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held on Monday, 12 September 2011, at 3.00 p.m.,
at the International Tribunal for the Law of the Sea, Hamburg,

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 Luíz Jesus
Vice-President	Helmut Tuerk
Judges	Vicente Marotta Rangel
	Alexander Yankov
	L. Dolliver M. Nelson
	P. Chandrasekhara Rao
	Joseph Akl
	Rüdiger Wolfrum
	Tullio Treves
	Tafsir Malick Ndiaye
	Jean-Pierre Cot
	Anthony Amos Lucky
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	Shunji Yanai
	James L. Kateka
	Albert J. Hoffmann
	Zhiguo Gao
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Judges <i>ad hoc</i>	Thomas A. Mensah
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as Advisers.

CLERK OF THE TRIBUNAL: All rise.

THE PRESIDENT: Please be seated.

THE PRESIDENT: Good afternoon. We now resume our hearing. I give the floor to Professor Crawford.

MR CRAWFORD: Mr President, Members of the Tribunal, this morning, you heard Bangladesh's views on the inadequacy of equidistance in this case. My task now is to present the delimitation Bangladesh proposes within 200 miles from the coasts of the two Parties, and to justify the angle bisector method on which it is based.

This presentation is in five parts. First, I will discuss the cases that support the use of the bisector, and through them explain the underlying concept. Second, I will identify the relevant coasts. Third, I will present the angle bisector Bangladesh proposes. Fourth, I will demonstrate the equitableness of the solution thereby put forward. Fifth, and because we are dealing with the areas within 200 miles of both States, I will discuss the issue of the so-called "grey zone", sometimes referred to as the *alta mar*, that is, the area created by the bisector that is beyond 200 miles from Bangladesh's coast but within 200 miles from Myanmar's.

I turn to the first point, the use of the bisector in the jurisprudence.

Mr President, Members of the Tribunal, this morning, my friend Professor Sands discussed the law applicable to the delimitation of the EEZ and continental shelf within 200 miles. What the relevant texts require is an equitable solution. But how you get there must be determined by the particular circumstances of a given case.

Myanmar itself accepts this:

"the equidistance method does not automatically have priority over other methods of delimitation and, in particular circumstances, there may be factors which make the application of the equidistance method inappropriate."¹

This morning Mr Martin and Mr Reichler addressed the factors that make the application of the equidistance method inappropriate in this case. There are two possible solutions to that problem: either (1) adjust the equidistance line by an amount sufficient to offset the inequities it creates, or (2) adopt another method. In our view the second alternative is to be preferred, for reasons I will explain.

The bisector method is the main alternative delimitation method to equidistance or adjusted equidistance which has been employed by international courts and tribunals. It has been employed in some fashion or another in five of the international delimitation cases decided in the modern era: *Anglo-French Continental Shelf*, *Libya/Tunisia*; *Gulf of Maine*; *Guinea/Guinea-Bissau* and, most recently, *Nicaragua/Honduras*.

¹ CMM, para. 5.20 (quoting *Nicaragua v. Honduras*, para. 272).

I would stress that although the angle bisector is an alternative method, it is not divorced from the concept of equidistance. What it does is to simplify the relevant coasts by drawing lines which reflect their general direction, then drawing a bisector which is, of course, equidistant between those lines. Whereas the equidistance/special circumstances method takes equidistance and then adjusts it, the angle bisector method first simplifies the coast, then draws a strict equidistance line between the simplified coastal projections. Using the angle bisector helps eliminate the need for the subjective determination of how much adjustment is required from this equidistance. In this respect both methods aim at achieving equality between like-situated coasts. In this regard I recall the remark of the Chamber in *Gulf of Maine*, which endorsed...

“[the] criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States [...] converge and overlap.”²

Throughout its written pleadings, Myanmar has insisted that the angle bisector is only used in very limited circumstances: when it is not technically feasible to draw an equidistance line.³ We thought we had thoroughly refuted that in our Reply but since Myanmar insists on the point again in its Rejoinder, let me try again.

In the first instance, it is a very rare case in which it is impossible to draw an equidistance line. It is not a difficult operation. It may be a more or less complex line, it may be more or less equitable, but in any given case it is not impossible.

Moreover, the jurisprudence refutes Myanmar’s argument. In the *Gulf of Maine* case, the first case in which the bisector was used in the manner we propose, there was nothing that made it difficult, much less technically unfeasible, to draw an equidistance line. You can see the equidistance line on the screen; and compare it with the Chamber’s line. The Chamber decided that the extraordinary irregularity of the coast, particularly on the United States side, made the use of equidistance problematic. The Chamber concluded that:

“it is necessary to renounce the idea of employing the technical method of equidistance. ... [P]reference must be given to a method which, while inspired by the same considerations, avoids the difficulty of application ... and is at the same time more suited to the production of the desired result.”¹

Similarly, in the *Guinea/Guinea-Bissau* arbitration, there were no difficulties associated with drawing an equidistance line. The tribunal decided that the use of the equidistance method was inappropriate due to the concavity of Guinea’s coast and to the cut-off effect that equidistance would have imposed on the parties and on other neighbouring coastal States. I will return to that case shortly but you can see the equidistance line on the screen.

² *Gulf of Maine*, para. 195.

³ MCM, paras. 5.23-5.26; MR, paras. 4.27, 5.42, 6.67(v).

¹ *Gulf of Maine*, para. 212.

Finally, even in the *Nicaragua/Honduras* case, which is the key case in Myanmar's argument that equidistance must be infeasible before the angle bisector method will be used, it is wrong to say that it was impossible to draw an equidistance line. In fact, both parties presented an equidistance line to the Court as part of their case but they were different lines because they had different base points.⁴ The issue was just that the instability of the coast in the area made equidistance unreliable. In its judgment, the Court specifically said:

“The use of a bisector ... has proved to be a viable substitute method in certain circumstances where equidistance is not possible *or appropriate*.”⁵

Myanmar's Rejoinder evidences a particular concern about the *Guinea/Guinea-Bissau* decision, as I said the other day. After ignoring it entirely in the Counter-Memorial, it directs rather sharp criticism at the decision in the Rejoinder, saying “it is so eccentric that it is difficult to refer to it.”⁶ The disapprobation is understandable since *Guinea/Guinea-Bissau* refutes Myanmar's approach to this case in almost every respect: one, equidistance was rejected due to the concavity of the coastline; two, a bisector was used instead; and three, the bisector chosen was designed to enable Guinea to “extend “its maritime territory as far seaward as international law permits”.⁷

Among its other critiques, Myanmar claims that the methodology employed by the tribunal was not exactly that of the angle bisector.⁸ With respect, that is not right. What the arbitral tribunal did was to draw a delimitation line perpendicular to a single coastal front that covered the entire coast in the region. As the Court observed in *Nicaragua/Honduras*,⁹ what is a perpendicular but the bisector of a 180 degree angle? What indeed?

In this respect, I should note that the use of a perpendicular to the general direction of the coast is a method that has support in State practice. I refer, for example, to the agreements between Argentina and Uruguay,¹⁰ Brazil and Uruguay,¹¹ Lithuania and Russia (in part)¹² and Estonia and Latvia.¹³ I would only note that the Argentina/Uruguay boundary formally employs an equidistance line, but as Antunes notes in his book, this is then converted into a perpendicular via the use of a 180 degree line closing off the mouth of the River Plate.¹⁴

⁴ *Nicaragua v. Honduras*, para. 91.

⁵ *Nicaragua v. Honduras*, para. 287.

⁶ RM, para. 4.27.

⁷ *Guinea/Guinea-Bissau*, para. 104.

⁸ RM, para. 5.58.

⁹ *Nicaragua v. Honduras*, para. 288.

¹⁰ 19 November 1973.

¹¹ 21 July 1972.

¹² 24 October 1997.

¹³ 12 July 1996.

¹⁴ N. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (2003) 162.

The Rejoinder also criticizes *Guinea/Guinea-Bissau* on the basis that the tribunal took into account the “rarely expressed concern”¹⁵ to ensure that the delimitation was suitable for integration into the regional context. Again, this is, in fact, not so unusual. In *Libya/Malta*, the Court stated that it ...

“...has to look beyond the area concerned in this case, and consider the general geographic context in which the delimitation will have to be effected.”¹⁶

Furthermore, it is hardly unconscionable to take account of macro-geographical factors in order to ensure that the rights of third States are not affected by any eventual delimitation, a point raised in *Tunisia/Libya*,¹⁷ *Qatar v. Bahrain*¹⁸ and *Cameroon v. Nigeria*,¹⁹ amongst others.²⁰ This makes sense. You cannot arrive at an equitable solution by ignoring the world around you.

Myanmar’s argument about *Guinea/Guinea-Bissau* reduces to concern about its “eccentricity”. Evidently, the International Court does not share this view – or perhaps it likes eccentricity. It cited the case favourably at key points in its two most recent delimitation judgments, *Nicaragua v. Honduras*²¹ and *Romania v. Ukraine*.²²

To summarize, the bisector has been used as an alternative to equidistance in a number of different contexts for a number of different reasons, including to abate the prejudicial effects of a concave coast, that’s exactly the reason Bangladesh says it should be used here.

Mr President, Members of the Tribunal, I turn then to the second part of my presentation this afternoon, the definition of the relevant coasts. As you know, the bisector method involves depicting the general directions of the coasts by means of a straight line. This is done by reference to the relevant coasts of the Parties. The term was authoritatively defined in *Romania/Ukraine* as follows:

“the coasts of [the parties] which generate the rights of these countries to the continental shelf and the exclusive economic zone, namely, those coasts the projections of which overlap, because the task of delimitation consists in resolving the overlapping claims by drawing a line of separation of the maritime areas concerned.”²³

The Parties disagree over the extent of their relevant coasts. Myanmar claims that Bangladesh’s relevant coast is *shorter* than we believe it is, and it claims that its own relevant coast is *longer* than we think it is.

¹⁵ RM, para. 5.58.

¹⁶ *Libya/Malta*, para. 69.

¹⁷ *Tunisia/Libya*, para. 130.

¹⁸ *Qatar v. Bahrain*, para. 250.

¹⁹ *Cameroon v. Nigeria*, para. 250.

²⁰ See also *Libya/Malta*, para. 21; *Eritrea/Yemen*, para. 162.

²¹ *Nicaragua v. Honduras*, para. 280.

²² *Romania v. Ukraine*, para. 211.

²³ *Romania v. Ukraine*, para. 77.

I will address the two coasts in turn.

Bangladesh considers that its own relevant coast extends from one end of the country to the other, from the land boundary terminus with Myanmar in the Naaf River to the land boundary terminus with India in the Raimangal Estuary. To avoid the significant difficulties associated with trying to measure the sinuosities of this coast, we measure it by means of the two straight lines, as you can see on your screen. Their combined length is 421 kilometres.

Myanmar arrives at a different figure of 364 kilometres for the length of Bangladesh's relevant coast. In order to get to this number, it divides the coast into four segments you can see on the screen and in tab 5 in your bundle. It then eliminates the middle two segments as irrelevant because they supposedly "face each other". It measures the two remaining segments by means of irregular lines which are meant to trace the sinuosities of the coast. The numbers it gets are 203 kilometres and 161 kilometres on either side for a total of 364.²⁴

In our view, there are several problems with what Myanmar has done but before getting to that, there is one significant point of agreement: the Parties agree that both ends of the Bangladesh coast on the side abutting Myanmar and on the side abutting India are relevant. I will deal with the implications of this point shortly.

The most obvious difference in the Parties' treatment of Bangladesh's relevant coast is the effort to cut the middle out of it, to eviscerate it, to disembowel it, you might say.

Myanmar attempts to justify this by analogizing its situation in the mouth of the Meghna River to the International Court's treatment of the Gulf of Karkinit's'ka in the *Black Sea* case. You can see the Gulf of Karkinit's'ka on your screen. It is tab 4.6. The Court excluded the two lengths of the Ukraine coast that face back on each other within the Gulf of Karkinit's'ka from its calculation of the relevant coast and it is on that analogy that Myanmar relies.

The analogy is inapposite. Most obviously, in the enclosed setting of the Black Sea, the opening at the mouth of the Gulf of Karkinit's'ka faces back onto other portions of Ukraine's coast, and not on to the delimitation.

You can see this on the graphic now on the screen, which compares the Gulf of Karkinit's'ka and the mouth of the Meghna. The Court in Romania/Ukraine held that:

"[t]he coasts of this gulf" – that is Karkinit's'ka – "face each other and their submarine extension cannot overlap with the extensions of Romania's coast. The coasts of Karkinit's'ka Gulf do not project in the area to be delimited."

²⁴ MCM, para. 5.58.

They were accordingly subtracted from Ukraine's total coastal length.²⁵ Here, in contrast, the mouth of the Meghna River faces directly on to the open sea and the areas of the delimitation.

In this respect, the opening at the mouth of the Meghna River is much more like the opening at the mouth of the Bay of Fundy in the *Gulf of Maine* case; again you can see the contrast on the screen. Although the coasts of the Bay of Fundy are generally parallel, and "face each other" much more even than the Gulf of Karkinit's'ka, the opening at the mouth of the Bay of Fundy faces directly on to the delimitation. In its judgment, the Chamber deemed relevant segments of Canada's parallel coasts within the Bay as well as the line drawn across the Bay inside its mouth. In the words of the Chamber:

"The Chamber wishes to emphasize that the fact that the two coasts opposite each other in the Bay of Fundy are both Canadian is not a reason to disregard the fact that the Bay is part of the Gulf of Maine, nor a reason to take only one of these coasts into account for the purpose of calculating the length of the Canadian coasts in the delimitation area."²²

I should add that by attempting to sever the middle portion of Bangladesh's coast on the ostensible grounds that the two segments it identifies face each other, Myanmar seeks to extract yet more benefit from the concavity of the coast. In our view, a more equitable approach, consistent with the fact that the entirety of Bangladesh's coast faces on to the Bay of Bengal, is to measure the middle portion of Bangladesh's coast by means of a straight line that neither artificially lengthens the coast in the area of the Meghna nor artificially shortens it by pretending it does not exist. In this respect, Bangladesh is not seeking treatment as favourable as the Chamber gave Canada in *Gulf of Maine*.

The second problem with Myanmar's measurement of Bangladesh's relevant coast is its use of irregular lines purporting to trace the sinuosities. Measuring this way introduces evident opportunities for mischief. Fractal geometry – the Tribunal will be familiar with fractal geometry just as I am now – Fractal geometry teaches that there is no limit to the length of an irregular object such as the sea-shore: it simply depends on the scale on which you measure it. It is William Blake's infinity in a grain of sand. By tracing the sinuosities on either side with different degrees of precision, one can artificially shorten or lengthen the coasts at will. As you will see when I discuss Myanmar's relevant coast, that is exactly what Myanmar has done. It has measured the sinuosities of Myanmar's coast with far greater, one might say loving, attention to detail. Measuring coastal lengths by means of straight lines avoids this pitfall.

Turning to the relevant coast of Myanmar, Bangladesh considers that it extends from the land boundary terminus in the Naaf River to the point approximately 200 miles south of the location of a feature known as Bhiif Cape. That coast is highlighted on the map now on the screen, which is tab 4.9. It measures 370 kilometres by means of the straight line you see. And on that basis, the ratio of relevant coastal lengths is 421:370, or 1.1:1, in favour of Bangladesh.

²⁵ *Romania/Ukraine*, para. 100.

²² *Gulf of Maine*, para.

Now of course, Myanmar takes a different view. It says its relevant coast extends all the way down to Cape Negrais, 595 kilometres, or almost 300 miles, away from the land boundary terminus. According to Myanmar, this coast measures 740 kilometres in length owing to its sinuosities, not coincidentally almost exactly two times the purported length of Bangladesh's truncated relevant coast.²⁶ This is the sketch map from No. 5.2 from the Counter-Memorial, which is tab 4.9 in your bundles.

Just as Myanmar has artificially downsized the Bangladesh coast, it has artfully upsized its own. First, there is the issue of how the measurement has been taken. Myanmar has used irregular lines purporting to trace the sinuosities, but it has traced its own sinuosities with a far greater degree of precision than it has on the Bangladesh side. Particularly in the areas south of Bhiif Cape, the Tribunal can see just how scrupulous Myanmar's cartographers were in taking account of every last curvature in the coast, whereas the sinuosities on our side, which are in fact more pronounced, are smoothed over. Myanmar says, "Our sinuosities are more sinuous than your sinuosities".

If Myanmar's coast to Cape Negrais is measured in the same manner as the coast of Bangladesh, that is by means of straight lines as shown on this graphic, Myanmar's coastal length would be 595 kilometres. Even accepting, which we don't accept, that the whole of that coast is relevant, the ratio of coastal lengths would be- 595:421, which is 1.4:1, in favour of Myanmar, much less than the 2:1 disparity that Myanmar claims.

In truth, though, none of Myanmar's coast south of Bhiif Cape is relevant. It is just too far away.

Myanmar justifies its inclusion of this remote coast on the grounds "Cape Negrais [is] the last point on Myanmar's coast generating maritime projections overlapping with Myanmar's coastal projections".²⁷ Yet, neither in its Counter-Memorial nor in its Rejoinder does Myanmar describe how these "coastal projections" should be drawn, much less show where they overlap. We invited them in our Reply to do so.³ They declined the invitation. In actuality, since the entire length of Myanmar's coast below Bhiif Cape is more than 200 miles from Bangladesh, and therefore beyond any conceivable projection of the Bangladesh coast, the projection of Myanmar's coast south of Bhiif Cape could not overlap with that of Bangladesh in terms of EEZ entitlement. I will demonstrate graphically why this is so in a few moments.

The relevant coastal lengths are therefore 421 kilometres for Bangladesh and 370 kilometres for Myanmar.

Mr President, Members of the Tribunal, this brings me to the third portion of my presentation: the application of the bisector method in this case. Step one is the drawing of a straight line façade representing the general direction of the Parties' relevant coasts. This part of the process is not complicated. In fact, the Parties will agree about one half of the equation – the Myanmar half. I will therefore start there.

²⁶ MCM, para. 5.60.

²⁷ CMM, para. 5.67; see also RM, para. 6.78.

³ RB, para. 3.151.

Myanmar's relevant coast extends down to Bhiif Cape. The general direction of this coast can be portrayed by means of the coastal façade that appears on the screen before you now or will shortly do so. It follows an azimuth of N 143° E. I'm sorry, this is Myanmar's relevant coast. Yes, we have Bangladesh's. We might go back to Myanmar.

I said a moment ago that Myanmar is in agreement, but that is something of a dangerous statement. But in the Rejoinder, Myanmar states that it "agrees with Bangladesh on the general direction of Myanmar's coast even though both Parties differ on the methodology".²⁸ Given Myanmar's argument that its relevant coast extends all the way down to Cape Negrais, this argument may strike the Tribunal as a bit curious, indeed it is. It is made possible by Myanmar's view that there are two different relevant coasts: one for "the delimitation in general" and another for "the depiction of the general direction of the coast when applying the angle-bi-sector method."²⁹ Myanmar cites no authority for the proposition that one State can have two relevant coasts on the same coastal frontage, and there is none. In *Nicaragua/Honduras*, the Court specifically stated that the angle-bisector method "should seek a solution by reference first to the States' 'relevant coasts'"³⁰, implying that there was only one relevant coast for each State.

On the other hand, the Parties disagree about the length of Bangladesh's relevant coast and about whether the middle portion should be counted or not; I have dealt with that disagreement. Whichever of us is right about how to account for the central bit of the coast, depicting Bangladesh's relevant coast by means of a straight-line façade still requires determining the general direction of a bi-directional coast. I should first point out that at this stage of the proceeding it should go without saying that the bi-directionality of the Bangladesh coast is due to the fact that it is fundamentally concave in shape.

In our view, the simplest way to depict this bi-directional coast as a single façade is by means of a straight line connecting the two end points, that is, the land boundary termini on either side. You see that line on the screen before you now.

In its Counter-Memorial Myanmar had precious little to say about the Bangladesh coastal front.³¹ The Rejoinder, in contrast, does try to tackle the issue. According to Myanmar, "Bangladesh's coastal façade by no means follows the general direction of the coasts of that country."³² It accuses Bangladesh of being engaged in a "land reclamation project" – I won't discuss the land reclamation case in this context – and it says that this land reclamation project "takes refashioning nature to a new extreme".³³

²⁸ RM, para. 5.54, fn. 345.

²⁹ RM, para. 5.52; see also RM, para. 5.59.

³⁰ *Nicaragua v. Honduras*, para. 289.

³¹ See CMM, paras. 3.157-3.160.

³² RM, para. 5.48.

³³ RM, para. 5.48.

But Bangladesh is doing no such thing. The problem is how to depict the average direction of a bi-directional coast, but the average bearing – that is, the general direction – of two sides of a triangle is nothing other than the direction of the third side that connects the ends of the other two. I think that is Pythagoras’s fourth theorem. That is all we have done. Perhaps it would be more visually pleasing to portray the general direction of the two segments of the coast by means of a single line that looks like this; but then this line would have to be transposed to the location of the land boundary terminus in order to meet the general direction line on the Myanmar side. Again, that is all we have done. The direction of the Bangladesh coastal façade is N 287° E.

Myanmar tries to compare what we have done with what Nicaragua proposed for the general direction of the Honduras coast in *Nicaragua v. Honduras*. You can see it on the screen, and your eyes do not deceive you! Nicaragua proposed a coastal front that ran from its land boundary terminus in the south to its land boundary terminus with Guatemala in the northwest. You can see that this “coastal frontage” pursues a distinctly terrestrial course, condemning large numbers of Honduran coastal residents to a watery existence – the very opposite of land reclamation, you may think, the condemnation of areas of lands to the sea. Not surprisingly the Court rejected Nicaragua’s proposal, but not for the reason Myanmar gives. Instead, the Court gave two reasons: First, the distance between Honduras’ two land boundary termini was much greater than it is here. Point-to-point, it was 549 kilometres. The Court noted that, as a result, much of this coast was “far removed from the area to be delimited”.³⁴ The point-to-point distance for Bangladesh is 349 kilometres, 200 kilometres less. Second, the Court limited the Honduras coastal front to a shorter segment because “to the northwest the Honduran coast turns away from the area to be delimited.”³⁵ That is not the case with Bangladesh. All the Bangladesh coast faces directly onto the area to be delimited.

This land boundary terminus to land boundary terminus coastal front for Bangladesh has the additional advantage of abating somewhat the effects of the concavity within a concavity, the secondary concavity, that defines the Bangladesh coast. Eliminating this internal concavity with a straight line has the effect of pushing back on the delimitation of Myanmar, abating partially some of the cut-off effect that equidistance produces.

This point is critical. In *Nicaragua/Honduras*, the Court made clear “[i]dentifying the relevant coastal geography calls for the exercise of judgment ...”.³⁶ As in the *Guinea/Guinea-Bissau* case, that judgment must be exercised with a view to addressing the problems that warrant recourse to the angle-bisector in the first place. In this case, the problem is the effect of the concavity in the Bay of Bengal’s north coast. Any other approach would convert the angle-bisector method from the solution it’s intended to be into a perpetuation of the problem. With the coastal fronts both defined, bisecting them is mere arithmetic. Half-way between Myanmar’s 143° E coastal façade and Bangladesh’s 287° E façade is 215°, as shown on the map appearing before you in red, and that is our bisector proposal.

³⁴ *Nicaragua v. Honduras*, para. 295.

³⁵ *Nicaragua v. Honduras*, para. 296.

³⁶ *Ibid.*, para. 289.

There is one final step. The general direction for the boundary in the EEZ and the continental shelf within 200 miles must be transposed slightly south to the end point of the territorial sea boundary, as discussed on Friday. You can see this on the sketch map. Myanmar complains about this transposition, but it is absolutely necessary.

For example, in the *Gulf of Maine* case, the Chamber transposed the initial segment of its bisector line from the land boundary terminus to point A₇. Point A was the point which the Parties had stipulated the user limitation should start from.³⁷ You can see the Chamber's approach on the screen before you now. The angle of the bisector is taken from the land boundary terminus and shifted south-southwest 39 miles. Bangladesh proposes the same approach here, except the transposition is for a shorter distance, just under 20 miles. And the reason for the transposition is clear. We have criticized Myanmar for failing to take St Martin's Island into account in its delimitation scheme. By contrast, we give St Martin's its full and appropriate effect by transposing the bisector to the south of the island, and starting it where the 12-metre arcs drawn from the island and the mainland coast intersect to form the outer limit of the territorial sea boundary. That is the obvious starting point for the boundary in the EEZ.

THE PRESIDENT: Excuse me for interrupting. The interpreters believe that you are too fast.

MR CRAWFORD: I am sorry. I have tried to go slow and I will go even slower, sir.

Mr President, Members of the Tribunal, this brings me to the fourth part of my presentation: the question whether the 215° bisector that we propose leads to an equitable result.

The equity of the 215° line can be seen in the first instance, in that it takes account of all three of the salient features of this case as described by Mr Reichler on Thursday: the twin concavities, the potential entitlement in the outer continental shelf and St Martin's Island.

It takes account of the concavity by abating the cut-off effect on Bangladesh. I use the term "abating" advisedly. The 215° bisector minimizes but does not eliminate the effects of the macro-concavity on the Bay's north coast, which remain very much evident. You can see this in the fact that Bangladesh's maritime space narrows dramatically in the areas farther seaward. As Mr Martin described this morning, these are the unmistakable fingerprints of a concavity. Bangladesh starts with a coastal opening as measured between land boundary termini of 349 kilometres. With the bisector it proposes, taken in combination with India's claim line as now disclosed, it reaches its 200-mile limit with a much narrower access corridor measuring just 50 miles across.

The 215° line also takes account of Bangladesh's entitlement in the outer continental shelf by according it access to the 200-mile limit and from there to the areas beyond.

³⁷ *Gulf of Maine*, paras. 212–14.

I will not dwell on this issue further today, as a fleet of colleagues commanded by Admiral Alam, with an experienced crew of Dr Parson and Professor Boyle, will deal with it in detail tomorrow morning.

And finally, the 215° bisector takes due account of St Martin's Island by virtue of the transposition to the end of the territorial sea boundary. On this basis the island gets its full effect to which it is entitled under article 121 *prima facie*.

The overall equity of the 215° line can perhaps best be viewed in a regional context. On the screen before you now are the maritime areas within 200 miles appertaining to the Bay of Bengal's littoral States. In this view, the Bangladesh-Myanmar maritime boundary is defined by Myanmar's equidistance proposal. The cut-off effect on Bangladesh is unmistakable – that is the dark green. Now you look at the Bangladesh-Myanmar boundary defined by the 215° bisector, that's the area in light green. The difference is not very noticeable – at least to all but Bangladesh. Myanmar's maritime space within 200 miles overall is reduced by 4%; Bangladesh's is increased by a full 25%. Moreover, Bangladesh gains a substantial though relatively still modest outlet to the 200-mile limit.

Myanmar's counter-argument against the equitable character of the 215° line is weak. In the Counter-Memorial it did not even try to argue that the line was inequitable. There was silence. We pointed this out in our Reply and the Rejoinder took up the challenge. How did it do so? It said: "The inequitable character of the Bangladesh's [*sic*] bisector is so obvious that it does not need a long discussion."³⁸ Mr President, Members of the Tribunal, I don't know if a long discussion was needed or not. Professor Pellet and I tend to disagree about what is a long discussion - I have finished the discussion and gone to bed before he is half-way through his; but at least some discussion would seem to be in order. The fact that there was none to speak of is telling.

The only argument against the equity of the 215° line that Myanmar makes in the Rejoinder concerns the transposition of the bisector to the end of the territorial sea boundary, the effect of which is to add approximately 8,000 km² to Bangladesh's maritime space.³⁹ But as we have shown in our discussion of St Martin's Island, demonstrating inequity is not a matter of tossing numbers about in the abstract. The numbers must be viewed in their overall context. And here, for the reasons I have given, the overall context confirms the equity of the 215° bisector line.

The equitableness of Bangladesh's boundary proposal is confirmed lastly by the disproportionality test. The Parties are agreed that this is the last stage of the delimitation process, a final check, done to ensure that a proposed result does not result in any evident disproportion by reference to the ratios of the relevant area allocated to each Party and their respective relevant coastal lengths.⁴⁰

³⁸ RM, para. 5.63.

³⁹ RM, para. 5.64-65

⁴⁰ See, e.g., *North Sea Continental Shelf*, paras. 92, 101; *Gulf of Maine*, para. 222; *Libya/Malta*, paras. 68, 73; *Jan Mayen*, para. 61; *St. Pierre & Miquelon*, para. 93; *Eritrea/Yemen*, para. 168; *Qatar v. Bahrain*, paras. 241–3; *Cameroon v. Nigeria*, para. 301; *Barbados/Trinidad & Tobago*, paras. 237, 369–73

We already have a clear definition of the relevant coasts. What we need then is an equally clear definition of the relevant area. Unfortunately, here again the Parties again are in substantial disagreement. It is a hotly contested issue what is the relevant area, made hotter by the fact that the existing jurisprudence is not altogether clear.

Mr President, Members of the Tribunal, I wonder if I might suggest a way of looking at the issue that I hope promises a greater measure of objectivity. The point is that any delimitation has a cut-off effect on both States in that it prevents them from exercising rights over the full extent of their potential entitlements. The goal of the delimitation process must be to apportion these entitlements – and I quote from the court in *Black Sea* “in a reasonable and mutually balanced way”.⁴¹

What better way then to define the relevant area than by reference to the area of overlapping potential entitlements? This is the approach the Court adopted in the *Jan Mayen* case, when it observed:

“Maritime boundary claims have the particular feature that there is an area of overlapping entitlements, in the sense of overlap between the areas which each State would have been able to claim had it not been for the presence of the other State[s]”.⁴²

It is precisely this area of overlapping entitlements that is in issue here.

Defining this area of overlapping entitlements within 200 miles is a simple cartographic exercise. Each State’s zone of entitlement can be identified by projecting an envelope of 200-mile arcs from all points on that State’s relevant coast. This is nothing more than the process by which a State’s 200-mile limit is defined. The area of overlapping entitlements is where the two zones of entitlement overlap. And as I say, that is how the Court did it in *Jan Mayen*.⁴³ You can see the area of overlapping potential entitlements on the screen now.

The total area intersection of these two sets of potential entitlements is shown on the screen before you in blue. Two additional observations are necessary about the areas so defined. First, in the west it excludes maritime areas claimed by India on the basis of the claim line in its Counter-Memorial in the counterpart case. In our view, areas claimed by third States should not be considered part of the area of bilateral overlap and must be excluded.

The result is the final relevant area depicted on the screen in a colour which I am told is blue but is a sort of blue-green – a very attractive colour in any event. In total, it measures 175,326.8 km².

My second observation is that defining the relevant area in this way has implications for the definition of the relevant coasts. We can see that on the Bangladesh’s side, the entirety of that coastal frontage is embraced by the area of overlapping

⁴¹ *Black Sea*, para. 201.

⁴² *Jan Mayen*, para. 59.

⁴³ *Jan Mayen*, para. 59, and for a map of the area of overlapping claims see p. 80.

entitlements, confirming that all of Bangladesh's coast is relevant. You can also see that on the Myanmar side, only Myanmar's coast down to the area approximately of Bhih Cape is included in the area of overlap, similarly confirming that none of Myanmar's coast further south is relevant in this case.

By using the Court's methodology from the *Jan Mayen* case – envelopes of overlapping 200-mile arcs – we can thus derive more objective measurements of the relevant coasts and areas, and avoid the manipulation of these concepts.

Using Bangladesh's 215° bisector to apportion this relevant maritime area yields the following figures: 89,803 km² for Bangladesh, shown in red, and 85,524 km² for Myanmar, shown in yellow. In other words, the bisector splits the relevant area almost exactly in half. The ratio is 1.05:1 in favour of Bangladesh. Given a ratio of coastal lengths, that is 1.1:1 in favour of Bangladesh. This allocation is plainly not disproportionate.

But the same conclusion would be true even if one accepted Myanmar's view of its own relevant coast, which we think is wrong for the reasons I have given. Properly measured, the difference between Bangladesh's relevant coast and Myanmar's coast all the way down to Cape Negrais gives a ratio of 1.4:1 in favour of Myanmar. A 1.1:1 allocation of the relevant area is not disproportionate even on this basis.

In short, the 215° line is fully consistent with the rules of delimitation referred to in articles 74(1) and 83(1), and we commend it to the Tribunal.

Mr President, Members of the Tribunal, I now address one of the more analytically interesting issues in the law of maritime delimitation, which we will call the "grey area" – also known as the orphan wedge, and also known as the *alta mar* problem. This is the area which is beyond 200 miles from the Bangladesh coast but within 200 miles from the Myanmar coast, yet on the Bangladesh side of the bisector line. The extent of this wedge-shaped area is depicted on the screens in front of you, shown appropriately in grey. By virtue of what we submit is its entitlement beyond 200 miles, Bangladesh is entitled to claim this area as continental shelf. At the same time, it is overlain by waters that Myanmar could in principle claim as EEZ.

In addressing the status of this area, the grey zone, I should note that it is not a rare, or uncommon, occurrence. It arises every time you depart from equidistance. By definition, a delimitation that is anything other than a strict equidistance line will reach the 200-mile limit of one State before it reaches the 200-mile limit of the other.

The result of the delimitation in the *Gulf of Maine* case, for example, was to create an area on the United States' side of the delimitation line but beyond 200 miles from the US coast, and within 200 miles of the Canadian coast. You can see the area on the map in front of you. The area will shortly occur. It's that little triangle, the grey zone. You can see the equidistance line. You can see the line awarded, which stopped at the US 200-mile zone but could have kept going to the Canadian 200-mile line, and the triangle of the figure there, which is approximately a triangle, is the grey zone. To this day the status of that area is still in dispute between the United States and Canada.

The issue here is made even more interesting by the fact that Bangladesh has an entitlement in the outer continental shelf that overlaps with Myanmar's 200-mile EEZ entitlement.

As I have said, the grey zone issue arises whenever one departs from equidistance. The only way to avoid it altogether is to make equidistance a mandatory rule of law applicable at all times and in all places, and if you did that you would not have a grey zone; but for all the reasons I explained last Thursday, that is not a serious option and, of course, it is not the law.

Now your Tribunal will be the first to confront this issue.

Although the issue arises whenever one departs from equidistance, in this case it is, like much else, yet another effect of the concavity of the Bay's north coast. To see how this is so, we have prepared a short animation that illustrates the problem.

We begin with what every tribunal dreams to have, an unproblematic delimitation exercise, an idealized straight-line coast with three adjacent States. The 200-mile limit from all three is a straight line that parallels the coast. The equidistance boundaries between them are perpendicular to the direction of the coastline; so the angle bisector and the equidistances principle produce exactly the same outcome. But now the coasts begin to arc inward, and the notional equidistance lines begin to move inward too. As the coast continues to bend, the 200-mile limit of the middle State is increasingly pinched by the 200-mile limits of the other two. Already, potential grey zones are being created as the delimitation varies from equidistance, which on this graphic it does not. Past a certain point the concavity is severe enough that the 200-mile limit of the middle State is forced inside the 200-mile limit of the others. The consequence is that any effort to abate the effects of the equidistance principle with a delimitation that gives the middle State access to 200-miles results in the creation of grey zones, about which we are speaking.

That is exactly the situation in which Bangladesh finds itself. You can see how our notional graphic is transformed into the real-life world of the Bay of Bengal. To use Myanmar's own words, "Bangladesh's 200-mile limits are completely surrounded by the 200-nautical-mile limit of Myanmar and by the 200-nautical-mile limit of India."⁴⁵

After entirely neglecting the issue in its Counter-Memorial (not the only questions entirely neglected), Myanmar's Rejoinder belatedly tries to leverage it into another reason the Tribunal is prohibited from recognizing any rights of Bangladesh beyond 200 miles. And I quote:

"The extension of the delimitation beyond 200 miles would inevitably infringe on Myanmar's indisputable rights. This would preclude any right of Bangladesh to the continental shelf beyond 200 nautical miles."⁴⁶

⁴⁵ RM, para. 6.14.

⁴⁶ RM, para. 6.54.

In a similar way, but rather more emphatically, Myanmar asserts “it is not legally possible to deprive it of its indisputable rights within its 200-mile limit”; so the problem is clearly posed.⁴⁷

Mr President, Members of the Tribunal, with all due respect, Myanmar has fallen into its own confusion. Myanmar elsewhere accuses Bangladesh of assuming it has rights that it does not yet have. Only the Tribunal can determine who has what rights.⁴⁸ But that is exactly what Myanmar is doing here. What rights it may or may not have, and where, is for this Tribunal to decide.

There is no textual basis in the 1982 Convention for the assertion that State A’s entitlement within 200 miles will inevitably trump State B’s entitlement in the continental shelf beyond 200 miles. But that is exactly what Myanmar says when it asserts: “There is no right to maritime areas beyond 200 nautical miles when that would trump indisputable rights within 200 miles.”⁴⁹

We say this is inconsistent with the plain words of the 1982 Convention. I have examined and re-examined the pertinent articles of that Convention. There is nothing in them that suggests either the EEZ or the continental shelf, whether within or beyond 200 miles, has priority over the other. They sit side by side. The only guidance on how to handle a contest between the two comes from articles 74 and 83, both of which say the same thing: the solution must be an equitable one.

How a court or tribunal gets to such a solution, and the manner in which it apportions rights in order to do so, necessarily involves a degree of judgment that takes account of the particular facts of the case. A substantial margin of appreciation inheres in the very nature of equity. The 1982 Convention gives no basis for concluding that a tribunal’s margin of appreciation is limited by a rigid rule that entitlements within 200 miles always defeat entitlements beyond 200 miles. It cannot be the case that the State with a clear and undisputable potential entitlement in the continental shelf beyond 200 miles should for ever be prohibited from reaching that entitlement solely by virtue of the geographical happenstance that it is located in a concavity and there is a slight wedge of potential EEZ separating it from the outer continental shelf.

Myanmar attempts to enlist the *Barbados/Trinidad & Tobago* decision as support for its position.⁵⁰ It has called that case up on a variety of fronts. But the tribunal there ducked the issue. They awarded that space to the Tobago triangle, which precluded the issue from arising. They deliberately decided not to go further.

Trinidad and Tobago claimed that its rights to the continental shelf cannot be trumped by Barbados’ EEZ.⁵¹ The tribunal said it had jurisdiction to decide that question but that it did not arise, and I quote:

⁴⁷ RM, para. 6.61.

⁴⁸ RM, para. 6.9.

⁴⁹ RM, para. 6.58.

⁵⁰ RM, paras. A.54-55.

⁵¹ *Barbados/Trinidad & Tobago*, para. 367.

“the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 200 nautical miles” – the tribunal meant beyond 200 nautical miles from Trinidad and Tobago – “The problems posed by the relationship of continental shelf and EEZ rights are accordingly problems with which the Tribunal has no need to deal. The Tribunal therefore takes no position on the substance of the problem posed by the argument advanced by Trinidad and Tobago.”⁵²

Words said, no doubt, with some degree of relief.

I should note further that Myanmar’s argument about the alleged priority of its EEZ entitlement over the outer continental shelf Bangladesh entitlement is contradicted by its own position concerning the territorial sea. The boundary Myanmar proposes in the territorial sea departs substantially from an equidistance line. The result is that a proportion of its proposed boundary is within 12 miles of St Martin’s Islands but more than 12 miles from Myanmar’s coast. You can see it on the screen. It’s an area in a shade of red. As the Rejoinder acknowledges, this means that Myanmar’s delimitation proposal in part divides the territorial sea of Bangladesh from the EEZ of Myanmar.⁵³ It is just fine with Myanmar if its rights in the EEZ trump Bangladesh’s rights within 12 miles. That is not a problem. The problem occurs at 200 miles, apparently.

It is worthwhile dwelling on this point. Article 15 of the 1982 Convention, although it connotes a presumption of equidistance, envisages that even within 12 miles the boundary will not necessarily follow the equidistance line. It therefore envisages a situation where a line will divide the territorial sea of one State and the EEZ of another at less than 12 miles from the first State and more than 12 miles from the second. Such a line will be a single maritime boundary, as indeed this is, and it will exclude each State from claiming sovereign rights – of *any* description – on the other side of the line. The point is this: to delimit a single maritime boundary is at the same time to attribute maritime areas to one State and to exclude the other State from those areas. To delimit is not only to include; it is also to *exclude*.

The point can be illustrated by taking air column rights in the red zone you can see on the screen. We have taken these on the Myanmar side of its claim line, cutting off St Martin’s Island, in the wedge which is within 12 miles of the Island. Myanmar has no air column rights in that wedge. Why? Because they are not part of the EEZ regime. Bangladesh doesn’t have them either because it is cut off from the EEZ boundary so drawn. Now that’s a situation which Myanmar accepts. The implications for the orphan wedge at 200 miles are clear enough. International law tells you the extent of your sovereign rights consequent upon a delimitation. It does not preclude a delimitation on account of rights not yet ascertained. Myanmar admits that within 12 miles - the air column rights example that I have given you - but it denies it at 200 miles.

Of course, we entirely disagree with Myanmar’s proposal for delimiting the territorial sea but that is not the point. Myanmar admits when it suits its own interests that

⁵² Ibid, para. 368.

⁵³ RM, paras. 3.33, 7.3-7.4.

entitlements in zones which are in principle further from the coast, where the coastal State's bag of rights is smaller, may take precedence over entitlements in zones nearer the coast, where a coastal State's bag of rights is larger. Here the right is the right of sovereignty. It is occluded by the sovereign rights in the EEZ. The fundamental rule of delimitation is that it depends on the equities of the case. The same reasoning applicable to the air column rights that I was taking as an example applies, we submit, with at least equal force, it may be said *a fortiori*, to the EEZ and continental shelf at 200 miles.

Mr President, Members of the Tribunal, for these reasons, in our submission:

- (1) In the present case, the appropriate delimitation method is that of an angle bisector drawn so as to mitigate the cut-off effect of the concave coasts on which Bangladesh is situated.
- (2) The appropriate bisector is one drawn at an angle of 215° from the end point of the territorial sea boundary at 12 miles from St Martin's Island and from the Myanmar coast.
- (3) Such a line produces an equitable result as between the parties, having regard to their respective coastal lengths and all other relevant circumstances.
- (4) The so-called grey area problem thereby produced at 200 miles is no reason not to continue the delimitation to the edge of the outer continental shelf at 200 miles from the Myanmar coast – to boldly go where, as Professor Akhavan will now demonstrate, you plainly have jurisdiction to go.

Mr President, Members of the Tribunal, I thank you again for your patient attention. I would now ask you to call on Professor Akhavan.

THE PRESIDENT: Thank you very much. I call Professor Payam Akhavan to take the floor.

MR AKHAVAN: Mr President, distinguished Members of the Tribunal, good afternoon. It is my honour and privilege to appear before you in this hearing on behalf of Bangladesh. With your permission, Mr President, I propose to speak until about half past four, at which point you may wish to have a break.

Professor Crawford's presentation concluded our first-round submissions on delimitation of the EEZ and the continental shelf up to 200 nautical miles. At tomorrow's session, Dr Parson, Admiral Alam and Professor Boyle will make our submissions on delimitation of the continental shelf beyond 200 miles. In advance of that presentation, I shall address the Tribunal's jurisdiction to effect a full delimitation of the maritime boundary between Bangladesh and Myanmar, including in the outer continental shelf.

The delimitation of this final segment of the boundary beyond 200 miles is the only issue in dispute between the Parties. Myanmar maintains that it is beyond the competence of the Tribunal. The Parties are otherwise in agreement that the Tribunal is competent to delimit their boundary in the Bay of Bengal. This sole exception however is highly significant: Bangladesh's claim to the outer continental

shelf comprises a substantial portion of its overall maritime space. As Professor Crawford explained, ensuring Bangladesh's access to the outer shelf is also a highly important factor in effecting an equitable delimitation within the inner shelf.

The Tribunal's competence to delimit the entire maritime boundary between the Parties is simple and straightforward. Article 21 of the ITLOS Statute provides that:

"The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal."

The Tribunal has jurisdiction over this dispute based on the notification of a Special Agreement under article 55 of the Rules of the Tribunal. In particular, Myanmar made a declaration recognizing the Tribunal's jurisdiction on 4 November 2009, and Bangladesh made a reciprocal declaration on 12 December 2009. Both declarations confer jurisdiction on this Tribunal to delimit the boundary in the Bay of Bengal without any exceptions or limitations, nor has Myanmar made any preliminary objections to the exercise of jurisdiction by this Tribunal and, as I shall now discuss, there is no basis for any objections to the Tribunal's exercise of jurisdiction in respect of any part of Bangladesh's case.

Article 288(1) of the 1982 Convention provides that the Tribunal:

"shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it".

There can be no doubt in the present case that Bangladesh and Myanmar's conflicting claims to the outer shelf is obviously a "dispute concerning the interpretation or application" of the Convention.

Article 76 of the Convention contains a definition of the continental shelf beyond 200 miles based on "natural prolongation". Article 83 contains the principles applicable to delimitation of the continental shelf between States with opposite or adjacent coasts. Article 83 does not distinguish between an inner or continental outer shelf. The dispute between Bangladesh and Myanmar in this regard plainly concerns "the interpretation or application" of those provisions of the Convention, namely articles 76 and 83. As such, it obviously falls within the jurisdiction of the Tribunal.

Myanmar, however, makes extraordinary efforts at preventing this Tribunal from exercising jurisdiction. It raises "objections" that aim to introduce obscurity and complexity where none exists. Myanmar's first argument is that the delineation of the outer margin by the CLCS is a condition precedent to the Tribunal's competence to delimit beyond 200 miles. Its second argument is that the Tribunal cannot make a binding delimitation as between Bangladesh and Myanmar because of the claims – whether actual or potential – of third parties.

As I shall set forth shortly, these objections have no merit whatsoever. They smack of desperation to prevent the Tribunal from delimiting the outer shelf under any possible pretext. From the outset, however, it is necessary to emphasize Bangladesh's claim that, based on "natural prolongation" within the meaning of

article 76 of the Convention, Myanmar has no entitlement to an outer shelf beyond 200 miles. Therefore, the Tribunal in our submission only needs to effect a bilateral delimitation up to 200 miles and merely indicate that, as between the Parties to this dispute, only Bangladesh has an entitlement beyond 200 miles. Delimitation on this basis would have no appreciable effect on the rights of third parties. But let us assume hypothetically that Myanmar does have an entitlement beyond 200 miles. Even then, delimitation in the outer shelf would have no effect on third parties. For them, the judgment would be *res inter alios acta* as clearly set forth in article 33(2) of the Tribunal's Statute. There is simply no bar to the jurisdiction of the Tribunal. None of Myanmar's two objections can withstand scrutiny.

I shall now address these arguments in greater detail. Myanmar's first contention is that the Tribunal cannot delimit the outer shelf *until* the CLCS has delineated its outer limits. This is plainly inconsistent with article 76, Part XV, and Annex II of the Convention, as well as the CLCS's own Rules of Procedure, as I shall shortly explain. These all indicate that delineation of the outer margin is not a precondition to delimitation. It would be absurd to conclude that the Tribunal cannot delimit the maritime boundary until the CLCS delineates the outer margin, and that the CLCS cannot determine the outer margin until the Tribunal has delimited the maritime boundary. The circularity of Myanmar's argument is self-evident. It would relegate delimitation of the outer shelf to a perpetual limbo. It conjures up an image of two excessively polite gentlemen trying to enter a door, each insists that the other must go first: "After you," says one, and the other insists "But no, after you." Several hours later none has entered the door. But it is far worse in this case, where many years rather than a few hours would be wasted.

This argument is not only absurd; it is also irrelevant. The recent CLCS submissions of both Bangladesh and Myanmar, and even that of India, are in complete agreement that the outer margin of the continental shelf in the Bay of Bengal is not even remotely near the areas claimed by the parties in this dispute. Myanmar, however, is not satisfied by this consensus. Instead, it maintains at paragraph 12 of the rather curious Annex to its Rejoinder that hypothetically:

"It cannot be excluded that the CLCS will not endorse all of the submissions of the States in the Gulf of Bengal region and that, according to the CLCS recommendations, there will be an 'area beyond the limits of national jurisdiction' in the Bay of Bengal."

But Myanmar does not present any evidence whatsoever suggesting that this in fact is the case. There is simply no basis to conclude that delimitation could potentially affect delineation of the International Seabed Area. To the contrary, Myanmar has submitted a summary of its own CLCS submission, which places the outer limit of the margin far beyond the overlapping areas claimed by the parties in this proceeding. A conflict between the jurisdiction of the Tribunal and the mandate of the Commission therefore is non-existent; it is so remotely theoretical as to be all but impossible.

Mr President, with your permission, now may be a suitable time for a break, unless you wish me to continue for another ten minutes or so.

THE PRESIDENT: If you feel more comfortable to cut off now, we will take a recess now and come back at 4.55 p.m. to give you more time to complete your statement. The hearing is suspended until 4.55 p.m..

(Short adjournment)

THE PRESIDENT: The hearing continues. Professor Akhavan, you have the floor.

MR AKHAVAN: Thank you, Mr President, Members of the Tribunal I began the break by summarizing Myanmar's arguments on the relationship between the CLCS and the Tribunal, and I would now like to continue by considering that, irrespective of where the outer margin is situated, the adjudicative role of Part XV compulsory procedures is in no way diminished by the expert technical advisory role of the Commission. Article 76(8) of the Convention sets forth the mandate of the Commission as follows:

"The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

This provision clearly indicates that the Commission can only issue recommendations and that these shall be "final and binding" only if the concerned State consents. Article 8 of Annex II of the Convention even stipulates that:

"In case of disagreement by the coastal State with the recommendations of the Commission, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission."

Thus, the Convention expressly contemplates that there may be disagreements between the Commission and States Parties to the Convention. Consequently, the expert advisory role of the Commission does not automatically or necessarily result in a final and binding settlement of the limits of the outer continental shelf, notwithstanding any disputes in relation to delimitation.

A recent example is Brazil's disagreement with the Commission's recommendations concerning its 17 May 2004 submission. Brazil does not accept the recommendations of the Commission, and the Commission is clearly not empowered to impose its decision against Brazil over such objections. Unlike this Tribunal and other Part XV jurisdictions, the CLCS is clearly not a compulsory procedure entailing binding decisions. It has no adjudicative powers whatsoever.

Article 2(1) of Annex II of the Convention makes it abundantly clear that Commission members are not even called upon to have legal expertise. Rather, they are to be selected as "experts in the field of geology, geophysics or hydrography". That is exactly why the Part XV procedures must necessarily apply to legal disputes concerning the outer continental shelf. For example, the 2004 report of the International Law Association's Outer Continental Shelf Committee, which will be familiar to members of Tribunal, emphasizes the exclusively scientific and technical role of the Commission, and it concludes as follows:

“If article 76 were to be completely excluded from the procedures of Part XV, the absence of legal expertise in the Commission would seem to be problematic, as there then would be hardly any possibility to submit questions of interpretation raised by a submission to legal scrutiny.”⁵⁴

An important point to bear in mind, as the number of submissions to the Commission increases dramatically and as this Tribunal may be called upon in the future to subject some of these questions to legal scrutiny. Since it is evident that disputes under article 76 fall within the purview of Part XV compulsory procedures, the ILA report goes on to state that a court or tribunal under Part XV may even “find that a recommendation of the CLCS is invalid”.⁵⁵ As mentioned, there is no conflict between the Tribunal’s jurisdiction and the Commission’s mandate in the present case. But even as a matter of academic interest, there can be no doubt that the Tribunal has jurisdiction over – to once again quote article 288(1) of the Convention – that the Tribunal has jurisdiction over “any dispute concerning the interpretation or application of the Convention”. This applies with even greater force to this Tribunal, in view of its unique role as the ultimate guardian of the law of the sea.

I shall now address Myanmar’s contention that the Commission’s recommendations are a condition precedent to this Tribunal’s jurisdiction. It is revealing that Myanmar cannot point to any provision of the Convention stipulating that the compulsory procedures under Part XV are somehow inapplicable to the outer shelf unless and until the Commission has delineated the outer margin. To the contrary, the Convention makes a sharp distinction between recommendations regarding the delineation of the outer margin and delimitation of the continental shelf between States. Article 76(10) expressly provides that:

“The provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”

This provision makes it clear that the process of delineating the outer limit does not trump or stop the process of delimitation. Similarly, article 9 of annex II of the Convention provides that:

“The actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts.”

The Commission’s Rules of Procedure expressly prohibits delineation of the outer margin where there is a delimitation dispute, unless the parties in dispute expressly agree otherwise. In particular, Annex I, paragraph 5(a) of the 2008 Rules of Procedure of the Commission provides that:

“In cases where a land or maritime boundary dispute exists, the Commission shall not examine and qualify a submission made by any of the States concerned in the dispute. However, the Commission may

⁵⁴ International Law Association, Outer Continental Shelf Committee, *Berlin Conference (2004): Legal Issues of the Outer Continental Shelf*, at p. 4.

⁵⁵ *Ibid.* at p. 12.

examine one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.”

Now Myanmar is unhappy with Bangladesh’s reliance on this provision. It complains at paragraph 19 of the Annex to its Rejoinder that:

“It is only Bangladesh’s refusal to consent to the consideration of Myanmar’s submission before the CLCS which has forced the Commission so far to defer the establishment of a sub-commission to consider the submission. ...To the extent that Bangladesh is caught in a ‘catch-22’, it is entirely of its own making.”

It seems that Myanmar believes that Bangladesh should not exercise its express rights under the Convention, Annex II, and the Commission’s own Rules of Procedure. It would perhaps wish to re-write the Convention to make the Commission’s recommendations a condition precedent to this Tribunal’s jurisdiction, but that is clearly not what the Convention says.

But let us assume that Myanmar is right and that Bangladesh should immediately today withdraw its objection under CLCS Rule 5(a). What would be the consequence? Would this be a happy outcome for dispute settlement? In answering this question, let us consider the workload of the Commission. For example, the 24 July 2009 Report of the Meeting of States Parties to the Convention indicated at paragraph 82 that as at that time in 2009 States had made 51 submissions to the Commission, transmitted 43 sets of preliminary information to the UN Secretary-General, and that many other submissions could be expected in the near future.⁵⁶ The report indicated at paragraph 83 back in 2009 that, based on this workload, it will take at least until the year 2030 to consider existing submissions. This time-estimate was confirmed at the June 2010 Meeting of States Parties by the CLCS Chairman Mr Albuquerque⁵⁷ and there have been several more submissions since 2009. This includes Bangladesh, which made its submission recently on 25 February 2011. Bangladesh is therefore one of the last States in the queue of submissions and may have to wait until 2035 for a response from the Commission. So if Myanmar’s contention is accepted that the Commission must first delineate the outer margin, this Tribunal would have to wait 25 years to delimit the boundary in the outer shelf. Such an absurd situation can hardly be called a trap Bangladesh has laid for itself, or a “catch-22” of Bangladesh’s “own making”, to quote Myanmar’s Rejoinder.

Myanmar’s extraordinary argument calls to mind the words of the legendary Bengali poet and mystic, Rabindranath Tagore, who in 1913 became the first non-European to win the Nobel Prize for Literature:

“Time is endless in thy hand, my Lord.

⁵⁶ *United Nations Convention on the Law of the Sea, Meeting of States Parties, Report of the Nineteenth Meeting of States Parties*, U.N. Doc SPLOS/203 (22-26 June 2009) at para. 82.

⁵⁷ See Chairman of the Commission on the Limits of the Continental Shelf (CLCS) “*Presentation on the workload of the Commission on the Limits of the Continental Shelf (CLCS)*”, 20th Meeting of States Parties, 14-18 June 2010, at p. 8 (available at <http://www.un.org/depts/los/clcs_new/workload/clcs_presentation_workload2010msp20.pdf>).

There is none to count the minutes.
Days and nights pass and ages bloom and fade like flowers.
Thou knowest how to wait.”⁵⁸

Divine patience is enchanting, but the earthly task of this Tribunal is to efficiently and expeditiously resolve disputes, and waiting another 25 years to do so would surely not be an encouraging precedent.

Another problem with Myanmar’s argument is that, while it places heavy reliance on the *Barbados v. Trinidad* award to support its claim to an outer shelf, it seems totally oblivious that the Annex VII Tribunal in that case held that it had jurisdiction to delimit the boundary beyond 200 miles. In this respect, it is worth reminding Myanmar that the Tribunal in that case explained that “there is in law only a single ‘continental shelf’ rather than an inner continental shelf and a separate extended or outer continental shelf”⁵⁹. The Tribunal then expressly held that “its jurisdiction in that respect includes delimitation of the maritime boundary in relation to that part of the continental shelf extending beyond 200 nm”.⁶⁰ Myanmar does not provide any explanation as to why this Tribunal’s jurisdiction should be any less than that of the Annex VII Tribunal in *Barbados v. Trinidad*.

I shall now address Myanmar’s second argument that delimitation of the outer continental shelf may prejudice the rights of third parties. Myanmar includes as potential third parties India and the International Seabed Area. In fact, neither India nor the Area could be prejudiced by the delimitation of the maritime boundary between Bangladesh and Myanmar. Article 33(2) of this Tribunal’s Statute makes this clear. It provides that: “The decision shall have no binding force except between the parties in respect of that particular dispute.”

Furthermore, third-party claims affect only a portion of the outer shelf. The first innermost portion of the outer shelf is only disputed between Bangladesh and Myanmar. This bilaterally disputed area is indicated in Figure R4.1 in Volume II of Bangladesh’s Reply, in the green area. It is only the second portion of the area beyond 200 miles that is also claimed by India, and it is clear in any event that any delimitation in that trilaterally disputed area would be *res inter alios acta* with respect to India.

In its Rejoinder, however, Myanmar conjures up a new argument that even the bilaterally disputed area could *potentially* be claimed by India. It now maintains that the Tribunal must treat the entire outer shelf as a trilaterally disputed area. At paragraph 15 of its Annex, it argues that since, in Myanmar’s view, the entire area is also *potentially* disputed by India, the Tribunal cannot exercise jurisdiction in this area at all because “[a]ny delimitation between the Parties in this area would prejudice the interests” of third parties. It is based on the contention, at paragraph 14

⁵⁸ Rabindranath Tagore, *Gitanjali*, poem no. 82 (London: Macmillan, 1913).

⁵⁹ *Delimitation of Maritime Boundary between Barbados and Trinidad and Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147 (hereinafter “Barbados/Trinidad & Tobago”), at para. 213. Reproduced in Memorial of Bangladesh (hereinafter “MB”), Vol. V.

⁶⁰ *Ibid.* at para. 217.

of the Annex to Myanmar's Rejoinder, that India's CLCS submission is only partial and that it has reserved its right:

“to make submissions with respect to other areas, which could potentially overlap entirely with the areas of continental shelf extending beyond 200 nautical miles claimed by the Parties to the present proceedings.”

This is a remarkable argument. Myanmar is correct that India has only made a partial submission to the Commission and that it may potentially make claims to other areas. What Myanmar omits to mention is the Indian submission is in no way partial with respect to the northern Bay of Bengal. Myanmar's Annex contains a general reference in footnote 24 to the Executive Summary of India's CLCS submission. Had Myanmar specifically referred to page 2, paragraphs 5 and 6, we would clearly see that India reserves the right to make a second submission only in support of its claim in the southern part of the Bay of Bengal pursuant to the Statement of Understanding in Annex II to the Final Act of the Convention. Nowhere does the Executive Summary state that India intends to claim additional areas to any area other than the southern Bay of Bengal. Perhaps counsel for Myanmar can read the mind of counsel for India. Perhaps their power of speculation allows them to predict what unspecified potential claims India could one day hypothetically make in an imaginary world. But in the real world, the express claims of India in its CLCS submissions are sufficiently clear to put such arguments to rest. These claims are indicated in Figure 2 on page 10 of its CLCS submissions and as the Members of the Tribunal will see, it corresponds to the area that is only disputed bilaterally and the other area to the south west which is trilaterally disputed. We would submit that Myanmar's baseless speculation on behalf of India as to what potential claims it could make, when it has clearly made its claims, is surely not the basis for defeating this Tribunal's jurisdiction.

Even where, unlike the present case, a third party's actual claims cannot be determined, international courts and arbitral tribunals have not refrained from exercising jurisdiction. It is apparent that speculation on “potential claims” could be fatal to any form of effective dispute settlement in the vast majority of disputes where third-party interests are involved. In *Qatar v. Bahrain* for example, the ICJ was able to ascertain the actual claims of Iran but not those of Saudi Arabia. But it did not decline to delimit the boundary; and that case is in stark contrast to the situation here where India's actual claims are abundantly clear.

Myanmar dismisses the *res inter alios acta* principle far too casually. It contends at paragraph 16 of the Annex to the Rejoinder that article 33(2) of this Tribunal's Statute is inapposite because “the limited reach of the *res judicata* principle in the international legal system ... does not shield non-parties from delimitation decisions that relate to areas in which they maintain a claim.” This is clearly not an issue, at the very least, with respect to the bilaterally disputed area. But even with respect to the trilaterally disputed area, Myanmar has shown no good reason why the Tribunal should not effect a full delimitation. In the *Anglo-French Continental Shelf* case, the arbitral tribunal delimited the entirety of the continental shelf between France and the United Kingdom, notwithstanding overlapping claims by Ireland. That tribunal emphasized that its award “will be binding only as between States to the present arbitration and will neither be binding upon nor create any rights or obligations for

any third State, and in particular for the Republic of Ireland, for which the Decision will be *res inter alios acta*".⁶¹ The Tribunal further observed that:

"In so far as there may be a possibility that the two successive delimitations of continental shelf zones in this region, where the three States are neighbours abutting on the same continental shelf, may result in some overlapping of the zones, it is manifestly outside the competence of this Court to decide in advance and hypothetically the legal problem which may then arise. That problem would normally find its appropriate solution by negotiations directly between the three States concerned ..."

That case, Mr President, is particularly apposite here. Soon after this Tribunal renders its judgment, an Annex VII Tribunal – three of whose five members (including its President) are also members of this Tribunal – will delimit Bangladesh's maritime boundary with India. The judgment in this case will have no bearing on India's claims. Of course, the Tribunal can do no more, in regard to the trilaterally disputed area, than determine, as between Bangladesh and Myanmar only, which of those two States has the superior claim *vis-à-vis* the other. Whether Bangladesh or Myanmar is determined to have the better claim does not affect India's claims. For example, if Bangladesh is judged by this Tribunal to have a better claim in relation to Myanmar, it must still confront all of India's claims before the Annex VII Tribunal. Thus, at the conclusion of that case, before the Annex VII Tribunal, Bangladesh's boundaries in the outer continental shelf with both Myanmar and India will be definitively established, and beyond dispute.

Why should Myanmar be able to block such an auspicious outcome? If this Tribunal does not adjudicate the full boundary between Bangladesh and Myanmar, it would condemn all three States – Bangladesh, Myanmar and India – to perpetual uncertainty about the areas now in dispute. There are only three ways to settle this dispute, to resolve this problem. The first option is for the parties to negotiate a boundary agreement, but that does not appear very promising in light of their inability to reach an agreement after 37 years of negotiations. In fact, the parties are no closer to an agreement today than they were in 1974. That is why they appear before this Tribunal. The second option is for the three parties to join together in a single case, either before this Tribunal or another jurisdiction; but India has refused Bangladesh's invitation to join these proceedings, or even to transfer the current Annex VII case to ITLOS. And there are no indications that India will ever agree to any tripartite dispute resolution procedure.

This leaves us with the third and only remaining option, which is to avoid perpetual deadlock through consecutive decisions in a judgment of this Tribunal and an award of the Annex VII Tribunal. This would leave fully settled Bangladesh's borders with both Myanmar and India. Only Myanmar's border with India would then remain unresolved by these two consecutive decisions. And of course, if those parties felt the need for resolution and were unable to reach agreement, either of them could

⁶¹ *Delimitation of the Continental Shelf between France and the United Kingdom*, Decision, 30 June 1977, reprinted in 18 RIAA 3 (hereinafter "*Anglo/French Continental Shelf Case*"), at para. 28. Reproduced in MB, Vol. 5.

initiate a third Part XV or other proceeding. This, of course, is a matter for them to decide, but what is clear is that the only way out of a permanent deadlock is for this Tribunal to establish the entire boundary between Bangladesh and Myanmar. There is no other alternative.

Mr President, distinguished Members of the Tribunal, the final and complete resolution of these disputes between the parties in this case is exactly the outcome that the drafters of the Convention envisaged when adopting Part XV in 1982. The President of the Third United Nations Conference on the Law of the Sea, Tommy Koh of Singapore, asked at that time, in 1982, whether the decade-long negotiations – this being the longest treaty-making conference in history – whether they “achieved [the] fundamental objective of producing a comprehensive constitution for the oceans which will stand the test of time”. One of the pillars of that constitution was what he described as the “mandatory dispute settlement” provisions of the Convention.⁶² It is for this Tribunal, created through painstaking negotiations over a decade, to exercise the jurisdiction that we say is granted to it properly, and to finally settle the present dispute between Bangladesh and Myanmar.

Mr President, distinguished Members of the Tribunal, one of Rabindranath Tagore’s wise sayings is that “you can’t cross the sea merely by standing and staring at the water”. It would seem that when the shores of the Bay of Bengal inspired him to write these words more than a century ago, he could have foretold that one day this Tribunal would do more than stare at the waters; that it would boldly go across the sea and to finally and equitably settle a longstanding dispute between two neighbours.

With that in mind, I conclude my remarks. I thank you, Mr President, and distinguished Members of the Tribunal, for your patience. That concludes our submissions for today.

THE PRESIDENT: Thank you, Professor Akhavan. This brings us to the end of today’s sitting. The hearing will be resumed tomorrow morning at 10 a.m. The sitting is now closed.

(The sitting closed at 5.25 p.m.)

⁶² “A Constitution for the Oceans”, Remarks by Tommy T. B. Koh, of Singapore, President of the Third United Nations Conference on the Law of the Sea, *available* at: <http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf>.