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President José Luís Jesus presiding

DISPUTE CONCERNING DELIMITATION OF THE MARITIME BOUNDARY BETWEEN BANGLADESH AND MYANMAR IN THE BAY OF BENGAL

(Bangladesh/Myanmar)

Verbatim Record

Present:	President	José Luís Jesus
	Vice-President	Helmut Tuerk
	Judges	Vicente Marotta Rangel
		Alexander Yankov
		P. Chandrasekhara Rao
		Joseph Akl
		Rüdiger Wolfrum
		Tullio Treves
		Tafsir Malick Ndiaye
		Jean-Pierre Cot
		Anthony Amos Lucky
		Stanislaw Pawlak
		Shunji Yanai
		James L. Kateka
		Albert J. Hoffmann
		Zhiguo Gao
		Boualem Bouguetaia
		Vladimir Golitsyn
		Jin-Hyun Paik
	Judge *ad hoc*	Bernard H. Oxman
	Registrar	Philippe Gautier

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and

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as Advisers.

1 **THE PRESIDENT:** Good morning. I would like to note that Judge *ad hoc*
2 Thomas Mensah, for reasons made known to me, is unable to take his seat on the
3 Bench today.
4
5 We will now hear the second round of oral arguments of Myanmar in a dispute
6 concerning delimitation of the maritime boundary between Bangladesh and Myanmar
7 in the Bay of Bengal.
8
9 I call on Mr Daniel Müller to make his presentation.
10
11 **MR MÜLLER:** Mr President, Members of the Tribunal, Before I start my
12 presentation, I should first indicate the order in which Myanmar's Counsel will
13 address you in the second round: I am going to speak about some issues concerning
14 the continental shelf beyond 200 M. I shall be followed by Professor Pellet, who will
15 deal with the question of admissibility and also the bisector. Sir Michael Wood will
16 then respond to Professor Boyle's arguments on the 1974 Agreed Minutes.
17 Professor Forteau will continue after the short break. He will address the issue of
18 special and relevant circumstances. This afternoon, Mr Coalter Lathrop will deal with
19 the construction of the line. He will be followed by Sir Michael Wood, who will
20 conclude the presentation by Myanmar's Counsel. The Agent of the Republic of the
21 Union of Myanmar will then read out Myanmar's final submissions. We expect to
22 finish about 4:30 in the afternoon.
23
24 My own task is limited to responding to some arguments and allegations concerning
25 the issue (I should say: non-issue) of the continental shelf beyond 200 M and the
26 interpretation of article 76, and in particular, to respond to Professor Boyle's
27 presentation of Thursday. As we have constantly said during the first round of our
28 argument, no issue concerning the delimitation of any entitlements nor the question
29 of the existence of such entitlements, does or can, legally speaking, arise in the
30 present dispute. This has not changed since last Tuesday, and my colleagues and
31 friends will explain, later this morning and this afternoon, the reasons why the
32 Tribunal has no need to dwell on these issues.
33
34 Mr President, I understand that Professor Boyle might not share my enthusiasm –
35 which is more limited than he says– for the interpretation and application of article 76
36 of the Montego Bay Convention. But, with respect, this is exactly the problem with
37 Bangladesh's argument: it ignores the technical aspects of article 76 and tries hard
38 to circumvent its lack of interest in the actual wording of this basic provision by an
39 open-ended concept of "natural prolongation" informed by geological elements. I
40 must admit that article 76 is not the most straightforward provision of the 1982
41 Convention and that its application is not at all an easy exercise, especially not on a
42 Saturday morning. But it is as it is, and a lawyer cannot ignore parts of it, only
43 because they are "technicalities", including the Gardiner and Hedberg formulae.
44 There is no strictly legal part of article 76 which is to be applied by lawyers, on the
45 one hand, and a mere, let us say, scientific legal part which can "safely be left to
46 States[] Parties and the CLCS"[1], on the other hand. Article 76 is "a carefully

[1] ITLOS/PV.11/13 (E), p. 25, lines 39-40 (Boyle).

1 structured package"[2], and these are the words of Bangladesh, words they are
2 perhaps now happy to forget.
3
4 Professor Boyle wants you to believe that some science, especially the science
5 necessary to apply paragraph 4 of article 76, is too difficult and could be set aside.
6 He does so only in order to reintroduce his own science – well, the science of
7 Bangladesh's "independent" experts, through the concept of "natural prolongation".
8 No science; yes, science; or maybe science?
9
10 Myanmar never argued that article 76 can be applied by lawyers alone. Indeed, it is
11 based, necessarily, on data and measurements which a lawyer is hardly able to
12 gather alone. Nevertheless, it is for the lawyer alone to reach his or her legal
13 conclusions having considered the scientific data. It is for the lawyer to make up his
14 mind whether there is a *legal* continental shelf extending out to 200 M, or if the
15 entitlement to a continental shelf extends beyond that limit. This is the central
16 question, and Professor Boyle stressed that this would be the core issue the Tribunal
17 would have to decide[3] – but you do not need to do so, as I recalled some minutes
18 ago. It is not for a scientist to tell the lawyer that there is a scientific continental shelf,
19 or even a scientific, geological, natural prolongation. We do not apply "science to
20 law"[4], as Mr Boyle said, we apply the law to scientific data. Even in the field of the
21 protection of the environment, which is, of course, a field where the interrelation of
22 science and law is particularly strong, we do not apply science to law. It is not
23 because a biologist considers that a species is disappearing, that this species falls
24 under those protected by the Convention on International Trade in Endangered
25 Species; the issue can only be decided by application of the law. If the law does not
26 correspond to scientific reality, well, then it is open to States Parties to change the
27 law, in order to add the disappearing species to one of the annexes of CITES.
28
29 Most of us might need an expert, a biologist or an ornithologist, in order to know if
30 a bird is part of the species listed in the annexes of CITES, for instance. Likewise,
31 we need scientists to tell us where the maximum change in the gradient is, where the
32 1 % sediment thickness line is, and we may need an expert even to tell us where the
33 200 or 350 M lines are on a map. But, like Professor Boyle would not ask the
34 ornithologist why the bird is endangered – well, of course he might and certainly will
35 be interested in this point, but it is not necessary for the application of CITES – in the
36 context of article 76 we do not need to ask the geologist if there is a geological
37 discontinuity or if the *legal* continental shelf is a *scientific* continental shelf. It is
38 irrelevant for the application of article 76.
39
40 Mr President, Members of the Tribunal, the aim of my speech on Tuesday, certainly
41 too long, I must confess, was indeed to show exactly this: the application of article
42 76, paragraph 1 – the very provision which defines the legal entitlement of a coastal
43 State to a continental shelf – is self-sufficient. There is no need to refer to anything
44 else than the "outer edge of the continental margin" and its distance from the
45 baselines. I did not try to go into the issue of delineation, and I apologize if Professor
46 Boyle did not understand that point. Throughout my presentation of last Tuesday, we
47 did nothing more than to solve the issue of paragraph 1: Is the outer edge of the

[2] RB, para. 4.47.
[3] ITLOS/PV.11/13 (E), p. 24, lines 45-47 (Boyle).
[4] ITLOS/PV.11/14 (E), p. 2, line 26 (Boyle).

1 continental margin of a coastal State situated beyond 200 M, or not? This question
2 cannot be resolved without reference to paragraph 4, containing the very definition of
3 the "outer edge of the continental margin".
4
5 Bangladesh, however, adds a test of "geological natural prolongation" as some
6 independent prerequisite to article 76, in order to import scientific concepts which,
7 otherwise, are not relevant to the application of article 76. There is no reference to
8 tectonic plates, the nature of the crust under the margin, or to a subduction zone.
9 There is no reference at all to any "natural" or scientific boundary or limit of the
10 margin anywhere in article 76. This is explained by the object and purpose of this
11 provision which we need to take into account in its interpretation and application: and
12 I entirely agree with Professor Boyle when he underlined that "one obvious object
13 and purpose of article 76 is to give the definition and extent of the continental shelf
14 greater certainty"[5]. Scientific "natural prolongation", whether a geologic or
15 a morphologic concept, cannot achieve this purpose, because, as Bangladesh's own
16 experts have admitted, it does not provide such certainty[6].
17
18 Mr President, I will not argue with Professor Boyle or with Professor Curray, whether
19 the subduction zone is at a distance of 50 M or at any other distance from the
20 coasts, or even (as seems to appear on Bangladesh's own drawings) somewhere
21 under Myanmar's land territory. Of course we did spot the black lines in
22 Professor Curray's sketch, but, as he explained in his report[7], these lines were only
23 aimed at showing the limits of the Bengal Depositional System, not a plate boundary.
24 The form of the line is indeed quite revealing (because plate boundaries are usually
25 depicted not by a dashed line but by a dented line – like Professor Curray's red one).
26 I will not bother the Members of the Tribunal by taking them to Bangladesh's own
27 scientific material attached to the Memorial. It is however interesting to note that
28 Professor Curray's red-line has in fact appeared in the very same form, not only in
29 two other figures attached to his first report[8], but also in at least eight maps in five
30 scientific articles[9], including those co-signed by Professor Curray. If there is any
31 conclusion which can be drawn from this material, it is merely the continuing
32 scientific uncertainty about the concrete location of the subduction.
33
34 Be that as it may, the subduction zone, at 50 M, or at 20, or even on land, does not
35 have any role in the application of article 76 to Myanmar's continental margin. I shall
36 try again to demonstrate why.
37
38 Let us take, again, a scheme of the profile of the sea-floor, but this time, we decided
39 not to take just an idealised model, but a bathymetric profile of Myanmar's
40 submerged prolongation, shown on figure A.4 of our Counter-Memorial. It is indeed
41 one of the profiles which have been used by Myanmar in applying article 76.
42
43 The land territory of Myanmar is on the left and to the right the profile extends out
44 into the Bay of Bengal.

[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).
[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.

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 Tuesday[10], 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 Thursday[12].

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.

[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).

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 region[13], 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 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

[13] ITLOS/PV.11/11 (F), p. 36, line 32 *et seq.* (Müller).
[14] BR, para. 4.47.
[15] ITLOS/PV.11/14 (E), p. 1, line 27 *et seq.* (Boyle).

1 South Fiji basin represent[s] deep ocean floor, beyond the continental margin”[16]. The
2 CLCS indeed accepted that in that region the outer edge of the continental margin of
3 New Zealand could be established by reference to the Hedberg formula on the red
4 arc of the circles. Everything which is beyond that limit is not part of New Zealand’s
5 legal margin. But this has indeed been taken care of by article 76, which, as you will
6 recall, explains in paragraph 3, that deep ocean floor is not included in the
7 continental margin. It is therefore not necessary to have recourse to “natural
8 prolongation”, but only, and foremost, to the provisions of article 76. Of course, these
9 provisions cannot be applied “slavishly” – no legal provision should be applied this
10 way – but in an orderly and reasonable manner.
11
12 Myanmar did exactly this, as you can see on these maps which are taken from the
13 Executive Summary of Myanmar’s Submission to the CLCS. It identified its foot of
14 the slope points at the maximum change in the gradient. It then constructed the
15 Gardiner line, the 1 % sediment thickness points, and the line which results. The
16 outer edge of the continental margin is represented by this Gardiner line. Myanmar
17 concluded that it is entitled to a continental shelf extending beyond the 200 M limit
18 and proceeded to the delineation of this entitlement with reference to the Gardiner
19 line, and the two constraint lines provided for by article 76 (5). The relevant data
20 have been submitted to the CLCS for its consideration[17]. You will find the
21 corresponding maps from the Executive Summary of Myanmar’s submission to the
22 CLCS at tab 6.2 of your Judges’ folders.
23
24 “Geological natural prolongation” or the existence of a subduction zone is entirely
25 irrelevant in this regard, as the recent practice of the CLCS shows.
26
27 On the screen you can see the outer limit of the continental shelf recommended by
28 the Commission with regard to Barbados’ submission[18]. The outer limit of Barbados’
29 entitlement (the purple line) extends well beyond 200 M, notwithstanding the
30 existence of a well-marked subduction zone – the Atlantic Plate is subducting under
31 the Caribbean Plate (which you also see on the screen depicted by the usual dented
32 line).
33
34 Similarly, Indonesia, in its submission to the CLCS of June 2008[19], submitted
35 relevant data concerning the outer limit of its continental shelf extending beyond
36 200 M and, and this is the relevant point, extending beyond the Sunda subduction
37 trench – the very same plate boundary Bangladesh is opposing against Myanmar’s
38 entitlement.
39
40 There is only one point left, Mr President, Members of the Tribunal, which I wish to
41 address this morning. It is not a technical but a legal one – and very short. In his

[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).

1 introductory statement of last Wednesday, Mr Martin accused us of disregarding the
2 terms of article 76, depriving “natural prolongation” of any meaning[20]. This is quite
3 incorrect. In its written pleadings, Myanmar set out its interpretation of “natural
4 prolongation” in the particular context of article 76, and I respectfully refer the
5 Tribunal to the relevant paragraphs of the Counter-Memorial and Rejoinder[21].
6
7 “Natural prolongation” does not, and cannot, refer to a pseudo-scientific concept of
8 geological continuity. Professor Curray said that the term “is not in common usage
9 among earth scientists”[22]. I have just shown, I hope, that the meaning Bangladesh
10 wants to attach to “natural prolongation”, does more harm to the function of article
11 76, than it serves the object or purpose of this provision.
12
13 Myanmar, on the other hand, accepts that “natural prolongation” has a clear function
14 within article 76. In order to understand that function, one cannot go back to 1969
15 and the ICJ *North Sea Continental Shelf* cases. Of course, the Court did use
16 extensively the term “natural prolongation”, but it did not invent it in 1969.
17
18 “Natural prolongation” is indeed as old as States’ claim areas of sea floor beyond
19 their territorial sea. Interestingly, the proclamation of President Truman[23], one of the
20 most fundamental steps in the history of the law of the continental shelf, did not claim
21 the entire “natural prolongation” of the United States land territory under the sea as
22 subject to certain sovereign rights. This first continental shelf did extend, in the
23 opinion of the Truman Administration, only to an artificial depth line of 100 fathoms
24 (which corresponds to 183 metres)[24]. But, despite this purely artificial definition of the
25 continental shelf, the idea and concept of “natural prolongation” was present, not in
26 order to define the extent of the shelf, but in order to justify the appropriation of this
27 area. I quote from the proclamation:
28
29 [I]t is the view of the Government of the United States that the exercise of
30 jurisdiction over the natural resources of the subsoil and sea bed of the
31 continental shelf by the contiguous nation is reasonable and just, … since
32 the continental shelf may be regarded as an extension of the land-mass of
33 the coastal nation and thus naturally appurtenant to it…[25].
34
35 The 1958 Geneva Convention on the Continental Shelf[26] did not define the extent of
36 the continental shelf with reference to a scientific “natural prolongation” either. The
37 criteria retained by article 1 of the 1958 Convention are, of course, very familiar to
38 you. “Natural prolongation” did not play any role in the definition of the legal
39 continental shelf. Despite this fact, the ICJ did not, in 1969 –in the *North Sea*
40 *Continental Shelf* cases which are so essential to Bangladesh’s case – call into
41 question the definition of the continental shelf contained in article 1 of the 1958

[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.

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 law[27]. 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.

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.

MR PELLET *(Interpretation from French)*: Mr President, Members of the Tribunal, with your permission, I would like to do two things this morning. First of all, I will revert to the question of the partial inadmissibility of Bangladesh's application. Secondly, I would like to say a few words about the angle bisector, which was so significantly neglected by the Applicant during its second round of pleadings.

These two subjects do not seem have much in common, but we thought that it would be better to discard them straightaway so that we can move on to more serious matters, for we maintain that Bangladesh's claims on these two points are not serious.

Mr President, before getting to the heart of the matter of the inadmissibility of Bangladesh's request, I wish to recapitulate our position on the question of the continental shelf beyond 200 M. Professor Boyle, who is otherwise very learned, stated that the arguments put forward by Daniel Müller in the first round of pleadings left him "rather confused" [28]. This morning Mr Müller took pains to express himself in

[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.
[28] ITLOS/PV.11/13 E, p. 24, line 26 (Mr. Boyle).

1 a language that is perhaps more familiar to our kind opponent. Be that as it may and
2 even giving Professor Boyle his due for the pleadings that he made with
3 consummate art and discreet charm, I see that the previous speaker spoke last
4 Tuesday of matters that are no doubt complicated but, Members of the Tribunal, if
5 you will allow, I would advise you very strongly to re-read the transcript of Daniel
6 Müller's presentation on Tuesday. It is a crystal clear explanation of these very
7 complicated matters.
8
9 These matters are complicated indeed, but I believe I have finally understood them
10 thanks, in part, to Daniel Müller and thanks to this case. Nonetheless, novice that I
11 am, I do not fully share Daniel Müller's interest in the technical aspects of the
12 application of article 76, but I do think that we have to understand them if we are to
13 draw the correct legal conclusions, and I would like to share with you, Mr President,
14 some of my own conclusions.
15
16 First of all, for our purposes, the notion of the continental shelf is a legal concept.
17
18 Secondly, the expression "natural prolongation of its land territory to the outer edge
19 of the continental margin" in article 76 (1) of the Convention, should be understood
20 and interpreted in the light of its context, especially in the light of the other provisions
21 of the same article and developments in international practice and jurisprudence.
22
23 Thirdly, for the purposes of this definition, geology has the role that the relevant
24 provisions of article 76assign to it – provisions that have been clarified by the CLCS.
25 This is the case, on the one hand, as regards the thickness of sedimentary rocks
26 according to the Gardiner formula in article 76(4)(b)(i) and, on the other hand, when
27 a State wishes to provide evidence that, by way of exception, the foot of the
28 continental slope that it claims cannot be determined by "the point of maximum
29 change of the gradient at its base," as specified in paragraph 4(b) of article 76. This
30 may seem complicated, but I do not think that we can put it any more simply.
31
32 Fourthly, Bangladesh is certainly at liberty to seek to substantiate its entitlement to
33 the continental shelf by relying solely on geological criteria. Allow me here to digress
34 to discuss a matter of terminology. It seems to me that there is no French equivalent
35 that renders precisely the meaning of the very convenient English word "entitlement".
36 The Registry of the ICJ translated the word as "title" [29] or "right" [30] in the 2009
37 judgment on delimitation in the Black Sea, but, more appropriately, it brought in the
38 idea of "claim" [31], which is preferable in any case in a context such as the one with
39 which we are concerned, where "entitlement" is not "title," and even less "right", but
40 rather the "claim to the entitlement". I would emphasize that the word "entitlement",
41 which is to be found throughout the 1982 Convention, is translated in the French and
42 Spanish versions of the Convention by a variety of different terms. I will now end this
43 digression and return to my fourth point. Bangladesh is at liberty to try to justify its

[29] See I.C.J., Judgment, 3 February 2009 *Maritime Delimitation in the Black Sea (Romania v. Ukraine) I.C.J. Reports 2009*, p. 88, para. 75, p. 89, paras. 76 and 77, p. 90, para. 80, p. 116, para. 166 and p. 118, para. 168.
[30] *Ibid.*, p. 93, para. 86, p. 95, para. 94, p. 96, para. 95, p. 97, para. 100, p. 99, para. 109, p. 100, para. 114, p. 120, para. 180, p. 121, para. 184, p. 122, para.185, p. 126, para. 199 and para. 200, p. 127, para. 201 and p. 129, para.208.
[31] *Ibid.*, p. 126, para. 200.

1 entitlement to the continental shelf by using geology, but – and it is a very big 'but' –
2 it is neither necessary nor sufficient to rely on such a test of natural geological
3 prolongation to establish such a title. It is for this reason that Myanmar has not
4 agreed to this and, in accordance with the relevant rules applied by the CLCS. has
5 based its case solely on the appurtenance test, which it passes without difficulty, as
6 Daniel Müller reminded us. Furthermore, the subduction zone has no bearing on the
7 morphological continuity of the continental shelf of Myanmar. I add that in
8 *Tunisia v Libya* the ICJ indicated that what could be a marked disruption of
9 discontinuance of the seabed – and I quote in English – (In English) "would be a
10 marked disruption of discontinuance of the sea-bed." [32] (Interpretation continued); I
11 have quoted that from the original English text because, oddly enough, the French
12 translation is quite far removed from this. We are talking about the *seabed*,
13 Mr President, not the subsoil, contrary to what Professor Boyle believes or would
14 have us believe.[33]
15
16 Fifthly, in any case, on the one hand and primarily, we are convinced that the
17 Tribunal, irrespective of any possible entitlement, will establish that Bangladesh has
18 no right to a continental shelf beyond 200 M, because its maritime boundary with
19 Myanmar necessarily stops shy of this limit. Secondly, on the other hand, a right to a
20 continental shelf cannot be established except on the basis of recommendations of
21 the CLCS. This brings me to my final argument and my actual topic for today.
22
23 Sixthly the Tribunal cannot but find Bangladesh's application inadmissible, given that
24 at the present time no such title has been established for either of the two States.
25
26 Mr President, Professor Akhavan said little new on this point in his statement on
27 Thursday afternoon. In a moment I will respond to this briefly by recapitulating our
28 own arguments, but I must say that I was most interested in and gratified by what
29 Professor Boyle said. Because he is so right, I shall cite him at length. After recalling
30 the geological and geomorphological aspects to which the provisions of article 76
31 refer, my opponent affirmed that recourse to technical experts is essential, and he
32 concludes:
33
34 (In English) All this different expertise is carefully reflected in Annex II,
35 article 2, paragraph 1, of the 1982 Convention, which identifies potential
36 members of the Commission on the Limits of the Continental Shelf and
37 calls for 'experts in the field of geology, geophysics or hydrography'.
38
39 So, Mr President and Members of the Tribunal, there is really no doubt
40 that the application of article 76 requires a great deal of scientific and
41 technical expertise before lawyers can make effective use of it. That is
42 why the submissions to the CLCS require significant amounts of scientific
43 research and data collection and take years to assemble.... It is also why
44 the CLCS Commissioners are not lawyers, and it explains why we have
45 geologists, hydrographers and cartographers on our legal team. Their
46 expertise is indispensible, even to lawyers. The idea that article 76 is
47 simply law and only law is untenable and unworkable. Indeed, it is absurd.
48

[32] I.C.J., Judgment, 24 February 1982, *Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Reports 1982,* p. 57, para. 66 – caractères droits ajoutés.
[33] ITLOS/PV.11/13 (E), p. 26, lines 36-41 (Mr. Boyle).

1 I could not put it better than that myself, Mr President. It is for that reason also that
2 the CLCS should make recommendations *before* States (no doubt the legal experts
3 of States), and, if necessary, the competent bodies for the settlement of disputes,
4 including the Tribunal, can draw the appropriate conclusions from the "entitlements"
5 resulting from the recommendations of the Commission.
6
7 However, as Professor Boyle says, "we have our experts, so why the devil don't you
8 have yours?" There are two answers to that. The first is that we do. Myanmar
9 attached to its Counter-Memorial the summary of its written submission to the CLCS
10 concerning the continental shelf dated 16 December 2008;[34] it appears as Annex 16.
11 As stated, this submission was with the assistance of Mr Sivaramakrishnan Rajan, a
12 doctor of geology and geophysics, project director at India's National Centre for the
13 Antarctic, and current member of the CLCS[35], and Mr N K Thakur, a doctor of
14 geophysics and former member of the Commission[36]. Simply put, unlike
15 Bangladesh, we did not think it appropriate to introduce our own consultants as
16 independent experts. That being so, in spite of the show put on by our opponents
17 revelling in the contributions of their experts, if we left aside the question of
18 geological discontinuity, which is not relevant, I do not see a great deal of difference
19 between the information appearing in the summary of Myanmar's submission to the
20 CLCS and Annex 16 to the Counter-Memorial, and what Dr Parson pleaded last
21 week on behalf of Bangladesh, relying on their consultants' reports. The second, and
22 in our eyes more persuasive, reason why it did not seem to us practical to inundate
23 the Tribunal with scientific data is that it is not enough for the Parties to provide
24 information on their respective submissions to the Commission for them to establish
25 a title – and I said title and not entitlement -- to the continental shelf beyond 200 M.
26
27 As I said during the first round, Members of the Tribunal, Bangladesh delights in
28 showering you with praise and outdid itself in flattery in the second round. I am not
29 sure that this is how you win cases. In any event, I hope that it is not the case. In
30 consideration of which, without fawning, I can say that I have no difficulty in going
31 along with Professor Boyle when he stated that the Tribunal is capable of taking
32 scientific data into account when it makes its judgments. He said, (In English) "there
33 is nothing unusual about this. Despite what counsel on the other side might urge
34 upon you, the application of science to law" (or law to science, if Daniel Müller
35 prefers it) "is what courts do all the time."[37] (Interpretation continued) I am sure that
36 there is no objection whatsoever to a judicial body, starting with this Tribunal,
37 integrating into a legal decision any scientific considerations to which a treaty or
38 other legal rule may relate. However, that is not the question.
39
40 As I said, the problem was very well put by Professor Boyle, who, rather playing
41 against his own side, gave an excellent answer to this. It is that the Convention –

[34] CMM, Vol. II, Annex 16 – also available in: http://www.un.org/Depts/los/clcs_new/submissions_files/mmr08/mmr_es.pdf.
[35] For a *curriculum vitae* published in Internet, see http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/274/90/PDF/N0727490.pdf?OpenElement (French) or http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/274/89/PDF/N0727489.pdf?OpenElement (English).
[36] For a *curriculum vitae* published in Internet, see http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/226/81/IMG/N0222681.pdf?OpenElement (French) or http://www.un.org/depts/los/meeting_states_parties/documents/splos_81e.pdf (English).
[37] ITLOS/PV.11/14 (E), p. 2, lines 24-26 (Mr. Boyle); see also : ITLOS/PV.11/14 (E), p. 4, lines 44-48 and p. 5, lines 1-8 (Mr Akhavan).

1 and I freely admit that the Tribunal is the guardian of the Convention – provides that
2 entitlement to a continental shelf beyond 200 M cannot be determined except on the
3 basis of a recommendation of the CLCS. This can clearly be seen in the texts of
4 article 76(8) and article 7 of Annex II of the Convention. This is necessary so that
5 States and the Tribunal may be enlightened by recommendations prepared by truly
6 independent experts; and, contrary to Professor Akhavan's affirmation[38], there are
7 no hierarchical relations between the Tribunal and the Commission. They have
8 complementary roles to play. The last word, of course, rests with the former, that is
9 the Tribunal, in terms of lateral delimitation when the titles of two States overlap.
10
11 Of course, Members of the Tribunal, we fully maintain that you have jurisdiction to
12 adjudicate a dispute concerning lateral delimitation between States that can advance
13 a claim to a part of the continental shelf beyond 200 M of their coasts, but we also
14 fully maintain that you can exercise this jurisdiction only after the Commission has
15 rendered recommendations to the States involved, which it is charged to do. It is only
16 when such titles have been established and the claims of the States in question
17 overlap that the Tribunal can exercise the jurisdiction that it in principle possesses in
18 such matters. However, prior to that, there is simply no dispute to be adjudicated on
19 between the two States.
20
21 Professor Akhavan - who did not seem to shed any new light on the problem relating
22 to this point with which we are now dealing - put forward an argument that, at first
23 sight, has a semblance of novelty. However, after pointing out that one could list 14
24 bilateral agreements on the delimitation of the continental shelf beyond 200 M, my
25 opponent asserted that, according to our line of reasoning, one would have to admit
26 that,
27
28 (In English) the states concerned have acted without lawful authority, and
29 these agreements would have to be deprived of any legal effect.
30
31 and that
32
33 [t]his is extensive practice by significant states, on any view. It is practice
34 that constitutes objective evidence of the understanding of the parties as
35 to the meaning of the procedure under article 76(8). If states can reach
36 bilateral agreement on delimiting their outer continental shelves lawfully
37 and without prejudice to the role of the CLCS, why cannot this Tribunal?[39]
38
39 I have three comments on this new argument, Mr President.
40
41 First of all, if an agreement exists, it is because there is no dispute between the
42 signatory States – which is not the case in these proceedings; paragraph 10 of
43 article 76 of the Convention and article 9 of Annex II are not relevant to such States.
44
45 Secondly, such agreements are concluded without prejudice to the jurisdiction of the
46 CLCS, and I refer to the tripartite agreement between Denmark and the Faeroes,
47 Iceland and Norway, of 20 September 2006, on the delimitation of the continental
48 shelf beyond 200 M in the southern part of the 'Banana Hole' of the North-East

[38] ITLOS/PV.11/14 (E), p. 5, lines 31-39 (Mr Akhavan).
[39] ITLOS/PV.11/14 (E), p. 9, lines 28-31 and p. 10, lines 1-6 (M Akhavan) – footnote omitted.

Atlantic. Articles 4 and 8 of this agreement, in particular, relate to the role to be played by the CLCS.[40]

Thirdly, even if the Tribunal and the Commission are not in a hierarchical relationship, it is hard to imagine that you could decide that if the CLCS were to adopt recommendations incompatible with your judgment or the implications of that judgment, your judgment could be challenged in disregard for the principle of *res judicata in order to respect the Commission's recommendations*.

As for the rest, Mr President, there is nothing new under the sun. It is true that the sun is often very shy in Hamburg, but it honours us today with its presence. Professor Akhavan restated, without much change, the argument that Bangladesh put forth in the first round, and I will confine myself to replying to this in somewhat telegraphic style, without referring to my own pleadings of 20 September.[41]

First of all, we would be confusing the concept of delineation, that is external delimitation, and delimitation *stricto sensu*, that is lateral delimitation[42]. No, Mr President, it is precisely because we attach the utmost importance to this distinction that we are convinced that only once entitlement is established can a dispute between opposing claims arise and the Tribunal, or another competent body under Part XV, adjudicate the lateral delimitation of the part of the continental shelf beyond 200 M. Let me add that my esteemed opponent concedes that the Tribunal cannot "delineate" the continental shelf and stresses that (In English) "Bangladesh has not come to this Tribunal to delineate its outer limit."[43] Duly noted, but, without a title to the continental shelf beyond 200 M, there is nothing to delimit.

Secondly, our plea of inadmissibility would conflict with the principle of the relative authority of *res judicata* and your future decision would be *res inter alios acta* with regard to India.[44] Perhaps, but what has this to do with this point of the argument? Incidentally, let me recall that according to the ICJ "where the maritime areas of several States are involved, the protection afforded by article 59 of the Statute [establishing the principle of *res judicata]* may not always be sufficient."[45]

Thirdly, another recurrent argument of Bangladesh is that the CLCS can make only recommendations to States.[46] However, my opponent has merely alluded to this without expanding upon it. Perhaps I have succeeded in convincing him that these recommendations are formal legal acts without which the outer limits adopted by the States would not be enforceable vis-à-vis third parties[47]. Having said that, I have no problem with the idea that once the Commission has taken a position, it is up to the State concerned to determine the outer limits of its continental shelf "on the basis of

[40] Colson A. D. & Smith R. W., *International Maritime Boundary*, Leiden/Boston, Martinus Nijhoff, pp. 4546-4549.
[41] ITLOS/PV.11/11 (E), pp. 7-15 (A. Pellet).
[42] ITLOS/PV.11/14 (E), p. 5, lines, 25-39 (Mr Akhavan).
[43] ITLOS/PV.11/14 (E), p. 5, lines 20-21 (Mr Akhavan).
[44] ITLOS/PV.11/14 (E), p. 5, line 17, p. 6, line 36, p. 7, line 29-30 and 33-38 (Mr Akhavan).
[45] I.C.J., Judgment, 10 October 2002 *The land and maritime boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Reports 2002,* p. 421, para. 238.
[46] ITLOS/PV.11/14 (E), p. 4, lines 44-46 (Mr Akhavan).
[47] See ITLOS/PV.11/11 (E), p. 10, lines 32-34 (A. Pellet).

1 these[the Commission's] recommendations." One inevitably comes back to this
2 point.
3
4 Fourthly, according to Mr. Akhavan, if we had to await the Commission's decision,
5 the matter could not be settled until 2035.[48] First of all, this is untrue[49]. Secondly,
6 Bangladesh, having waited until nearly the eleventh hour to make its submission,
7 can only blame itself if the submission cannot be considered immediately, since it
8 must await its turn in the queue. If the Tribunal were to draw a maritime boundary
9 between Myanmar and Bangladesh beyond 200 M - which it is not empowered to do-
10 it is clear that recognizing the title of two States in this way would mean completely
11 bypassing the Commission
12
13 Finally and most important – it bears repeating - the matter will be solved in a
14 different way since the limit between the continental shelf of the two countries does
15 not reach or pass the 200 M limit and the problem simply does not arise.
16
17 This is precisely what happened in the case of *Barbados v Trinidad and Tobago*[50]
18 that Professor Akhavan accuses us of overlooking,[51] which is rather surprising[52],
19 inasmuch as Professor Crawford complained that we talked about it too much.[53]
20
21 Mr President, with all due respect to this Tribunal, in the current state of affairs, the
22 Tribunal cannot decide on a very hypothetical maritime boundary determining the
23 extent of the respective rights claimed by the Parties but not yet established beyond
24 the limit of 200 M. Once again, Members of the Tribunal, this does not mean that you
25 will not be called upon to define, in accordance with your jurisprudence, the
26 principles applicable to the delimitation of the continental shelf beyond this limit for
27 present and future generations, as our opponents insistently invite you to do, and
28 such demagoguery[54]. It simply means that in the present case and at this stage the
29 conditions are not met for you to do so.
30
31 That is why I believe that no one can take offence at our response to the first
32 question put by the Tribunal on the subject of the delimitation of the continental shelf
33 beyond 200 M. Apart from the fact that it would be very strange indeed not to
34 respond directly to a question, as Professor Crawford reproached me (in his words:
35 "Professor Pellet was explicit in failing to answer the question" [55]), it seems to me
36 that the rather lengthy pleadings that Daniel Müller and I devoted to this matter
37 speak volumes.

[48] ITLOS/PV.11/14 (E), p. 7, line 7 and p. 10, lines 12-41 – p. 11, lines 1-34 (Mr Akhavan).
[49] See ITLOS/PV.11/11 (E), p. 12, lines 29-30 (A. Pellet).
[50] Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the *delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, *R.I.A.A.* Vol. XXVII, p. 242, para. 368.
[51] ITLOS/PV.11/14 (E), p. 11, lines 36-38 (Mr Akhavan).
[52] ITLOS/PV.11/8 (E), p. 32, lines 9-26 (A. Pellet), ITLOS/PV.11/9 (E), p. 1, lines 43-48, p. 2, lines 1-15, p. 3, lines 19-27 (A. Pellet), p. 36, lines 42-45 and p. 37, lines 1-5 (Mr Forteau), ITLOS/PV.11/10 (E), p. 6, lines 38-45, p. 7, lines 1-21 and 43-35, p. 8, lines 1-25 (Mr Forteau), p. 18, lines 13-18, p. 19, lines 1-2 and p. 20, lines 28-29 (Sir Mr. Wood) and ITLOS/PV.11/11/Corr.1 (E), p. 12, lines 2-25 (A. Pellet.).
[53] ITLOS/PV.11/14 (E), p. 19, lines 9-10 (Mr. J. Crawford).
[54] See in particular ITLOS/PV.11/14 (E), p. 12, lines 12-39 (Mr Akhavan); see also in particular: ITLOS/PV.11/12 (E), p. 5, lines 27-31 (Mr L. Martin).
[55] ITLOS/PV.11/14 (E), p 22, lines 1-2 (Mr Crawford) – caractères droits ajoutés.

It is true, on the other hand, that we would be incapable of plotting a boundary line in this area; this would be in absolute contradiction to our deep conviction that Bangladesh has absolutely no entitlement there.

Mr. President, I really believe that I have gone as far as possible in saying that if the problem arose - *quod non* - it would be necessary to apply the same rules of lateral delimitation which must be applied on this side of this limit and which Bangladesh interprets and applies so badly.

Moving on swiftly, Mr. President, this brings me, with your permission, to the problems concerning the angle bisector method and the way that Bangladesh applies this. It will not take me too long.

The Applicant praised it to the skies during the written procedure and talked about it during the first round of oral pleadings but largely neglected it in the second. You could call this, without exaggeration, the repudiated bisector. *La Bisettrice Ripudiata* would be a nice title for an opera.

Starting at the end, in the Summation of Bangladesh's Case made by Professor Crawford on Thursday afternoon, the word "bisector" appeared only once[56] – once in ten pages, Mr President. I will quote the relevant passage – it will not take me long.

> (In English) There are other methods [than equidistance/special circumstances], including angle bisectors, and they may be appropriate and they have been recently used.[57]

(Interpretation continued) That is it; that is all that our very eminent counsel for Bangladesh, given the job of summing up his client's case – and we suppose that he would emphasize the salient points - that is all he has to say on the bisector. In the written submissions and in the first round of oral pleadings the Applicant went to great efforts to establish that in this case the bisector was the only possible method to achieve an equitable result. I quote my friend Mr. Reichler:

> (In English) The only way to achieve an equitable solution in this case is … to employ the angle bisector methodology.[58]

(Interpretation continued) Furthermore, Bangladesh's submissions have remained unchanged. It is essentially requesting the Tribunal to decide that,

> (In English) the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215º.[59]

(Interpretation continued) This is rather extraordinary, Mr President, because without a bisector this submission has no basis. Moreover, this is quite consistent with what preceded, when Professor Crawford invites you, Members of the Tribunal, right at

[56] ITLOS/PV.11/14 (E), p. 18, line 9 (Mr Crawford).
[57] ITLOS/PV.11/14 (E), p. 18, lines 8-10 (Mr Crawford), emphasis added.
[58] ITLOS/PV.11/4 (E), p. 32, lines 19-23 (Mr Reichler).
[59] ITLOS/PV.11/4 (E), p. 24, lines 30-31 (H.E. Mr. Mohamed Mijarul Quayes).

the end of the presentation of Bangladesh's arguments , and just before coming back to the questions put by the Tribunal, to adjust "the line", but he is wary of saying what sort of line he is talking about. And all that goes before suggests that it is the equidistance line rather than the bisector that he is talking about.[60] Of course, with weakening conviction, counsel for the Applicant continues to affirm:

> (In English) Bangladesh's preferred way [to address St Martin's Island] is a transposed angle bisector.[61]

(Interpretation continued) This no longer comes from the heart and they immediately turn to serious matters: arguments to try and convince you that you certainly have to have recourse to the standard equidistance/relevant circumstances method, but have to interpret it in their very strange way. [62] Mathias Forteau will demonstrate this in a minute.

I have to say that Professor Crawford nevertheless devoted one third of a fairly short presentation to the bisector – that is only three pages of the PV[63] can follow this step by step – it will not take a lot of time.

The first point is that the reason for using the bisector would be:

> (In English) 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.[64]

(Interpretation continued) No, Mr President, the only reason that there could be for using a bisector is if it were impossible to apply the standard method, which, if need be, would later allow the excessive rigour of equidistance to be rectified[65], if it is excessive. And, in fact, our opponent knows that its proposal is a subjective makeshift job and is not consistent with with the law in force. They admit to this when they complain that,

> 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.[66]

Mr President, I am not ashamed to say that I love the law ... especially when I am a pleading before a Tribunal whose job is to apply it. The second point, and I quote again:

[60] ITLOS/PV.11/4 (E), p. 20, lines 6-10 (Mr Crawford).
[61] ITLOS/PV.11/13 (E), p. 2, lines 38-39 (Mr Reichler); see also p. 12, lines 45-47.
[62] See in particular ITLOS/PV.11/13 (E), p. 2, lines 39-42; see also p. 8, lines 46-47 and p. 9, lines 1-6 or 31-33; p. 12, lines 8-9 or 32-42 (Mr Reichler) or p. 21, lines 43-45 and p. 22, lines 1-4 (Mr Crawford).
[63] ITLOS/PV.11/13 (E), pp. 21-24.
[64] ITLOS/PV.11/13 (E), p. 21, lines 41-43 (Mr J. Crawford).
[65] ITLOS/PV.11/7 (E), p. 6, lines 3-7 (A. Pellet), ITLOS/PV.11/9 (E), p. 8, lines 20-22 and 32-42 and p. 9, lines 1-2 (A. Pellet) and ITLOS/PV.11/10, p. 28, lines 22-28 and p. 32, lines 17-21 (A. Pellet).
[66] ITLOS/PV.11/13 (E), p. 22, lines 13-15 (Mr Crawford).

1 The transposition of the bisector to the end of the territorial sea
2 boundary …[67]
3
4 Mr. Crawford has a little more to say about this, but the only real novelty is a fairly
5 obscure allusion to making pizzas at sea.[68] For the rest, it is just the same
6 references to *Tunisia v. Libya*, *Gulf of Maine* and *Guinea-Guinea Bissau.*[69].
7
8 However, there is a translation of an azimuth line in *Tunisia v. Libya*; but it was
9 a rather special bisector because the angle that it divided was completely defined by
10 the coasts of only one of the Parties to that case, and that is Tunisia.[70]
11
12 In *Gulf of Maine* the ICJ did not transpose a line; it constructed it, starting from
13 a point that is not situated on the coasts of the Parties.[71] If I understood the pizza
14 metaphor correctly, this is what Professor Crawford was conceding through it.
15
16 In *Guinea-Guinea Bissau* the arbitral tribunal did not shift the perpendicular to the
17 "regional" coast that it had invented; it did this simply from a point situated 12 M from
18 the Island of Alcatraz.[72]
19
20 The third and last point – and I am faithfully following the presentation by Professor
21 Crawford:
22
23 (In English) The larger question of the choice of the line to represent
24 Bangladesh's coastal frontage ….[73]
25
26 (Interpretation continued) Here too, amongst our friends, we see perfect
27 arbitrariness. I quote again Mr Crawford:
28
29 (In English) We chose to draw a line joining the two land boundary
30 termini.[74]
31
32 (Interpretation continued) "We chose"! To put it clearly, Bangladesh put forward what
33 it thought was a or *the* equitable solution. It draws this desirable line and then,
34 because the standard method does not accommodate its claims, it turns to a method
35 that has only been applied once recently in the judgment of the ICJ in *Nicaragua v.*
36 *Honduras*, for reasons which have strictly nothing to do with those put forward by
37 Professor Crawford,[75] who does not once quote the 2007 judgment in his purported
38 defense of the angle bisector. However, he does not hesitate to re-write the
39 judgment of 1969 in the *North Sea Continental Shelf* cases, which are so close to the
40 heart of our Bangladeshi friends, by ascribing to the ICJ Judges the drawing of

[67] ITLOS/PV.11/13 (E), p. 22, lines 20-21 (Mr Crawford).
[68] ITLOS/PV.11/13 (E), p. 22, lines 33-40 (Mr Crawford).
[69] ITLOS/PV.11/13 (E), p. 22, lines 30-33 and 42-45 (Mr Crawford).
[70] See I.C.J., Judgment, 24 February 1982, *Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) I.C.J. Reports 1982*, p. 89, para. 129.
[71] See I.C.J., Judgment, 12 October 1984, *Delimitation of the Boundary in the Gulf of Maine Area, I.C.J. Reports 1984*, p. 333, para. 213.
[72] See *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, decision of 14 February 1985, *RIAA*, vol. XIX, p. 190, para. 111.
[73] ITLOS/PV.11/13 (E), p. 23, lines 4-5 (Mr Crawford).
[74] ITLOS/PV.11/13 (E), p. 23, lines 5-6 (Mr Crawford) – emphasis added.
[75] V. ITLOS/PV.11/10 (F), pp. 28-32 (A. Pellet).

1 a virtual bisector line[76], which they neither drew nor envisaged. This may be the
2 reasoning of the Bangladesh counsel, but it is not in this way that law must be
3 applied.
4
5 I would like to outline our position briefly,[77] Mr President, a position based on law –
6 even if Professor Crawford does not like this. I do still have a small weakness for
7 law. So, very briefly....
8
9 You cannot have recourse to the bisector unless there are "compelling reasons" that
10 exclude recourse to the standard method, which is equidistance/relevant
11 circumstances. Secondly, this is not the case here. Thirdly, if, nonetheless, you
12 wanted to draw a bisector line, it should be done properly; that is by regarding as
13 relevant the coasts that allow the two sides of the angle that the bisector will divide to
14 be determined (and they are not the same coasts that are relevant if you are
15 constructing an equidistance line or non-disproportionality test, on the one hand, and
16 drawing a bisector, on the other). Fourthly, here it is a case of coasts, which are
17 more or less straight, of two countries, extending about 100 km on each side of the
18 mouth of the Naaf River, which you can see in red on the graphic.
19
20 I understand, Mr. President, that seeing this sketch-map our opponents preferred to
21 back-pedal and, trying at the same time not to go back too much on what they had
22 said, they, *in petto, repudiated the angle bisector*. You cannot swap from one
23 method to another because suddenly you realise that you have got everything
24 wrong. You cannot justify a predetermined solution by having recourse to just any
25 method – omitting a coast that bothers you here, and then adding one that suits you
26 there.
27
28 The most generous interpretation of this strategy would be to see it as calling upon
29 you to decide on the basis of distributive or corrective inequity, that is *ex aequo et*
30 *bono*. However, Members of the Tribunal, that is something that you cannot do.
31 Bangladesh has said that it agrees on this, but this also shows the extent to which
32 our opponents, who are nonetheless friends, have not taken the law seriously in this
33 case.
34
35 By way of conclusion, a little parody of the stances of *Le Cid*[78], called to the rescue
36 by Professor Akhavan[79]:
37
38 Nature, island and concavity,
39 Equidistance or equity,
40 All forces joined to limit me,
41 Relevant or special
42 No circumstance will allow me beyond 200 M to advance.
43
44 Before the Tribunal salvation I seek,
45 Bisector I invoke,
46 Myanmar wraps me back,
47 Finally, its evil equidistance I beseech.

[76] ITLOS/PV.11/13 (E), p. 23, lines 17-48 and p. 24, lines 1-3 (Mr Crawford).
[77] ITLOS/PV.11/10 (E), pp. 24-35 (A. Pellet) and ITLOS/PV.11/11 (E), pp. 1-7 (C. Lathrop).
[78] Act I, scene 6.
[79] ITLOS/PV.11/14 (E), p. 11, lines 26-28 (Mr Akhavan).

[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.]

I know, Mr. President, that this does not do justice to the great Corneille, and I hope that my talents as a lawyer, as modest as they are, are less limited than my gift as poetaster. However, I could not avoid the poem of W.H. Auden, as revised by my *complice*, friend and adversary James Crawford[80] – a poem to which I do not object: "Law is the law."

(In English) I would add that justice must be done according to the law.

(Interpretation continued) Essentially, the position of Bangladesh at this end point of our case seems to me to be more or less well reflected by my bit of doggerel.

My colleagues, Mathias Forteau and Coalter Lathrop will address this more seriously.

Before that, Mr President, I would be grateful if you would be so kind as to give the floor to Sir Michael Wood so that he can say a few words on the "non-agreement" of 1974 on the territorial sea.

Members of the Tribunal, I would like to thank you for your courteous and kind attention.

THE PRESIDENT: Thank you, Mr Pellet. I give the floor to Sir Michael Wood.

SIR MICHAEL 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"[81]. 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 sea[82]. 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.

[80] ITLOS/PV.11/14 (E), p. 12, line17 (Crawford).
[81] ITLOS/PV.11/14 (E), p. 21, lines 36-38 (Crawford).
[82] ITLOS/PV.11/12 (E), p. 7, lines 30-32 (Boyle).

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 said[83]. 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-serving[84].

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"[85]. 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 minutes[86]. 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.[87] 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 concluded[88]. 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"[89]. 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

[83] *Ibid.*, p. 13, lines 1-4 (Sands).
[84] *Ibid.*, p. 7, lines 42-47 and p. 8, lines 1-25 (Boyle).
[85] *Ibid.*, p. 11, lines 25-27 (Boyle).
[86] *Ibid.*, p.11, lines 30-34 (Boyle).
[87] ITLOS/PV.11/8 (E), p. 11, lines 11-19 (Sthoeger).
[88] ITLOS/PV.11/7 (E), pp. 22-36 (Wood) and ITLOS/PV.11/8 (E), pp. 1-5 (Wood).
[89] ITLOS/PV.11/12 (E), p. 7, lines 31-32 (Boyle).

1 treaty (which they had not), such a commitment would not be an article 15
2 agreement.
3
4 Second, Professor Boyle has, finally, addressed the actual terms of the 1974
5 minutes.[90] But what did he say? He said that the minutes contain both delegations'
6 agreement to points 1 through 7[91], not just that of Bangladesh. But - and this point I
7 made in my first presentation - while the 1974 minutes contain the consent of
8 Bangladesh's Government to the proposed line, any reference to the agreement of
9 the Myanmar Government was removed from the draft prepared by Bangladesh, and
10 remains absent[92].
11
12 Professor Boyle tries to find this missing consent in the 2008 minutes[93]. The
13 weakness of this attempt to establish the binding force of a document by praying in
14 aid an equally non-binding document signed by heads of delegation some 34 years
15 later is obvious; yet it comes as little surprise, in light of the fact that Bangladesh
16 itself only began seriously to assert that the 1974 minutes constituted a binding
17 agreement some 36 years after the event, in the Memorial produced by its lawyers
18 for the present proceedings.
19
20 I now come to the question of free and unimpeded access. On Thursday, Professor
21 Crawford, somewhat strangely, accused Mr Lathrop of not answering the Tribunal's
22 question about access. That was rather unfair; it overlooked the fact that I had
23 already answered that question[94]. Be that as it may, Professor Crawford went on to
24 say the following:
25
26 "Well, you have heard what the Foreign Minister and Agent had to say on Day 1[95].
27 I thought she was clear. What the Foreign Minister and Agent says in response to
28 a direct question from an international tribunal commits the State. That is the lesson
29 of the *Nuclear Tests* cases. So there is your answer."[96]
30
31 So, Professor Crawford. However, while the Foreign Minister's statement may have
32 been clear to Professor Crawford, it was not clear to us[97].
33
34 The Bangladesh side has once again sought to reassure Myanmar on the
35 continuance of its historic right, since 1948, of free and unimpeded access for
36 Myanmar ships to and from the Naaf River. Again, what they have said is equivocal.
37 It is hardly reassuring to Myanmar that Professor Boyle referred to this important
38 matter as "a complete red herring". He then asked, perhaps rhetorically, why
39 Myanmar had not raised it in negotiations between 1974 and 2008[98]. The short

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[90] *Ibid.*, p. 8, lines 27-42 and p. 9, lines 1-24; p. 10, lines 24-31 (Boyle).
[91] *Ibid.*, p. 8, lines 27-37 (Boyle).
[92] ITLOS/PV.11/7, p. 35, lines 33-35 (Wood).
[93] ITLOS/PV.11/12 (E), p. 7, lines 38-40 and p. 11, lines 13-20 (Boyle).
[94] *Ibid.*, p. 24, lines 2-47 (Wood).
[95] ITLOS/PV.11/2/Rev.1, p. 5, lines 23-29 (H.E. Dr Dipu Moni).
[96] ITLOS/PV11/14 (E), p. 21, lines 42-45 (Crawford) (footnotes omitted).
[97] ITLOS/PV.11/7 (E), p. 24, lines 2-47 (Wood).
[98] ITLOS/PV.11/12 (E), p. 10, lines 1-2 (Boyle).

1 answer is that Myanmar did raise it, many times[99]. Professor Boyle then referred to
2 the sentence that was introduced by the 2008 minutes, inserted, you will recall, into
3 the paragraph that recorded Myanmar's concerns, but not the Bangladesh
4 Government's agreement[100]. Professor Boyle claimed that Bangladesh had never
5 demanded that Myanmar vessels seek prior permission. Why, then, at the second
6 round of negotiations, the very round at which the 1974 minutes were signed, did
7 Bangladesh draw Myanmar's specific attention to its 1974 law expressly requiring
8 prior permission?[101] That law seems still to be in force[102]. Professor Boyle went on to
9 say that Bangladesh had "made unequivocally clear its acceptance of the right of
10 unimpeded innocent passage" - I repeat, "unimpeded innocent passage" - "for
11 Myanmar vessels in accordance with the 1982 Convention as agreed in 2008"[103].
12 That is yet another form of words, another unclear form of words, from a
13 representative of Bangladesh.
14
15 Mr President, Members of the Tribunal, I turn to the fourth point. Professor Boyle
16 referred the Tribunal once again to the *Qatar* v. *Bahrain* case. This time, he claimed
17 that the 1974 minutes were "considerably clearer and more precise" than the 1990
18 minutes in that case.[104] But he was unconvincing. To decide which of two very
19 different texts is "clearer and more precise" is a highly subjective matter. Is
20 Mallarmé's *Brise Marine* "clearer and more precise" than Shakespeare's eighteenth
21 sonnet? The minutes in *Qatar* v. *Bahrain* concerned submission to the jurisdiction of
22 the International Court; they did not embody - as is alleged by Bangladesh in our
23 case - the maritime delimitation itself. Professor Boyle took you to paragraph 2 of the
24 1990 minutes. He overlooked the preamble and paragraph 1, which read "The
25 following was agreed: (1) to reaffirm what was agreed previously between the two
26 Parties…"[105]
27
28 Looking at the actual terms of the 1990 minutes[106] the International Court noted the
29 unequivocal language of paragraph 1, containing the express agreement of both
30 sides, based on an undisputed agreement from 1987, to bring the matters in dispute
31 before the International Court of Justice. This agreement was expressed by the
32 signatures of the Foreign Ministers of both States and referred to the agreement of
33 the *Parties*, not the delegations, as in the 1974 minutes[107]. Paragraph 2 of the 1990
34 minutes also recorded the agreement of Qatar to the "Bahraini formula" that

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[99] 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) .
[100] ITLOS/PV.11/12 (E), p. 10, lines 9-12 (Boyle).
[101] 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).
[102] 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.
[103] ITLOS/PV.11/12 (E), p. 10, lines 18-21 (Boyle).
[104] *Ibid.*, p. 10, lines 31-33 (Boyle).
[105] *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.
[106] *Ibid.*, p. 121, para. 23.
[107] *Ibid.*, p. 121, para. 24.

1 contained the precise language of the Parties' joint submission to the Court; and a
2 clear timetable for mediation and subsequent adjudication[108]. The Court found that
3 "the 1990 minutes include a reaffirmation of obligations previously entered into"
4 adding to the previous adjudication agreement precise timetables and deadlines.[109].
5
6 Fifth, Professor Boyle also briefly discussed the context of the negotiations during
7 which the 1974 minutes were signed[110]. He referred to comments made by the
8 delegations on their respective interests in reaching the agreement[111]. With respect,
9 this does not add to Bangladesh's previous assertions concerning context.[112] As I
10 pointed out during the first round, that the Parties had an interest in the successful
11 conclusion of the negotiations is hardly novel; yet how this sheds light on what was
12 actually agreed is wholly unclear.
13
14 Mr President, Members of the Tribunal, Professor Boyle made much of the
15 introductory statement by Myanmar's Foreign Minister at the beginning of the sixth
16 round of negotiations in 1985[113]. Professor Boyle noted that the Minister "referred to
17 the Agreed Minutes signed in Dhaka with approval"[114]. From this, Professor Boyle
18 concluded that "Myanmar is now estopped from denying the authority of Commodore
19 Hlaing to conclude the 1974 minutes".
20
21 The Foreign Minister of Myanmar did indeed mention the 1974 minutes, which is
22 more than the Prime Minister of Bangladesh did on that occasion. But you have to
23 look at the context. Mr President, Members of the Tribunal, I would invite you to look
24 closely at the Minister's statement, on which Bangladesh now places such reliance.
25 That statement is at tab 6.4 in your folders. (Bangladesh has not produced any
26 account of its own of this meeting.)
27
28 As you will see, the Minister began by noting that six years had passed since the last
29 round of negotiations in 1979, and therefore, as he said: "It would be helpful to our
30 work if each of us were to begin by recounting briefly the positions it had taken on
31 the previous occasions."[115] He then noted that during the second round of
32 negotiations, the Myanmar delegation had decided, "subject to two conditions, to
33 accept instead a variation of the median line as the territorial waters boundary"[116]. It
34 was also at this point that the Minister referred to the full 12 M of St. Martin's Island,
35 as noted by Professor Sands, but that did not amount to any recognition of
36 entitlement in law. It was in the context of what, subject to conditions, was set out in
37 the Agreed Minutes, as something that could be concluded in an eventual treaty.[117]
38 The Minister was recapping what had happened in the earlier negotiating rounds.
39 You can see the part on the Agreed Minutes on the screen. The Minister immediately
40 went on to say: "Here I might recall the two conditions we had set forth in accepting

[108] *Ibid.*, p. 121, paras. 24-25.
[109] *Ibid.,* p. 118, para. 18.
[110] ITLOS/PV.11/12 (E), p. 8, lines 46-47 and p. 9, lines 1-12 (Boyle).
[111] *Ibid.*
[112] ITLOS/PV.11/3 (E), p. 3, lines 29-31 (Boyle).
[113] ITLOS/PV.11/12 (E), p. 11, lines 9-20 (Boyle) and p. 13, lines 18-20 (Sands).
[114] *Ibid.,* p. 11, lines 17-19 (Boyle).
[115] MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 3 (Annex 8).
[116] *Ibid.*, p. 4.
[117] ITLOS/PV.11/12 (E), p. 13, lines 18-20 (Sands).

1 the line proposed by Bangladesh."[118] He then mentioned these two conditions with
2 which you are familiar: unimpeded passage and the conclusion of a comprehensive
3 treaty delimiting the entire maritime boundary.[119] Notably, it was only when recalling
4 these conditions that the Minister referred to the Agreed Minutes.
5
6 It is clear, we say, that when one looks at the full account of what the Foreign
7 Minister of Myanmar actually said, it lends no support to Bangladesh's claims before
8 this Tribunal.

9
10 I would like now to take a look at what the Bangladesh Foreign Minister said in reply,
11 which is also found in tab 6.4 [120]. Mr Choudhury started by recalling what
12 Bangladesh believed were points of "substantial agreement between our two sides
13 on a number of essential points"[121]. He listed five such points. The 1974 minutes
14 were not among them. The fifth point is particularly relevant, however, since it
15 concerns the nature of the negotiations, and any understandings reached up to that
16 point. It is now on your screens, and it is in the middle of page 12 at tab 6.4. The
17 Foreign Minister said, in 1985:
18

> 19 Lastly, I believe we are agreed that in accordance with the well-
> 20 established rules covering such negotiations, between two
> 21 sovereign states neither side is prevented from raising new
> 22 proposals or looking at old proposals afresh and in new ways. Our
> 23 understanding is that international negotiations of this type are to
> 24 put it loosely without prejudice to either side until the conclusion of
> 25 an international agreement.[122]

26
27 Coincidentally, Professor Crawford expressed the exact same views on the nature of
28 negotiations in his closing remarks on Thursday[123]. Mr President, in other words,
29 "Nothing is agreed until everything is agreed". There is no more I need say.
30
31 Mr President, after the break, Professor Forteau will address you on what our
32 opponents had to say on special or relevant circumstances. Thank you very much for
33 your attention.
34
35 **THE PRESIDENT:** I think now the Tribunal will break for a period of thirty minutes.
36 We will be back by twelve.
37
38 (Short adjournment)
39
40 **THE PRESIDENT:** The hearing continues. I would like to give the floor to Professor
41 Mathias Forteau.
42

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[118] MCM, Vol. II, Burma-Bangladesh Maritime Boundary Delimitation Talks, Sixth Round, Speeches and Statements, 19-20 November 1985, p. 4 (Annex 8).
[119] *Ibid.*, p. 4-5.
[120] *Ibid.*, p. 4-5., p. 11.
[121] *Ibid.*
[122] *Ibid.*, p. 12.
[123] ITLOS/PV11/13 (E), p. 21, lines 20-23 (Crawford).

MR FORTEAU ***(Interpretation from French)*****:** Mr President, and Members of the Tribunal, this morning I will return to the question of relevant circumstances and special circumstances.

Having heard the counsel for Bangladesh last Wednesday and Thursday, it is clear that they have now had a complete change of heart as far as the second stage of the delimitation process is concerned. In the Memorial, in the Reply, during their first round of oral pleadings, the Applicant kept on pounding away and insisting on the fact that the crucial point in our case was the cut-off effect caused by the regional concavity – and I would like to insist on this qualifying adjective – the regional concavity of the Bay of Bengal. Their insistence on the *North Sea Continental Shelf* cases cannot be explained in any other way.

The cut-off effect constituted the only ground raised by Bangladesh in is Memorial as the "reasons" which justified its application[124]. Bangladesh then protested against the fact that the equidistance line enclaved it in a zone of just 137 M[125], which does not correspond at all to reality, as we know now.

We refuted this allegation in our written and in our oral pleadings, demonstrating that modern case law, in particular in the cases of *Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago*, does not consider that such a cut-off effect constitutes a relevant circumstance.[126]

Equidistance enclaves Cameroon in less than 30 M and the ICJ decided unanimously in 2002 that the equidistance line is the equitable line.

Trinidad and Tobago claims access to the continental shelf beyond 200 M, which was not afforded to it by an equidistance line. In 2006, the arbitral tribunal decided unanimously that there was no need to adjust the equidistance line for this reason.

We expected Bangladesh to refute the evidence that we raised *vis-à-vis* the purported inequity of the cut-off effect and that they would do this point by point. We expected our opponents to explain to us why the precedents of *Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago* did not reflect international law as it stands today.
We expected that Mr Martin would address them when he dealt with the question of concavity. No, he said, Professor Crawford would have "a bit more" to say about them later, before adding, in all modesty, "I will not burden the Tribunal by saying anything more [on these cases]"[127].

We expected, on Thursday afternoon, that Professor Crawford would shed some light on this but he did not feel that he should spend more than a few minutes on these two cases, a few minutes during which he said absolutely nothing concrete on them, nor did he try to counter the conclusions that we drew from them. We take note[128].

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[124] Memorial of Bangladesh, paras. 1.6-1.16.
[125] *Ibid.*, para. 1.12.
[126] ITLOS/PV.11/10, pp. 6 *et seq.* (Forteau).
[127] ITLOS/PV.11/12 (E), p. 3, lines 3-6 (Martin).
[128] ITLOS/PV.11/14 (E), pp. 18-19, lines 37-47 and 2-22 (Crawford).

Mr Sands and then Mr Reichler, as far as they are concerned, discussed at great length the effect to be given to St Martin's Island – 40 minutes for one and more than an hour for the other – and this strange balance can be explained by the new strategy adopted by the Applicant. This consists of two propositions.

(i) The equidistance line will lead to a dramatic cut-off effect.

(ii) In order to compensate for this, St Martin's Island must be given full effect on the delimitation line; and this would not be sufficient and it is necessary to compensate for the compensation by shifting the line once again seawards.

This new strategy is no more admissible than the preceding one for four reasons.

- The premise upon which it is based still does not correspond to current case law. The cut-off effect is not a relevant circumstance.

- Therefore, St Martin's Island cannot be used to compensate for something which does not have to be compensated. Modern case law is clear. A cut-off effect is not a relevant circumstance necessitating an adjustment of the equidistance line.

- St Martin's Island cannot, in any case, be given any effect in a delimitation between continental masses beyond the territorial sea. Here again the case law is very clear on this point.

- This is even truer here since the effect given to this island would lead to a grave distortion in the course of the delimitation line, which is precluded by international law.

- However, this is exactly what the Applicant wants you to do. Because, apparently, he is afraid of not being well understood by you, Professor Crawford twice outlined a compromise solution which he is asking you to adopt. In order to compensate for the effect caused by the concavity, you should use St Martin's Island, including, he said, even if it is unrelated to the cause of the alleged inequality. I would like to underline this revealing slip "even if [it] is unrelated to the cause of the inequality" – the "inequality" and not the lack of equitableness . The terms are ever evocative of the true nature of the claim by the Applicant. [129] This new strategy adopted by the Applicant is very alien to a judicial delimitation exercise. It does not change anything as regards the substance of the problem.

St Martin's Island cannot compensate for the effect of concavity for which modern case law does not require any compensation. "Context is key" is what our opponents[130] have repeated time and again, but the key to what?

If the equidistance line and the very relative cut-off effect that it produces (I would like to recall that Bangladesh has access to 182 M, more or less). If the equidistance line is not inequitable, which door do we need to open? I would point out that the

[129] ITLOS/PV.11/13 (E), pp. 21-22, lines 43-45 and 1-4.
[130] ITLOS/PV.11/12 (E), p. 6, line 19 (Martin).

1 door of equity is not a door or an option open to your Tribunal. Neither the arbitral
2 tribunal in 2006 nor the International Court of Justice in 2002 considered that an
3 adjustment of the equidistance line was required, and why should this be any
4 different in the present case?
5
6 With your permission, Mr President, I would like to come back to these various points
7 and do so around the two following propositions.
8
9 The cut-off effect created by a regional concavity is not always a relevant
10 circumstance.
11
12 As a result, it is not necessary, and in fact it is not possible, to make use of St
13 Martin's Island for compensatory ends.
14
15 I will be very brief on concavity because our opponents have been very subdued as
16 far as this point is concerned.
17
18 Mr Martin, first of all, was slightly ironic about the comments made by Professor
19 Pellet on the abstract sketch-maps on concavity[131]. But we will persist: the situation
20 in the present case is the case of the third, and not the fourth sketch-map. Access by
21 Bangladesh to maritime zones is not less than 100 M; it is around 182 M.
22
23 As far as law is concerned, Bangladesh's arguments have literally vanished before
24 our eyes.
25
26 As far as State practice is concerned, first of all, Mr Martin limited himself to giving a
27 mathematics lesson. Five agreements is not four[132]. So be it, but we are still awaiting
28 a legal response to our arguments on the irrelevance of these few agreements. I
29 would like to say that the fifth agreement concerned Venezuela and Trinidad and
30 Tobago, which I have spoken about at length, commenting on the 2006 award
31 between Trinidad and Tobago and Barbados[133], and Mr Martin said nothing about
32 this.
33
34 Fortunately, Mr Martin did not come completely empty-handed last Wednesday. He
35 had found, in the Reply of Bangladesh, the arbitration in *St Pierre et Miquelon*,
36 which, he affirmed, had given the "two small French islands" which are stuck in a
37 concavity, access to 200 M. Mr Martin, however, did not think that it was worth
38 saying any more on this case. He merely said, knowingly, that "at a certain point ...
39 there is value in brevity". Members of the Tribunal, he cannot be serious[134].
40
41 We had explained in our Rejoinder why this arbitration did not support Bangladesh's
42 claim. On the contrary[135]. Mr Martin preferred not to say anything about this. Please
43 allow me to do so instead of him. You will find an explanatory sketch-map under tab
44 6.11 of the Judges' folder.
45

[131] *Ibid.*, p. 2, lines 1-8 (Martin).
[132] ITLOS/PV.11/12 (E), p. 3, lines 12-14 (Martin).
[133] ITLOS/PV.11/10 (F), pp. 7-10 (Forteau).
[134] ITLOS/PV.11/12 (E), p. 3, lines 24-28 (Martin).
[135] Rejoinder of Myanmar, paras. 6.29-6.30; *RIAA*, vol. XXI, Decision of 10 June 1992.

The case of Saint Pierre et Miquelon concerned, above all, a State surrounded on both sides by a single State. As the arbitral tribunal stated in paragraph 26 of its award, the French islands of St Pierre et Miquelon are situated within a concavity which is surrounded only by the Canadian coast. In our case, I would repeat: Myanmar is not India.[136]

Finally, it is misleading you to suggest, as Mr Martin did, that the arbitral tribunal had "given" a corridor to France as compensation for the inequity created by the concavity. It is exactly the opposite that happened. It was France that claimed the application of equidistance and not Canada.

The arbitral tribunal limited the maritime space that France claimed by making a very significant adjustment to the delimitation line, so that ultimately France was not "given" a corridor; it saw its maritime space reduced significantly to this corridor.

The tribunal had refused to give the French islands full effect as far as their projection seawards was concerned and only allowed them a narrow corridor, which the legal writers have largely agreed is entirely symbolic effect.[137]

Mr Martin was even less verbose on the case law which is directly relevant in our case. He only made two affirmations which are both unfounded. First of all, in our case account must be taken of the coastal façade of India so that you see "the whole coast in context"[138], but the case law does not adopt this global approach. It does not take account of the "regional concavity".

In the case of the *Territorial and Maritime Dispute between Nicaragua and Colombia*, on 4 May of last year, the ICJ recalled, in connection with the Honduras' application for permission to intervene, that delimitation must be "determined pursuant to the coastline and maritime features of the two Parties".[139]

The Court here takes up the argument of the Counsel for Colombia, according to which, and I quote, "maritime boundaries are established on a relative, relational basis, by each State *vis-à-vis* each other's relevant coastal State"[140].

The International Court of Justice had already firmly emphasized this in the *Cameroon v. Nigeria* case.

> (...) 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, and is not relevant to the issue of delimitation before the Court.[141]

It is the same for the present case.

[136] ITLOS/PV.11/10 (F), p. 1, lines 36-46 (Forteau).
[137] Rejoinder of Myanmar, p. 155, note 414.
[138] ITLOS/PV.11/12 (E), p. 2, lines 25-26 and 38-39 (Martin).
[139] ICJ, Judgment of 4 May 2011, [www.icj-cij.org], para. 73.
[140] CR 2010/14, hearings of 13 October 2010, [www.icj-cij.org] para. 23.
[141] Judgment of 10 October 2002, *ICJ Reports 2002,* p. 446, para. 299.

1 Secondly, the case law and practice show, according to Mr Martin, “a clear
2 international consensus”. When a State is in a concavity between two others,
3 equidistance cannot lead to an equitable result[142]. This is incorrect again. Do I need
4 to mention the cases of *Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago*
5 again?
6
7 What does Bangladesh have as further arguments? The cut-off would be “dramatic”,
8 claimed Mr Martin[143]. Repeating this a thousand times does not make the line
9 inequitable. No doubt Cameroon in its time, and Trinidad and Tobago more recently,
10 regretted their enclosure but this does not make the equidistance line inequitable.
11 Let me repeat: Equity is dependent on geography and fact, there are natural
12 inequalities. This is a fact which international courts and tribunals cannot change, as
13 long as it does not stem from a manifest disproportionality.
14
15 Mr President, Members of the Tribunal, under these circumstances, St Martin’s
16 Island should not be used as a compensatory variable, as the Applicant asks you to
17 do without any respect for methodology or applicable law.
18
19 According to Bangladesh, St Martin’s Island should be accorded a territorial sea of
20 12 M to the south and the west and should be given full effect in the delimitation of
21 the continental shelf and the EEZ. This position is untenable for at least two reasons.
22
23 First of all, no island has ever been treated this way in case law. Even the very rare
24 islands to which some effect has been given beyond the territorial sea have never
25 been given full effect. I mentioned last week that they only obtained this treatment for
26 reasons that have nothing to do with St Martin’s Island[144]. In all the other cases the
27 delimitation line of the territorial sea always meets the delimitation line of the
28 continental masses. In our case, it is point E. Bangladesh has not been able to
29 produce even one example to prove the contrary, whereas during its two rounds of
30 oral pleadings it has produced many examples which back up the position of
31 Myanmar on this point.
32
33 Bangladesh’s claim completely disregards the unique geographic location of St
34 Martin’s Island that Bangladesh treats as a part of its mainland coast, which the
35 island certainly is not.
36
37 Myanmar’s position is completely in line with the law on maritime delimitation. It is
38 based on three elements, which I will go into successively, and which I can sum up
39 in three words: method, geography and law.
40
41 According to the Applicant, the method is broken down only into two steps. St
42 Martin’s Island in principle has an absolute right to a full territorial sea. This is what
43 Professor Sands pleaded on Wednesday[145]. And it should then be given full effect in
44 drawing the equidistance line for the delimitation of the maritime areas up to 200 M;

[142] ITLOS/PV.11/12 (E), p. 3, lines 37-39 (Martin).
[143] ITLOS/PV.11/12 (E), p. 4, lines 1-8 (Martin).
[144] ITLOS/PV.11/10 (F), pp. 19 *et seq.*
[145] ITLOS/PV.11/12 (E), pp. 12 *et seq.* (Sands).

1 that is what Mr Reichler pleaded on Thursday[146], adding that this was not enough
2 and that one should still add compensation to compensation.
3
4 This is now how international courts and tribunals proceed. The approach taken by
5 the International Court of Justice, in particular in the two last cases of maritime
6 delimitation that it had to decide, is quite different. It is different more especially in
7 two ways. First of all, one must distinguish between the right that an island has, in
8 principle, to a territorial sea and the question of the delimitation of that territorial sea.
9 Special circumstances can limit the extent of the territorial sea when it is being
10 delimited. This approach was clearly followed by the ICJ in the case of *Nicaragua v.*
11 *Honduras* where the Court distinguished between the entitlement and delimitation.
12
13 The Court first of all recognized that Honduras could fix the extent of its territorial sea
14 around its sovereign islands at 12 M[147]and then, in a second step, the Court drew
15 the provisional median line before ascertaining that there were not "any legally
16 relevant 'special circumstances' in this area that would warrant adjusting this
17 provisional line"[148]. This is exactly the method followed by Myanmar.
18
19 The second methodological error by Bangladesh is to assimilate delimitation of the
20 territorial sea of St Martin's Island and the delimitation of the EEZ and the continental
21 shelf of the two State parties to this dispute. Bangladesh acts as if it were a case of
22 drawing a delimitation line beyond the territorial sea between St Martin's Island on
23 the one hand and the mainland of Myanmar on the other. Again, this is not in
24 conformity with case law. Furthermore, it also does not reflect the general
25 configuration of the coast, which here has been refashioned.
26
27 Mr Lathrop will come back in a minute to the "mainland-to-mainland delimitation".
28 Here I will limit myself to three remarks. The Applicant explained in its Reply that the
29 question of the effect to be given to the island in the delimitation of the territorial sea
30 must be distinguished from "a very different question of the effect to be given islands
31 in the continental shelf and exclusive economic zone".[149]
32
33 In the case of *Nicaragua v. Honduras* the Court indicated explicitly that it first
34 effected the delimitation "from the mainland" and then considered delimitation of the
35 territorial sea of the islands offshore[150]. The final course thus results in a semi-
36 enclaving of the islands to which only a territorial sea has been granted.
37
38 In the case of *Romania v. Ukraine*, the Court also recalled that Serpents' Island was
39 not part of the "general configuration of the coast" – in other words, of the mainland
40 coastal configuration. The Court then decided that the island "cannot serve as a
41 base point for the construction of the provisional equidistance line"[151] – ergo, the
42 final delimitation line skirts around the territorial sea of the island and joins the
43 equidistance line. Myanmar is not asking anything else in this case except that it also

[146] ITLOS/PV.11/13 (E), pp. 1 *et seq.*
[147] *ICJ Reports 2007,* p. 751, para. 302.
[148] *ICJ Reports 2007*, p. 752, para. 304.
[149] Reply of Bangladesh, para. 2.81.
[150] *ICJ Reports 2007*, p. 749, para. 299.
[151] *ICJ Reports 2009,* p. 122, para. 186.

1 considers that in view of the unique location of St Martin's Island, the median line for
2 delimitation of the territorial sea should be adjusted.
3
4 This now brings me to geography. Repudiating all evidence, Bangladesh is
5 continuing to act as if St Martin's Island was situated "opposite the coast of
6 Bangladesh". Professor Sands affirmed, without the slightest embarrassment, on
7 Wednesday that there did not seem to be any disagreement between the Parties on
8 the fact that it was a "coastal island"[152]. Obviously Professor Sands had been absent
9 during the first round of oral pleadings by Myanmar when we once again refuted this
10 untenable claim.[153]
11
12 The idea that St Martin's Island is an integral part of the coast of Bangladesh is
13 contradicted by the description which the Applicant itself gives to the island. It is true
14 that on this point some confusion is shown by our opponents. On Wednesday they
15 told us that the island was situated at an equal distance of 4.5 M from the mainland
16 coast of Bangladesh and that of Myanmar[154]. In its Reply, however, Bangladesh
17 wrote that the island was 6.5 M from the mainland cost of Bangladesh. The island
18 seems to be shifting northwards as the hearings progress![155] It would cut across the
19 route of the relevant coast of Bangladesh which tends to be extended to the south.
20 Bangladesh has invented the fast track to geographical reconfiguration.
21
22 In his first presentation in the first round of pleadings, Mr Reichler stated that the
23 island was "opposite to the land boundary"[156]. The following day, Bangladesh
24 recognized, in the statement by Mr Sands, that the island was, more precisely,
25 "opposite" the Myanmar coast, which is to the south of the land boundary.[157]
26
27 Whatever these prevarications may be, Members of the Tribunal, it is Bangladesh –
28 yes, Bangladesh – that in fact is right. I will cite successively paragraph 2.18 of its
29 Memorial, which is the first description of the island in the Applicant writings of the
30 and paragraph 110 of its reply.
31
32 St Martin's Island "is located 6.5 M southwest of the land boundary terminus with
33 Myanmar"; and, St Martin's Island is "adjacent to Bangladesh's coast".
34
35 The latter description is perfectly true. St Martin's Island is adjacent to and not
36 opposite the Bangladesh coast. It is to the southwest of the land boundary and
37 opposite the coast of Myanmar. This is precisely the reason for which a delimitation
38 of the territorial sea passes *between* the island and the mainland coast of Myanmar.
39 Such a delimitation need not exist if the island were located opposite the coast of
40 Bangladesh, as the Applicant claims against all reason; and it is precisely for this
41 reason that the location of the island constitutes a special circumstance, on the one
42 hand, and cannot be assimilated to the coast of Bangladesh for the purpose of
43 delimitation of areas beyond the territorial sea, on the other.
44

[152] ITLOS/PV.11/12 (E), p. 18, line 25 (Sands).
[153] ITLOS/PV.11/10 (F), p. 15, particularly lines 34-39
[154] ITLOS/PV.11/12 (E), p. 18, line 24 (Sands).
[155] Reply of Bangladesh, para. 3.111.
[156] ITLOS/PV.11/2/Rev. 1 (E), p. 9, lines 26-27.
[157] ITLOS/PV.11/3 (E), p. 17, lines 25-26.

1 Now on the subject of applicable rules, I would like to underline first of all that the
2 Applicant has a rather curious idea of the evidentiary value to be accorded in a
3 judicial delimitation to delimitations effected by international agreements. On
4 Wednesday Professor Sands made a great deal about the agreements concluded
5 between Myanmar and Thailand on the one hand and with India on the other,
6 believing that these confirmed Bangladesh's arguments regarding the effect to be
7 given to St Martin's Island.[158]
8
9 A simple reading of these agreements and the commentary on them in *International*
10 *Maritime Boundaries* clearly shows, however, that the limit plotted runs between a
11 whole series of islands coming under the respective sovereignty of two States, which
12 does not correspond in any way to the geographical situation of our case.
13 Furthermore, the description of these agreements shows that they are the result of
14 reciprocal concessions made by the Parties[159] and thus cannot be accepted in this
15 Tribunal.
16
17 This was also recognized by Professor Sands a few minutes later, on the subject this
18 time of the agreements concluded between Iran and Qatar and between Canada and
19 Denmark, agreements that are both consistent with Myanmar's argument. This time,
20 mysteriously, these agreements lose any value. He said, "It was an agreement,
21 Mr President, negotiated and adopted between two States. It can provide no support
22 for the drawing of the equidistance line..."[160].
23
24 While State practice is of little assistance according to the Applicant itself, this is not
25 true of international jurisprudence. I shall apply this to St Martin's Island, first of all, in
26 the context of the delimitation of the territorial sea, and then in the context of the
27 delimitation of the exclusive economic zones and the continental shelf.
28
29 First of all, with regard to the delimitation of the territorial sea, it is not true to state
30 that St Martin's Island would in principle have an absolute right to delimitation
31 granting it a full territorial sea. It is not the conclusion to which analysis of
32 jurisprudence would lead us.
33
34 First of all, the fact that certain islands have, in certain cases, been granted a
35 territorial sea of 12 M is not derived from the application of an absolute principle but,
36 on the contrary, was due to particular circumstances in each case.
37
38 I would like to emphasize first that the Channel Islands as such were not granted a
39 territorial sea of 12 M by the Court of Arbitration, but in 1977 it simply found that,
40 based on the European Fisheries Convention, the islands had a fishery zone of 12
41 M[161], so it plotted a delimitation line for the continental shelf, according to the Court
42 of Arbitration, "so as not to allow the continental shelf of the French Republic to
43 encroach upon the established 12-M fishery zone of the Channel Islands".[162]

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[158] ITLOS/PV.11/12 (E), p. 13, lines 26-39 (Sands).
[159] *International Maritime Boundaries* (J.I. Charney et L.M. Alexander (eds)), vol. II, 1993, p. 1329 and p. 1340; see also *ibid.*, vol. I, p. 138.
[160] ITLOS/PV.11/12 (E), p. 15, lines 36-38 and p. 16, lines 4-5 and lines 11-14 (Sands), as well as Reply of Bangladesh, para.2.92.
[161] Decision of 30 June 1977, *RIAA,* vol. XVIII, para. 187.
[162] *Ibid.*, para. 202.

In the case of *Romania v. Ukraine*, the International Court of Justice granted a territorial sea of 12 M to Serpents' Island, but this was done based on an agreement to that effect by the two Parties.[163]

In the case of *Nicaragua v. Honduras*, the same Court granted a territorial sea of 12 M to the cays, but only having verified that there were no special circumstances leading to a different solution.[164]

Secondly, it is wrong to claim, as Mr Martin did, that there is no precedent of an island having received less than 12 M[165]. The agreement of 1969 between Qatar and Abu Dhabi only grants a territorial sea of 3 M to the island of Jazirat Dayyinah, which was on the wrong side of the equidistance line[166]. Furthermore, I would say that the coasts of the two States are concave here and that the two Parties to the agreement nevertheless adopted a line that follows the direction of the equidistance line and gives only 3 M to the island.

Thirdly, what is legally crucial is the location of the island. In our case, because St Martin's Island is situated close to and opposite the coast of Myanmar, it constitutes precisely a special circumstance. As the Arbitral Tribunal rightly said in the case of *Dubai v. Sharjah*:

> (In English) The entitlement of an island to a belt of territorial sea does not of course prejudge *how much* territorial sea the island is entitled to. That is a question which will arise, for example, if the entitlement to a territorial sea of an island affects its territorial sea boundary with another adjacent or opposite State.[167].

This is precisely the case in point, and that is the reason why it is necessary to adjust the median line.

Contrary to the Applicant's claims, the delimitation of the territorial sea proposed by Myanmar is perfectly justified and reasonable on this point. It grants to St Martin's Island between points C and E a territorial sea between 6 and 12 M progressively up to the point where the delimitation of the territorial sea meets the equidistance line. This approach is in conformity with the line plotted by the Arbitral Tribunal in the case of *Guyana v. Suriname* in which the Tribunal plotted a line that, starting from 3 M, meets progressively the 12 M, taking into account the navigation interests that the Tribunal described as a special circumstance.[168]

As regards delimitation beyond the territorial sea, we noted in the first round of our oral pleadings three fundamental elements[169]: that jurisprudence excludes isolated islands from the "general configuration of the coast" – the term used in the case of

[163] *ICJ Reports 2009,* para. 188.
[164] *ICJ Reports 2007,* para. 302.
[165] ITLOS/PV.11/12 (E), pp. 4-5, lines 42 *et seq.*
[166] Counter-Memorial of Myanmar, para. 4.60, penultimate dash; *International Maritime Boundaries*, vol. II, p. 1541.
[167] *ILR,* vol. 91, p. 674.
[168] Decision of 17 September 2007, [www.pca-cpa.org], paras. 306 and 324.
[169] ITLOS/PV.11/10, pp. 19 *et seq.*

1 *Romania v. Ukraine*[170] – and this solution applies all the more when these islands
2 are on the wrong side of the provisional equidistance line; that either these isolated
3 islands are enclaved in their territorial sea or their territorial sea is bypassed by the
4 equidistance line, which means that these islands are not taken into consideration
5 when plotting the equidistance line; and, finally, that even in a case in which such
6 islands could be taken into account, case law shows that no effect has ever been
7 given to them when this causes a distortion in the course of the equidistance line.
8
9 This was amply demonstrated by Mr Reichler's entire statement on Thursday and, to
10 be honest, I cannot add any more to his presentation, but what did he show us in his
11 study of case law? He showed us that there is a fundamental difference between
12 fringe islands and isolated islands; that even certain fringe islands have not been
13 granted full effect; that islands which were not fringe islands have never been
14 granted any effect in the delimitation of maritime areas beyond the territorial sea; that
15 any distorting effect produced by an island in the plotting of the equidistance line
16 should be set aside; and, finally, that in the present case such a distorting effect is to
17 the detriment of Myanmar.
18
19 I will show this by referring, one by one, to the decisions analysed by Mr Reichler
20 using his sketch maps from Thursday.
21
22 Mr Reichler passed very quickly over the arbitration of 1977 in the case of the
23 *Continental Shelf between France and the United Kingdom.* However, the case is
24 very instructive from two points of view:
25
26 First, the Channel Islands were totally enclaved in their territorial sea precisely
27 because they were on the wrong side of the equidistance line. According to the Court
28 of Arbitration, this location "disturbs the balance of the geographical circumstances
29 which would otherwise exist between the Parties" [171]; the fact that the islands are on
30 the wrong side of the line resulted in a reduction of France's maritime areas, a fact
31 which, by itself, appeared to the Court to be, *prima facie*, a "circumstance creative of
32 inequity"[172].
33
34 Secondly, concerning the Scilly Isles and Ushant, the award is also very interesting.
35 The distorting effect, which the Tribunal corrected, is exactly the same as that
36 produced by St Martin's Island to the detriment of Myanmar. It was not a case of
37 isolated islands there. The Court underlined the fact that both coasts of the States
38 formed "peninsulas which constitute the ultimate reach of their respective territories
39 into the Atlantic region; both have offshore islands which project their respective
40 territories still further into the region". In spite of this integration of the islands into the
41 mainland coast, the Tribunal considered that it should not give half effect to the Scilly
42 Isles by virtue of their location further to the west than Ushant.
43
44 Let us look at *Eritrea v. Yemen*. First of all, the Tribunal distinguished three
45 categories of island. It said, first of all, that it refused to give the slightest effect to the
46 islands of Jabal al-Ta'ir and al-Zubayr because they were not part of the mainland

[170] *ICJ Reports 2009*, p. 122, para. 186.
[171] *RIAA,* vol. XVIII, para.182.
[172] *Ibid.*, para.196.

1 coast of Yemen[173] and taking them into account would have a distorting effect on the
2 equidistance line. Similarly, the line linking points 13, 14 and 15 did not give a full
3 territorial sea to the Yemeni islands situated to the east, and *a fortiori* did not give
4 them any effect in the delimitation in the EEZ[174] . On the other hand, the Tribunal
5 gave full effect to the Dahlak Islands on the Eritrea side[175] and Tiqfash, Kutama,
6 Uqban and Kamaran on the Yemen side[176], but only for the reason that these were
7 fringe islands, that is, a system of islands integrated in the coastline. The Tribunal
8 said that this was a typical example of a "group of islands that forms an integral part
9 of the general coastal configuration"[177]. This obviously does not apply to St Martin's
10 Island. This is not a part of a group of islands that forms an integral part of the
11 "general" coastal configuration of Bangladesh.
12
13 Mr Reichler then admits[178] that in the case of *Qatar v. Bahrain* no effect was given to
14 the island of Qit'at Jaradah precisely because this would have shifted the
15 equidistance line, pushing it towards the coast of the State to which the island did not
16 belong. Let me add that the Court gave no effect either to the "sizeable maritime
17 feature" of Fasht Al Jarim (Fasht al Azm on the sketch map) again because of the
18 deviation effect that this would produce on the equidistance line.[179].
19
20 The case of Sable Island seemed to bother Mr Reichler. He explained that if effect
21 had been given to the island, the equidistance line would have cut through the EEZ
22 of St Pierre-et-Miquelon. According to him, the Tribunal wanted to avoid this
23 outcome[180]. However, not only did the Tribunal say nothing of this sort (you only
24 have to look at the sketch map after paragraph 4.36 of the award to see that the
25 Tribunal was not concerned at all with St Pierre-et-Miquelon). But, furthermore, it
26 would have been absurd for the Tribunal to be concerned with it. The maritime areas
27 situated east of the corridor are still Canadian. Consequently, the Tribunal would
28 have been able to adopt the equidistance line, giving full effect to Sable Island,
29 sharing the maritime areas east of the corridor between the two Canadian provinces
30 and granting Nova Scotia the areas situated to the south of the corridor.
31
32 In reality, this award shows once again that an island producing a distorting effect to
33 the detriment of the State to which it does not belong cannot be granted any
34 effect.[181]
35
36 The case of *Dubai v. Sharjah* led to the same conclusions. Giving effect to the island
37 of Abu Musa would have led to pushing the equidistance line towards the coastal
38 façade of Dubai, and this is the only reason for which it was given no effect beyond
39 the territorial sea.[182]
40

[173] *RIAA,* vol. XXII, paras. 147-148.
[174] *Ibid.*, paras. 160-162.
[175] *Ibid.,* para. 139.
[176] *Ibid.*, para. 151.
[177] *Ibid.*, para. 139.
[178] ITLOS/PV.11/12 (E), p. 6, lines 1-2.
[179] *ICJ Reports 2001,* paras. 242-249.
[180] ITLOS/PV.11/12 (E), p. 6, lines 19-25.
[181] Rejoinder of Myanmar, para. 5.40.
[182] *ILR,* vol. 91, p. 677.

I would like to correct an important point on Mr Reichler's sketch map. Sharjah had claimed only half effect (whereas the sketch indicates full effect) to for the island of Abu Musa, not by reason of the claimed enclaving effect resulting from the concavity, as Mr Reichler maintained, but in view of the presence of an oil well operated by Dubai in this area[183]. In fact, as we know, the Tribunal accorded it no effect beyond the territorial sea.

The following islands can also be quoted along these lines: the Italian islands of Pantelleria, Linosa, Lampedusa and Lampione, which, because they are on the wrong side of the equidistance line, were only granted a territorial sea of 12 M and an area of 1 M of continental shelf in the Italian-Tunisian agreement of 20 August 1971, although these islands each have more than 6,000 inhabitants[184]; the Yugoslav islands of Pelagruz and Galijula, which were given a territorial sea of only 12 M in the agreement of 8 January 1968 between Italy and Yugoslavia – in other words they were semi-enclaved in their territorial sea[185]; and one could also mention the Iranian island of Sirri, which was given no effect beyond the territorial sea in the agreement of 31 August 1974 between Iran and Dubai.[186]

Mr Reichler lastly referred to the case of *Romania v. Ukraine*, giving it a rather surprising interpretation. According to Mr Reichler, the Court gave no effect to Serpents' Island beyond the territorial sea because this would have created a cut-off effect in a situation of functional concavity.[187]

I read the Court's judgment several times. There is no mention of any effect of concavity. In reality, if the Court did not give weight to Serpents' Island, the Applicant persists in avoiding this for an entirely different reason. An isolated island, *a fortiori* where it is on the wrong side of the equidistance line cannot be integrated into the coast of the State and cannot therefore be taken into account in the plotting of the delimitation line for maritime areas beyond the territorial sea.

In its Memorial, the Applicant also wrote that this is the reason why no effect can be given to May Yu Island[188]. The ICJ judgment in 2009 is quite clear on this point. Mr President, Members of the Tribunal, I apologize in advance for the length of the citation, but it is crucial:

> In connection with the selection of base points, the Court observes that there have been instances when coastal islands have been considered part of a State's coast, in particular when a coast is made up of a cluster of fringe islands. Thus in one maritime delimitation arbitration, an international tribunal placed base points lying on the low water line of certain fringe islands considered to constitute part of the very coastline of one of the Parties [the Court quotes the 1999 Arbitration between Eritrea and Yemen]. However, Serpents' Island, lying alone and some 20 nautical miles away from the mainland, is not one of a cluster of fringe islands constituting 'the coast' of Ukraine, to count Serpents' Island as a relevant

[183] *Ibid.*, pp. 668-669.
[184] *International Mariitime Boundaries,* vol. II, p. 1611, pp. 1616-1617.
[185] *Ibid.*, vol. III, p. 1627, p. 1630.
[186] *Ibid.*, vol. III, p. 1533, p. 1535.
[187] ITLOS/PV.11/12 (E), p. 7, lines 7 *et seq.*
[188] Memorial of Bangladesh, paras. 6.47-6.55.

> 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 (cf. the islet of Filfla in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta),* Judgment ... For this reason, the Court considers it inappropriate to select any base points on Serpents' Island for the construction of a provisional equidistance line between the coasts of Romania and Ukraine. [189]

I am sure that Bangladesh would not hasten to stress that St Martin's Island is not Serpents' Island, nor May Yu Island,[190] which, I would remind you, is irrefutably an island within the meaning of article 121 of UNCLOS. Bangladesh has not contested this at any time during the negotiations.

But this is not the subject. The Court clearly stated in another paragraph of its judgment in 2009 that Serpent's Island does not form part of "the general configuration of the coast" – "general" – and, as such, it cannot "serve as a base point for the construction of the provisional equidistance line between the coasts of the Parties". *A fortiori*, the same applies to St Martin's Island in this case. In view of its location opposite the coast of Myanmar and not of Bangladesh, it is quite simply impossible to integrate it into the general configuration of the coast of Bangladesh.

Mr President, Members of the Tribunal, it is time to sum all this up. First of all, it is indisputable that St Martin's Island constitutes an isolated island that is, furthermore, opposite the coast of Myanmar and not of Bangladesh. Under these circumstances, considering it to be "a relevant part of the coast would amount to grafting an extraneous element on to [Bangladesh's] coastline, the consequence of which would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes."[191]

If it were legally possible to give the slightest effect to St Martin's Island (*quod non)*, this would in any case cause a serious distorting effect. This would lead to a completely disproportionate shift in the equidistance line just off the coast of Myanmar.

In its Reply, Bangladesh purely and simply denied the existence of the slightest distorting effect, affirming that the presence of the island "does not threaten any kind of distortion of the boundary, let alone a radical distortion of it."[192]

The Applicant recognizes this distorting effect today, and this is quite manifest in the sketch map projected on Thursday by Mr Reichler; you can see it here. If effect were given to St Martin's Island in the delimitation beyond the territorial sea, this would inevitably have the consequence of radically distorting the equidistance line, directly in front of the coast of Myanmar.

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[189] *ICJ Reports 2009*, pp. 109-110, para. 149.
[190] ICJ Reports 2009, p 122, para. 186.
[191] *ICJ Reports 2009*, pp. 109-110, para. 149
[192] Reply of Bangladesh, para. 3.116.

The case law cited previously, which prohibits any distorting effect along these lines, applies a fortiori in the present case since the island is close to the starting point of the maritime boundary and therefore any effect given to it would be produced directly opposite the coast of Myanmar and very close to it. Lastly, in so far as the cut-off created by the regional concavity is not at all inequitable, there is no need to give any compensating effect to St Martin's Island.

I would like to underscore that the Applicant does not invoke the island as a relevant circumstance, but as a compensatory variable, which is in fact refashioning geography and also law.

Mr President, Members of the Tribunal, so we have come back to the starting point. Our case is no different from the case of *Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago*, and as far as international law is concerned there is absolutely no need for compensation in our case.

Mr President, Members of the Tribunal, I would like to thank you very sincerely for your attention.

(Luncheon adjournment)