues because they do not arise in the present case. Even if they did, it would not be appropriate for you to decide them since they are currently issues being dealt with under the procedure set forth in article 76, and annex II of the Convention.

Mr President, Members of the Tribunal, thank you very much for your kind attention. May I ask you now to give the floor to Professor Alain Pellet?

The President:

Thank you, Mr Müller.

I now give the floor to Mr Alain Pellet.

EXPOSÉ DE M. PELLET – 24 septembre 2011, matin

EXPOSÉ DE M. PELLET
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/15/Rev.1, Fr, p. 9–21]

M. Pellet :

Monsieur le Président, Messieurs les Juges, si vous le voulez bien, je ferai deux choses ce matin. En premier lieu, je reviendrai sur la question de l'irrecevabilité partielle de la requête du Bangladesh. En second lieu, je dirai quelques mots de la bissectrice, si significativement délaissée par le Demandeur durant son second tour de plaidoiries.

Ces deux thèmes n'ont apparemment pas grand-chose en commun – mais nous avons pensé qu'il valait mieux nous en « débarrasser » d'emblée pour pouvoir passer ensuite aux choses (plus) sérieuses. Car nous maintenons que les prétentions du Bangladesh sur ces deux points ne sont pas sérieuses.

Monsieur le Président, avant d'entrer dans le vif du sujet sur l'irrecevabilité de la requête bangladaise, je souhaite récapituler notre position sur la question du plateau continental au-delà de 200 milles marins. Le pourtant très savant professeur Boyle a déclaré que les arguments avancés par Daniel Müller durant le premier tour de plaidoiries l'avaient laissé perplexes (*that he « felt rather confused by [Daniel Müller's] arguments »*); celui-ci a donc pris la précaution de s'exprimer ce matin dans une langue plus familière à notre aimable contradicteur. Cela dit, et même en faisant leur part aux effets de plaidoiries, dont le professeur Boyle use avec un art consommé et un charme discret, je reconnais que mon préopinant a dit mardi dernier des choses qui étaient sans doute compliquées – mais si je peux me le permettre, Messieurs les Juges, je vous conseille très vivement de relire la transcription de la présentation de Daniel Müller de mardi ; c'est une explication limpide de ces choses compliquées.

Des choses compliquées, mais que je pense avoir enfin comprises en partie grâce à lui et sûrement grâce à cette affaire. Ceci étant, tout néophyte que je sois, je ne partage pas entièrement l'intérêt de Daniel Müller pour les aspects techniques de l'application de l'article 76, même si je crois qu'il faut les comprendre pour pouvoir en tirer des conclusions juridiques correctes. Et je vous livre, Monsieur le Président, celles que j'en tire :

1° La notion de plateau continental est, pour ce qui nous intéresse un concept juridique.

2° L'expression « prolongement naturel du territoire terrestre jusqu'au rebord externe de la marge continentale », qui figure dans le paragraphe 1^{er} de l'article 76 de la Convention, doit être comprise et interprétée à la lumière de son contexte – et donc avant tout des autres dispositions de ce même article – et de l'évolution de la pratique et de la jurisprudence internationales.

3° La géologie joue dans cette définition le rôle que lui assignent les dispositions pertinentes de l'article 76, explicitées par les précisions que lui a apportées la Commission des limites du plateau continental ; c'est le cas, d'une part de l'épaisseur des roches sédimentaires (au titre de la formule Gardiner – reprise à l'article 76.4.b).i de la Convention) et, d'autre part, lorsqu'un Etat souhaite administrer la preuve que, à titre exceptionnel, le pied du talus continental dont il se réclame ne peut pas être déterminé par « la rupture de pente la plus marquée à la base du talus », comme l'indique le paragraphe 4.b) de l'article 76 (cela a l'air compliqué comme cela – mais, je ne crois pas que l'on puisse simplifier davantage...).

4° Quatrième conclusion, libre au Bangladesh de présenter sa vocation à un plateau continental en se fondant sur des critères exclusivement géologiques (et j'ouvre ici une petite parenthèse terminologique : il me semble qu'il n'y a pas d'équivalent français rendant exactement le sens de ce mot anglais si commode : *entitlement* ; le Greffe de la CIJ l'a traduit

¹ ITLOS/PV.11/13 E, p. 24, ligne 26 (M. Boyle).

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par « titre »² ou par « droit »³ dans l'arrêt de 2009 sur la *Délimitation maritime en mer Noire*, mais aussi et de manière sans doute plus appropriée par l'idée de « prétention »⁴, ce qui est sans doute préférable, en tout cas dans un contexte comme le nôtre où l'*entitlement*, ce n'est pas le *title*, encore moins le *right*, c'est plutôt la « vocation au titre » ; je relève d'ailleurs que le mot *entitlement*, omniprésent dans la Convention de 1982, y est traduit, en français et en espagnol, par des vocables très divers). Je referme cette parenthèse pour revenir à ma quatrième conclusion : libre au Bangladesh donc de tenter de justifier son *entitlement*, sa vocation à un titre sur le plateau continental en se réclamant de la géologie. Mais – et ici encore c'est un très gros « mais » – *mais* donc, il n'est ni nécessaire, ni suffisant de se fonder sur un tel test du prolongement naturel géologique pour établir un tel titre ; c'est pour cette raison que le Myanmar ne s'y est pas soumis et qu'il s'est, conformément aux règles applicables, que met en œuvre la CLPC, appuyé sur le seul test de l'appartenance – qu'il « passe » sans difficulté, comme Daniel Müller vient de le rappeler, d'autant plus que la zone de subduction n'a aucune incidence sur la continuité morphologique du plateau continental du Myanmar. J'ajoute que, dans *Tunisie/Libye*, la CIJ a indiqué que ce qui pourrait constituer une rupture dans le prolongement naturel du territoire terrestre, ce serait – je cite la Cour en anglais – « a marked disruption or discontinuance of the sea-bed »⁵ (je cite dans le texte anglais original car, curieusement, la traduction française s'en éloigne assez considérablement) – du fond de la mer, Monsieur le Président, pas de son sous-sol, contrairement à ce que le professeur Boyle veut croire ou faire croire⁶.

5° De toute manière,

- d'une part, et à titre principal, nous avons la conviction que le Tribunal établira qu'indépendamment de tout *entitlement* éventuel, le Bangladesh n'a aucun droit sur un plateau continental au-delà de 200 milles marins, car sa frontière maritime avec le Myanmar s'arrête nécessairement avant cette limite ;

- d'autre part, et subsidiairement, un titre sur le plateau continental ne peut être établi que sur la base de recommandations de la CLPC – et ceci me conduit à ma dernière conclusion en même temps qu'à mon sujet d'aujourd'hui :

6° en conséquence, le Tribunal ne peut que déclarer la requête du Bangladesh irrecevable en l'absence, à l'heure actuelle, de l'établissement d'un tel titre (pour l'un comme pour l'autre des deux Etats d'ailleurs).

Monsieur le Président, le professeur Akhavan a dit peu de choses nouvelles sur ce point lors de son intervention de jeudi après-midi. Je lui répondrai brièvement dans un instant en récapitulant nos propres arguments. Mais je dois dire que c'est peut-être ce qui a été dit par le professeur Boyle qui m'a le plus intéressé – et réjoui. Il a tellement raison que je vais le citer un peu longuement. Après avoir rappelé les aspects géologiques et géomorphologiques auxquels renvoient les dispositions de l'article 76, mon contradicteur affirme que le recours à des experts techniciens est indispensable ; et il conclut :

All this different expertise is carefully reflected in Annex II, article 2, paragraph 1 of the 1982 Convention, which identifies potential members of the Commission on the Limits of the Continental Shelf and calls for "experts in the field of geology, geophysics or hydrography".

² V. C.I.J., arrêt, 3 février 2009, *Délimitation maritime en mer Noire (Roumanie c. Ukraine)*, C.I.J. Recueil 2009, p. 88, par. 75, p. 89, pars. 76 et 77, p. 90, par. 80, p. 116, par. 166 et p. 118, par. 168.

³ *Ibid.*, p. 93, par. 86, p. 95, par. 94, p. 96, par. 95, p. 97, par. 100, p. 99, par. 109, p. 100, par. 114, p. 120, par. 180, p. 121, par. 184, p. 122, par. 185, p. 126, par. 199 et par. 200, p. 127, par. 201 et p. 129, par. 208.

⁴ *Ibid.*, p. 126, par. 200.

⁵ C.I.J., arrêt, 24 février 1982, *Plateau continental (Tunisie/Jamahiriyah arabe libyenne)*, C.I.J. Recueil 1982, p. 57, par. 66 – caractères droits ajoutés.

⁶ ITLOS/PV.11/13 (E), p. 26, lignes 36-41 (M. Boyle).

EXPOSÉ DE M. PELLET – 24 septembre 2011, matin

So, Mr President and Members of the Tribunal, there is really no doubt that the application of Article 76 requires a great deal of scientific and technical expertise before lawyers can make effective use of it. That is why the submissions to the CLCS require significant amounts of scientific research and data collection and take years to assemble. ... It is also why the CLCS Commissioners are not lawyers, and it explains why we have –‘we’, I am speaking for the professor Boyle- geologists, hydrographers, and cartographers on our legal team. Their expertise is indispensable, even to lawyers. The idea that Article 76 is simply law and only law is untenable and unworkable. Indeed, it is absurd.

On ne saurait mieux dire Monsieur le Président ! Et c'est pour cela aussi que la CLPC doit faire des recommandations avant que les Etats (sans doute les juristes des Etats) et, le cas échéant, les organes compétents en matière de règlement des différends, dont le Tribunal, puissent tirer les conséquences des « *entitlements* » résultant des recommandations de la Commission.

Mais, nous dit M. Boyle, « nous avons nos experts, que diable n'avez-vous les vôtres » ? Il y a deux réponses à ceci. La première est que nous les avons ; le Myanmar a joint à son contre-mémoire le résumé de sa Demande à la CLPC concernant le plateau continental, en date du 16 décembre 2008⁷. C'est l'annexe 16 au mémoire. Comme cela y est précisé, cette demande a été établie avec l'aide de M. Sivaramkrishnan Rajan, docteur en géologie et en géophysique, directeur de projet au Centre national indien pour l'Antarctique et membre actuel de la CLPC⁸, et de M. N. K. Thakur, docteur en géophysique et ancien membre de la Commission⁹. Simplement, contrairement au Bangladesh, il ne nous a pas semblé approprié d'introniser nos propres consultants comme des « experts indépendants ». Cela étant, malgré tous les grands airs que se sont donnés nos contradicteurs en se gargarisant de l'apport de leurs experts, si on laisse de côté la question de la discontinuité géologique – qui n'est pas pertinente –, je ne vois pas beaucoup de différence entre les informations qui figurent dans le résumé de la demande du Myanmar à la CLPC (annexe 16 au contre-mémoire) et ce qu'a plaidé le Dr Parson la semaine dernière au nom du Bangladesh en s'appuyant sur les rapports de leurs consultants. La seconde raison, encore plus déterminante à nos yeux, pour laquelle il ne nous a pas semblé utile d'inonder le Tribunal de données scientifiques, est qu'il ne suffit pas que les Parties lui donnent des informations sur les demandes respectives qu'elles ont adressées à la Commission pour qu'elles aient établi les titres – pas les *entitlements* mais les *titres* – dont elles se prévalent sur le plateau continental au-delà de 200 milles.

Comme je l'avais relevé lors du premier tour, Messieurs du Tribunal, le Bangladesh se plaît à vous encenser – il n'a pas manqué de surenchérir dans la flatterie lors du second. Je ne suis pas sûr que ce soit ainsi que l'on gagne les procès – en tout cas, j'espère que ce n'est pas le cas. Moyennant quoi, je peux dire sans flagornerie que je n'ai pas de difficulté à m'associer à ce que dit le professeur Boyle lorsqu'il affirme que le Tribunal est parfaitement capable de tenir compte de données scientifiques pertinentes pour rendre ses arrêt et lorsqu'il déclare que - je le cite : « *there is nothing unusual about this. Despite what counsel on the other side*

⁷ CMM, Vol. II, Annexe 16 – également disponible sur :

http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf.

⁸ Pour un *curriculum vitae* publié sur Internet, v.

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/274/90/PDF/N0727490.pdf?OpenElement> (français) ou <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/274/89/PDF/N0727489.pdf?OpenElement> (anglais).

⁹ Pour un *curriculum vitae* publié sur Internet, v.

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/226/81/IMG/N0222681.pdf?OpenElement> (français) ou http://www.un.org/depts/los/meeting_states_parties/documents/splos_81c.pdf (anglais).

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might urge upon you, the application of science to law is what courts do all the time »¹⁰. Et il n'y a, assurément, aucune objection à ce qu'un organe judiciaire, à commencer par le Tribunal de céans, puisse intégrer dans une décision de justice des considérations scientifiques auxquelles un traité ou toute autre règle de droit renvoie. Mais ce n'est pas la question.

Comme je l'ai dit, le problème a été fort bien posé par le professeur Boyle – ou plutôt, jouant contre son camp, il lui a donné une excellente réponse : elle est que la Convention – dont, j'en conviens volontiers, le Tribunal est le gardien – a prévu que l'*entitlement* à un plateau continental au-delà de 200 milles marins ne pouvait être déterminé que sur la base d'une recommandation de la CLPC ; cela ressort du texte clair du paragraphe 8 de l'article 76 et de l'article 7 de l'Annexe II à la Convention ; cela est nécessaire pour permettre aux Etats et au Tribunal d'être éclairés par des recommandations qui seront formulées par des experts véritablement indépendants et, contrairement à l'affirmation du professeur Akhavan¹¹, il n'y a pas de relations hiérarchiques entre le Tribunal et la Commission : ils ont un rôle complémentaire, le dernier mot revenant bien sûr au premier, le Tribunal, en matière de délimitation latérale lorsque les titres des deux Etats se chevauchent.

Alors bien sûr, Messieurs du Tribunal, nous maintenons pleinement

- et que vous avez compétence pour vous prononcer sur un différend concernant une délimitation latérale entre Etats pouvant faire valoir un titre à une partie du plateau continental au-delà de 200 milles marins de leurs côtes,

- mais nous maintenons pleinement aussi que vous ne pouvez exercer cette compétence qu'après que la Commission aura adressé aux Etats concernés les recommandations qu'elle est chargée de faire.

Ce n'est que si d'une part, ces titres sont établis et, d'autre part, si les prétentions des Etats en cause se chevauchent que le Tribunal pourra – ou pourrait – exercer la compétence de principe lui appartenant en la matière. Avant cela, il n'y a tout simplement pas de différend justiciable entre les deux Etats.

Le professeur Akhavan – qui n'a pourtant pas profondément renouvelé la problématique sur le point qui nous occupe en ce moment – a invoqué un argument qui a au moins l'apparence de la nouveauté. Après avoir rappelé que l'on pouvait recenser quatorze accords bilatéraux de délimitation du plateau continental au-delà de 200 milles marins, mon contradicteur croit pouvoir affirmer qu'à nous suivre, il faudrait admettre, et je vais le citer assez longuement en anglais, que

the states concerned have acted without lawful authority, and these agreements would have to be deprived of any legal effect » and that « [t]his is extensive practice by significant states, on any view. It is practise that constitutes "objective evidence of the understanding of the parties as to the meaning of" the procedure under Article 76(8). If States can reach bilateral agreement on delimiting their outer continental shelves lawfully and without prejudice to the role of the CLCS, why cannot this Tribunal?¹².

Trois remarques sur ce nouvel argument, Monsieur le Président :

1. d'abord, si accord il y a, c'est que les Etats signataires n'ont pas de différend, contrairement à ce qui est le cas dans notre affaire, le paragraphe 10 de l'article 76 de la Convention et l'article 9 de l'annexe II ne sont pas pertinents en ce qui concerne ces Etats ;

¹⁰ ITLOS/PV.11/14 (E), p. 2, lignes 24-26 (M. Boyle); v. aussi : ITLOS/PV.11/14 (E), p. 4, lignes 44-48 et p. 5, lignes 1-8 (M. Akhavan).

¹¹ ITLOS/PV.11/14 (E), p. 5, lignes 31-39 (M. Akhavan).

¹² ITLOS/PV.11/14 (E), p. 9, lignes 28-31 et p. 10, lignes 1-6 (M. Akhavan) – note de bas de page omise.

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2. ces accords sont conclus sans préjudice de la compétence de la CLPC – je me réfère notamment à l'Accord tripartite entre le Danemark et les Féroé, l'Islande et la Norvège du 20 septembre 2006, sur la délimitation du plateau continental au-delà de 200 milles de la partie méridionale du « Banana Hole » de l'Atlantique du Nord-Est; les articles 4 et 8 de cet accord en particulier réservent le rôle qui incombe à la CLPC¹³ ;

3. même si le Tribunal et la Commission ne sont pas en situation de rapports hiérarchiques, on imagine tout de même mal que vous pourriez décider qu'au cas où la CLPC adopterait des recommandations incompatibles avec votre arrêt ou ce qu'il impliquerait, celui-ci pourrait être remis en cause au mépris du principe *res judicata* pour respecter les recommandations de la Commission.

Pour le reste, Monsieur le Président, « rien de nouveau sous le soleil » (souvent timide, il est vrai, à Hambourg mais qui nous honore de sa présence aujourd'hui...) : le professeur Akhavan a repris, sans y changer grand-chose, l'argumentation du Bangladesh lors du premier tour. Je me bornerai donc à y répondre en style télégraphique en me permettant de renvoyer à ma propre plaidoirie du 20 septembre¹⁴ :

1° Nous confondrions les concepts de « délinéation » (délimitation extérieure) et de délimitation *stricto sensu* (délimitation latérale)¹⁵. Non, Monsieur le Président, c'est précisément parce que nous attachons la plus grande importance à la distinction que nous sommes convaincus que ce n'est qu'une fois un *entitlement* établi qu'un différend entre des prétentions opposées peut naître et que le Tribunal (ou un autre organe compétent au titre de la Partie XV) peut se prononcer sur la délimitation latérale de la partie du plateau continental qui s'étend au-delà des 200 milles marins. J'ajoute que mon estimé contradicteur concède lui-même que le Tribunal ne peut « délinéer » le plateau continental et insiste sur le fait que « *Bangladesh has not come to this Tribunal to delineate its outer limit* »¹⁶ ; dont acte – mais sans titre établi sur le plateau continental au-delà de 200 milles, il n'y a rien à délimiter.

2° Notre exception d'irrecevabilité se heurterait au principe de l'autorité relative de la chose jugée et votre futur arrêt serait *res inter alios acta* à l'égard de l'Inde¹⁷. Peut-être ; mais quel rapport avec ce point-ci de l'argumentation ? Accessoirement je rappelle que, selon la CIJ, « dans le cas de délimitations maritimes intéressant plusieurs Etats, la protection offerte par l'article 59 du Statut [sur l'autorité relative de la chose jugée] peut ne pas être toujours suffisante »¹⁸ [« *where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute [establishing the principle res judicata] may not always be sufficient* »].

3° Autre argument récurrent du Bangladesh : la CLPC ne peut qu'adresser des recommandations aux Etats¹⁹. Mais mon contradicteur n'a fait qu'évoquer la chose sans s'y attarder ; peut-être ai-je réussi à le convaincre qu'il s'agit d'actes-conditions sans lesquels les limites extérieures adoptées par les Etats ne seraient pas opposables aux tiers²⁰ ? Ceci dit, je n'ai pas de problème avec l'idée qu'une fois que la Commission s'est prononcée, c'est à l'Etat concerné qu'il convient de déterminer les limites extérieures de son plateau continental, « sur la base de ces recommandations » (« *on the basis of these recommendations* ») – on y revient forcément.

¹³ Colson A. D. & Smith R. W., *International Maritime Boundary*, Leiden/Boston, Martinus Nijhoff, pp. 4546-4549.

¹⁴ ITLOS/PV.11/11 (E), pp. 7-15 (A. Pellet).

¹⁵ ITLOS/PV.11/14 (E), p. 5, lignes 25-39 (M. Akhavan).

¹⁶ ITLOS/PV.11/14 (E), p. 5, lignes 20-21 (M. Akhavan).

¹⁷ ITLOS/PV.11/14 (E), p. 5, ligne 17, p. 6, ligne 36, p. 7, lignes 29-30 et 33-38 (M. Akhavan).

¹⁸ C.I.J., arrêt, 10 octobre 2002, *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, C.I.J. Recueil 2002, p. 421, par. 238.

¹⁹ ITLOS/PV.11/14 (E), p. 4, lignes 44-46 (M. Akhavan).

²⁰ V. ITLOS/PV.11/11 (E), p. 10, lignes 32-34 (A. Pellet).

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4° Selon M. Akhavan, s'il fallait attendre que la Commission se prononce, la question ne pourrait être tranchée qu'en 2035²¹. D'abord, c'est faux²². Ensuite, le Bangladesh, qui a attendu la quasi-dernière minute pour soumettre sa demande, ne peut se plaindre qu'à lui-même si l'examen de celle-ci ne peut être immédiat, il doit attendre sagement son tour dans la queue ; et, si le Tribunal en venait à tracer une frontière maritime entre le Myanmar et le Bangladesh au-delà des 200 milles – ce qui ne se peut, il est clair qu'en reconnaissant ainsi un titre aux deux Etats la Commission s'en trouverait clairement court-circuitée. Enfin et surtout – nous ne pouvons que le répéter –, le problème sera résolu autrement : dès lors que la limite entre les plateaux continentaux des deux pays n'atteint pas – en tout cas ne dépasse pas – la limite des 200 milles, le problème ne se pose tout simplement pas.

5° C'est d'ailleurs très exactement ce qui s'est passé dans l'affaire entre *La Barbade et La Trinité-et-Tobago*²³, que le professeur Akhavan nous accuse de négliger²⁴ – ce qui ne laisse pas d'être assez surprenant²⁵ – tandis que le professeur Crawford semble se plaindre que nous en ayons trop parlé²⁶.

Monsieur le Président, avec tout le respect dû au Tribunal de céans, celui-ci ne peut pas, dans l'état actuel des choses, se prononcer sur une très hypothétique frontière maritime déterminant l'étendue des droits respectifs revendiqués, mais non établis, par les Parties au-delà de la limite des 200 milles marins. Encore une fois, Messieurs les Juges, ceci ne signifie pas que vous ne serez pas appelés à fixer dans l'airain de votre jurisprudence les principes applicables à la délimitation du plateau continental au-delà de cette limite pour les générations présentes et futures, comme nos contradicteurs vous y invitent avec beaucoup d'insistance et ... autant de démagogie²⁷ ; ceci veut dire seulement que, s'agissant de cette affaire et à ce stade, les conditions ne sont pas réunies pour que vous puissiez le faire.

Et c'est pour cela que je ne pense pas que quiconque puisse se formaliser de notre réponse à la première question posée par le Tribunal au sujet de la délimitation du plateau continental au-delà de 200 milles marins. Outre qu'il est bizarre de *ne pas* répondre explicitement à une question comme le professeur Crawford me le reproche (« *Professor Pellet was explicit in failing to answer the ... question* »²⁸), il me semble que les fort longues plaidoiries que Daniel Müller et moi y avons consacrées parlent pour elles-mêmes. Ce qui est vrai en revanche, c'est que nous serions bien incapables de tracer une ligne frontière dans cette zone : ce serait en parfaite contradiction avec notre conviction profonde selon laquelle le Bangladesh n'y a aucun droit. Je crois vraiment, Monsieur le Président, être allé aussi loin que possible en disant que *si* le problème se posait – *quod non* – il conviendrait d'appliquer les mêmes règles (de délimitation latérale) qui doivent trouver application en-deçà de cette limite et que le Bangladesh interprète et applique si mal.

Sans transition, j'en viens, Monsieur le Président, avec votre permission, aux problèmes posés par la méthode de la bissectrice et l'application qu'en fait le Bangladesh. Elle ne me

²¹ ITLOS/PV.11/14 (E), p. 7, ligne 7 et p. 10, lignes 12-41 – p. 11, lignes 1-34 (M. Akhavan).

²² V. ITLOS/PV.11/11 (E), p. 12, lignes 29-30 (A. Pellet).

²³ 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, R.S.A.N.U., Vol. XXVII, p. 242, par. 368.

²⁴ ITLOS/PV.11/14 (E), p. 11, lignes 36-38 (M. Akhavan).

²⁵ ITLOS/PV.11/8 (E), p. 32, lignes 9-26 (A. Pellet), ITLOS/PV.11/9 (E), p. 1, lignes 43-48, p. 2, lignes 1-15, p. 3, lignes 19-27 (A. Pellet), p. 36, lignes 42-45 et p. 37, lignes 1-5 (M. Forteau), ITLOS/PV.11/10 (E), p. 6, lignes 38-45, p. 7, lignes 1-21 et 43-55, p. 8, lignes 1-25 (M. Forteau), p. 18, lignes 13-18, p. 19, lignes 1-2 et p. 20, lignes 28-29 (Sir M. Wood) et ITLOS/PV.11/11/Corr.1 (E), p. 12, lignes 2-25 (A. Pellet.).

²⁶ ITLOS/PV.11/14 (E), p. 19, lignes 9-10 (M. J. Crawford).

²⁷ V. not. ITLOS/PV.11/14 (E), p. 12, lignes 12-39 (M. Akhavan); v. aussi, not. : ITLOS/PV.11/12 (E), p. 5, lignes 27-31 (M. L. Martin).

²⁸ ITLOS/PV.11/14 (E), p. 22, lignes 1-2 (M. Crawford) – caractères droits ajoutés.

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retiendra pas longtemps : le Demandeur, après l'avoir portée au pinacle durant la procédure écrite et son premier tour de plaidoiries orales, l'a très largement délaissée durant le second. On peut parler, sans exagération, de répudiation – « La bissectrice répudiée », cela ferait un joli titre d'opéra : « *La bisettrice repudiata* ».

Commençons par la fin – le résumé de l'argumentation du Bangladesh [*Summation of Bangladesh's Case*] fait par le Professeur Crawford jeudi après-midi. Le mot « bissectrice » (« *bisector* ») y apparaît UNE fois²⁹ – une seule fois, Monsieur le Président, en dix pages. Je peux citer le passage pertinent intégralement, cela ne me fera pas perdre de temps : « *There are other methods [than equidistance/special circumstances], including angle bisectors, and they may be appropriate and they have been recently used* »³⁰.

Voilà tout ce que le très éminent avocat du Bangladesh, chargé de résumer la thèse de son client, et dont on suppose qu'il va mettre en exergue les points saillants de celle-ci, trouve à dire sur la bissectrice. Et ceci alors que, tant dans ses pièces de procédure écrite que durant son premier tour de plaidoiries orales, le Demandeur a déployé des efforts considérables pour établir que la bissectrice était, en l'espèce, la seule méthode utilisable permettant d'arriver à un résultat équitable : je cite mon cher ami, Monsieur Reichler, en anglais : « *the only way to achieve an equitable solution in this case is ... to employ the angle bisector methodology*. »³¹ Au surplus, les conclusions du Bangladesh sont inchangées et demandent essentiellement au Tribunal de bien vouloir décider que « *the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215°* »³². Voici qui est assez extraordinaire, Monsieur le Président, car, sans bissectrice, cette conclusion n'a plus aucun support.

D'ailleurs – et ceci est assez cohérent avec ce qui précède, lorsque le professeur Crawford vous invite, Messieurs les Juges, tout à fait à la fin de l'exposé de la thèse du Bangladesh (juste avant de revenir sur les questions posées par le Tribunal), à ajuster « la ligne » (« *the line* »), il se garde bien de préciser de quelle sorte de ligne il parle ; et tout ce qui précède donne à penser que c'est de la ligne d'équidistance plus que de la bissectrice qu'il s'agit³³.

Certes, avec une conviction faiblissante, les conseils du Demandeur continuent à affirmer, et je cite M. Reichler, que « *Bangladesh's preferred way [to address St Martin's Island] is a transposed angle bisector* »³⁴ [« La méthode que préfère le Bangladesh [pour traiter l'île de Saint Martin] est celle de la bissectrice transposée »]. Et ils passent tout de suite aux choses sérieuses : des arguments pour tenter de vous convaincre qu'il faut, certes, recourir à la méthode-standard « équidistance / circonstances pertinentes », mais l'interpréter à leur très étrange façon³⁵ (Mathias Forteau le montrera tout à l'heure).

Je dois à la vérité de dire que le professeur Crawford a tout de même consacré un tiers d'une assez brève plaidoirie à la bissectrice – cela occupe à peine trois pages de compte-rendu³⁶. Je peux le suivre pas à pas, cela ne prendra pas beaucoup de temps...

Premier point : le motif de recourir à la bissectrice serait que « *[i]t is a remedy for an inequitable result, which we know follows from strict equidistance when there is a coastal State with a comparable coastline caught in a concavity* »³⁷. Je cite M. Crawford. Mais non,

²⁹ ITLOS/PV.11/14 (E), p. 18, ligne 9 (M. Crawford).

³⁰ ITLOS/PV.11/14 (E), p. 18, lignes 8-10 (M. Crawford), italiques ajoutées.

³¹ ITLOS/PV.11/4 (E), p. 32, lignes 19-23 (M. Reichler).

³² ITLOS/PV.11/4 (E), p. 24, lignes 30-31 (H.E. M. Mohamed Mijarul Quayes).

³³ ITLOS/PV.11/4 (E), p. 20, lignes 6-10 (M. Crawford).

³⁴ ITLOS/PV.11/13 (E), p. 2, lignes 38-39 (M. Reichler); v. aussi p. 12, lignes 45-47.

³⁵ V. not. ITLOS/PV.11/13 (E), p. 2, lignes 39-42 ; v. aussi p. 8, lignes 46-47 et p. 9, lignes 1-6 ou 31-33 ; p. 12, lignes 8-9 ou 32-42 (M. Reichler) ou p. 21, lignes 43-45 et p. 22, lignes 1-4 (M. Crawford).

³⁶ ITLOS/PV.11/13 (E), pp. 21-24.

³⁷ ITLOS/PV.11/13 (E), p. 21, lignes 41-43 (M. J. Crawford).

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Monsieur le Président ! Le seul motif qu'il peut y avoir à recourir à une bissectrice, c'est qu'il serait impossible de se fonder sur la méthode-standard (qui permet, ensuite, le cas échéant, de rectifier l'excessive rigueur de l'équidistance)³⁸ si excès il y a. Et, au fond, notre contradicteur sait bien que le bricolage subjectif qu'il propose n'est pas conforme au droit en vigueur. Il en fait l'aveu lorsqu'il se plaint de ce que « *Professor Pellet and Mr Lathrop both complained that our angle bisector cut the corner and was therefore inadmissible as a matter of law: they are fond of law doing all the work...* »³⁹. Monsieur le Président, je n'ai pas honte de l'avouer ; j'aime en effet le droit... surtout quand je plaide devant un Tribunal chargé de l'appliquer !

Deuxième point : « *the transposition of the bisector to the end of the territorial sea boundary* »⁴⁰. Monsieur Crawford a un peu plus à nous dire là-dessus : mais la seule véritable nouveauté est une allusion un peu obscure à la fabrication des pizzas en mer⁴¹ ; pour le reste, seulement les mêmes rappels de *Tunisie/Libye*, *Golfe du Maine* et *Guinée-Guinée Bissau*⁴². Pourtant,

- il y a bien une translation d'une ligne d'azimut dans *Tunisie/Libye* ; mais c'était une bissectrice assez spéciale puisque l'angle qu'elle partageait était entièrement défini par les côtes d'une seule des Parties à cette affaire – la Tunisie⁴³ ;

- dans *Golfe du Maine*, la CIJ n'a pas transposé de ligne – elle l'a construite à partir d'un point qui n'est pas situé sur les côtes des Parties⁴⁴ ; si j'ai bien compris la métaphore des pizzas, c'est ce que le professeur Crawford concédait en fait à travers elle... ;

- et dans *Guinée/Guinée-Bissau*, le Tribunal arbitral n'a nullement déplacé la perpendiculaire à la côte « régionale » qu'il avait inventée ; il la fait simplement partir d'un point situé à 12 milles marins de l'île d'Alcatraz⁴⁵

Troisième et dernier point – je suis fidèlement la présentation du professeur Crawford : « *the larger question of the choice of the line to represent Bangladesh's coastal frontage* »⁴⁶. Et ici encore règne chez nos amis le plus parfait arbitraire. Je recite M. Crawford : « *we chose to draw a line joining the two land boundary termini* »⁴⁷ – « nous avons choisi... » ; en clair, le Bangladesh a posé ce qu'il estime être une (ou *la*) solution équitable ; il trace cette ligne souhaitable, puis faute pour la méthode-standard d'accommoder ses prétentions, il se tourne vers une méthode qu'une seule décision récente met en œuvre – l'arrêt de la CIJ dans *Nicaragua c. Honduras* – pour des raisons qui n'ont strictement rien à voir avec celles avancées par le professeur Crawford⁴⁸ (qui d'ailleurs ne cite pas une fois l'arrêt de 2007 dans sa prétendue défense de la bissectrice). Il n'hésite pas en revanche à réécrire l'arrêt de 1969 dans les affaires du *Plateau continental de la mer du Nord*, si chères au cœur de nos amis bangladais, en prêtant aux Juges de la CIJ le tracé d'une bissectrice virtuelle⁴⁹ qu'ils n'ont

³⁸ ITLOS/PV.11/7 (E), p. 6, lignes 3-7 (A. Pellet), ITLOS/PV.11/9 (E), p. 8, lignes 20-22 et 32-42 et p. 9, lignes 1-2 (A. Pellet) et ITLOS/PV.11/10, p. 28, lignes 22-28 et p. 32, lignes 17-21 (A. Pellet).

³⁹ ITLOS/PV.11/13 (E), p. 22, lignes 13-15 (M. Crawford).

⁴⁰ ITLOS/PV.11/13 (E), p. 22, lignes 20-21 (M. Crawford).

⁴¹ ITLOS/PV.11/13 (E), p. 22, lignes 33-40 (M. Crawford).

⁴² ITLOS/PV.11/13 (E), p. 22, lignes 30-33 et 42-45 (M. Crawford).

⁴³ V. C.I.J., arrêt, 24 février 1982, *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, C.I.J. Recueil 1982, p. 89, par. 129.

⁴⁴ V. C.I.J., arrêt, 12 octobre 1984, *Délimitation de la frontière maritime dans la région du golfe du Maine*, C.I.J. Recueil 1984, p. 333, par. 213.

⁴⁵ V. *Délimitation maritime entre la Guinée et la Guinée-Bissau*, sentence du 14 février 1985, *RSANU*, vol. XIX, p. 190, par. 111.

⁴⁶ ITLOS/PV.11/13 (E), p. 23, lignes 4-5 (M. Crawford).

⁴⁷ ITLOS/PV.11/13 (E), p. 23, lignes 5-6 (M. Crawford) – italiques ajoutées.

⁴⁸ V. ITLOS/PV.11/10 (F), pp. 28-32 (A. Pellet).

⁴⁹ ITLOS/PV.11/13 (E), p. 23, lignes 17-48 et p. 24, lignes 1-3 (M. Crawford).

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évidemment pas tracée ni envisagée. C'est peut-être ainsi que raisonnent les conseils du Bangladesh ; ce n'est sûrement pas ainsi que le droit doit être dit.

Mais, tout de même un bref rappel de notre position⁵⁰, Monsieur le Président, une position fondée sur le droit – n'en déplaise au professeur Crawford, j'ai en effet un petit faible pour le droit... Donc, en style télégraphique :

1° il ne peut être recouru à la bissectrice que si des « raisons impérieuses » (des *compelling reasons*) excluent le recours à la méthode-standard, équidistance-circonstances pertinentes;

2° tel n'est pas le cas en l'espèce;

3° si, néanmoins, l'on voulait tracer une ligne bissectrice, il conviendrait de le faire convenablement, c'est-à-dire en tenant pour pertinentes les côtes permettant de déterminer les deux côtés de l'angle que partagera la bissectrice (et ce ne sont pas les mêmes côtes qui sont pertinentes en vue de l'établissement d'une ligne d'équidistance ou du test de la non-disproportionnalité d'une part, et du tracé de la bissectrice d'autre part;

4° il s'agit ici des côtes à peu près droites des deux pays s'étalant sur une centaine de kilomètres de part et d'autre de l'embouchure du fleuve Naaf que vous voyez en rouge sur le schéma.

Je comprends d'ailleurs, Monsieur le Président, qu'en voyant ce croquis, nos contradicteurs aient préféré faire machine-arrière et, tout en essayant de ne point trop se renier, qu'ils aient *in petto*, répudié la bissectrice. On ne peut ainsi passer d'une méthode à une autre parce que tout d'un coup on s'aperçoit que l'on a tout faux ! On ne peut justifier une solution pré-déterminée en recourant à n'importe quelle méthode, en retranchant une côte qui dérange par-ci, en rajoutant une par là parce qu'elle arrange. L'interprétation la plus généreuse de cette stratégie serait d'y voir une incitation à vous faire décider sur la base de l'équité correctrice ou distributive, c'est-à-dire *ex aequo et bono*. Mais cela, Messieurs les Juges, vous ne le pouvez pas (et le Bangladesh dit en être d'accord) – mais cela montre aussi à quel point nos adversaires et néanmoins amis n'ont pas pris, dans cette affaire, le droit au sérieux.

En guise de conclusion, une petite parodie des stances du *Cid*⁵¹, appelées à la rescousse par le professeur Akhavan⁵² :

Nature, île et concavité,
 Equidistance ou équité,
 Tout se ligue et concourt à trop me limiter
 Pertinente ou spéciale, aucune circonstance
 Plus loin que deux-cents milles ne permet que j'avance
 Devant le Tribunal je cherche le salut
 Bissectrice j'invoque
 Myanmar me retoque
 L'équidistance honnie finalement m'a plu.

Je sais, Monsieur le Président, que ceci ne rend pas justice au génie du grand Corneille et j'espère que mes talents de juriste, aussi modestes soient-ils, sont moins limités que mes dons de rimailleur ; mais il fallait bien que je relaie le poème de W.H. Auden, tel que l'a un peu revu mon vieux complice, ami et adversaire, James Crawford⁵³ – un poème que, d'ailleurs, je ne récusé en aucune manière : « *Law is the law* » – *and I would add that justice*

⁵⁰ ITLOS/PV.11/10 (E), pp. 24-35 (A. Pellet) et ITLOS/PV.11/11 (E), pp. 1-7 (C. Lathrop).

⁵¹ Acte I, scène 6.

⁵² ITLOS/PV.11/14 (E), p. 11, lignes 26-28 (M. Akhavan).

⁵³ ITLOS/PV.11/14 (E), p. 12, ligne 17 (M. Crawford).

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must be done according to the law! Mais sur le fond, la position du Bangladesh à ce stade ultime de notre affaire me paraît à peu près bien reflétée par mes vers de mirliton. Mes collègues Mathias Forteau et Coalter Lathrop illustreront ceci plus sérieusement. Auparavant, Monsieur le Président, je vous serais reconnaissant de bien vouloir donner la parole à Sir Michael Wood pour qu'il puisse dire quelques mots sur le « non-accord » de 1974 sur la mer territoriale.

Messieurs les Juges, je vous remercie très vivement pour votre écoute attentive et bienveillante.

The President:

Thank you, Mr Pellet.

I give the floor to Sir Michael Wood.

STATEMENT OF MR WOOD – 24 September 2011, a.m.

STATEMENT OF MR WOOD
 COUNSEL OF MYANMAR
 [ITLOS/PV.11/15/Rev.1, E, p. 19–24]

Mr Wood:

Mr President, Members of the Tribunal, on Thursday, Professor Crawford referred to my, and I quote, “long refutation” – too long, I think – “of a proposition for which [Bangladesh has] not argued – that is, that there is a signed treaty delimiting the territorial sea”¹. That seems a rather significant statement, after all the reliance that our friends from Bangladesh placed on the Agreed Minutes throughout these proceedings up to that point.

Unfortunately, Professor Crawford did not go on to explain just what proposition, if any, Bangladesh does now put forward in respect of the 1974 minutes. Just one day earlier, on Wednesday, Professor Boyle sought once again to establish that the 1974 minutes constituted a legally-binding agreement delimiting the territorial sea². He did so, however, briefly - half-heartedly one might even say. Perhaps we now know why: this was apparently never, or at least is no longer, Bangladesh’s position. Perhaps that explains why Professor Boyle failed to respond to many points we made orally and in the written pleadings. I am at something of a loss to know what proposition I am now supposed to answer.

To adopt Professor Sands’s elegant - if not particularly original - expression, what is not said is often as interesting as what is said³. Professor Boyle has once again largely ignored the negotiations. The records were produced by both sides. One can understand why, since these records clearly evidenced Myanmar’s consistent position throughout. To the extent that Professor Boyle did refer to the negotiations at all, his description was, as we shall see, one-sided and self-serving⁴.

Professor Boyle also largely ignored what Mr Sthoeger said about Bangladesh’s reliance on practice and their so-called evidence - though he did helpfully clarify that Bangladesh is not now using its evidence “to prove the existence of a boundary agreement”⁵. Professor Boyle suggested that the absence of protests by Myanmar at the arrests of its fisherman was proof of the binding force of the 1974 minutes⁶. On this, I shall just refer you to what we actually said about these alleged events. So far as we can tell, they did not take place in areas in dispute between the Parties, and they shed no light whatsoever on the status of the 1974 minutes.⁷ They are immaterial, as is the rest of Bangladesh’s “evidence”.

At the end of his short intervention, Professor Boyle accused Myanmar of wanting to “unpick”, as he put it, what Bangladesh at that stage (though apparently no longer) persisted in calling an “agreement” on the delimitation of the territorial sea. He accused us of wanting to unpick it only because of the EEZ and continental shelf. That is not so, Mr President. Myanmar is not unpicking an agreement. There is no agreement to unpick. Myanmar is upholding a central principle of the law of treaties: treaties, especially boundary treaties, are serious matters: their existence is not lightly to be presumed.

Mr President, we stand by what we have already said about the true nature and meaning of the Agreed Minutes, their actual terms and the circumstances in which they were

¹ ITLOS/PV.11/14 (E), p. 21, lines 36-38 (Crawford).

² ITLOS/PV.11/12 (E), p. 7, lines 30-32 (Boyle).

³ *Ibid.*, p. 13, lines 1-4 (Sands).

⁴ *Ibid.*, p. 7, lines 42-47 and p. 8, lines 1-25 (Boyle).

⁵ *Ibid.*, p. 11, lines 25-27 (Boyle).

⁶ *Ibid.*, p. 11, lines 30-34 (Boyle).

⁷ ITLOS/PV.11/8 (E), p. 11, lines 11-19 (Sthoeger).

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concluded⁸. Today, I shall respond briefly to six points made in the second round by Professor Boyle and Professor Crawford.

First, Professor Boyle began by mis-stating Myanmar's position. We do not, quoting from Professor Boyle, "accept that if the Agreed Minutes of 1974/2008 are binding agreements then they are sufficient for the purposes of article 15"⁹. Even if the minutes were legally binding, which they are not, they would be binding only in accordance with their terms. Their conditionality would preclude them from being a maritime delimitation agreement within the meaning of article 15. Even if the parties had committed themselves, legally, to include a particular line in a future overall treaty (which they had not), such a commitment would not be an article 15 agreement.

Second, Professor Boyle has, finally, addressed the actual terms of the 1974 minutes.¹⁰ But what did he say? He said that the minutes contain both delegations' agreement to points 1 through 7¹¹, not just that of Bangladesh. But - and this point I made in my first presentation - while the 1974 minutes contain the consent of Bangladesh's Government to the proposed line, any reference to the agreement of the Myanmar Government was removed from the draft prepared by Bangladesh, and remains absent¹².

Professor Boyle tries to find this missing consent in the 2008 minutes¹³. The weakness of this attempt to establish the binding force of a document by praying in aid an equally non-binding document signed by heads of delegation some 34 years later is obvious; yet it comes as little surprise, in light of the fact that Bangladesh itself only began seriously to assert that the 1974 minutes constituted a binding agreement some 36 years after the event, in the Memorial produced by its lawyers for the present proceedings.

I now come to the question of free and unimpeded access. On Thursday, Professor Crawford, somewhat strangely, accused Mr Lathrop of not answering the Tribunal's question about access. That was rather unfair; it overlooked the fact that I had already answered that question¹⁴. Be that as it may, Professor Crawford went on to say the following:

Well, you have heard what the Foreign Minister and Agent had to say on Day 1¹⁵. I thought she was clear. What the Foreign Minister and Agent says in response to a direct question from an international tribunal commits the State. That is the lesson of the *Nuclear Tests* cases. So there is your answer.¹⁶

So, Professor Crawford. However, while the Foreign Minister's statement may have been clear to Professor Crawford, it was not clear to us¹⁷.

The Bangladesh side has once again sought to reassure Myanmar on the continuance of its historic right, since 1948, of free and unimpeded access for Myanmar ships to and from the Naaf River. Again, what they have said is equivocal. It is hardly reassuring to Myanmar that Professor Boyle referred to this important matter as "a complete red herring". He then asked, perhaps rhetorically, why Myanmar had not raised it in negotiations between 1974 and 2008¹⁸. The short answer is that Myanmar did raise it, many times¹⁹. Professor Boyle then

⁸ ITLOS/PV.11/7 (E), pp. 22-36 (Wood) and ITLOS/PV.11/8 (E), pp. 1-5 (Wood).

⁹ ITLOS/PV.11/12 (E), p. 7, lines 31-32 (Boyle).

¹⁰ *Ibid.*, p. 8, lines 27-42 and p. 9, lines 1-24; p. 10, lines 24-31 (Boyle).

¹¹ *Ibid.*, p. 8, lines 27-37 (Boyle).

¹² ITLOS/PV.11/7, p. 35, lines 33-35 (Wood).

¹³ ITLOS/PV.11/12 (E), p. 7, lines 38-40 and p. 11, lines 13-20 (Boyle).

¹⁴ *Ibid.*, p. 24, lines 2-47 (Wood).

¹⁵ ITLOS/PV.11/2/Rev.1, p. 5, lines 23-29 (H.E. Dr Dipu Moni).

¹⁶ ITLOS/PV.11/14 (E), p. 21, lines 42-45 (Crawford) (footnotes omitted).

¹⁷ ITLOS/PV.11/7 (E), p. 24, lines 2-47 (Wood).

¹⁸ ITLOS/PV.11/12 (E), p. 10, lines 1-2 (Boyle).

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referred to the sentence that was introduced by the 2008 minutes, inserted, you will recall, into the paragraph that recorded Myanmar's concerns, but not the Bangladesh Government's agreement²⁰. Professor Boyle claimed that Bangladesh had never demanded that Myanmar vessels seek prior permission. Why, then, at the second round of negotiations, the very round at which the 1974 minutes were signed, did Bangladesh draw Myanmar's specific attention to its 1974 law expressly requiring prior permission?²¹ That law seems still to be in force²². Professor Boyle went on to say that Bangladesh had "made unequivocally clear its acceptance of the right of unimpeded innocent passage" - I repeat, "unimpeded innocent passage" - "for Myanmar vessels in accordance with the 1982 Convention as agreed in 2008"²³. That is yet another form of words, another unclear form of words, from a representative of Bangladesh.

Mr President, Members of the Tribunal, I turn to the fourth point. Professor Boyle referred the Tribunal once again to the *Qatar v. Bahrain* case. This time, he claimed that the 1974 minutes were "considerably clearer and more precise" than the 1990 minutes in that case.²⁴ But he was unconvincing. To decide which of two very different texts is "clearer and more precise" is a highly subjective matter. Is Mallarmé's *Brise Marine* "clearer and more precise" than Shakespeare's eighteenth sonnet? The minutes in *Qatar v. Bahrain* concerned submission to the jurisdiction of the International Court; they did not embody - as is alleged by Bangladesh in our case - the maritime delimitation itself. Professor Boyle took you to paragraph 2 of the 1990 minutes. He overlooked the preamble and paragraph 1, which read "The following was agreed: (1) to reaffirm what was agreed previously between the two Parties..."²⁵

Looking at the actual terms of the 1990 minutes²⁶ the International Court noted the unequivocal language of paragraph 1, containing the express agreement of both sides, based on an undisputed agreement from 1987, to bring the matters in dispute before the International Court of Justice. This agreement was expressed by the signatures of the Foreign Ministers of both States and referred to the agreement of the *Parties*, not the delegations, as in the 1974 minutes²⁷. Paragraph 2 of the 1990 minutes also recorded the agreement of Qatar to the "Bahraini formula" that contained the precise language of the Parties' joint submission to the Court; and a clear timetable for mediation and subsequent adjudication²⁸. The Court found that "the 1990 minutes include a reaffirmation of obligations previously entered into" adding to the previous adjudication agreement precise timetables and deadlines.²⁹

¹⁹ MCM, Vol. II, Minutes of the Third Round, first meeting, para. 4 (Annex 4); MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 4-5 (Annex 8).

²⁰ ITLOS/PV.11/12 (E), p. 10, lines 9-12 (Boyle).

²¹ MCM, Vol. II, Minutes of the Second Round, third meeting, para. 2 (Annex 3). See Bangladesh Territorial Waters and Maritime Zones Act (Act No. XXVI of 14 February 1974), Article 3(7), in BM, Vol. III, Annex 10; see also BM, Vol. III, Annex 15, para. 3. The Law was mentioned by Bangladesh again during the third round of negotiations, see MCM, Vol. II, Minutes of the Third Round, first meeting, para. 4 (Annex 4).

²² ITLOS/PV.11/12 (E), p. 8, note 25. See United Nations Division for Ocean Affairs and the Law of the Sea website, at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/BGD_1974_Act.pdf.

²³ ITLOS/PV.11/12 (E), p. 10, lines 18-21 (Boyle).

²⁴ *Ibid.*, p. 10, lines 31-33 (Boyle).

²⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994*, p. 112, at p. 119, para. 19.

²⁶ *Ibid.*, p. 121, para. 23.

²⁷ *Ibid.*, p. 121, para. 24.

²⁸ *Ibid.*, p. 121, paras. 24-25.

²⁹ *Ibid.*, p. 118, para. 18.

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Fifth, Professor Boyle also briefly discussed the context of the negotiations during which the 1974 minutes were signed³⁰. He referred to comments made by the delegations on their respective interests in reaching the agreement³¹. With respect, this does not add to Bangladesh's previous assertions concerning context.³² As I pointed out during the first round, that the Parties had an interest in the successful conclusion of the negotiations is hardly novel; yet how this sheds light on what was actually agreed is wholly unclear.

Mr President, Members of the Tribunal, Professor Boyle made much of the introductory statement by Myanmar's Foreign Minister at the beginning of the sixth round of negotiations in 1985³³. Professor Boyle noted that the Minister "referred to the Agreed Minutes signed in Dhaka with approval"³⁴. From this, Professor Boyle concluded that "Myanmar is now estopped from denying the authority of Commodore Hlaing to conclude the 1974 minutes".

The Foreign Minister of Myanmar did indeed mention the 1974 minutes, which is more than the Prime Minister of Bangladesh did on that occasion. But you have to look at the context. Mr President, Members of the Tribunal, I would invite you to look closely at the Minister's statement, on which Bangladesh now places such reliance. That statement is at tab 6.4 in your folders. (Bangladesh has not produced any account of its own of this meeting.)

As you will see, the Minister began by noting that six years had passed since the last round of negotiations in 1979, and therefore, as he said: "It would be helpful to our work if each of us were to begin by recounting briefly the positions it had taken on the previous occasions."³⁵ He then noted that during the second round of negotiations, the Myanmar delegation had decided, "subject to two conditions, to accept instead a variation of the median line as the territorial waters boundary"³⁶. It was also at this point that the Minister referred to the full 12 M of St. Martin's Island, as noted by Professor Sands, but that did not amount to any recognition of entitlement in law. It was in the context of what, subject to conditions, was set out in the Agreed Minutes, as something that could be concluded in an eventual treaty.³⁷ The Minister was recapping what had happened in the earlier negotiating rounds. You can see the part on the Agreed Minutes on the screen. The Minister immediately went on to say: "Here I might recall the two conditions we had set forth in accepting the line proposed by Bangladesh."³⁸ He then mentioned these two conditions with which you are familiar: unimpeded passage and the conclusion of a comprehensive treaty delimiting the entire maritime boundary.³⁹ Notably, it was only when recalling these conditions that the Minister referred to the Agreed Minutes.

It is clear, we say, that when one looks at the full account of what the Foreign Minister of Myanmar actually said, it lends no support to Bangladesh's claims before this Tribunal.

I would like now to take a look at what the Bangladesh Foreign Minister said in reply, which is also found in tab 6.4⁴⁰. Mr Choudhury started by recalling what Bangladesh

³⁰ ITLOS/PV.11/12 (E), p. 8, lines 46-47 and p. 9, lines 1-12 (Boyle).

³¹ *Ibid.*

³² ITLOS/PV.11/3 (E), p. 3, lines 29-31 (Boyle).

³³ ITLOS/PV.11/12 (E), p. 11, lines 9-20 (Boyle) and p. 13, lines 18-20 (Sands).

³⁴ *Ibid.*, p. 11, lines 17-19 (Boyle).

³⁵ MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 3 (Annex 8).

³⁶ *Ibid.*, p. 4.

³⁷ ITLOS/PV.11/12 (E), p. 13, lines 18-20 (Sands).

³⁸ MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 4 (Annex 8).

³⁹ *Ibid.*, p. 4-5.

⁴⁰ *Ibid.*, p. 4-5., p. 11.

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believed were points of “substantial agreement between our two sides on a number of essential points”⁴¹. He listed five such points. The 1974 minutes were not among them. The fifth point is particularly relevant, however, since it concerns the nature of the negotiations, and any understandings reached up to that point. It is now on your screens, and it is in the middle of page 12 at tab 6.4. The Foreign Minister said, in 1985:

Lastly, I believe we are agreed that in accordance with the well-established rules covering such negotiations, between two sovereign states neither side is prevented from raising new proposals or looking at old proposals afresh and in new ways. Our understanding is that international negotiations of this type are to put it loosely without prejudice to either side until the conclusion of an international agreement.⁴²

Coincidentally, Professor Crawford expressed the exact same views on the nature of negotiations in his closing remarks on Thursday⁴³. Mr President, in other words, “Nothing is agreed until everything is agreed”. There is no more I need say.

Mr President, after the break, Professor Forteau will address you on what our opponents had to say on special or relevant circumstances. Thank you very much for your attention.

The President:

I think now the Tribunal will break for a period of thirty minutes. We will be back by twelve.

(Short adjournment)

The President:

The hearing continues.

I would like to give the floor to Professor Mathias Forteau.

⁴¹ *Ibid.*

⁴² *Ibid.*, p. 12.

⁴³ ITLOS/PV11/13 (E), p. 21, lines 20-23 (Crawford).

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

EXPOSÉ DE M. FORTEAU
 CONSEIL DU MYANMAR
 [ITLOS/PV.11/15/Rev.1, Fr, p. 27–42]

M. Forteau :

Merci, Monsieur le Président.

Monsieur le Président, Messieurs les Juges, il m'incombe de revenir ce matin sur la question des circonstances spéciales et des circonstances pertinentes.

Après avoir entendu les avocats du Bangladesh mercredi et jeudi derniers, il est évident que ceux-ci ont désormais entièrement changé leur fusil d'épaules à l'égard de la seconde étape du processus de délimitation. Dans le mémoire, dans la réplique, lors du premier tour de plaidoiries, le Demandeur n'a cessé de marteler, avec la plus extrême insistance, que le point crucial de notre affaire était l'effet d'amputation occasionné par la concavité régionale (j'insiste sur ce qualificatif), par la concavité régionale du Golfe du Bengale. L'insistance mise sur l'affaire du *Plateau continental de la mer du Nord* ne s'expliquait pas autrement. L'effet d'amputation constituait le seul motif invoqué par le Bangladesh dans son mémoire au titre des « raisons » qui ont justifié sa requête¹ : le Bangladesh protestait alors contre le fait que la ligne d'équidistance l'enfermait dans une zone ne dépassant pas 137 milles marins² – ce qui ne correspond, nous le savons désormais, aucunement à la réalité.

Nous avons réfuté cette allégation dans nos écritures ainsi que dans nos plaidoiries en montrant notamment que la jurisprudence contemporaine, en particulier les affaires *Cameroun c. Nigéria* et *La Barbade c. La Trinité-et-Tobago*, ne considèrent pas qu'un tel effet d'amputation constitue une circonstance pertinente³ :

- i) l'équidistance enclave le Cameroun dans moins de 30 milles nautiques : la Cour internationale de Justice décide à l'unanimité en 2002 que la ligne d'équidistance est la ligne équitable;
- ii) la Trinité-et-Tobago réclame un accès au plateau continental au-delà de 200 milles marins que ne lui offre pas la ligne d'équidistance : le Tribunal arbitral décide en 2006 à l'unanimité qu'il n'y a pas lieu d'ajuster la ligne d'équidistance pour ce motif.

Aussi, nous attendions-nous à ce que le Bangladesh réfute point par point les éléments que nous avons fait valoir à l'encontre de la prétendue iniquité de l'effet d'amputation, en particulier nous nous attendions à ce que nos contradicteurs nous expliquent pourquoi les précédents *Cameroun c. Nigéria* et *La Barbade c. La Trinité-et-Tobago* ne seraient pas le reflet du droit international d'aujourd'hui.

Nous nous attendions à ce que M. Martin nous en entretienne lorsqu'il a abordé la question de la concavité. Non, nous a-t-il dit, le Professeur Crawford y reviendra « un petit peu » plus tard, avant de préciser tout en pudeur : « I will not burden the Tribunal by saying anything more [on these cases] »⁴.

Nous avons attendu alors jeudi après-midi que M. Crawford nous éclaire. Il n'a pas estimé utile de consacrer plus que quelques petites minutes à ces deux affaires, quelques

¹ Mémoire du Bangladesh, paras. 1.6-1.16.

² *Ibid.*, par. 1.12.

³ ITLOS/PV.11/10, pp. 6 et s. (Forteau).

⁴ ITLOS/PV.11/12 (E), p. 3, lignes 3-6 (Martin).

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petites minutes pendant lesquelles il n'a absolument rien dit de concret sur celles-ci ni ne s'est essayé à contredire les conclusions que nous en avons tirées⁵. Nous en prenons acte.

MM. Sands puis Reichler ont quant à eux longuement débattu du sort à réserver à l'île de Saint Martin. Quarante minutes pour l'un, plus d'une heure pour l'autre. Étrange équilibre qu'explique la nouvelle stratégie du Demandeur. Celle-ci tient désormais en deux propositions :

i) la ligne d'équidistance aboutirait à un effet dramatique d'amputation;
 ii) pour compenser cela, il faudrait donner à l'île de Saint Martin un plein effet sur la ligne de délimitation ; et encore ceci ne suffirait-il pas, il faudrait encore compenser la compensation en faisant subir à la ligne une nouvelle déflexion au large.

Cette nouvelle stratégie n'est pas plus admissible que la précédente, pour quatre raisons en particulier :

i) la prémisse sur laquelle elle repose ne correspond toujours pas à la jurisprudence contemporaine : l'effet d'amputation n'est pas une circonstance pertinente;

ii) il n'est donc pas utile d'utiliser l'île de Saint Martin pour compenser quelque chose qui n'a pas à être compensé. La jurisprudence contemporaine est limpide : un effet d'amputation n'est pas une circonstance pertinente nécessitant d'ajuster la ligne d'équidistance;

iii) l'île Saint Martin ne peut de toute manière recevoir aucun effet dans une délimitation entre masses continentales au-delà de la mer territoriale. La jurisprudence est de nouveau très claire sur ce point;

iv) c'est est d'autant plus vrai ici que l'effet donné à l'île aboutirait à une grave distorsion dans le tracé de la ligne d'équidistance, ce qu'exclut le droit international.

C'est pourtant très exactement ce que vous demande de faire le Demandeur. De peur apparemment de ne pas être bien compris de vous, le Professeur Crawford a tenu à prononcer deux fois la solution de compromis qu'il vous demande de consacrer : pour compenser l'effet produit par la concavité, vous devriez utiliser l'île de Saint Martin, y compris a-t-il précisé, si celle-ci n'a rien à voir avec la cause de la prétendue inégalité – et je souligne en passant le lapsus révélateur : « even if [it] is unrelated to the cause of the *inequality* » – the « inequality », et non the « inequity », les termes sont évocateurs, encore et toujours, de la véritable nature de la réclamation du Demandeur⁶.

Cette nouvelle stratégie du Demandeur est parfaitement étrangère à ce que doit être une opération de délimitation judiciaire. Elle ne change par ailleurs strictement rien au fond du problème. L'île de Saint Martin ne peut venir compenser l'effet de la concavité que la jurisprudence contemporaine n'exige justement pas de compenser. « Context is key » n'ont cessé de répéter nos contradicteurs⁷. Mais la clef de quoi ? Si la ligne d'équidistance et l'effet très relatif d'amputation qu'elle produit (je rappelle que le Bangladesh a accès à 182 milles nautiques environ) Si la ligne d'équidistance n'est pas inéquitable, alors quelle porte a-t-on besoin d'ouvrir ? Je rappelle que la porte de l'équité n'est pas une porte ni une option ouverte devant votre Tribunal. Ni le Tribunal arbitral en 2006, ni la Cour internationale de Justice en 2002 n'ont estimé qu'un ajustement de la ligne d'équidistance était requis. Pourquoi en irait-il différemment dans la présente affaire ?

Avec votre permission, Monsieur le Président, je reviendrai sur ces différents points, en le faisant autour des deux propositions suivantes :

- l'effet d'amputation créée par une concavité régionale n'est toujours pas une circonstance pertinente;

⁵ ITLOS/PV.11/14 (E), pp. 18-19, lignes 37-47 et 2-22 (Crawford).

⁶ ITLOS/PV.11/13 (E), pp. 21-22, lignes 43-45 et 1-4.

⁷ ITLOS/PV.11/12 (E), p. 6, ligne 19 (Martin).

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- par conséquent, il n'est pas nécessaire – et il n'est au demeurant pas possible – d'instrumentaliser l'île de Saint Martin à des fins compensatoires.

Je serai très bref sur la concavité car nos contradicteurs ont été très discrets à son égard.

M. Martin a tout d'abord ironisé sur les commentaires du Professeur Pellet relatifs aux croquis abstraits sur la concavité⁸. Nous persistons : la situation de la présente affaire est celle du troisième, pas du quatrième croquis. L'accès du Bangladesh aux zones maritimes n'est pas inférieur à 100 milles marins. Il atteint les 182 milles nautiques environ.

Sur le plan du droit maintenant, la thèse du Bangladesh s'est littéralement évanouie sous nos yeux.

S'agissant en premier lieu de la pratique étatique, M. Martin s'est limité à une leçon de mathématiques. « 5 accords ce n'est pas 4 »⁹. Soit. Mais nous attendons toujours une réponse juridique à nos arguments sur l'absence de pertinence de ces quelques accords. Au demeurant, je précise que le cinquième accord concernait le Venezuela et la Trinité-et-Tobago dont j'ai eu l'occasion de parler longuement en commentant la sentence de 2006 entre la Trinité-et-Tobago et la Barbade¹⁰. M. Martin n'en a rien dit.

M. Martin n'était toutefois pas venu les mains totalement vides mercredi dernier. Il avait retrouvé, dans la réplique du Bangladesh, l'arbitrage *Saint-Pierre et Miquelon* qui, a-t-il affirmé, aurait « donné aux deux petites îles françaises », coincées dans une concavité, un accès aux 200 milles marins. M. Martin n'a pas jugé néanmoins utile d'en dire plus sur cette affaire. A partir d'un certain moment a-t-il dit « la brièveté était bienvenue » [*at a certain point (...) there is value in brevity*]¹¹.

Messieurs du Tribunal, ce n'est guère sérieux. Nous avons expliqué dans la duplique pourquoi cet arbitrage n'appuyait pas la prétention du Bangladesh, au contraire¹². M. Martin a préféré ne rien en dire. Permettez-moi de le faire à sa place – et vous trouverez un croquis éclairant dans le dossier des Juges au numéro 11 :

i) Cette affaire Saint-Pierre-et-Miquelon concernait tout d'abord un Etat entouré de part et d'autre par un seul et même Etat : comme l'a souligné le Tribunal arbitral, au paragraphe 26 de sa sentence, « [l]es îles françaises de Saint-Pierre-et-Miquelon se trouvent à l'intérieur d'une concavité bordée *par le* seul littoral canadien » ; dans notre affaire, je le répète, le Myanmar n'est pas l'Inde¹³ ;

ii) ensuite, c'est vous induire en erreur que de suggérer, comme l'a fait M. Martin, que le Tribunal arbitral aurait « donné » un corridor à la France à titre de compensation de l'inéquité créée par la concavité. C'est exactement le contraire qui s'est produit :

- c'est la France qui réclamait l'application de l'équidistance, pas le Canada ;

- le Tribunal arbitral a limité l'espace maritime que la France revendiquait en procédant à un ajustement très significatif de la ligne de délimitation si bien qu'en définitive, la France ne s'est pas vue « donner » un corridor ; elle a vu son espace maritime se réduire significativement à ce corridor ;

- en effet, le Tribunal a refusé de donner aux îles françaises un plein effet quant à leur projection vers le large et ne leur a laissé qu'un maigre corridor dont la doctrine s'est largement accordée à souligner le caractère tout à fait symbolique¹⁴.

⁸ *Ibid.*, p. 2, lignes 1-8 (Martin).

⁹ ITLOS/PV.11/12 (E), p. 3, lignes 12-14 (Martin).

¹⁰ ITLOS/PV.11/10 (F), pp. 7-10 (Forteau).

¹¹ ITLOS/PV.11/12 (E), p. 3, lignes 24-28 (Martin).

¹² Duplique du Myanmar, pars. 6.29-6.30; *RSA*, vol. XXI, décision du 10 juin 1992.

¹³ ITLOS/PV.11/10 (F), p. 1, lignes 36-46 (Forteau).

¹⁴ Duplique du Myanmar, p. 155, note 414.

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M. Martin a été encore moins loquace sur la jurisprudence directement pertinente dans notre affaire. Il s'est contenté de deux affirmations, l'une et l'autre infondées :

i) premièrement, il faudrait dans notre affaire tenir compte de la façade côtière de l'Inde de manière à envisager « the whole coast in context »¹⁵ (la côte dans son entier et dans le contexte). Mais la jurisprudence ne retient précisément pas cette démarche globale ; elle ne tient pas compte de la « concavité régionale ».

- Dans l'affaire du *Différend territorial et maritime entre le Nicaragua et la Colombie*, la Cour internationale de Justice a rappelé le 4 mai dernier dans le cadre de la requête à fin d'intervention du Honduras que la délimitation doit être –je cite : « déterminée en fonction de la côte et des formations maritimes des deux Parties » en litige [« *determined pursuant to the coastline and maritime features of the two Parties* »]¹⁶.

- La Cour reprend ici l'argument du Conseil de la Colombie selon lequel –je cite également : « les frontières maritimes sont établies sur une base relative, relationnelle, par chaque Etat côtier par rapport à chaque autre Etat côtier concerné » [« *maritime boundaries are established on a relative, relational basis, by each State vis-à-vis each other relevant coastal State* »]¹⁷.

- La Cour internationale de Justice l'avait déjà fermement souligné dans l'affaire *Cameroun c. Nigéria* :

La question des effets de l'île de Bioko sur la projection de la façade maritime camerounaise vers le large se pose (...) entre le Cameroun et la Guinée équatoriale et non entre le Cameroun et le Nigéria, et n'est pas pertinente aux fins de la délimitation qui occupe la Cour¹⁸.

Il en va de même dans la présente affaire.

ii) deuxièmement, la jurisprudence et la pratique montreraient selon M. Martin « a clear international consensus » : quand un Etat est coincé entre deux autres dans une concavité, l'équidistance ne pourrait pas aboutir à un résultat équitable¹⁹ : c'est là encore incorrect : ai-je besoin d'évoquer de nouveau les affaires *Cameroun c. Nigéria* et *La Barbade c. Trinité-et-Tobago* ?

Que reste-t-il comme argument du côté du Bangladesh ? L'amputation serait « dramatique », a réaffirmé M. Martin²⁰. Le répéter mille fois ne rend pas la ligne inéquitable. Nul doute que le Cameroun en son temps, la Trinité-et-Tobago plus récemment, ont regretté leur enclavement. Cela ne rend pas pour autant la ligne d'équidistance inéquitable. L'équitable, je le rappelle, est géographiquement conditionné, et il existe des inégalités naturelles. C'est un fait qu'il n'appartient pas aux juridictions internationales de modifier tant qu'il n'en découle aucune disproportion manifeste.

Monsieur le Président, Messieurs les Juges, dans ces conditions, il n'y a pas lieu d'instrumentaliser l'île de Saint Martin comme une variable compensatrice comme le Demandeur vous demande de le faire en dehors de tout respect de la méthodologie et du droit applicable.

¹⁵ ITLOS/PV.11/12 (E), p. 2, lignes 25-26 et 38-39 (Martin).

¹⁶ CIJ, arrêt du 4 mai 2011, [www.icj-cij.org], par. 73.

¹⁷ CR 2010/14, audience du 13 octobre 2010, [www.icj-cij.org] par. 23.

¹⁸ Arrêt du 10 octobre 2002, *CIJ Recueil 2002*, p. 446, par. 299.

¹⁹ ITLOS/PV.11/12 (E), p. 3, lignes 37-39 (Martin).

²⁰ ITLOS/PV.11/12 (E), p. 4, lignes 1-8 (Martin).

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Selon le Bangladesh, l'île de Saint Martin devrait se voir reconnaître une mer territoriale de 12 milles nautiques au sud et à l'ouest ; et elle devrait se voir donner un plein effet dans la délimitation du plateau continental et de la zone économique exclusive.

Pareille position est intenable, pour deux raisons au moins :

i) tout d'abord, aucune île n'a jamais reçu un tel sort dans la jurisprudence : même les très rares îles auxquelles un certain effet a été donné au-delà de la mer territoriale n'ont jamais reçu un plein effet ; par ailleurs, je l'ai rappelé la semaine passée, elles ne l'ont obtenu que pour des raisons qui ne concernent en rien l'île de Saint Martin²¹ ; dans toutes les autres hypothèses, la ligne de délimitation de la mer territoriale rejoint toujours la ligne de délimitation des masses continentales – dans notre affaire il s'agit du point E ; le Bangladesh n'a pas été capable de produire un seul exemple en sens contraire tandis qu'à l'inverse il a, lors de ses deux tours de plaidoiries, produit quantité d'exemples qui confortent la position du Myanmar sur ce point ;

ii) la réclamation du Bangladesh ignore totalement ensuite la localisation géographique singulière de l'île de Saint Martin que le Bangladesh traite ni plus ni moins que comme une partie de sa côte continentale, ce que l'île n'est certainement pas.

La position du Myanmar est quant à elle pleinement conforme au droit de la délimitation maritime. Elle repose sur trois éléments que je développerai successivement et que je peux résumer en trois mots : méthode, géographie, droit.

Selon le Demandeur, la méthode ne se déclinerait qu'en deux séquences : l'île de Saint Martin aurait par principe un droit absolu à une pleine mer territoriale – c'est ce que le Professeur Sands a plaidé mercredi²² ; et elle devrait se voir accorder ensuite un plein effet aussi dans le tracé de la ligne d'équidistance de délimitation des espaces maritimes jusqu'aux 200 milles marins – c'est ce que M. Reichler a plaidé jeudi²³ ; en ajoutant d'ailleurs que cela ne serait pas encore suffisant et qu'il faudrait encore ajouter une compensation à la compensation.

Ce n'est aucunement comme ceci que les juridictions internationales procèdent. La démarche suivie par la Cour internationale de Justice en particulier dans les deux dernières affaires de délimitation maritime qu'elle a eu à trancher est bien différente. Elle l'est sur deux plans en particulier.

Tout d'abord, il convient de bien distinguer le droit qu'une île a, en principe, d'avoir une mer territoriale et la question de la délimitation de cette mer territoriale. Une circonstance spéciale peut en effet venir limiter l'étendue de cette mer territoriale au moment de sa délimitation.

C'est la démarche clairement suivie par la Cour internationale de Justice dans l'affaire *Nicaragua c. Honduras*, où celle-ci a distingué l'*entitlement* (la vocation au titre) et la délimitation. La Cour a d'abord reconnu que le Honduras pouvait fixer à 12 milles marins l'étendue de la mer territoriale autour des îles sous sa souveraineté²⁴. Mais dans un second temps, la Cour a tracé la ligne médiane provisoire avant de s'assurer qu'il n'existait pas, je cite : « dans cette zone, de circonstances spéciales juridiquement pertinentes justifiant l'ajustement de cette ligne provisoire »²⁵. C'est très exactement la méthode qu'a suivie le Myanmar.

La seconde erreur méthodologique du Bangladesh consiste à assimiler la délimitation de la mer territoriale de l'île de Saint Martin et la délimitation des zones exclusives et du plateau continental des deux Etats parties au présent différend. Le Bangladesh fait comme s'il

²¹ ITLOS/PV.11/10 (F), pp. 19 et s.

²² ITLOS/PV.11/12 (E), pp. 12 et s. (Sands).

²³ ITLOS/PV.11/13 (E), pp. 1 et s.

²⁴ *CJ Recueil 2007*, p. 751, par. 302.

²⁵ *CJ Recueil 2007*, p. 752, par. 304.

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s'agissait dans notre affaire de tracer, au-delà de la mer territoriale, une ligne de délimitation entre l'île de Saint Martin, d'une part, et la masse continentale du Myanmar, d'autre part. De nouveau, ceci n'est pas conforme à la jurisprudence, pas plus que cela ne reflète la configuration générale des côtes qui se trouve ici refaçonnée. M. Lathrop reviendra tout à l'heure sur la « mainland-to-mainland delimitation ». Je me limiterai ici à trois remarques :

i) le Demandeur explique lui-même dans sa réplique que la question de l'effet à donner à l'île dans la délimitation de la mer territoriale doit être distinguée de –je cite : la « very different question of the effect to be given islands in the continental shelf and exclusive zone »²⁶ (la question tout autre de l'effet à accorder aux îles aux fins de la délimitation du plateau continental et de la zone exclusive).

ii) dans l'affaire *Nicaragua c. Honduras*, la Cour indique expressément avoir d'abord procédé à la délimitation « à partir du continent » et ensuite envisagé la délimitation de la mer territoriale des îles situées au large²⁷; le tracé final procède en conséquence à un semi-enclavement des îles auxquelles seule une mer territoriale a été accordée;

iii) dans l'affaire *Roumanie c. Ukraine*, la Cour a également tenu à rappeler que l'île des Serpents ne faisait pas partie –je cite : de « la configuration côtière générale », autrement dit, de la configuration côtière continentale ; la Cour a décidé par conséquent que l'île –je cite toujours : « ne pouvait servir de point de base pour construire la ligne d'équidistance provisoire »²⁸. En conséquence de quoi la ligne de délimitation finale contourne la mer territoriale de l'île et rejoint la ligne d'équidistance. Le Myanmar ne demande pas autre chose dans cette affaire, à cette réserve près qu'il estime également que, compte tenu de la localisation très singulière de l'île de Saint Martin, la ligne médiane de délimitation de la mer territoriale doit être ajustée.

J'en viens à la géographie. Niant l'évidence, le Bangladesh continue de faire comme si l'île de Saint Martin était située –et je cite : « en face des côtes du Bangladesh ». Et le Professeur Sands d'affirmer sans la moindre gêne mercredi qu'il ne semblait pas y avoir de désaccord entre les Parties sur le fait qu'il s'agissait d'une « île côtière » [« coastal island »]²⁹. Visiblement, le Professeur Sands était absent lors du premier tour de plaidoiries du Myanmar où nous avons, une fois encore, réfuté cette insoutenable allégation³⁰.

L'idée que l'île de Saint Martin serait une partie intégrante de la côte du Bangladesh est contredite par la description que le Demandeur a lui-même donnée de cette île.

Il est vrai que sur ce point, une certaine confusion se manifeste chez nos contradicteurs. Mercredi, il nous a été dit que l'île serait située à une égale distance de 4,5 milles de la côte continentale du Bangladesh et de celle du Myanmar³¹ ; dans la réplique, le Bangladesh écrivait pourtant que l'île était située à 6,5 milles marins de la côte continentale du Bangladesh : l'île remonterait-elle vers le nord au fur et à mesure que les audiences avancent ?³² Elle croiserait alors sur sa route les côtes pertinentes du Bangladesh qui, quant à elles, ont tendance à s'allonger vers le sud. Le Bangladesh a inventé l'autoroute de la reconfiguration géographique.

Dans sa première plaidoirie du premier tour, M. Reichler affirmait par ailleurs que l'île était « opposite to the land boundary »³³ ; le jour suivant, le Bangladesh reconnaissait,

²⁶ Réplique du Bangladesh, par. 2.81.

²⁷ *CIJ Recueil 2007*, p. 749, par. 299.

²⁸ *CIJ Recueil 2009*, p. 122, par. 186.

²⁹ ITLOS/PV.11/12 (E), p. 18, ligne 25 (Sands).

³⁰ ITLOS/PV.11/10 (F), p. 15, lignes 34-39 en particulier.

³¹ ITLOS/PV.11/12 (E), p. 18, ligne 24 (Sands).

³² Réplique du Bangladesh, par. 3.111.

³³ ITLOS/PV.11/2/Rev.1 (E), p. 9, lignes 26-27.

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par l'entremise de M. Sands, que l'île était plus exactement « opposite » à la côte du Myanmar, laquelle côte se trouve au sud de la frontière terrestre³⁴.

Quoi qu'il en soit de ces attermoissements, Messieurs les Juges, c'est bel et bien le Bangladesh – oui, le Bangladesh – qui en définitive a raison : je citerai successivement le paragraphe 2.18 de son mémoire (qui constitue la première description de l'île dans les écritures du Demandeur) et le paragraphe 1.10 de sa réplique :

- « l'île de Saint Martin est située à 6,5 milles marins au sud-ouest du point d'aboutissement de la frontière terminale avec le Myanmar »,

- « l'île de Saint Martin est adjacente à la côte du Bangladesh ».

Cette dernière description est parfaitement exacte : l'île de Saint Martin est adjacente à – et non pas en face de – la côte du Bangladesh ; elle se situe au sud-ouest de la frontière terrestre ; et elle est opposée à la côte du Myanmar. C'est précisément la raison pour laquelle la délimitation de la mer territoriale passe entre l'île et la côte continentale du Myanmar. Pareille délimitation n'aurait pas lieu d'exister si l'île se trouvait en face des côtes du Bangladesh comme le prétend contre toute raison le Demandeur. Et c'est précisément pour cette raison-là que la localisation de l'île constitue une circonstance spéciale, d'une part, et ne peut être assimilée à la côte du Bangladesh aux fins de la délimitation des espaces au-delà de la mer territoriale, d'autre part.

Sur le plan des règles applicables maintenant, j'aimerais souligner tout d'abord que le Demandeur a une conception plutôt curieuse de la valeur probatoire à accorder dans une délimitation judiciaire aux délimitations opérées par voie d'accords internationaux. Le Professeur Sands a fait grand cas mercredi des accords conclus par le Myanmar avec la Thaïlande, d'une part, avec l'Inde, d'autre part, en estimant que ceux-ci confirmeraient la thèse du Bangladesh quant au sort à réserver à l'île de Saint Martin³⁵.

La simple lecture de ces accords et du commentaire qui en est fait dans *International Maritime Boundaries* montre cependant de manière évidente que la limite tracée court entre toute une série d'îles relevant de la souveraineté respective des deux Etats, ce qui ne correspond aucunement à la situation géographique de notre affaire. Par ailleurs, la description de ces accords montre qu'ils sont le fruit de concessions réciproques des parties³⁶. A ce dernier titre, ils ne peuvent faire droit devant votre Tribunal.

C'est d'ailleurs ce que reconnaît le Professeur Sands quelques minutes plus tard à propos cette fois-ci des accords conclus entre l'Iran et le Qatar et entre le Canada et le Danemark, lesquels accords abondent l'un et l'autre dans le sens de la thèse du Myanmar. Cette fois-ci, mystérieusement, ces accords perdent toute valeur : « It was an agreement, Mr President, negotiated and adopted between two States. It can provide no support for the drawing of the equidistance line ... »³⁷.

Si la pratique étatique est d'un faible secours de l'aveu même du Demandeur, il n'en va pas de même de la jurisprudence internationale. J'en envisagerai l'application à l'île de Saint Martin tout d'abord dans le contexte de la délimitation de la mer territoriale, ensuite dans le contexte de la délimitation des zones économiques exclusives et du plateau continental.

Pour ce qui concerne tout d'abord la délimitation de la mer territoriale, il n'est pas vrai d'affirmer que l'île de Saint Martin aurait par principe un droit absolu à ce que la

³⁴ ITLOS/PV.11/3 (E), p. 17, lignes 25-26.

³⁵ ITLOS/PV.11/12 (E), p. 13, lignes 26-39 (Sands).

³⁶ *International Maritime Boundaries* (J.I. Charney et L.M. Alexander (eds)), vol. II, 1993, p. 1329 et p. 1340; v. également *ibid.*, vol. I, p. 138.

³⁷ ITLOS/PV.11/12 (E), p. 15, lignes 36-38 et p. 16, lignes 4-5 et lignes 11-14 (Sands), ainsi que réplique du Bangladesh, par. 2.92.

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délimitation lui réserve une pleine mer territoriale. Ce n'est pas la conclusion à laquelle conduit l'analyse de la jurisprudence.

Premièrement, le fait que certaines îles se sont vu attribuer dans certaines affaires une mer territoriale de 12 milles nautiques n'a pas découlé de l'application d'un principe absolu, mais a tenu au contraire aux circonstances particulières de chaque cas d'espèce :

(i) Je tiens à préciser tout d'abord sur ce point que les Iles Anglo-Normandes ne se sont pas vu attribuer en tant que telles par la Cour d'arbitrage une mer territoriale de 12 milles nautiques. La Cour d'arbitrage, en 1977, a simplement constaté que ces îles bénéficiaient, en vertu de la Convention européenne sur la pêche, d'une zone de pêche de 12 milles marins³⁸ ; il fallait en conséquence tracer une ligne de délimitation du plateau continental telle que, dit la Cour d'arbitrage, « le plateau continental de la République française [n']empi[ète] pas sur la zone de pêche existante de 12 milles des Iles Anglo-Normandes »³⁹ ;

(ii) dans l'affaire *Roumanie c. Ukraine*, la Cour internationale de Justice a accordé une mer territoriale de 12 milles marins à l'île des Serpents, mais elle l'a fait sur le fondement d'un accord en ce sens des deux parties⁴⁰ ;

(iii) dans l'affaire *Nicaragua c. Honduras*, la même Cour a accordé une mer territoriale de 12 milles nautiques aux cayes, mais seulement après avoir vérifié qu'il n'existait pas de circonstance spéciale devant conduire à une autre solution⁴¹.

Deuxièmement, il est faux de prétendre, comme l'a fait M. Martin, qu'il n'existerait aucun précédent d'île qui aurait reçu moins de 12 milles nautiques⁴². L'accord de 1969 entre le Qatar et Abu Dhabi ne laisse ainsi qu'une mer territoriale de 3 milles nautiques à l'île Jazirat Dayyinah qui se trouvait du mauvais côté de la ligne d'équidistance⁴³. Je précise d'ailleurs que les côtes des deux Etats sont ici concaves et que les deux parties à l'accord n'en ont pas moins retenu une ligne qui suit la direction de la ligne d'équidistance et qui ne donne que 3 milles marins à l'île.

Troisièmement, ce qui est juridiquement déterminant, c'est la localisation de l'île. Dans notre affaire, c'est parce que l'île de Saint Martin est située tout près et en face de la côte du Myanmar qu'elle constitue précisément une circonstance spéciale. Comme l'a parfaitement dit le Tribunal arbitral dans l'affaire *Dubai/Sharjah* :

The entitlement of an island to a belt of territorial sea does not of course prejudice how much territorial sea the island is entitled to. That is a question which will arise, for example, if the entitlement to territorial sea of an island affects its territorial sea boundary with another adjacent or opposite State⁴⁴.

C'est précisément la situation de l'espèce et c'est la raison pour laquelle il est nécessaire d'ajuster la ligne médiane.

Contrairement aux allégations du Demandeur, la délimitation de la mer territoriale que propose le Myanmar est parfaitement justifiée et raisonnable sur ce point. Elle octroie progressivement à l'île de Saint Martin, entre les points C et E, une mer territoriale comprise entre 6 et 12 milles marins jusqu'au point où la délimitation de la mer territoriale rejoint la ligne d'équidistance. Cette manière de procéder est conforme à la ligne tracée par le Tribunal

³⁸ Décision du 30 juin 1977, *RSA*, vol. XVIII, par. 187.

³⁹ *Ibid.*, par. 202.

⁴⁰ *CIJ Recueil 2009*, par. 188.

⁴¹ *CIJ Recueil 2007*, par. 302.

⁴² ITLOS/PV.11/12 (E), pp. 4-5, lignes 42 et s.

⁴³ Contre-mémoire du Myanmar, par. 4.60, avant-dernier tiret; *International Maritime Boundaries*, vol. II, p. 1541.

⁴⁴ *ILR*, vol. 91, p. 674.

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arbitral dans l'affaire *Guyana/Suriname* dans laquelle le Tribunal a tracé une ligne qui, partant de 3 milles marins, rejoint progressivement les 12 milles marins aux fins de tenir compte des intérêts de la navigation que le Tribunal a qualifiés de circonstance spéciale⁴⁵.

S'agissant maintenant de la délimitation au-delà de la mer territoriale, nous avons rappelé lors de notre premier tour de plaidoiries trois éléments fondamentaux⁴⁶ :

- la jurisprudence exclut les îles isolées de la « configuration côtière générale » (c'est la formule énoncée dans l'affaire *Roumanie c. Ukraine*⁴⁷) et cette solution vaut à plus forte raison lorsque ces îles se situent du mauvais côté de la ligne provisoire d'équidistance;

- ensuite, soit ces îles isolées sont enclavées dans leur mer territoriale, soit leur mer territoriale est contournée par la ligne d'équidistance, ce qui veut dire que ces îles ne sont pas prises en compte dans le tracé de la ligne d'équidistance;

- enfin, même dans le cas où de telles îles pourraient être prises en compte, la jurisprudence montre qu'aucun effet ne leur a jamais été donné lorsque cela introduisait une distorsion dans le tracé de la ligne d'équidistance.

Toute la plaidoirie de jeudi de M. Reichler l'a amplement démontré et, à dire vrai, je ne vois pas trop ce que je peux ajouter à sa démonstration. Que nous a-t-il montré dans son étude de la jurisprudence ?

- i) qu'il existe une différence fondamentale entre les îles frangeantes et les îles isolées;

- ii) que même certaines îles frangeantes ne se sont pas vu accorder un plein effet;

- iii) que les îles qui n'étaient pas des îles frangeantes n'ont jamais reçu aucun effet dans la délimitation des espaces maritimes au-delà de la mer territoriale;

- iv) que tout effet de distorsion produit par une île dans le tracé de la ligne d'équidistance doit être écarté;

- v) enfin, que dans le cas présent, un tel effet de distorsion se fait précisément sentir au détriment du Myanmar.

Je le montrerai en reprenant une par une les décisions étudiées par M. Reichler, en m'appuyant sur ses croquis de jeudi.

M. Reichler est passé très rapidement tout d'abord sur l'arbitrage de 1977 dans l'affaire du *Plateau continental entre la France et le Royaume-Uni*. L'affaire est pourtant très instructive à deux points de vue :

- (i) les îles Anglo-Normandes ont été totalement enclavées dans leur mer territoriale précisément parce qu'elles se trouvaient du mauvais côté de la ligne d'équidistance. Selon la Cour d'arbitrage, cette localisation « romp[ait] l'équilibre des conditions géographiques que l'on constaterait sans cela entre les Parties »⁴⁸ ; le seul fait pour les îles d'être du mauvais côté de la ligne avait pour effet d'entraîner une réduction des espaces maritimes de la France, ce qui constituait « en soi, *prima facie* » dit le Tribunal, « une circonstance créatrice d'inéquité »⁴⁹ ;

- (ii) s'agissant des îles Sorlingues [*« Scilly »*] et d'Ouessant [*« Ushant »*] ensuite, la sentence est tout à fait intéressante également :

- l'effet de distorsion que le Tribunal a corrigé est exactement le même que celui que produit l'île de Saint Martin au détriment du Myanmar ;

- il ne s'agissait pas par ailleurs en l'espèce d'îles isolées; la Cour souligne que les côtes des Etats formaient « [t]outes deux (...) des péninsules qui constituent la dernière avancée des territoires respectifs des deux Etats dans la région Atlantique : toutes deux ont

⁴⁵ Sentence du 17 septembre 2007, [www.pca-cpa.org], pars. 306 et 324.

⁴⁶ ITLOS/PV.11/10, pp. 19 et s.

⁴⁷ *CIJ Recueil 2009*, p. 122, par. 186

⁴⁸ *RSA*, vol. XVIII, par. 182.

⁴⁹ *Ibid.*, par. 196.

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des îles situées au large qui projettent les territoires respectifs des deux États encore plus avant dans la région ».

Malgré cette intégration des îles à la côte continentale, le Tribunal a estimé devoir ne donner qu'un demi-effet aux îles Sorlingues en raison de leur localisation plus à l'ouest que l'île d'Ouessant.

L'arbitrage *Erythrée/Yémen* est tout aussi intéressant. Le Tribunal a distingué trois catégories d'îles :

i) il a tout d'abord refusé de donner le moindre effet aux îles Jabal al-Ta'ir et al-Zubayr au motif qu'elles ne constituaient pas une partie de la côte continentale du Yémen⁵⁰ et que les prendre en compte aurait eu un effet de distorsion sur la ligne d'équidistance;

ii) de même, la ligne rejoignant les points 13, 14 et 15 ne donne pas une pleine mer territoriale aux îles yéménites situées à l'est, et à plus forte raison ne leur donne aucun effet dans la délimitation de la zone économique exclusive⁵¹;

iii) en revanche, le Tribunal a donné plein effet aux îles Dahlak, côté Erythrée⁵², et Tiqfash, Kutama, Uqban et Kamaran, côté Yémen⁵³, mais uniquement au motif qu'il s'agissait d'îles frangeantes, c'est-à-dire d'un système d'îles intégrées à la côte ; il s'agit, dit le Tribunal, d'un exemple typique de « group of islands that forms an integral part of the general coastal configuration »⁵⁴. Ceci ne vaut évidemment pas pour l'île de Saint Martin : celle-ci n'appartient à aucun groupe d'îles qui formeraient une partie intégrante de la configuration côtière « générale » du Bangladesh.

M. Reichler l'admet ensuite⁵⁵, dans l'affaire *Qatar/Bahrein*, aucun effet n'a été donné à l'île de Qit'at Jaradah précisément parce que cela aurait dévié la ligne d'équidistance en la repoussant vers les côtes de l'État à qui l'île n'appartenait pas. J'ajouterai que la Cour n'a donné aucun effet non plus à « la formation maritime assez étendue » de Fasht Al Jarim [Fasht al Azm sur le croquis] en raison de nouveau de l'effet de déviation qu'elle aurait produit sur la ligne d'équidistance⁵⁶.

Le cas de l'île de Sable a paru troubler M. Reichler. Celui-ci nous a expliqué que si un effet avait été donné à l'île, la ligne d'équidistance aurait coupé la zone économique exclusive de Saint Pierre-et-Miquelon. Selon lui, le Tribunal aurait voulu éviter ce résultat⁵⁷. Mais :

- non seulement le Tribunal ne dit rien de tel (il suffit de regarder le croquis figurant après le paragraphe 4.36 de la sentence pour constater que le Tribunal ne s'est nullement inquiété de St Pierre-et-Miquelon);

- mais au surplus, c'eût été absurde que le Tribunal s'en préoccupât : les zones maritimes situées à l'est du corridor sont encore canadiennes et par conséquent le Tribunal aurait très bien pu adopter la ligne d'équidistance donnant plein effet à l'île de Sable en partageant entre les deux provinces canadiennes les espaces maritimes situés à l'est du corridor et en octroyant à la Nouvelle-Ecosse les espaces situés au sud de ce corridor.

Ce que montre en réalité cette sentence, de nouveau, c'est qu'une île produisant un effet de distorsion au détriment de l'État auquel elle n'appartient pas ne peut se voir reconnaître aucun effet⁵⁸.

⁵⁰ RSA, vol. XXII, pars. 147-148.

⁵¹ *Ibid.*, pars. 160-162.

⁵² *Ibid.*, par. 139.

⁵³ *Ibid.*, par. 151.

⁵⁴ *Ibid.*, par. 139.

⁵⁵ ITLOS/PV.11/12 (E), p. 6, lignes 1-2.

⁵⁶ *CJ Recueil 2001*, pars. 242-249.

⁵⁷ ITLOS/PV.11/12 (E), p. 6, lignes 19-25.

⁵⁸ Duplique du Myanmar, par. 5.40.

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La sentence *Dubai/Sharjah* de 1981 conduit aux mêmes conclusions. Donner un effet à l'île d'Abu Musa aurait conduit à pousser la ligne d'équidistance vers la façade côtière de Dubaï. C'est la seule raison pour laquelle aucun effet ne lui a été donné au-delà de la mer territoriale⁵⁹.

Je corrigerai ici sur un point important le croquis de M. Reichler : Sharjah n'avait réclamé qu'un demi-effet seulement (le croquis lui attribue un plein effet) pour l'île d'Abu Musa, non pas en raison d'un prétendu effet d'enclavement dû à la concavité comme l'a soutenu M. Reichler, mais compte tenu de la présence d'un puits de pétrole exploité par Dubaï dans cette zone⁶⁰. En définitive, nous le savons, le Tribunal ne lui a donné aucun effet au-delà de la mer territoriale.

Pourraient être citées encore dans le même sens :

- les îles italiennes de Pantelleria, Linosa, Lampedusa et Lampione, qui, parce qu'elles sont situées du mauvais côté de la ligne d'équidistance, ne se sont vu reconnaître qu'une mer territoriale de 12 milles nautiques et une zone d'un mille marin de plateau continental dans l'accord italo-tunisien du 20 août 1971, alors qu'il s'agit d'îles comportant chacune plus de 6 000 habitants⁶¹ ;

- les îles yougoslaves de Pelagruz et Galijula qui ne se sont vu reconnaître qu'une mer territoriale de 12 milles marins dans l'accord du 8 janvier 1968 entre l'Italie et la Yougoslavie – autrement dit, elles ont été à leur tour semi-enclavées dans leur mer territoriale⁶².

- On pourrait encore citer l'île iranienne de Sirri à laquelle aucun effet n'a été donné au-delà de la mer territoriale dans l'accord du 31 août 1974 conclu par l'Iran et Dubaï⁶³.

M. Reichler s'est enfin référé à l'affaire *Roumanie c. Ukraine* en en donnant une interprétation plutôt surprenante. Voici ce qu'aurait décidé la Cour selon M. Reichler : la Cour n'aurait donné aucun effet à l'île des Serpents au-delà de la mer territoriale car cela aurait créé un effet d'amputation dans une situation de concavité fonctionnelle⁶⁴.

J'ai eu beau relire l'arrêt de la Cour plusieurs fois, à aucun moment celle-ci n'invoque le moindre effet de concavité.

En réalité, si la Cour n'a pas pris en compte l'île des Serpents, c'est pour un tout autre motif que le Demandeur persiste à esquiver : une île isolée, *a fortiori* lorsqu'elle se trouve du mauvais côté de la ligne d'équidistance, ne peut pas être intégrée à la côte de l'Etat et, par conséquent, ne peut entrer en ligne de compte dans le tracé de la ligne de délimitation des espaces maritimes situés au-delà de la mer territoriale.

C'est du reste ce qu'écrivait le Demandeur dans son mémoire à l'appui de son allégation selon laquelle aucun effet ne pouvait être donné à l'île de May Yu⁶⁵. L'arrêt de la Cour internationale de Justice de 2009 est parfaitement clair sur ce point. Monsieur le Président, Messieurs les Juges, je m'excuse par avance de la longue citation qui va suivre, mais elle est déterminante :

S'agissant du choix des points de base, la Cour fait observer que des îles côtières ont parfois pu être assimilées à la côte de l'Etat, en particulier lorsque celle-ci était découpée en une série d'îles frangeantes. Ainsi, dans le cadre d'un arbitrage relatif à une délimitation maritime, un tribunal international s'est servi de points de base situés sur la laisse de basse mer de certaines îles frangeantes considérées

⁵⁹ *ILR*, vol. 91, p. 677.

⁶⁰ *Ibid.*, pp. 668-669.

⁶¹ *International Maritime Boundaries*, vol. II, p. 1611, pp. 1616-1617.

⁶² *Ibid.*, vol. III, p. 1627, p. 1630.

⁶³ *Ibid.*, vol. III, p. 1533, p. 1535.

⁶⁴ ITLOS/PV.11/12 (E), p. 7, lignes 7 et s.

⁶⁵ Mémoire du Bangladesh, pars. 6.47-6.55.

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comme appartenant à la côte même de l'une des parties [la Cour cite ici la sentence de 1999 dans l'arbitrage entre l'Erythrée et le Yémen]. L'île des Serpents -poursuit la Cour-, formation isolée située à quelque 20 milles marins du continent, *ne fait cependant pas partie d'une série d'îles frangeantes qui formerait la « côte » de l'Ukraine. Considérer l'île des Serpents comme une partie pertinente du littoral reviendrait à greffer un élément étranger sur la côte ukrainienne ; c'est-à-dire à refaçonner, par voie judiciaire, la géographie physique, ce que ni le droit ni la pratique en matière de délimitation maritime n'autorisent.* La Cour est donc d'avis que l'île des Serpents ne saurait être assimilée à la configuration côtière de l'Ukraine (voir le cas de l'île de Filfla dans l'affaire *Lybie/Malte*), *arrêt, C.I.J. Recueil 1985, p. 13*). Dès lors, la Cour considère qu'il n'y a lieu de retenir aucun point de base sur l'île des Serpents aux fins d'établir une ligne d'équidistance provisoire entre les côtes respectives de la Roumanie et de l'Ukraine⁶⁶.

Je ne doute pas que le Bangladesh s'empresse de faire valoir que l'île de Saint Martin n'est pas l'île des Serpents, ni l'île de May Yu – qui, je le rappelle, est incontestablement une île au sens de l'article 121 de la Convention sur le droit de la mer. Le Bangladesh ne l'a contesté à aucun moment lors de toutes les négociations.

Mais là n'est pas le sujet. La Cour le dit clairement dans un autre paragraphe de son arrêt de 2009 : l'île des Serpent « ne fait pas partie de la configuration côtière générale » –« générale »– et à ce titre, elle ne peut « servir de point de base pour construire la ligne d'équidistance provisoire entre les côtes des Parties »⁶⁷. Il en va *a fortiori* de même de l'île de Saint Martin dans la présente affaire. Compte tenu de sa localisation en face des côtes du Myanmar *et non du Bangladesh*, il est tout simplement impossible de l'intégrer à la configuration côtière générale du Bangladesh.

Monsieur le Président, Messieurs les Juges, il est temps de récapituler tout ceci :

i) il est incontestable tout d'abord que l'île de Saint Martin constitue une île isolée qui, par ailleurs, se trouve en face des côtes du Myanmar et pas du Bangladesh. Dans ces circonstances, la considérer « comme une partie pertinente du littoral reviendrait à greffer un élément étranger sur la côte [du Bangladesh], c'est-à-dire à refaçonner, par voie judiciaire, la géographie physique, ce que ni le droit ni la pratique en matière de délimitation maritime n'autorisent »⁶⁸,

(ii) S'il était juridiquement possible de donner le moindre effet à l'île de Saint Martin (*quod non*), cela entraînerait de toute manière un grave effet de distorsion : cela conduirait à faire dévier de manière tout à fait disproportionnée la ligne d'équidistance juste devant les côtes du Myanmar.

Dans sa réplique, le Bangladesh avait purement et simplement nié l'existence du moindre effet de distorsion en affirmant que la présence de l'île ne « menace aucunement d'entraîner une distorsion quelconque de la délimitation, et encore moins une distorsion radicale »⁶⁹.

Le Demandeur reconnaît aujourd'hui cet effet de distorsion : celui-ci est tout à fait manifeste sur le croquis projeté jeudi par M. Reichler. Comme vous le voyez, si un effet était attribué à l'île de Saint Martin dans la délimitation au-delà de la mer territoriale, cela aurait inévitablement pour conséquence de déformer radicalement la ligne d'équidistance, et cela directement en face des côtes du Myanmar ;

⁶⁶ *CJ Recueil 2009*, pp. 109-110, par. 149.

⁶⁷ *CJ Recueil 2009*, p. 122, par. 186.

⁶⁸ *CJ Recueil 2009*, pp. 109-110, par. 149

⁶⁹ Réplique du Bangladesh, par. 3.116.

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iii) les jurisprudences recensées à l'instant qui prohibent tout effet de distorsion de ce type s'appliquent d'autant plus en l'espèce que l'île se trouve tout près du point de départ de la frontière maritime et qu'à ce titre, tout effet qui lui serait donné se produirait directement en face des côtes du Myanmar et tout juste à proximité de celles-ci.

iv) dans la mesure enfin où l'amputation créée par la concavité régionale n'a rien d'inéquitable, il n'y a de toute manière pas lieu de donner le moindre effet compensateur à l'île de Saint Martin – je le souligne, le Demandeur n'invoque pas l'île comme une circonstance pertinente, mais comme une variable compensatrice, ce qui revient à refaire et la géographie, et le droit.

Monsieur le Président, Messieurs les Juges, nous sommes revenus ainsi au point de départ. Notre affaire n'est pas différente de l'affaire *Cameroun c. Nigéria* et de l'affaire *La Barbade c. La Trinité-et-Tobago*. Au regard du droit international, il n'y a dans notre affaire absolument rien à compenser.

Monsieur le Président, Messieurs les Juges, je vous remercie très sincèrement de votre écoute.

The President:

The sitting is now closed. We will resume at 3 p.m.

(The sitting closes at 12.55 p.m.)

REPRESENTATION – 24 September 2011, p.m.

PUBLIC SITTING HELD ON 24 SEPTEMBER 2011, 3.00 P.M.

Tribunal

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judge ad hoc* OXMAN; *Registrar* GAUTIER.

For Bangladesh: [See sitting of 8 September 2011, 10.00 a.m.]

For Myanmar: [See sitting of 8 September 2011, 10.00 a.m.]

AUDIENCE PUBLIQUE DU 24 SEPTEMBRE 2011, 15 HEURES

Tribunal

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; M. OXMAN, *juge ad hoc*; M. GAUTIER, *Greffier*.

Pour le Bangladesh : [Voir l'audience du 8 septembre 2011, 10 heures]

Pour le Myanmar : [Voir l'audience du 8 septembre 2011, 10 heures]

The President:

The hearing continues.

I call on Mr Coalter Lathrop to make his presentation.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

STATEMENT OF MR LATHROP
COUNSEL OF MYANMAR
[ITLOS/PV.11/16/Rev.1, E, p. 1–8]*Mr Lathrop:*

Thank you, Mr President. Mr President, Members of the Tribunal, on this beautiful Saturday afternoon I will be brief as I touch upon a series of issues related to delimitation terminology and methodology, and the effects of the coastal geography in the area on the delimitation between Myanmar and Bangladesh. As I move through this short presentation, I will show several maps on the screen that we have not reproduced in your folders. Most of these will be familiar to the Tribunal from the written and oral pleadings. Where possible, we have provided references to the original source of the maps.

I will start with an old favorite: mainland-to-mainland. “Mainland-to-mainland” delimitation is a phrase that has been used for some time by writers from all over the globe¹. Of course, who uses the phrase, “mainland-to-mainland”, is not half as important as who uses the concept – that is, the Court of Arbitration in the *Anglo-French Continental Shelf* case², the Arbitral Tribunal in *Eritrea/Yemen*,³ and the International Court of Justice in both of its most recent delimitation cases, *Nicaragua v Honduras*⁴ and the *Black Sea* case between Romania and Ukraine⁵. Despite much attention to these cases, no member of Bangladesh’s team ever denied that a form of mainland-to-mainland delimitation was applied in all four. Counsel for Bangladesh was adamant, however, that the phrase “mainland-to-mainland” did not appear in any of them. Mr Reichler said: “The ICJ did not speak of a ‘mainland-to-mainland equidistance line’ in *Romania v Ukraine*. It did not utter the phrase.”⁶ Mr Reichler is correct. Instead, the International Court described its line as a “provisional equidistance line ... drawn between the relevant mainland coasts of the Parties”⁷. If I continue to use the phrase “mainland-to-mainland” it is only for the sake of efficiency.

I come to my second point, which is the recent and rather sudden reconciliation between counsel for Bangladesh and the equidistance method. Certainly, the Bangladesh

¹ Coalter G. Lathrop, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, in *American Journal of International Law*, Vol. 102, p. 113 (2008), at p. 119; J.I. Charney & L.M. Alexander (eds.), *Australia-New Zealand Boundary Report*, in *International Maritime Boundaries*, Vol. 5, p. 3759 (2005), at p. 3763; Steven Wei Su, *The Taoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, in *Chinese Journal of International Law*, Vol. 3, p. 385 (2004), at p. 412; Zou Keyuan, *Maritime Boundary Delimitation in the Gulf of Tonkin*, in *Ocean Development & International Law*, Vol. 30, p. 235 (1999), at p. 246; Derek Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries*, Vol. 1, p. 131 (1993), at p. 136; Hiran Wasantha Jayewardene, *The Regime of Islands in International Law* (1990), at p. 429; L.A. Willis, *From Precedent to Precedent: The Triumph of Pragmatism in International Maritime Boundaries*, *Canadian Yearbook of International Law*, Vol. 24 p. 3 (1986), at p. 28; Jan Schneider, *The Gulf of Main Case: The Nature of an Equitable Result*, 79 *American Journal of International Law* p. 539 (1985), at p. 557, fn. 79.

² *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, *R.I.A.A.*, Vol. 18 (hereinafter “*Anglo-French Continental Shelf*”), p. 88, para. 183.

³ *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)*, 17 December 1999, *R.I.A.A.*, Vol. 22 (hereinafter “*Eritrea/Yemen*”), p. 371–372, para. 163.

⁴ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, *I.C.J. Reports 2007* (hereinafter “*Nicaragua v Honduras*”), p. 76 and 78, paras. 280 and 287.

⁵ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, *I.C.J. Reports 2009* (hereinafter “*Black Sea*”), pp. 55–56, paras. 182 and 187.

⁶ ITLOS/PV.11/13 (E), p. 13, lines 2–3 (Reichler).

⁷ *Black Sea*, *I.C.J. Reports 2009*, p. 55, para. 182.

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submission is still based loosely on the angle bisector method; but we now hear from Mr Reichler that equidistance could still be “legally correct”⁸.

Of course, even if Bangladesh has come to accept Myanmar’s equidistance methodology, it still does not accept Myanmar’s views on the appropriate sources of base points for constructing the equidistance line. Bangladesh complained vigorously throughout the written pleadings and the first round of these hearings that, if equidistance were used, the entire line would be driven by a single base point. In fact, the Memorial contained a whole subsection titled *The Entire Course of the Equidistance Line Is Determined by a Single, Insignificant Feature*⁹. Now Bangladesh presents the Tribunal with its own equidistance line – a line that teeters for its entire journey to the 200-M limit and beyond, on the extreme tip of an attenuated and fast-eroding reef that extends nearly a kilometer off the southern coast of the one and only Bangladeshi island in the area,¹⁰ which also happens to be located on the wrong side of the equidistance line. This single base point, Mr Reichler tells us, “should be given ... full weight in the event that an equidistance approach is favoured by the Tribunal”¹¹.

Indeed, Bangladesh’s misapplication of equidistance in this case is exactly what the Court was referring to in the *Black Sea* case when it cautioned against re-fashioning geography.¹² When Mr Reichler discussed the *Black Sea* case on Thursday, he said “[t]he deflection of the equidistance line across, and in front of, Romania’s coast, and the consequent cut-off effect caused by Serpents’ Island” could be described as “blindingly obvious”¹³.

The equidistance line to which he was referring is the line that gives full effect to Serpents’ Island, shown in blue. I submit that the distorting effect of Serpents’ Island, as the screen now shows, would have been even more “blindingly obvious” if it had been located on the wrong side of the equidistance line and hard against the Romanian coast.

In contrast to Bangladesh’s equidistance line, Myanmar’s line is constructed from the nearest base points on the mainland coasts of the Parties. It thereby takes account of the actual geographic configuration in this corner of the Bay of Bengal, avoiding the distortion caused by extraneous elements. This distortion is perfectly described in a quotation from Sir Derek Bowett, which Mr Reichler kindly put up on the screen on Thursday:

The notion of “distortion” is always linked to a perception of what the line would otherwise be, if the island did not exist. A variation caused by the island which appears inequitable, given the location and size of the island, will be regarded as a “distortion”.¹⁴

As we have demonstrated throughout this hearing, the distortion caused by St Martin’s Island is, in Mr Reichler’s words, “blindingly obvious.”¹⁵ In accordance with the method applied in 2009 in the *Black Sea* case, Myanmar has therefore excluded St Martin’s

⁸ ITLOS/PV11/13 (E), p. 2, line 40 (Reichler).

⁹ Memorial of Bangladesh (hereinafter “BM”), pp. 84–86.

¹⁰ Sirajur Rahman Khan et al., *St. Martin’s Island and its Environmental Issues*, Geological Survey of Bangladesh (2002), in BM, Vol. IV, Annex 49, pp. 3–4 (describing “the three major islands” that comprise St. Martin’s Island, including the southernmost island of “Cheradia”, which is connected to the rest of St. Martin’s Island by a “rocky platform”. According to Professor Khan, the “southern shoreline” Cheradia suffers from “severe erosion”).

¹¹ ITLOS/PV11/13 (E), p. 15, lines 20–21 (Reichler).

¹² For the relevant map, see *Black Sea, I.C.J. Reports 2009*, p. 9, Sketch-map No. 1.

¹³ ITLOS/PV11/13 (E), p. 13, lines 12–15 (Reichler).

¹⁴ *Ibid.*, p. 15, lines 1–4 (Reichler) (citing D. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, in J.I. Charney & L.M. Alexander (eds.), *International Maritime Boundaries* (1993), Vol. 1, p. 144.)

¹⁵ ITLOS/PV11/13 (E), p. 13, lines 12–15 (Reichler).

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Island as a source of base points and drawn “what the line would otherwise be, if the island did not exist”¹⁶ – that is, the mainland-to-mainland equidistance line.

My third point relates to the transposition that Bangladesh calls, “slight,” which constitutes the “final step” in constructing Bangladesh’s line¹⁷. Like Bangladesh’s changing attitudes about equidistance, the rationale for this “slight” transposition has also undergone a slight transformation. As before, the proposed transposition would require a shift of the bisector from its vertex at the land boundary terminus to Bangladesh’s point 7 or 8A. The original rationale for this transposition was that Bangladesh’s point 7 or 8A, and not the land boundary terminus, was the last point agreed between the parties. To quote the Memorial:

Because this bisector intersects the coastal fronts of Bangladesh and Myanmar at their land boundary terminus in the Naaf River, not the end point of their agreed boundary in the territorial sea (point 7 of the 1974 agreement), one final step is required ... the 215° line must be transposed slightly to the southeast so that it connects with point 7 ...¹⁸

Seeing that this argument regarding an existing agreement is completely untenable, Bangladesh’s rationale has now changed. Bangladesh now asks for the bisector to be moved, not to give effect to any alleged agreement, but simply “to take account of St Martin’s”¹⁹. Purported rationales aside, this transposition creates a Frankenstein monster. Bangladesh fabricates a line using a method that by its very nature gives no effect to islands. It then tears the line from its roots and transplants it to an entirely new location in order to take full account of the same island that was disregarded in its initial creation.

It was asserted that *Gulf of Maine* provides support for this transplantation. I showed the Tribunal how the Chamber in the *Gulf of Maine* actually constructed its line²⁰. Professor Crawford responded with a story about baking a pizza on a boat²¹.

My fourth point relates to Bangladesh’s evolving conception of its own coastal configuration. Professor Crawford told us on Thursday that Bangladesh has “a bi-directional coast”²², and he showed us what it looks like. The first section of Bangladesh’s bi-directional coast leaves the land boundary terminus trending toward the north-west. At a point near Sonadia and Kutubdia Island, the first segment ends, and the second segment begins trending generally due west. As Professor Crawford’s map showed us, these two segments are essentially perpendicular to each other, or shaped like a capital letter “L”. This seems a reasonable approximation of Bangladesh’s coasts and nearly matches the configuration that Myanmar presented in its Counter-Memorial²³. A map based on Map 5.1 of the Counter-Memorial has been added to the screen. When we remove the segments that represent the coasts within the Meghna Estuary – the same segments that are not relevant for measuring the coastal length – we start to see how similar the Parties’ conceptualizations of these coastal segments are to each other.

Bangladesh has a bi-directional coast, but Bangladesh’s treatment of its coast in this delimitation – connecting the dots to find the average direction of its two coastal segments²⁴ –

¹⁶ D. Bowett, *Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations*, p. 144.

¹⁷ BM, para. 6.73.

¹⁸ BM, para. 6.73.

¹⁹ ITLOS/PV11/13 (E), p. 1, lines 43-45 (Reichler).

²⁰ ITLOS/PV11/11 (E), p. 5, lines 21-39 (Lathrop).

²¹ ITLOS/PV11/13 (E), p. 22, lines 30-40 (Crawford).

²² ITLOS/PV11/13 (E), p. 23, lines 6-7, 39 (Crawford); see also ITLOS/PV11/5 (E), p. 8, lines 15, 17, 20, 33 (Crawford).

²³ For the relevant map, see Myanmar’s Counter-Memorial (hereinafter “MCM”), p. 109, Sketch-map No. 5.1.

²⁴ ITLOS/PV11/5 (E), p. 8, line 17-18 (Crawford); ITLOS/PV11/13 (E), p. 23, lines 6-7, 39 (Crawford).

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does not create a general direction line approximating the actual coast and is not faithful to the treatment of bi-directional coasts in any of the case law. The *Gulf of Maine*²⁵ and *Libya/Tunisia*²⁶ cases both featured geographic situations similar to the configuration in this case: including the L-shaped coasts of the United States and Tunisia, respectively. Bangladesh might call these coastal configurations, “concavities”, but the Chamber and the full Court characterized them as bi-directional coasts²⁷. In both cases, the Court and the Chamber took the coasts of the U.S. and Tunisia as they are. No “average direction” of coastal segments was calculated; neither judicial body drew a hypotenuse, or cited to Pythagoras’s fourth theorem;²⁸ and, finally, in neither case was the State with the L-shaped coast granted any judicial remedy of “abatement” from the prejudicial effects²⁹ of the “L” shape.

In reality, Bangladesh’s bi-directional coast is already reflected in Myanmar’s provisional delimitation line. From point A through B, E, F, G, and out to point Z, that line is controlled by two points on the adjacent coasts of the Parties – including on the first of Bangladesh’s two coastal segments³⁰. Throughout most of the length of the line, Bangladesh’s Shahpuri Point drives the line away from Bangladesh’s second coastal segment. Then, at point Z, the second segment of Bangladesh’s bi-directional coast begins to influence the course of the provisional equidistance line, and turns that line to the south.

Of course, Bangladesh does not complain that the line turns toward the south. Bangladesh’s complaint is that the line does not turn toward the south soon enough. In effect, Bangladesh would like its second, western, or south-facing, section of its coast – a section located some 200 to 300 km from the land boundary terminus – to begin to influence the direction of the line *at the starting point*. This is the effect of Professor Crawford’s novel average bearing line. When that line is used to form the bisected angle, or to calculate an equidistance line, it transports the effect of the western coastal segment to the land boundary terminus in the east. Applying the approach taken in the cases, the effect of the second segment of Bangladesh’s coast should not influence the line until the line has moved well offshore, if at all.

I now turn to a fifth point, third States. At or before the major inflection point in the provisional equidistance line – point Z – where the south-facing coasts of Bangladesh begin to influence the line, that line crosses into the area potentially claimed by India – the third State in the vicinity of this delimitation.

But India is not a Party to the proceedings before this Tribunal. If the Tribunal’s delimitation line were to enter into this unknown area of Indian interest, the delimitation between the Parties to this case could prejudice the interests of India, notwithstanding article 33 of the Statute of the Tribunal and the principle of *res inter alios acta*. For that reason, a delimitation line between Myanmar and Bangladesh that enters areas of third State interest can and should be avoided.

At the same time, because India is a non-Party, the coasts of India are simply not part of the coastal configuration in this case. It is irrelevant what effect those coasts may or may not have in a separate bilateral delimitation between Bangladesh and India. As the

²⁵ *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984* (hereinafter “*Gulf of Maine*”), p. 331, para. 207.

²⁶ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 85-86 at paras. 121-122 (hereinafter “*Tunisia/Libya*”).

²⁷ *Gulf of Maine, I.C.J. Reports 1984*, p. 331, para. 207; *Tunisia/Libya, I.C.J. Reports 1982*, p. 85-86, at para. 121-122.

²⁸ Contrast with ITLOS/PV11/5 (E), p. 8, line 35-36 (Crawford).

²⁹ Contrast with ITLOS/PV11/13 (E), p. 3, line 19-21 (Reichler); ITLOS/PV11/13 (E), p. 20, line 25-26 (Crawford); ITLOS/PV11/13 (E), p. 23, line 44-46 (Crawford).

³⁰ For the relevant map, see MCM, p. 169, Sketch-map No. 5.11.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

International Court wrote in *Cameroon v Nigeria* – you have heard this already in French today, but it is an important quote so I will read it again in English:

In the present case Bioko Island is subject to the sovereignty of Equatorial Guinea, a State which is not a party to the proceedings. Consequently the effect of Bioko Island on the seaward projection of the Cameroonian coastal front is an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria” – the Parties to the case – “and is not relevant to the issue of delimitation before the Court. The Court does not therefore regard the presence of Bioko Island as a circumstance that would justify the shifting of the equidistance line as Cameroon claims.³¹

As in the case between Cameroon and Nigeria, the case now before this Tribunal is a bilateral delimitation between two States and their two coasts. Maritime boundaries are established on a relative, or relational basis, by each State *vis-à-vis* each other relevant coastal State. In practical terms, this means that India and its coasts may not influence this delimitation. India’s presence is not a circumstance that can shift the delimitation line, or provide grounds for an “abatement.”³² Bangladesh cannot recruit India’s coast to make its case against Myanmar.

Next, I would like to address, as my sixth point, the so-called “cut-off” effect, which Bangladesh calls “severe”³³ and “dramatic”³⁴. From what, I ask, would Bangladesh be cut off; and to the extent it would be cut off from anything, would that result be inequitable?

Bangladesh tells us that it would be cut off from its “sovereign rights in an outer continental shelf”³⁵ and “its access to a full 200-M EEZ and continental shelf”³⁶. But here, as in other parts of Bangladesh’s written and oral pleadings, Bangladesh confuses the concepts of entitlement and delimitation. Bangladesh also reverses their order, trying to drive the delimitation with its potential entitlements or claims. Of course, without overlapping potential entitlements, there is no need for delimitation. But it is the delimitation of those overlapping potential entitlements that finally determines the actual entitlements of each coastal state. As the International Court said in *Jan Mayen*:

The task of a tribunal is to define the boundary line between the areas under the maritime jurisdiction of two States; the sharing-out of the area is therefore the consequence of the delimitation, not vice versa.³⁷

The Law of the Sea Convention contains many articles that describe the extent and content of potential coastal state entitlements. They grant coastal states a potential entitlement to a “territorial sea up to a limit not exceeding 12 M”³⁸ and to an “exclusive economic zone that shall not extend beyond 200 M”³⁹. And under article 76, coastal states with the correct morphology may have a potential entitlement to continental shelf rights beyond 200 M.

³¹ *Maritime Boundary between Cameroon and Nigeria, Judgment, I.C.J. Reports 2002* (hereinafter “*Cameroon v Nigeria*”), p. 446, para. 299.

³² Contrast with ITLOS/PV11/13 (E), p. 3, line 19-21 (Reichler); ITLOS/PV11/13 (E), p. 20, line 25-26 (Crawford); ITLOS/PV11/13 (E), p. 23, line 44-46 (Crawford).

³³ BM, para. 2.46(i).

³⁴ Reply of Bangladesh (hereinafter “BR”), para. 3.39.

³⁵ BM, para. 6.45.

³⁶ *Ibid.*, para. 2.2.

³⁷ See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), Judgment, I.C.J. Reports 1993* (hereinafter “*Jan Mayen*”), pp. 66-67, paras. 64.

³⁸ United Nations Convention on the Law of the Sea, 1982, art. 3, U.N.T.S., Vol. 1833.

³⁹ *Ibid.*, art. 57.

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But these entitlement provisions are the beginning, not the end, of the story. When a coastal State is faced with a competing claim to the same areas, a delimitation is required. That a coastal State may have potential entitlements in one or more of these jurisdictional zones is not dispositive of anything. A State may have very extensive entitlements in the abstract, but, in the face of competing claims, it has no actual entitlements until there has been a negotiated or litigated delimitation.

Accordingly, Bangladesh can hardly hope to influence the course of the present delimitation by arguing that certain delimitation lines would cut Bangladesh off from its *actual* entitlements. Since delimitation determines where the actual entitlements are, this is a logical impossibility. Bangladesh can only be cut off from its *potential* entitlements, or claimed area, as would happen and does happen in every single maritime delimitation. In this, Bangladesh must ultimately recognize that its “predicament is not unique”⁴⁰.

Here are just two examples. In the absence of conflicting claims, Cameroon is entitled to a 200-M exclusive economic zone and a wide margin shelf extending beyond 200 M. Cameroon’s outer limit line, shown on the screen⁴¹, is from Cameroon’s preliminary information submission to the Commission on the Limits of the Continental Shelf⁴². This represents Cameroon’s sense of its potential entitlement in the area. However, after the International Court in *Cameroon v Nigeria* drew the delimitation line, Cameroon was zone-locked and “cut off” from what could have been – in the absence of competing claims – a fairly extensive maritime area.

Counsel for Cameroon complained of a “radical and absolute cut-off”⁴³, which may sound familiar to the Tribunal. As its judgment revealed, the International Court had full knowledge of the claims of Equatorial Guinea to delimitation against Cameroon based on equidistance. The Court knew quite well that its decision would cause what Bangladesh has recently called “a severe cut-off of its coastal projection by application of equidistance boundary lines.”⁴⁴ And yet, when the law of maritime delimitation was applied to the coasts of Cameroon and Nigeria, the judgment limited Cameroon to an area stretching no more than 30 M from its coast. The Court observed “that the equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling”⁴⁵. It will not escape the Tribunal’s notice that other States in the region, including for example island nations and mainland states with convex coastlines, have received or would receive substantial actual entitlements in delimitations based on equidistance, many of them at Cameroon’s expense. But this was not problematic for the Court. In that case, the Court applied an unadjusted equidistance line for the full length of the delimitation⁴⁶.

The arbitration between Barbados and the Republic of Trinidad & Tobago provides another example of the same phenomenon.⁴⁷ Trinidad and Tobago faces onto the open sea unobstructed by the territory of another coastal State. Like Cameroon, Trinidad & Tobago considers itself to be entitled to all of the zones contemplated in the Convention, including a wide margin shelf that extends well beyond 200 M along the coast of South America toward

⁴⁰ See BM, para. 6.32.

⁴¹ For the relevant maps, see also *Cameroon v Nigeria*, I.C.J. Reports 2002, p. 444, Sketch-map No. 11, and p. 449, Sketch-map No. 12.

⁴² See generally *Demande Préliminaire de la République du Cameroun aux Fins De L’Extension des Limites de Son Plateau Continental Au-Dela De 200 Milles Marins*, 11 May 2009, filed pursuant to Decision regarding the workload of the Commission, SPL/OS/183, available online at http://www.un.org/depts/los/clcs_new/submissions_files/preliminary/cmr2009informationpreliminaire.pdf.

⁴³ *Cameroon v Nigeria*, I.C.J. Reports 2002, para. 274.

⁴⁴ BM, para. 2.46(i).

⁴⁵ *Cameroon v Nigeria*, I.C.J. Reports 2002, para. 306.

⁴⁶ *Ibid.*

⁴⁷ For the relevant map, see Myanmar Rejoinder (hereinafter “MR”), p. 171, Sketch-map No. R6.3.

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French Guyana. And yet, in the delimitation with Barbados, an Annex VII tribunal saw fit to delimit on the basis of equidistance⁴⁸. The tribunal was not moved by the fact that, like Cameroon, Trinidad and Tobago would be cut off from its potential entitlements, nor was the tribunal moved by the fact that, just to the north, the smaller State of Barbados sits with uncontested rights to wide expanses of maritime area including continental shelf well beyond 200 M.

Bangladesh – *Bangladesh* – concluded that this delimitation created an “equitable result that followed from the delimitation process in accordance with articles 74 and 83”⁴⁹. And in fact, this is the result dictated by the law of maritime boundary delimitation. Delimitation defines actual entitlements, “not vice versa.”⁵⁰

Bangladesh claims to be cut off from the outer limit of its entitlements stretching some 370 M from its coast⁵¹. But this measurement is based on the misconception that Bangladesh could be cut off from something that it does not possess. Instead of measuring what it does not possess, the only sensible measurement is the measurement of what it does possess. Bangladesh will have sovereign rights and jurisdiction in areas stretching as much as 182 M from its coasts and totaling approximately 84,000 km².⁵² This is hardly, as Bangladesh calls it, a “small triangular wedge”,⁵³ or a “narrow wedge of maritime space”.⁵⁴

Mr President, here is my final point. Considering all of the above, how then should the Tribunal end its delimitation line? Bangladesh’s submission would have the Tribunal fix an endpoint located hundreds of miles from the land boundary terminus and closer to both Myanmar and India than to Bangladesh. During the oral hearings this week, Bangladesh has suggested, in the alternative, that the Tribunal end the delimitation with a directional line, to ensure that “the rights of any third parties are fully protected”⁵⁵. Myanmar agrees with the latter approach and has always argued that an arrow on the end of a directional line is the only reasonable solution in a delimitation such as this. As the Tribunal is aware, delimitations ending in directional lines are quite common when third-State interests lie in such close proximity. Courts and tribunals have typically dealt with these interests by indicating a direction of the final segment of the delimitation line, where the line has not yet entered the area of third-State interest. Myanmar’s delimitation does just this, leaving the last indisputably bilateral turning point – Point G – and travelling along a specified azimuth toward the area of the third State interest.

Mr President and Members of the Tribunal, that concludes my presentation. I thank you again for your kind attention and I ask that you please give the floor to Sir Michael Wood.

The President:

Thank you, Mr Lathrop.

I now give the floor to Sir Michael Wood.

⁴⁸ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, R.I.A.A., Vol. 27, p. 221, para. 271.

⁴⁹ BR, para. 4.43.

⁵⁰ *Jan Mayen, I.C.J. Reports 1993*, pp. 66-67, para. 64.

⁵¹ BM, para. 6.42.

⁵² ITLOS/PV11/13 (E), p. 19, line 32 (Crawford).

⁵³ ITLOS/PV11/12 (E), p. 4, line 24 (Martin).

⁵⁴ BM, para. 6.31.

⁵⁵ ITLOS/PV11/14 (E), p. 7, lines 1-5, 11-13 (Akhavan).

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STATEMENT OF MR WOOD
COUNSEL OF MYANMAR
[ITLOS/PV.11/16/Rev.1, E, p. 9–14]

Mr Wood:

Mr President, Members of the Tribunal, it falls to me to make the concluding statement by Counsel for Myanmar in this, the second round of oral pleadings. The Agent will then read out Myanmar's final submissions.

Mr President, this is not a particularly complicated case. Yet, as they did throughout the negotiations, so too before this Tribunal, our friends from Bangladesh have produced rabbit after rabbit out of a hat. They have devoted enormous effort to conjuring up a pre-existing agreement that simply does not exist. They have introduced the wholly inappropriate notion of an angle-bisector. They have presented learned scientists, even masquerading as learned counsel, to explain the deepest mysteries of the universe. We have been taken back almost to the Creation, the Big Bang, or whatever it was – fortunately, I do not think you will need to decide precisely what happened “In the beginning”, but these magician's tricks do not deceive.

More seriously, our opponents have played fast-and-loose with juridical notions, including those of the relevant coasts, the relevant area, and relevant circumstances. Above all, our colleagues from Bangladesh have played fast-and-loose with legal principle, as it has been developed, so carefully developed, by international courts and tribunals and by learned authors over recent decades.

I hope that, despite the fog of litigation conjured up by our friends opposite, the main issues before you are now relatively clear:

(i) Is there an existing agreement, within the meaning of article 15 of the Law of the Sea Convention, between the Parties delimiting the territorial sea? Answer, “No”.

(ii) What is the correct delimitation method to apply in the circumstances of the present case? Answer, “Equidistance/special or relevant circumstances.”

(iii) What is the significance of the overall concave nature of the Bay of Bengal to this delimitation? Answer, “None”.

(iv) What weight, if any, is to be given to Bangladesh's St Martin's Island, which lies directly off the coast of Myanmar? Answer, “Partial but significant effect in the territorial sea, no effect for the EEZ/continental shelf”.

(v) Does the line thus constructed by Myanmar represent an equitable solution? Answer “Yes. It easily passes the disproportionality test.”

(vi) Is the Tribunal called upon, in this case, to consider the interpretation and application of article 76 of the Law of the Sea Convention? Answer “No”, for all the reasons given by Myanmar throughout our written and oral pleadings.

Mr President, Members of the Tribunal, what I propose to do in the next few minutes is, first, to make two short general legal points that go to the heart of what we submit is the approach that this Tribunal should adopt; second, to highlight some salient features of Myanmar's case; and third, to show again that the line we propose represents an equitable solution as mandated by articles 74 and 83 of the Convention.

The first legal point is this. Despite Professor Crawford's protestations of innocence, Bangladesh is urging you, Members of the Tribunal, to go on a journey back in time, and apply the law as it stood at the time of the *North Sea* cases. For Bangladesh, the law on maritime delimitation was frozen in amber in 1969. Yet international courts and tribunals have struggled with the law over the decades since 1969. The modern international law of maritime delimitation – with at its heart the three-stage equidistance-relevant circumstances method – is set out systematically in the February 2009 judgment of the International Court

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in the *Black Sea* case¹. With that judgment, which is the culmination of a long line of cases, the International Court has brought a high degree of clarity and legal certainty to the law, clarity and legal certainty that reflects 40 years of jurisprudence since the *North Sea* cases.

Professor Crawford does not do his case any good when he seeks to caricature his opponents. We are not ‘intoning a canticle’². We are seeking to assist the Tribunal to apply the law to the facts. Professor Crawford does not do his case any good when he cites, for his basic propositions of law, writings dating mostly from the early 1990s. The late Sir Derek Bowett, if he were writing today, would surely take account of the latest case-law.

A second and related point is this. Professor Crawford warned the Tribunal of the proliferation of jurisdictions, and called on you to do your utmost to foster a consistent interpretation of the Convention and its related agreements³. We would, of course, strongly agree with that. The dispute settlement bodies provided for in Part XV of the Convention must surely work together for a consistent case-law. International courts and tribunals owe each mutual respect, no more so than in the field of the law of the sea. Unfortunately, Professor Crawford did not stop there. He then put forward the proposition that “this is your *North Sea Continental Shelf* case”⁴. With respect, this is not your *North Sea Continental Shelf* case. This is your *Bangladesh v Myanmar* case, not to be decided in a legal vacuum, but in light of international delimitation law as it has developed over the years right up to the present day.

Mr President, Members of the Tribunal, I shall now recall some salient features of Myanmar’s case. I shall not seek to summarize our case as a whole. For the avoidance of doubt, let it be clear that we stand by all that we have said in our written pleadings and during the hearing. In this second round we have, in accordance with the usual practice, concentrated on points – and there were not very many – made by our opponents that require answer.

As you are all too well aware, Members of the Tribunal, the present proceedings follow extended, but ultimately fruitless, negotiations stretching over almost four decades – fruitless since the Parties were unable to reach any agreement regarding the course of their maritime boundary; fruitless, despite Bangladesh’s attempt to transform a conditional understanding as to what might be included in an eventual comprehensive maritime delimitation agreement, reached between delegations in a negotiating round some 37 years ago, into what – in all practical terms, and whatever they now may say – they claim was an international agreement binding upon the Parties under international law.

I do not think I need repeat what we have said about the Agreed Minutes of 1974. You have seen their actual terms. You have seen the circumstances of their conclusion. We have seen that important conditions were never met, and have still not have been met, including (i) free and unimpeded passage for Myanmar ships; and (ii) the conclusion of a comprehensive maritime delimitation agreement. As Bangladesh itself acknowledged, the Agreed Minutes were merely a “summary of the discussions”⁵. As Bangladesh itself said in its application instituting these proceedings, “[t]here is no treaty or other international agreement ratified by Bangladesh. And Myanmar delimiting any part of the maritime boundary in the Bay of Bengal”⁶, and, as we have heard this morning, as the Bangladesh Foreign Minister said in 1985: “Our understanding is that international negotiations of this

¹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, I.C.J. Reports 2009, p. 61.

² ITLOS/PV.11/14 (E), p. 13, lines 46-47 (Crawford).

³ ITLOS/PV.11/2/Rev.1 (E), p. 21, lines 32-46 (Mr Crawford).

⁴ *Ibid.*, p. 21, lines 16-17 (Mr Crawford).

⁵ BM, Vol. III, Annex 14, para. 10.

⁶ *Notification under Article 287 and Annex VII, article 1 of UNCLOS and the Statement of Claim and Grounds on Which it is Based*, 8 October 2009, para. 4.

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type are to put it loosely without prejudice to either side till the conclusion of an international agreement.”⁷

Mr President, Members of the Tribunal, the Bangladesh Foreign Minister was right. What happened in the negotiations was “without prejudice to either side”. One can only suspect that our friends opposite have placed such heavy emphasis on the 1974 minutes, not because they believe for one moment that there was an agreed line, but because they want you, the Members of this Tribunal, to think that a line under consideration some 37 years ago, in a completely different context, would be acceptable today as part of the decision of the Tribunal based on law. It is clear from the records that, even as early as 1974, discussions were continuing on where the territorial sea boundary should end, and the EEZ/continental shelf boundary begin. Right from the outset, in 1974, alternatives were under consideration for point 7⁸.

Absent agreement on delimitation in the territorial sea, the Parties are in agreement that the equidistance/special circumstances rule applies in that area. We have explained the correct application of article 15 to the territorial sea of the Parties. The line needs to correct the otherwise distorting effect that St Martin’s Island would have on the equidistance line drawn on the basis of the general configuration of the coasts of the Parties. For this reason, it is essential for the proper continuation of the line out to sea that the line in the area of St Martin’s Island ends at Point E on the 12 M arc around the Island. If it did not, the line would cease to reflect the actual relationship between the coasts of the Parties.

Before we leave islands, let me follow Professor Forteau and state for the record that, contrary to what Mr Reichler said⁹, Myanmar does not accept that May Yu Island (Oyster Island) is a rock within the meaning of article 121, paragraph 3 of the Convention. May Yu Island is an island falling within article 121, paragraph 2.

Myanmar has applied the three-stage equidistance/relevant circumstances method to the determination of the line beyond the territorial sea. We have explained that, in the present case, it is perfectly feasible to apply this standard method, so there is no reason to discard it in favour of any other, whether it be the angle-bisector to which our opponents were so attached, or something else¹⁰. Unlike Bangladesh, we have correctly identified the relevant coasts and the relevant area. Then, at the first stage we have drawn the provisional equidistance line using five relevant base points located on appropriate features, two points on the coast of Bangladesh and three on the coast of Myanmar.

We then considered whether there were any relevant circumstances that would necessitate the adjustment of the provisional equidistance line, and found that there were none. Neither the overall concavity of the Bay of Bengal, nor the presence of St Martin’s Island lying just off the coast of Myanmar, requires any adjustment of our provisional equidistance line.

Third, we then applied the disproportionality test, and found that it did not require any adjustment. I shall return to this in the concluding section of my speech.

Notwithstanding the fact that the final point of the maritime boundary reaches the area where the rights of a third party may be affected before reaching the 200-M limit, Myanmar has responded to Bangladesh’s arguments regarding its self-proclaimed ‘entitlement’ to an area of continental shelf beyond 200 M. We have explained that Bangladesh’s request that

⁷ MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 12 (Annex 8).

⁸ E.g., BM, Vol. III, Annex 15, para. 5; MCM, Vol. II, Minutes of the Third Round, second meeting, paras. 5 and 7; third meeting, para. 8 (Annex 4); MCM, Vol. II, Sixth Round, Speeches and statements, p. 8 (Annex 8).

⁹ ITLOS/PV.11/13 (E), p. 11, lines 23-25 (Reichler).

¹⁰ *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment*, I.C.J. Reports 2009, p. 61, at p. 101, para. 116.

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the Tribunal should recognize its 'entitlement' beyond 200 miles, and that the Tribunal should decide that Myanmar has no such entitlement, are in any event inadmissible. These are matters to be determined in accordance with the procedure provided for in article 76 and Annex II of the Convention.

Mr President, I come now to the third and last section of this statement. This concerns the equitable nature of our proposed line, which is to be assessed by application of the disproportionality test. I dealt with this in some detail during the first round. I shall not repeat what I said then. Instead, I shall respond to points made by Bangladesh on Thursday.

Professor Crawford tried to muddy the waters by coming up with some completely new figures, and a veritable smorgasbord of lines to choose from. He showed you a sketch-map with a cat's cradle of lines. No doubt these were carefully selected to create the impression of reasonableness for Bangladesh's preferred line.

As you well know, and contrary to what Professor Crawford implied, the search for an equitable solution, including the application of the disproportionality test, does not involve an allocation of the relevant area in proportion to the coasts. Rather, the Tribunal must evaluate whether a "significant"¹¹, "marked"¹², "great"¹³ or "gross"¹⁴ disproportion exists between the ratio of the coastal lengths of the Parties and the areas of EEZ/continental shelf appertaining to Myanmar and to Bangladesh. To date, international courts and tribunals have only adjusted the equidistance line in instances of great disparity between coastal lengths, in ratios of 8:1 and higher.¹⁵

With the case-law in mind, I now turn to the application of the disproportionality test in the present dispute.

I look first at the relevant area. On Thursday, Bangladesh's sketch maps seemed to concede that areas in dispute between Bangladesh and India, at least on Bangladesh's side of the median line with India, were within the area to be delimited. However, Bangladesh's sketch maps also attributed to Myanmar the large triangle in the south which is not part of the overlapping projections generated by Myanmar's and Bangladesh's coasts. As explained by Daniel Müller during the first round, this addition has no basis in the modern law of maritime delimitation as found in the case law. Accordingly, the total relevant area to be delimited is 214,300 km².

As for relevant coasts, Professor Crawford's attempts to shorten the Myanmar coast and lengthen the Bangladesh coast were equally unconvincing. The coasts of the Meghna Estuary – facing east and west – clearly do not "project into the area to be delimited"¹⁶, while the coast between Cape Bhirr and Cape Negrais, which faces north-west back into the area to be delimited, clearly does "generate projections which overlap with projections from the coast of" Bangladesh¹⁷. As a result, the ratio between Bangladesh and Myanmar's relevant coasts is approximately 1:2.03.

¹¹ *Ibid.*, at p. 129, para. 210.

¹² *Ibid.*, at p. 103, para. 122.

¹³ *Ibid.*, at p. 103, para. 122.

¹⁴ *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*, Award of 11 April 2006, UNRILAA, Vol. XXVII, p. 214, para. 238.

¹⁵ *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 48-49, paras. 66-73; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993*, p. 38, at p. 65, para. 61; *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*, Award of 11 April 2006, UNRILAA, Vol. XXVII, p. 239, para. 352.

¹⁶ *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, I.C.J. Reports 2009*, p. 61, at p. 97, para. 100 discussing coasts of Karkinit's'ka Gulf.

¹⁷ *Ibid.*, at pp. 96-97, para. 99.

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Mr President, Members of the Tribunal, on your screens you have the correct relevant area. Myanmar's proposed delimitation line allocates 80,400 km² to Bangladesh and 133,900 km² to Myanmar. The ratio is approximately 1:1.66. This is clearly not disproportionate, and it is in any event in Bangladesh's favour.

Mr President, even the true angle-bisector line, as described by Mr Lathrop on Tuesday, within the correct relevant area, would pass the disproportionality test. The true bisector line, as we described it, divides the relevant area into a ratio of 1:2.22. With a coastal ratio of 1:2.03, that is well within the ratio found to meet the test in *Tunisia/Libya*¹⁸ and *Romania v Ukraine*¹⁹.

Finally Mr President, we have placed a so-called "proportionality line" on the sketch map, dividing the correct relevant area into two parts, proportionate to the relevant coasts of the Parties. This of course is not the proper approach, as the International Court has made clear, but the sketch is perhaps instructive: the equidistance line produced by Myanmar is considerably more favourable to Bangladesh than the so-called "proportionality line", which itself runs slightly south of the true bisector. A sketch with all three lines can be found at tab 7.3 and it is on the screen.

Mr President, Members of the Tribunal, to return to reality and to conclude on this point, the disproportionality test, as applied in the case-law, does not require any adjustment of Myanmar's proposed line. Indeed, the line passes the test with flying colours. If anything, it allocates to Bangladesh a larger portion of the relevant area in comparison to the Parties' coastal lengths. It is an eminently equitable solution.

In conclusion, Mr President, let me just say this. It is easy to see why Counsel for the Applicant has felt the need to invite you to boldly go where none has gone before. They are not at all comfortable with the application of the existing law to this delimitation. Yet this is a straightforward case: straightforward in its geography, straightforward in its applicable law. That is precisely why Myanmar, for its part, does not wish you to set off into the unknown. We simply trust you to do what the Law of Sea Convention envisages your role to be: to apply the law to the facts of the case.

Mr President, Members of the Tribunal, before I conclude, let me place on record a personal word of thanks. I speak for all of Myanmar's team of Counsel in expressing our sincere appreciation to the Agent of Myanmar, and to the Deputy Agents, and to all their Myanmar colleagues. We could not have wished for better colleagues over the several years during which we have worked so closely together on this important case.

Mr President, I would request you to ask the Agent of Myanmar, His Excellency Dr Tun Shin, Attorney General of the Union, to make the final submissions on behalf the Republic of the Union of Myanmar. I thank you, Mr President.

The President:

I thank you, Sir Michael.

I now invite the Agent of Myanmar, His Excellency the Attorney General, Dr Tun Shin, to present his Party's final submissions.

¹⁸ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, at p. 91, para. 131.

¹⁹ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* Judgment, I.C.J. Reports 2009, p. 61, at p. 130, paras. 215-216.

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STATEMENT OF MR SHIN
AGENT OF MYANMAR
[ITLOS/PV.11/16/Rev.1, E, p. 14–16]

Mr Shin:

Mr President, Members of the Tribunal, I shall now read the final submissions of the Republic of the Union of Myanmar. These are, in substance, unchanged from those in our Rejoinder:

Having regard to the facts and law set out in the Counter-Memorial and the Rejoinder, and at the oral hearing, the Republic of the Union of Myanmar requests the Tribunal to adjudge and declare that:

1. The single maritime boundary between Myanmar and Bangladesh runs from point A to point G, as set out in the Rejoinder. With your permission, I shall not read out the co-ordinates. (The co-ordinates are referred to WGS 84 datum).
2. From point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of $231^{\circ} 37' 50.9''$ until it reaches the area where the rights of a third State may be affected.

In accordance with article 75 of the Rules of the Tribunal, a copy of the written text of these submissions is being communicated to the Tribunal.

Mr President, Members of the Tribunal, it only remains for me, on behalf of the Myanmar team, to thank all those in this room, and behind the scenes, who have worked so hard over the past few weeks on this case.

First, I wish to thank the Registrar, Mr Philippe Gautier, and the members of the Registry who have worked so tirelessly and efficiently to ensure the smooth running of these proceedings.

We especially thank the interpreters, who certainly have not had an easy time, and those who have worked long hours to produce so promptly the records of the public sessions.

We thank our friends from Bangladesh for their co-operation in the course of these proceedings. We thank the Agent, Her Excellency the Honourable Dr Dipu Moni, Foreign Minister of Bangladesh, His Excellency Mr Mohammed Mijraul Quayes, Foreign Secretary of Bangladesh, who addressed the Tribunal on Thursday, the Deputy Agent, Rear Admiral Muhammad Khurshed Alam, and all the members of the Bangladesh team. We are grateful for the kind words that they addressed to the Myanmar team and, in turn, wish to thank them for the professional and courteous manner in which they have participated in these proceedings.

I also wish to associate myself with Bangladesh's Foreign Secretary's words of friendship between our two countries. We, too, think that the Tribunal's judgment is likely to reinforce our links of good neighbourliness.

I also want to record my thanks to the members of my own team for all their efforts.

Above all, we thank you, Mr President, and all the Members of this distinguished Tribunal for listening to us with patience and attention. We are confident that your eagerly awaited judgment will resolve the dispute between Myanmar and Bangladesh in the Bay of Bengal on the basis of the modern law of maritime delimitation, thus making an important contribution to friendly relations between our two countries.

Mr President, Members of the Tribunal, I thank you for your attention.

CLOSURE OF THE ORAL PROCEEDINGS – 24 September 2011, p.m.

Closure of the Oral Proceedings

[ITLOS/PV.11/16/Rev.1, E, p. 16]

The President:

Thank you, Excellency. This brings us to the end of the oral proceedings.

On behalf of the Tribunal, I would like to take this opportunity to express our appreciation for the high quality of the presentations of the Agents and counsel of both Bangladesh and Myanmar. I would also like to take this opportunity to thank both Agents for their exemplary spirit of co-operation.

The Registrar will now address questions in relation to documentation.

The Registrar:

Thank you, Mr President.

Pursuant to article 86(4) of the Rules of the Tribunal, the Parties, under the supervision of the Tribunal, may correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the meaning and scope thereof. If not done yet, corrections should be submitted to the Registry as soon as possible and at the latest by Thursday, 29 September 2011, noon, Hamburg time.

Thank you, Mr President.

The President:

The Tribunal will now retire to deliberate. The judgment will be read on a date to be notified to the Agents. The Tribunal has tentatively set a date for the delivery of the judgment. That date is 14 March 2012. The Agents will be informed reasonably in advance if there is any change to this schedule.

In accordance with the usual practice, I request the Agents to kindly remain at the disposal of the Tribunal in order to provide any further assistance and information that it may need in its deliberations prior to the delivery of the judgment.

The sitting is now closed.

(The hearing closes at 4.03 p.m.)

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

PUBLIC SITTING HELD ON 14 MARCH 2012, 11.30 A.M.**Tribunal**

Present: *President* JESUS; *Vice-President* TUERK; *Judges* MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *and* PAIK; *Judges ad hoc* MENSAH *and* OXMAN; *Registrar* GAUTIER.

Bangladesh is represented by:

H.E. Dr. Dipu Moni, MP,
Foreign Minister, Ministry of Foreign Affairs,

as Agent;

Rear Admiral (Ret'd) Md. Khurshed Alam,
Additional Secretary, Ministry of Foreign Affairs,

as Deputy Agent;

and

H.E. Mr Mosud Mannan,
Ambassador to the Federal Republic of Germany, Embassy of Bangladesh, Berlin, Germany,

Mr Jishnu Roy Chowdhury,
Additional Secretary and Private Secretary to the Hon'ble Foreign Minister,

Mr Mohammed Abdul Hye,
Director General (UNCLOS), Ministry of Foreign Affairs,

Mr Gomal Sarwar,
Director-General (South-East Asia), Ministry of Foreign Affairs,

Dr Payam Akhavan,
Member of the Bar of New York, Professor of International Law, McGill University,
Montreal, Canada,

Dr Robin Cleverly,
Law of the Sea Consultant, The United Kingdom Hydrographic Office, Taunton, United
Kingdom,

Dr James Crawford SC, FBA,
Member of the Bar of England and Wales, Whewell Professor of International Law,
University of Cambridge, Cambridge, United Kingdom,

Dr Lindsay Parson,

READING OF THE JUDGMENT – 14 March 2012, a.m.

Director, Maritime Zone Solutions Ltd., United Kingdom,

Mr Paul S. Reichler,
Foley Hoag LLP, Member of the Bars of the United States Supreme Court and of the District
of Columbia, United States of America,

Mr Philippe Sands QC,
Member of the Bar of England and Wales, Professor of International Law, University College
London, London, United Kingdom,

Dr Alan Boyle,
Member of the Bar of England and Wales, Professor of International Law, University of
Edinburgh, Edinburgh, United Kingdom,

Lt. Cdr. M. R. I. Abedin,
System Analyst, Ministry of Foreign Affairs,

Ms Shahanara Monica,
Assistant Secretary, Ministry of Foreign Affairs,

Mr Jamal Uddin Ahmed,
Assistant Secretary, Ministry of Foreign Affairs,

as Counsel and Advocates.

Myanmar is represented by:

H.E. Dr Tun Shin (Mr),
Attorney General of the Union, Union Attorney General's Office,

as Agent;

Ms Hla Myo Nwe,
Deputy Director General, Consular and Legal Affairs Department, Ministry of Foreign
Affairs,

Mr Kyaw San,
Deputy Director General, Union Attorney General's Office,

as Deputy Agents;

and

H.E. U Tin Win,
Ambassador Extraordinary and Plenipotentiary to the Federal Republic of Germany,
Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Professor Alain Pellet,

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Professor at the University of Paris Ouest, Nanterre La Défense, Member and former Chairman of the International Law Commission, Associate Member of the Institut de droit international, France,

Sir Michael Wood, K.C.M.G.,
Member of the English Bar, Member of the International Law Commission, United Kingdom,

Professor Mathias Forteau,
Professor at the University of Paris Ouest, Nanterre La Défense, France,

Mr Coalter Lathrop,
Attorney-Adviser, Sovereign Geographic, Member of the North Carolina Bar, United States of America,

Mr Benjamin Samson,
Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France,

as Counsel and Advocates;

Captain Min Thein Tint (Mr),
Commanding Officer, Myanmar Naval Hydrographic Center, Yangon,

Dr Thura Oo (Mr),
Pro-Rector, Meiktila University, Meiktila,

Ms Khin Oo Hlaing,
First Secretary, Embassy of the Republic of the Union of Myanmar, Brussels, Belgium,

Mr Mang Hau Thang,
Assistant Director, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,

Mr Kyaw Htin Lin,
First Secretary, Embassy of the Republic of the Union of Myanmar, Berlin, Germany,

Mrs Héloïse Bajer-Pellet,
Lawyer, Member of the Paris Bar, France,

Ms Tessa Barsac,
Master, University of Paris Ouest, Nanterre La Défense, France,

Mr Octavian Buzatu,
Hydrographer, Romania,

Mr David Swanson,
Cartography Consultant, United States of America,

as Advisers.

LECTURE DE L'ARRÊT – 14 mars 2012, matin

AUDIENCE PUBLIQUE DU 14 MARS 2012, 11 H 30**Tribunal**

Présents : M. JESUS, *Président*; M. TUERK, *Vice-Président*; MM. MAROTTA RANGEL, YANKOV, NELSON, CHANDRASEKHARA RAO, AKL, WOLFRUM, TREVES, NDIAYE, COT, LUCKY, PAWLAK, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN *et* PAIK, *juges*; MM. MENSAH *et* OXMAN, *juges ad hoc*; M. GAUTIER, *Greffier*.

Le Bangladesh est représenté par :

S. E. Mme Dipu Moni,
membre du Parlement, Ministre des affaires étrangères, Ministère des affaires étrangères,

comme agent;

Le contre-amiral (à la retraite) Md. Khurshed Alam,
secrétaire d'Etat auxiliaire, Ministère des affaires étrangères,

comme agent adjoint;

et

S. E. M. Mosud Mannan,
Ambassadeur auprès de la République fédérale d'Allemagne, Ambassade du Bangladesh,
Berlin, Allemagne,

M. Jishnu Roy Chowdhury,
secrétaire d'Etat auxiliaire et secrétaire personnel du Ministre des affaires étrangères,

M. Mohammed Abdul Hye,
directeur-général (CNUDM), Ministère des affaires étrangères,

M. Md. Gomal Sarwar,
directeur-général (Asie du Sud-Est), Ministère des affaires étrangères,

M. Pamyam Akhavan,
membre du barreau de New York, professeur de droit international à l'Université McGill,
Montréal, Canada,

M. Robin Cleverly,
consultant en droit de la mer, Bureau hydrographique du Royaume-Uni, Taunton, Royaume-Uni,

M. James Crawford, S.C., F.B.A.,
membre du barreau d'Angleterre et du pays de Galles, professeur de droit international à l'Université de Cambridge (chaire Whewell), Cambridge, Royaume-Uni,

DÉLIMITATION DE LA FRONTIÈRE MARITIME DANS LE GOLFE DU BENGALE

M. Lindsay Parson,
directeur du cabinet de conseil Maritime Zone Solutions Ltd., Royaume-Uni,

M. Paul S. Reichler,
cabinet Foley Hoag LLP, membre du barreau de la Cour suprême des Etats-Unis d'Amérique
et du barreau du district de Columbia, Etats-Unis d'Amérique,

M. Philippe Sands, QC,
membre du barreau d'Angleterre et du pays de Galles, professeur de droit international,
University College de Londres, Londres, Royaume-Uni,

M. Alan Boyle,
membre du barreau d'Angleterre et du pays de Galles, professeur de droit international à
l'Université d'Edimbourg, Edimbourg, Royaume-Uni,

Le capitaine de corvette M. R. I. Abedin,
analyste système, Ministère des affaires étrangères,

Mme Shahanara Monica,
secrétaire d'Etat assistante, Ministère des affaires étrangères,

M. Jamal Uddin Ahmed,
secrétaire d'Etat assistant, Ministère des affaires étrangères,

comme conseils et avocats.

Le Myanmar est représenté par :

S. E. M. Tun Shin,
procureur général de l'Union, Bureau du procureur général de l'Union,

comme agent;

Mme Hla Myo Nwe,
directrice générale adjointe du Département des affaires consulaires et juridiques, Ministère
des affaires étrangères,

M. Kyaw San,
directeur général adjoint, Bureau du procureur général de l'Union,

comme agents adjoints;

S. E. M. U Tin Win,
Ambassadeur extraordinaire et plénipotentiaire auprès de la République fédérale
d'Allemagne, ambassade de la République de l'Union du Myanmar, Berlin, Allemagne,

M. Alain Pellet,
professeur à l'Université Paris Ouest, Nanterre-La Défense, membre et ancien président de la
Commission du droit international, associé de l'Institut de droit international, France,

LECTURE DE L'ARRÊT – 14 mars 2012, matin

Sir Michael Wood, KCMG,
membre du barreau d'Angleterre et membre de la Commission du droit international,
Royaume-Uni,

M. Mathias Forteau,
professeur à l'Université Paris Ouest, Nanterre-La Défense, France,

M. Coalter Lathrop,
avocat-conseil du bureau Sovereign Geographic, membre du barreau de Caroline du Nord,
Etats-Unis d'Amérique,

M. Benjamin Samson,
chercheur au Centre de droit international de Nanterre (CEDIN), Université Paris Ouest,
Nanterre-La Défense, France,

comme conseils et avocats;

Le capitaine Min Thein Tint,
commandant le Centre hydrographique de la marine du Myanmar, Yangon,

M. Thura Oo,
prorecteur de l'Université de Meiktila, Meiktila,

Mme Khin Oo Hlaing,
première secrétaire, ambassade de la République de l'Union du Myanmar, Bruxelles,
Belgique,

M. Mang Hau Thang,
sous-directeur de la Division du droit international et des traités internationaux, Département
des affaires consulaires et juridiques, Ministère des affaires étrangères,

M. Kyaw Htin Lin,
premier secrétaire, ambassade de la République de l'Union du Myanmar, Berlin, Allemagne,

Mme Héloïse Bajer-Pellet,
avocate, membre du barreau de Paris, France,

Mme Tessa Barsac,
master, Université de Paris Ouest, Nanterre-La Défense, France,

M. Octavian Buzatu,
hydrographe, Roumanie,

M. David Swanson,
consultant cartographe, Etats-Unis d'Amérique,

comme conseillers.

DELIMITATION OF THE MARITIME BOUNDARY IN THE BAY OF BENGAL

Reading of the Judgment

[PV.12/01/Rev.1, E, p. 1, Fr, p. 1]

Le Greffier :

Le Tribunal va rendre aujourd'hui son arrêt dans le *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*. L'affaire porte le No. 16 dans le rôle des affaires du Tribunal. Le Tribunal a entendu les exposés oraux des parties au cours de 15 audiences publiques qui se sont tenues du 8 au 24 septembre 2011. En raison de la longueur de l'arrêt, une interruption de 15 minutes aura au milieu de la lecture.

Mr President.

The President:

I note the presence of the Agents, Counsel and Advocates of both parties.

I now call on the Agent of the People's Republic of Bangladesh, Her Excellency Minister Dipu Moni, to note the representation of Bangladesh.

(Ms Dipu Moni notes the representation of Bangladesh.)

THE PRESIDENT: Thank you very much, Excellency.

I now call on the Agent of the Republic of the Union of Myanmar, His Excellency Attorney General Tun Shin, to note the representation of Myanmar.

(Mr Tun Shin notes the representation of Myanmar.)

The President:

Thank you very much, Excellency.

I will now read extracts of the Judgment in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, of 14 March 2012.

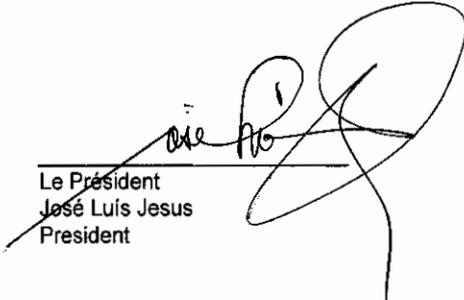
(The President reads the extracts.)

The sitting is now closed.

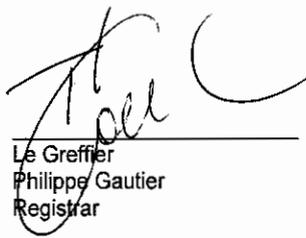
These texts are drawn up pursuant to article 86 of the Rules of the International Tribunal for the Law of the Sea and constitute the minutes of the public sittings held in the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*.

Ces textes sont rédigés en vertu d'article 86 du Règlement du Tribunal international du droit de la mer et constituent le procès-verbal des audiences publiques du *Différend relatif à la délimitation de la frontière maritime entre le Bangladesh et le Myanmar dans le golfe du Bengale (Bangladesh/Myanmar)*.

Le 6 mars 2013
6 March 2013



Le Président
José Luis Jesus
President



Le Greffier
Philippe Gautier
Registrar